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

2. Rule TRCP 749c

Input from the practicing bench and bar expressed several concerns including that a party appealing informa pauperis from a justice court ruling in a forcible rule and detainer case, be required to continue to pay rent accruing in the duration of the appeal. Conceptually, this is similar to the notion that any litigant be required to post a supersedeas or other security to cover costs accruing by virtue of the appeal being taken. Therefore, Rule 749c and its counterparts are proposed to be amended as follows. The right to appeal in a forcible entry and detainer case by a pauper, is not however, conditioned on the posting of additional rent in proposed amendments to Rule 749c as it has in the past, but only current accruing rent as suggested in Rule 749b.

RULE 749a. PAUPER'S AFFIDAVIT

If appellant is unable to pay the costs of appeal, or file a bond as required by Rule 7439, he shall nevertheless be entitled to appeal by making strict proof of such inability within five days after the judgment is signed, which shall consist of his affidavit filed with the justice of the peace stating his inability to pay such costs, or any part thereof, or to give security, which may be contested within five days after the notice of the filing of such affidavit thereof to the opposite party or his attorney of record, whereupon it shall be the duty of the justice of ~~the peace~~ in whose court the ~~suit is~~ pending to hear ~~evidence~~ and determine the right of the party to appeal, and ~~he shall~~ enter his finding on the docket as a part of the record. Upon the filing of a pauper's affidavit the justice of the peace or clerk of the court shall notice the opposing party of the filing of the affidavit of inability within one working day of its filing by written notification accomplished through first class mail. It will be presumed prima facie that the affidavit speaks the truth, and, unless contested within five days after the mailing of notice, ~~the presumption~~ shall be ~~deemed conclusive;~~ but if a contest if filed, the burden shall then be on the appellant to prove his alleged inability by competent ~~evidence other than~~ by the affidavit above referred to. When a pauper's affidavit is timely contested by the appellant, the justice shall hold a hearing and rule on the matter within five days.

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

A pauper's affidavit will be considered approved upon one of the following occurrences: (1) the pauper's affidavit is not contested by the other party; (2) the pauper's affidavit is contested by the other party and upon a hearing the justice determines that the pauper's affidavit is approved; or (3) upon a hearing by the justice disapproving of the pauper's affidavit the appellant appeals to the county judge who then, after a hearing, approves the pauper's affidavit.

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

RULE 749c. APPEAL PERFECTED

When an appeal bond has been timely filed or a pauper's affidavit approved in conformity with Rule 749a, the appeal shall be perfected.

RULE 751. TRANSCRIPT

When an appeal has been perfected, the justice shall stay all further proceedings on the judgment, and immediately make out a transcript of all the entries made on his docket of the proceedings had in the case; and he shall immediately file the same, together with the original papers and any money in the court registry, including sums tendered pursuant to Rule 749b(1), with the clerk of the county court of the county in which the trial was had, or other court having jurisdiction of such appeal. The clerk shall docket the cause, and the trial shall be de novo.

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

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

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

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

SUBCOMMITTEE REPORT/TRCP 737-813

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

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

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

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4543, 601

12-21-89

December 20, 1989

Professor Elaine Carlson
South Texas College of Law
1303 San Jacinto, Suite 224
Houston, Texas 77002

Re: Texas Apartment Association's objections to changes in TRCP 749c

Dear Professor Carlson:

This is a follow-up on several points raised in the hearing in Austin regarding TRCP 749c on Thursday, November 30, 1989. The proposed rule change for TRCP 749c would delete the requirement that the tenant (who has had judgment rendered against him in a non-payment-of-rent eviction) must pay one rental period's worth of rent into the court as a condition of appeal. Very briefly, my additional thoughts are as follows:

1. Constitutionality. I would like to make it clear that the intended meaning of my language in paragraph 2 of page 4 of my letter to Judge Hecht was that the Texas Apartment Association and the Texas Tenants Association believed TRCP 749c to be constitutional at the time of its original adoption by the Court.

2. Relationship of Rule 749c to Rule 749b(1). When the appeal rules for paupers were adopted for non-payment of rent evictions, it was intended that the rental payment required in Rule 749c was the same rental payment as required in Rule 749b(1). The attorney for the Texas Tenants Association and I jointly prepared the original draft of the rule. It was intended that the eviction appeal would not be perfected until both the affidavit was filed and the rent which was called for in Rule 749b(1) was tendered into JP court.

If the proposed change were adopted and if an appeal could be perfected by the tenant in a non-payment-of-rent eviction without payment of rent for one rental period, the landlord would be doomed to unjustified delay and expense, i.e., the landlord would have to hire an attorney, file a motion to dismiss the appeal in county court, arrange for a hearing, wait for the hearing, have the hearing, get the judgment, and then get a writ of possession from the county court if the tenant has not moved out. As a practical matter, any hearing on such a motion would occur no sooner than the hearing on the merits of the appeal. I think you can see, therefore, the practical importance of the requirement of tender into the JP court of one rental period's rent in order to protect the landlord during appeal and minimize frivolous appeals with no factual justification.

3. Appellate supersedeas bond analogy. When an appeal of a JP Court eviction is perfected, there is a trial de novo in county court. It has been assumed by both landlord and tenant lawyers that the perfection of the appeal prevents execution of the judgment and allows the tenant to continue in possession of the premises. TRCP 749c serves as a type of supersedeas bond to protect the landlord during the appeal since he is losing rent by the tenant remaining in possession.

Under the Texas rules of appellate procedure applicable to other civil cases, a losing party may not avoid the necessity of filing a supersedeas bond by merely filing a pauper's oath. (See TRAP 47 in which there is no "pauper" exception for avoidance of a supersedeas bond to suspend the trial court's judgment during appeal and protect the party who won in trial court.

The requirement in TRCP 749c that the tenant pay one rental period's rent in a nonpayment of rent eviction serves a purpose similar to a supersedeas bond. The provisions of Rules 749 et al were intended to avoid the overwhelming complexities of Appellate Rule 47 regarding supersedeas bonds and to make it simple and easy for the tenant to appeal a nonpayment-of-rent eviction while still protecting the landlord. In such cases, a single rental period of rent is still woefully insufficient to cover past due rent; but it is better than nothing. When Rule 749 et al were adopted, there was considerable doubt as to whether Appellate Rule 47 actually governed JP court eviction appeals to county court; and it was believed by the lawyers supporting the change that there may indeed have been a void in the Texas Rules on that subject. This author believes that TRAP 47 did not and still does not apply to eviction appeals from JP court to county court and that therefore a traditional supersedeas bond is not available for the landlord's protection.

4. Federal Appeal Rules and Supersedeas Bonds. Federal Rule of Appellate Procedure 24 allows paupers affidavits in civil cases for appeal bonds to cover fees and costs of appeal. However, under federal rules, there is no provision for waiver of the requirement of a supersedeas bond under FRAP 8 merely because the appellant is a pauper.

5. Limited to non-payment of rent cases. I would emphasize that the requirement of the payment of one rental period's rent as a condition of appeal under Rule 749c applies only when judgment has been rendered against the pauper tenant in a non-payment-of-rent eviction case. It does not apply to other eviction appeals.

6. JP Association. We would urge you to make inquiry to the Justices of the Peace and Constables Association of Texas as to whether that association shares our fear that the proposed change to TRCP 749c will result in widespread abuses. You may find that the JPs will agree with TAA. If the proposed rule change is adopted, we believe that it will be used and abused by many, many tenants who claim they are "broke". *Tenants who haven't paid their rent will be able to appeal the eviction by merely filing a "pauper's affidavit", do nothing further, and still get two to four more weeks of free rent from a landlord while the landlord tries to get extricated from the appeal. And, in addition, the tenant will have unjustifiably run up another attorneys fee bill for the landlord. The potential drain on the court's time is also a factor.*

Thank you for your patience and indulgence with regard to this Rule. The proposed change has a very serious potential economic effect on the apartment industry, and for that reason I would appreciate the opportunity to attend the next meeting of the Supreme Court Advisory Committee on the rules to answer any questions.

Sincerely,

NIEMANN & NIEMANN

By Larry Niemann
Larry Niemann
Attorneys for Texas Apartment Association

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xc: Judge Nathan Hecht, Texas Supreme Court
Judge David Peeples
Mr. Luther H. Soules III, Chairman, Supreme Court Advisory Committee on Rules
Mr. Paul Heath Till
Mr. Joe Bax, Attorney for the Houston Apartment Association
Mr. Jerry Adams, TAA Executive Vice President
Judge Fay Murphree, President, Justices of the Peace and Constables Association of Texas

OBJECTION TO PROPOSED CHANGE IN TRCP 749c

The proposed changes in Rule 749c of the Texas Rules of Civil Procedure as published in the Bar Journal are as follows (hyphenated language is being deleted and underlined language is new):

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

ARGUMENTS AGAINST CHANGE

1. DELAY OF POSSESSION. The most significant result of perfecting an appeal is to stop the writ of possession from being issued by the JP. If appeal can be perfected in a nonpayment-of-rent eviction of a pauper *without* an appeal bond or *without* at least one rental period's rent being tendered to the court to protect the landlord, then a pauper can merely file a pauper's affidavit in lieu of an appeal bond and ride the "free rent" gravy train for two to four weeks more while the landlord tries to get a hearing and a decision out of the county court. This is patently unfair. Who is going to compensate the landlord for this extra time period without any rent coming in? the pauper?

2. CONSTITUTIONALITY AND PAST APPROVAL BY TENANTS. The Texas Tenant's Association helped draft existing Rules 749a, b, and c. They supported the rules in public hearing, and they wrote a letter to the Court urging the initial adoption of the rules several years ago. They and TAA both were of the opinion that the rules were unconstitutional. No one has ever challenged the constitutionality of the rules.

3. NO COMPLAINT BY JP ASSOCIATION. We would encourage the Court to inquire about the wisdom of this rule with the Justices of the Peace and Constables Association of Texas. The JPs live with these rules on a daily basis and collectively have experience and insight regarding the need for any change and the potential abuse from the change. We believe the Court will find no opposition to the existing rule from that body.

4. POTENTIAL ABUSE. If the rent-tender requirement were deleted from pauper appeals in nonpayment-of-rent evictions, it would very likely be a real source of abuse by knowledgeable tenants who would claim pauper status, force the landlord to a possible hearing to contest the pauper status, and probably squeeze another month's worth of free rent out of the landlord via the county court trial de novo process. In this regard, it would be difficult for a landlord to contest the pauper affidavit since the landlord is seldom privy to sufficient facts to contest the alleged pauper status. Furthermore, to contest the alleged pauper status would probably cost the landlord more in attorneys fees than an extra month's rent; so he cannot come out ahead, even if he is right.

5. RULES WHICH ARE AFFECTED. Set forth below are the various rules which relate to the proposed change in TRCP 749c. The bold language is for purposes of emphasis only.

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

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

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

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

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November 27, 1989

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

via hand delivery

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

Dear Justice Hecht:

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

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

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

Respectfully submitted,

NIEMANN & NIEMANN

By Larry Niemann
Larry Niemann
Attorneys for Texas Apartment Association

nlh.8ms
enclosures

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

JOE G. BAX, P.C.
PARTNER
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4
748
749c

November 28, 1989

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

VIA FEDERAL EXPRESS
AIRBILL #5000353945

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

Dear Justice Hecht,

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

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

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

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

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

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

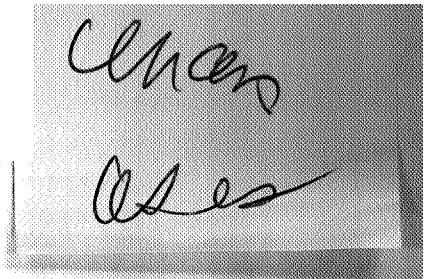
Respectfully submitted,

HOOVER, BAX & SHEARER

Joe G. Bax
Attorney for the
Houston Apartment Association

JGB:df

cc: Mr. Paul Heiberger



TRAP 4. Signing, Filing and Service

(a) Signing. Each application, brief, motion or other paper filed shall be signed by at least one of the attorneys for the party/ [and] shall give the State Bar of Texas identification number, the mailing address[,] and telephone number[, and telecopier number, if any,] of each attorney whose name is signed thereto/ /and /shall /state /that /a /copy /of /the /paper /has /been delivered /to /all /parties /or /their /attorneys /of /record /in /accordance /with /this /rule. A party who is not represented by an attorney shall sign his brief and give his address and telephone number. The statement /of /service /on /parties /who /is /not a licensed/attorney/shall/be/verified/by/affidavit/

(b) Filing. The filing of records, briefs and other papers in the appellate court as required by these rules shall be made by filing them with the clerk, except that any justice of the court may permit the papers to be filed with him, in which event he shall note thereon the filing date and time and forthwith transmit them to the office of the clerk. If a motion for rehearing, any matter relating to taking an appeal or writ of error from the trial court to any higher court, or application for writ of error or petition for discretionary review is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail one /day /or /more /before [on or before] the last day for filing same, the same, if received by the clerk not more than ten

days tardily, shall be filed by the clerk and be deemed as filed in time; provided, however, that a certificate of mailing by the United States Postal Service or a legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing.

(c) (No change.)

(d) (No change.)

(e) (No change.)

(f) Manner of Service. Service may be personal[,] ~~or~~ by mail[, or by telephonic document transfer to the party's current telecopier number]. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing. Service by telephonic document transfer is complete on receipt.

(g) ~~Proof~~ Service. Papers presented for filing shall [be served and shall] contain an acknowledgement of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names [and addresses] of the persons served, certified by the person who made the service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgement or proof of service but shall require such to be filed promptly thereafter.

[COMMENT TO 1990 CHANGE: Time period clarification, deletion of requirement of verification by a pro se litigant, provision for service by telephonic document transfer, and textual corrective changes.]

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

January 2, 1990

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

Dear Justice Hecht:

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

TRAP

Rule 4(b). This rule provides for mailing only, not other services such as Federal Express, etc. However, we do not see this as a problem.

Rule 4(f). This rule does not define service by telephonic document transfer. Is service complete when the document is sent?

Court of Appeals
Fifth District of Texas at Dallas
CRAIG T. ENOCH
CHIEF JUSTICE
DALLAS COUNTY COURTHOUSE
DALLAS, TEXAS 75202-4658
(214) 653-6920

December 7, 1989

TRCP 5 → TRAP 4
TRCP 296 → TRAP 4
TRCP 4 → TRAP 5
TRAP 51 → TRAP 13
TRAP 90 → TRAP 5
TRAP 20 → TRAP 40
TRAP 9
TRAP 40
TRAP

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

Dear Nathan:

A. Certificate of service requirements.

(1) Tex. R. App. P. 4 would now require certificates of service to give the names and addresses of all parties served. A general certificate showing service "upon all counsel of record" is not sufficient.

This change is significant primarily for prerecord motions, *e.g.*, a motion to extend the time to file the cost bond. Once we get the transcript, we have a fighting chance at knowing who the parties and the attorneys are, but before we get the transcript, the only information we have about the appeal comes from the prerecord motion itself. In the past, when we got a prerecord motion with a general certificate, we did not know who the adversary was, and the only letter asking for a response was sent just to the movant, asking him to respond to his own motion.

This situation was hardly desirable. With the adoption of the amended rule, we can reserve ruling on such motions until the movants supply us with a specific certificate of service and we can cite the rule as our authority. Then we can effectuate real notice on all interested parties.

(2) Rule 4 is also being amended to permit pro se parties from dispensing with the old requirement that they certify service by affidavit. (We usually didn't require a pro se party to provide us an affidavit; we relied upon our clerks' notice to the parties for a 10-day response and simply waited the full 10 days.)

D. Faxing. The new rules accommodate filing by fax. *See, e.g.*, Tex. R. App. P. 4.

A man in a cafe once asked the waiter for a cup of coffee, "black, without cream." The waiter returned and said, "Sir, I'm sorry, but we're out of cream; would you like your coffee black, without milk?" I can tell you how these amendments would have changed our procedures (if we had had any) concerning the faxing machines that we don't have, if we had had any, but black is black.

But I note these changes because the day is coming.

A. Changes in the mailbox rule.

(1) Both Tex. R. Civ. P. 5 and Tex. R. App. P. 4 will now expressly provide that a document is timely filed if deposited in the first-class mail on the day that it is due, even if that day otherwise results from the application of the weekend rule. This amendment effectively overrules our opinion in *Fellowship Missionary Baptist Church of Dallas, Inc., v. Sigel*, 749 S.W.2d 186 (Tex. App.--Dallas 1988, no writ).

(2) The mailbox rule (rule 4) still applies only to items deposited in the first-class mail. Any other transmittal method does not trigger the rule. *See Mr. Penguin Tuxedo Rental & Sales, Inc., v. NCR Corp.*, 777 S.W.2d 800, 801-02 (Tex. App.--Eastland 1989, n.w.h.) (per curiam) (something sent by Federal Express is not sent by first-class mail). The proposed rule amendments do not address *Mr. Penguin*; the failure to do so is probably because the opinion is so recent, not because of any implied endorsement by the Rules Advisory Committee.

Regards,

Craig T. Enoch
Chief Justice

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HENRY D. SCHLINGER
(1921-1988)

November 28, 1989

21A
4 TRAP 4(f)

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

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

Dear Judge Hecht:

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

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

Yours very truly,

Robert A. Miller

RAM:ag

TRAP 5. Computation of Time

(a) In General. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run ~~is/not/to~~ [shall not] be included. The last day of the period so computed ~~is /to~~ [shall] be included, unless it is a Saturday, [a] Sunday or [a] legal holiday, as defined by Article 4591, Revised Civil Statutes, in which event the period ~~runs/until~~ [extends to] the end of the next day which is ~~neither~~ [not] a Saturday, Sunday ~~nor~~ [or a] legal holiday. ~~When/the/last/day/of/the/period/is/the next/day/which/is/neither/a/Saturday//Sunday/nor/legal/holiday/ any/paper/filed/by/mail/as/provided/in/Rule/4/is/mailed/on/time when/it/is/mailed/on/the/last/day/of/the/period/~~

(b) (No change.)

(c) Nunc Pro Tunc Order. In civil cases, when a corrected judgment has been signed after expiration of the court's plenary power pursuant to Rule 316 ~~or/317~~ of the Texas Rules of Civil Procedure, the periods mentioned in subparagraph (b)(1) of this rule shall run from the date of signing the corrected judgment with respect to any complaint that would not be applicable to the original judgment.

(d) (No change.)

(e) (No change.)

(f) (No change.)

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

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

January 2, 1990

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

Dear Justice Hecht:

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

TRAP

Rule 5. Please note typographical error . . . a Saturday, Sunday nor [or a] legal holiday. "Nor" should be stricken.

Note: Already corrected.

Court of Appeals
Fifth District of Texas at Dallas
CRAIG T. ENOCH
CHIEF JUSTICE
DALLAS COUNTY COURTHOUSE
DALLAS, TEXAS 75202-4658
(214) 653-6920

December 7, 1989

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

→ TRAP 4
TRAP 41
TRAP 5[illegible]
TRAP 13[illegible]
TRAP 5
TRAP 40
TRAP 9
TRAP 4[illegible]
TRAP 7[illegible]

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

Dear Nathan:

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

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

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

Regards,

Craig T. Enoch
Chief Justice

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324
TRAP 5
90(h)

Court of Appeals
Eighth Judicial District

500 CITY-COUNTY BUILDING
EL PASO, TEXAS
79901 - 2490
915 546-2240

November 22, 1989

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

Dear Justice Hecht:

I take this opportunity to write concerning the proposed changes in the Texas Appellate Practice Rules as set forth in the November issue of the Texas Bar Journal.

The proposed change to TRAP 5 is one that has been needed for some time and probably every one will agree is a good change. I am confident it will be adopted.

Sincerely,

Max N. Osborn

TRAP 5

12. Same problems in #1; strike the "nor".

TRAP 5. Computation of Time

(a) In General. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run ~~is not to~~ [shall not] be included. The last day of the period so computed ~~is to~~ [shall] be included, unless it is a Saturday, [a] Sunday or [a] legal holiday, as defined by Article 4591, Revised Civil Statutes, in which event the period ~~runs until~~ [extends to] the end of the next day which is ~~neither~~ [not] a Saturday, Sunday ~~nor~~ [or a] legal holiday. ~~When the last day of the period is the next day which is neither a Saturday, Sunday nor legal holiday, any paper filed by mail as provided in Rule 4 is mailed on time when it is mailed on the last day of the period.~~

(12)

(b) (No change.)

(c) Nunc Pro Tunc Order. In civil cases, when a corrected judgment has been signed after expiration of the court's plenary power pursuant to Rule 316 ~~or 317~~ of the Texas Rules of Civil Procedure, the periods mentioned in subparagraph (b)(1) of this rule shall run from the date of signing the corrected judgment with respect to any complaint that would not be applicable to the original judgment.

(d) (No change.)

(e) (No change.)

(f) (No change.)

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

Sincerely,

Carol Baker

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

TRAP 9 Substitution of Parties

(a) Death of a Party in Civil Cases. (No change.)

(b) Death of Appellant in a Criminal Case. (No change.)

(c) Public Officers; Separation from Office. (No change.)

[(d) Substitution for Other Causes. If substitution of a successor to a party in the appellate court is necessary for any reason other than death or separation from public office, the appellate court may order such substitution upon motion of any party at any time or as the court may otherwise determine.]

[COMMENT TO 1990 CHANGE: To provide mechanism for substitution of appellate parties as may be necessary.]

Court of Appeals
Fifth District of Texas at Dallas

CRAIG T. ENOCH
CHIEF JUSTICE

DALLAS COUNTY COURTHOUSE
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December 7, 1989

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TRAP 130
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TRAP 40
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Honorable Nathan L. Hecht
Justice
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Nathan:

B. Substitution of parties. The only provisions for substituting parties on appeal in the old rules were: (1) on the death of a party; or (2) in the case of a public official succeeding a previous official litigating in his official capacity. Proposed new Tex. R. App. P. 9 now expressly provides for substitution generally as the Court may determine necessary.

That's what we've been doing all along anyway, because, as a practical matter, it seemed to make things so much simpler. (We have a number of cases in which FDIC has been substituted as successor-in-interest to an insolvent bank.) But we did so on very slender authority, and arguably with no authority at all. *See Leggitt v. Nesbitt*, 415 S.W.2d 696, 700 (Tex. Civ. App.--Tyler 1967, no writ). Now we have clear authority.

Regards,

Craig T. Enoch
Chief Justice

TRAP 12. Work of Court Reporters

(a) (No change.)

(b) (No change.)

(c) To aid the judge in setting the priorities in (b) above, each court reporter shall report in writing to the judge on a monthly basis the amount and nature of the business pending in the court reporter's office. A copy of this report shall be filed with the Clerk of the Court of Appeals of each ~~Supreme Judicial~~ [d]istrict in which the court sits.

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

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

January 2, 1990

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

Dear Justice Hecht:

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

TRAP

Rule 12(c). A copy shall be filed with the Court of Appeals where the case will be heard on appeal not necessarily where the court sits. For example, transfer cases.

TRAP 12

TRAP 90 156 216(1) 289 307 542 324(a)

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AUSTIN, TEXAS 78767
TELEPHONE: (512) 480-5600

IRELAND GRAVES IIB
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(512) 480-5609

TELECOPY NUMBER:
(512) 478-1976

Fed Rules Evid 201

TRAP 41 202 210

November 26, 1989

TRAP 41 57(a)(1) 12 74 41(a)(1) 54(a) 52(d)

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

Dear Judge Hecht:

1. Texas Rule of Appellate Procedure 57(a)(1) refers to "supreme judicial district." Perhaps this should be changed to "court of appeals district" or simply "district" in keeping with the proposed amendments to rules 12, 74, and the appendix for criminal cases.

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

Respectfully,

Charles A. Spain, Jr.

TRAP 20. Amicus [Curiae] Briefs

The clerk of the appellate court may receive but not file amicus curiae briefs. An amicus curiae shall comply with the briefing rules for the parties, and shall show in the brief that copies have been furnished to all attorneys of record in the case. [In civil cases, an amicus curiae brief shall not exceed 50 pages in length, exclusive of pages containing list of names and addresses of parties, the table of contents, index of authorities, points of error, and any addendum containing statutes, rules, regulations, etc. The court may, upon motion and order, permit a longer brief.]

[COMMENT TO 1990 CHANGE: To provide for a maximum length for amicus curiae briefs in civil cases to conform with Rules 74(h) and 136(e).]

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

January 2, 1990

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

Dear Justice Hecht:

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

TRAP Rule 20. Please note typographical error "a nd" should be "and." Also, the added portion is unnecessary since the rule already requires that the amicus curiae brief comply with the briefing rules for the parties.

Court of Appeals
Fifth District of Texas at Dallas

CRAIG T. ENOCH
CHIEF JUSTICE

DALLAS COUNTY COURTHOUSE
DALLAS, TEXAS 75202-4658

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December 7, 1989

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

Dear Nathan:

C. Motions for amicus curiae briefs in excess of 50 pages. Amicus curiae briefs were always marked received, but never filed. Tex. R. App. P. 20. (The reason is that the Court always has discretion to address any point raised in an amicus brief, but, unlike a point raised by a party, need not do so.) As a result, we never filed motions for leave to file amicus briefs, because the motions could not be granted in any case.

Tex. R. App. P. 20 is being amended to require a motion for leave to tender an amicus brief in excess of 50 pages. At first glance, the rule appears to be confused: how can we refuse to accept a motion for leave to file an amicus brief less than 50 pages, while we must accept a motion for leave to file an amicus brief more than 50 pages? The distinction between a filestamp and a "rec'd" mark is critical here.

Because we never had the authority to file amicus briefs, we could only receive them. Because we could only receive them, we could not refuse to accept any; it made no difference whether an amicus brief was ten or a thousand pages long. If a *party* tendered a thousand-page brief, we could mark it "rec'd" and compel him to file a motion for leave to file it; we could then deny the motion, strike the brief, and return it. But as long as an *amicus* could never get leave to file a brief of any size, we had no mechanism by which we could get rid of unwanted amicus briefs.

But at a point when we're putting file boxes throughout the hallways of the Court because we've run out of storage space, it is a little ridiculous to say that we can compel a party to cut his brief down to 50 pages, but that we can't do anything about the bulk that a nonparty gives us. This rule change is obviously to remedy that problem. The amendment is carefully worded and never talks about the filing of an amicus brief, of any size. But it puts amicus briefs on a par with party briefs: it gives us the

mechanism to get rid of excessively long ones. The motion required for a lengthy amicus brief will not, strictly speaking, be a motion for leave to *file* an amicus brief in excess of 50 pages; it will be a motion for leave to *tender* an amicus brief in excess of 50 pages.

The clerks' office will have to be told that they are to continue refusing to file any motion for leave to file an amicus brief, if:

(a) the brief is less than 50 pages long; or

(b) if the brief has not yet been tendered (so that we can't tell how long it is going to be).

They are, however, to require a motion whenever an amicus brief is tendered that is longer than 50 pages.

Orders drafted for the motions panel on motions in connection with excessively long amicus briefs must be carefully drafted: they must never inadvertently order the briefs "filed," but merely direct the clerk to "receive" them.

Regards,

Craig T. Enoch
Chief Justice

No change

TRAP 40. Ordinary Appeal -- How Perfected

(a) Appeals in Civil Cases.

(1) When Security is Required. (No change.)

(2) When Security is Not Required. (No change.)

(3) When Party is Unable to Give Security. (No change.)

(4) Notice of Limitation of Appeal. No attempt to limit the scope of an appeal shall be effective ¢$/¥ø/¢/þ¢ŧ¥ŷ/¢đŷ¢ŧ$¢ ¥ø/¥h¢/¢þþ¢ll¢ñ¥ unless the severable portion of the judgment from which the appeal is taken is designated in a notice served on ¥h¢/¢đŷ¢ŧ$¢/þ¢ŧ¥ŷ [all other parties to the trial court's final judgment] within fifteen days after judgment is signed, or if a motion for new trial is filed by any party, within seventy-five days after the judgment is signed.

(5) Judgment Not Suspended by Appeal. (No change.)

(b) Appeals in Criminal Cases.

(1) (No change.)

(2) Effect of Appeal in Criminal Cases. (No change.)

[COMMENT TO 1990 CHANGE: This amendment, together with other similar amendments conforming other appellate rules, requires the parties to any appeal to serve copies of all papers filed with the clerk of the appellate court (except the statement of facts and the transcript), and the clerk of the appellate court to mail notice and copies of all appellate court orders and opinions on all parties to the trial court's judgment.]

Court of Appeals
Fifth District of Texas at Dallas
DALLAS COUNTY COURTHOUSE
DALLAS, TEXAS 75202-4658

CRAIG T. ENOCH
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December 7, 1989

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TRAP 5
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Honorable Nathan L. Hecht
Justice
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Nathan:

E. Failure to serve a court reporter with an affidavit of inability to pay. Tex. R. App. P. 40(a)(3)(B) currently provides that an indigent appellant shall serve his affidavit upon the opposing party and upon the court reporter; "otherwise, he shall not be entitled to prosecute the appeal without paying the costs or giving security therefor." This rule has caused us some difficulty in interpretation. *See Dodson v. Stevens Transport*, 776 S.W.2d 800 (Tex. App.--Dallas 1989, no writ) (en banc). In *Dodson*, we carved out an exception to the rule in summary judgment cases, where no statement of facts is necessary. If the Rules Advisory Committee wants to give clarification concerning what it intended the rule to mean, it is not taking the opportunity of the current proposed amendments to do so.

Regards,

Craig T. Enoch
Chief Justice

Court of Appeals
Fifth District of Texas at Dallas
CRAIG T. ENOCH
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Honorable Nathan L. Hecht
Justice
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Nathan:

C. Parties to be served

The proposed rules contain provisions throughout stating, in substance, that anything part of the record on an appeal (except for the transcript and the statement of facts) is to be served on all "parties to the trial court's judgment." *See* comment to Tex. R. App. P. 40. This change applies to our own notices, orders, opinions, and judgments. *See* Tex. R. App. P. 91.

The clerks' office will have to be informed. The clerks will also have to make sure that every party to the judgment is on the Court's mailing list for every case.

The change is probably to prevent the disaster that occurred in *Hexcel Corp. v. Conap, Inc.*, 738 S.W.2d 359 (Tex. App.--Fort Worth 1987, writ denied). *Hexcel* involved multiple parties, with claims for contribution. The appellant served a copy of its bond upon the party against whom it directly asserted a claim, but not upon all parties to the judgment. As a result, the appellant's direct adversary was unable to timely perfect an appeal against the third party from whom the adversary sought contribution, if the appellant should ultimately prevail. Because the appellant's failure to serve all parties prejudiced its adversary's rights against the third party, the appeal was dismissed.

Yet this change, seemingly innocuous enough, is probably going to impact upon our day-to-day operations the most. Even when a party attempts to limit an appeal so that not all parties are affected, all "parties to the trial court's judgment" must still be served. *See* Tex. R. App. P. 40(a)(4). An immediate problem for us will be to identify just who is and who is not a party to the judgment. Not all parties to the suit are parties to the judgment: for example, a named defendant whom a plaintiff voluntarily nonsuits before trial. Conversely, the rules make clear that a party to the judgment must be served even if he appears to be not a party directly interested in the appeal.

Presently, the transcript department of the trial court clerks' office types the names and addresses of the parties on appeal on the cover of the transcript. The transcript department gets this information from the bond: the appellant is the principal on the bond, and the appellee is the obligee. Thus, the transcript cover identifies only the parties to the appeal. When the transcript is filed, our clerks note who the parties are by looking at the cover. Notice of the filing of the transcript is then sent immediately to the parties.

About all that we can do, on adoption of these amendments, is our best to identify the proper parties that require notice. Now there will be other parties (aside from the parties to the appeal) who will also require notice.

> **The clerks should look at the final judgment in the transcript to determine who is named in that judgment, instead of referring to the parties given on the cover of the transcript.**

Despite *Hexcel*, the proposed changes requiring us to give notice to all parties to the judgment do not completely absolve prospective appellants from making sure that all interested parties are served. Tex. R. App. P. 74(a) has a proposed amendment, to provide that parties must include the names and addresses of all parties to the judgment in their briefs, for the express purpose of assisting our clerks in determining to whom notice should be sent. We will also be assisted by the new requirement that certificates of service give the names and addresses of all parties served. We can check our own notice list against a specific certificate to eliminate variances or omissions. (This the clerks already do, when a motion is filed; the problem is when the transcript is filed, before there are any motions.)

The *Hexcel* problem is likely to remain. The most critical (and jurisdictional) deadlines occur at the beginning of an appeal. By the time we get the transcript, the time to file a motion to extend the time to file a bond has usually completely expired. Thus, although the clerks do not have the ultimate responsibility to keep all interested parties informed, the proposed rule changes

will achieve their full purpose only if the clerks do attempt to establish who the parties to the judgment are as soon as possible. Because the clerks can't do so without examining the inside of the transcript, the task of sending out our initial notice letters will be considerably more difficult.

Also, the clerks will have to brace themselves for phone calls from anxious attorneys. Attorneys whose clients have no direct interest in an appeal are prone to panic when they hear from the Court; they conclude that we must know something about the appeal that they don't. The clerks' office has even been asked in the past to review an appellant's brief and assure an attorney that he need not respond to it on behalf of his client. We inform the attorney, of course, that that kind of determination is beyond the clerks' capacity, but the proposed change means that we will be giving that answer out far more frequently.

Regards,

Craig T. Enoch
Chief Justice

TRAP 41 Ordinary Appeal - When Perfected

(a) Appeals in Civil Cases.

(1) Time to Perfect Appeal. When security for costs on appeal is required, the bond, ~~or~~ affidavit in lieu ~~thereof~~ shall ~~be filed with~~ the clerk within thirty days after the judgment is signed, or, within ninety days after the judgment is signed if a timely motion for new trial has been filed by any party [or if any party has timely filed a request for findings of fact and conclusions of law in a ~~non-jury~~ case]. If a deposit of cash is made in lieu of bond, the same ~~shall be made within~~ the same period.

(2) Extension of Time. (No change.)

(b) Appeals in Criminal Cases.

(1) Time to Perfect Appeal. (No change.)

(2) Extension of Time. (No change.)

(c) Prematurely Filed Documents. No appeal or bond or affidavit in lieu thereof, notice of appeal, or notice of limitation of appeal shall be held ineffective because prematurely filed. In civil cases, every such instrument shall be deemed to have been filed on the date of but subsequent to the ~~date~~ [time] of signing of the judgment or the ~~date~~ [time] of the overruling of motion for new trial, if such a motion is filed. In criminal cases, every such instrument shall be deemed to have been filed on the date of but subsequent to the imposition or suspension of sentence in open court or the signing of appealable order by the trial judge, provided that no notice of appeal shall be

effective if given before a finding of guilt is made or a verdict is received.

[COMMENT TO 1990 CHANGE: To make the appellate timetable for non-jury cases conform more to that in jury cases.]

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

January 2, 1990

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

Dear Justice Hecht:

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

TRAP

Rule 41(a)(1). We suggest you cite the rule governing the timely filing of a request for findings of fact and conclusions of law. Also, rule could ~~be changed~~ to delete the last line of rule 41(a)(1) and in the first sentence simply add the word "deposit." For example, "When security for costs on appeal is required the bond, the deposit or the affidavit in lieu thereof . . ."

Court of Appeals
Fifth District of Texas at Dallas

CRAIG T. ENOCH
CHIEF JUSTICE

DALLAS COUNTY COURTHOUSE
DALLAS, TEXAS 75202-4658

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December 7, 1989

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

Dear Nathan:

B. Effect of filing a request for findings of fact and conclusions of law. The proposed amendments provide that a request for findings of fact and conclusions of law is to be filed within 20 days of judgment after a nonjury case. Tex. R. Civ. P. 296. If one is timely filed, the appellate timetable is extended the same as if a motion for new trial is timely filed. Tex. R. App. P. 41(a)(1) & 54(a).

The impetus seems to be to give appellants' attorneys time to get the findings and conclusions in hand, so that they can assess realistically the desirability of an appeal. *See Garcia v. Kastner Farms, Inc.*, 774 S.W.2d 668, 669 (Tex. 1989), *overruling Garcia v. Kastner Farms, Inc.*, 761 S.W.2d 444 (Tex. App.--Corpus Christi 1988).

Nonetheless, the comment to the proposed new rule states only that the amendment is "[t]o make the appellate timetable for non-jury cases conform more to that in jury cases," without further elaboration. This comment is somewhat mystifying, because a motion for new trial could be filed in either a jury or a nonjury case. And there are problems that caselaw will have to resolve. For example, what if a party does not make a timely reminder and fails to obtain any findings or conclusions--is the timetable still extended? A motion for new trial is overruled by operation of law if the trial court doesn't act; a request for findings and conclusions can simply be ignored if there's not a timely reminder.

What if a request is filed in a case in which a request is inappropriate (such as a summary judgment case)--is the timetable still extended? A motion for new trial can be so deficient that it should be overruled as a matter of law, but it still operates to extend the timetable. *See Vasquez v. Carmel Shopping Center Co.*, 777 S.W.2d 532, 533-34 (Tex. App.--Corpus Christi 1989, n.w.h.). On the other hand, a motion for new trial in an interlocutory appeal is totally ineffective to do anything. *See Leone v. S. Nordhaus Co., Inc.*, 678 S.W.2d 129, 130 (Tex. App.--San Antonio 1984, no writ) (on mot. for reh'g). A request in a summary judgment case, if analogized to a legally deficient motion, would extend the timetable, but, if analogized to a motion filed in the wrong kind of case, would not. The draft rule does not give much guidance.

The clerks' office will have to be instructed to file in any transcript showing a request for findings and conclusions filed within 20 days of the judgment when the transcript is timely under the 90/120-day timetable. We can't risk the clerks refusing to file a transcript as untimely when it might in fact be timely.

Regards,

Craig T. Enoch
Chief Justice

Court of Appeals
Eighth Judicial District

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79901 - 2490
915 546-2240

324
TRAP 5
90(h)

November 22, 1989

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

Dear Justice Hecht:

I take this opportunity to write concerning the proposed changes in the Texas Appellate Practice Rules as set forth in the November issue of the Texas Bar Journal.

My real purpose in writing is with regard to the Article on page 1147 of the Journal and the comment that many complain because the rules "do not do enough to reduce the cost and delay of litigation." In particular I note that under TRAP 41 we are now increasing the time table in many non-jury cases so as to conform to the rules in jury cases. I don't object to conformity. It may be needed. But I see nothing in any of the rules which will reduce delay. Thus, the following suggestion is made to help speed up appellate review.

When I began my practice in 1953 and up until the change of Rule 324 in 1976 a motion for new trial was a necessity and served as the basis for practically all points of error. Nothing could be incorporated by reference and thus under the holding in Wagner v. Foster, 341 S.W.2d 887 (Tex. 1960) Motions for New Trial were ususally the longest instrument in any transcript. I just reviewed a copy of the motion for new trial which I filed in Shell Oil Company v. Reinhart, 375 S.W.2d 717 (Tex. 1964) and find it was more than 20 pages in length. It included all the objections to evidentiary rulings, all the objections to the court's charge and matters set forth in motions for an instructed verdict. That was not an unusual motion in those days of practice. At that time a motion for new trial had to be filed within 10 days after the judgment and could be amended in another 20 days. That much time was needed in those days.

Sincerely,

Max N. Osborn

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2300 NCNB TOWER
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BEN F. VAUGHAN, III,
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CHARLES A. SPAIN, JR.
(512) 480-5629

TELECOPY NUMBER
(512) 478-1976

November 26, 1989

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

Dear Judge Hecht:

6. The following proposed amendments use the word "nonjury": Texas Rules of Appellate Procedure 41(a)(1) and 54(a). The following proposed amendments use the word "non-jury": Texas Rules of Appellate Procedure 41 comment, 52(d), 52 comment, and 54 comment. The court may wish to standardize the terminology. The term "non-jury" currently appears in Texas Rules of Civil Procedure 90, 156, 216(1), 249, 307, and 542. The term "nonjury" currently appears in Texas Rule of Civil Procedure 324(a) and Texas Rule of Judicial Administration 6(b)(2).

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

Respectfully,

Charles A. Spain, Jr.

TRAP 46. Bond for Costs on Appeal in Civil Cases

(a) Cost Bond. (No change.)

(b) Deposit. (No change.)

(c) Increase or Decrease in Amount. (No change.)

(d) Notice of Filing. Notification of the filing of the bond or certificate of deposit shall promptly be given by [each] appellant by [serving] a copy thereof [on all parties in the trial court together with notice of] the date on which the appeal bond or certificate was filed. Failure to [so] serve [all other parties] shall be ground for dismissal of the [appellant's] appeal or other appropriate action if [an] appellee is prejudiced by such failure.

(e) Payment of Court Reporters. (No change.)

(f) Amendment: New Appeal Bond or Deposit. (No change.)

[COMMENT TO 1990 CHANGE: To provide immediate notice to all parties in the trial court of any appeal by any other parties.]

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

January 2, 1990

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

Dear Justice Hecht:

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

TRAP
Rule 46(d). It is not clear who must give notification of the filing of the bond.

TRAP 47. Suspension of Enforcement of Judgment Pending Appeal in Civil Cases

(a) Suspension of Enforcement. Unless otherwise provided by law or these rules, a judgment debtor may suspend the execution of the judgment by filing a good and sufficient bond to be approved by the clerk, subject to review by the court on hearing, or making the deposit provided by Rule 48, payable to the judgment creditor in the amount provided below, conditioned that the judgment debtor shall prosecute his appeal or writ of error with effect and, in case the judgment of the Supreme Court or court of appeals shall be against him, he shall perform its judgment, sentence or decree and pay all such damages and costs as said court may award against him. If the bond or deposit is sufficient to secure the costs and is filed or made within the time prescribed by Rule ~~40~~ [41], it constitutes sufficient compliance with Rule 46. The trial court may make such orders as will adequately protect the judgment creditor against any loss or damages occasioned by the appeal.

(b) Money Judgment. When the judgment awards recovery of a sum of money, the amount of the bond or deposit shall be at least the amount of the judgment, interest, and costs.

The trial court may make an order deviating from this general rule if after notice to all parties and a hearing the trial court finds [:

(1) as to civil judgments rendered in a bond forfeiture proceeding, a personal injury or wrongful death action, a claim covered by liability insurance or a workers' compensation claim] that posting the amount of the bond or deposit will cause irreparable harm to the judgment debtor, and not posting such bond or deposit will cause no substantial harm to the judgment creditor. In such a case, the trial court may stay enforcement of the judgment based upon an order which adequately protects the judgment creditor against any loss or damage occasioned by the appeal;

[(2) as to civil judgments rendered other than in a bond forfeiture proceeding, a personal injury or wrongful death action, a claim covered by liability insurance or a workers' compensation claim, that setting the security at an amount of the judgment, interest, and costs would cause irreparable harm to the judgment debtor, and setting the security at a lesser amount would not substantially decrease the degree to which a judgment creditor's recovery under the judgment would be secured after the exhaustion of all appellate remedies.]

(c) (No change.)

(d) (No change.)

(e) (No change.)

(f) (No change.)

(g) Conservatorship or Custody. When the judgment is one involving the conservatorship or custody of a ~~child~~ [minor], the appeal, with or without security shall not have the effect of suspending the judgment as to the conservatorship or custody of

the ~~child~~ [minor], unless it shall be so ordered by the court rendering the judgment. However, the appellate court, upon a proper showing, may permit the judgment to be superseded in that respect also.

(h) (No change.)

(i) (No change.)

(j) (No change.)

(k) (No change.)

[COMMENT TO 1990 CHANGE: To conform the rule to statute.]

4543.001 hjr LHS 9-22-89 88

CARL A. PARKER
President Pro Tempore
DISTRICT 4

Committees:

EDUCATION, Chairman
Administration
Finance
Jurisprudence

The Senate of The State of Texas

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512/463-0104

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One Plaza Square
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409/985-2591

TRAP 49
TRAP 47

September 18, 1989

Mr. Luther H. Soules III
Soules and Wallace
10th Floor
Republic of Texas Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Dear Luke:

I appreciated you giving me the opportunity to comment on your proposed rules to implement the provisions of SB 134. While I believe that your draft accurately captures the intent of the law with regard to the subject of the change made in the burden required of a defendant to obtain a reduced bond requirement, I offer the following additional comments.

The draft you sent me fails to incorporate the change made in Sec. 52.004 of the bill, which reinstates statutorily the old, pre-amendment Rule 49(b), "Excessiveness". As you may be aware, this provision was dropped by the Supreme Court Advisory Committee. when the rules were rewritten in the spring and summer of 1987, and took effect January 1, 1988. The new rules allowed for a review for "Sufficiency" (Rule 49(a)), but dropped excessiveness.

The Joint Committee heard testimony from Professor Elaine Carlson, who chaired the subcommittee of the Advisory Committee which proposed the rules, that discretion still existed for excessiveness review. The Joint Committee in this instance, however, believed that because a positive action had been taken (the deletion of an existing rule), that the rule would need to be readopted or statutorily imposed to be effective. Thus the passage of Sec. 52.004 of SB 134.

I would suggest that appropriate language for a rule to implement this change read as follows:

49(d) Rule 49(d). In a manner similar to appellate review under this rule of the sufficiency of the amount set by a trial court, an appellate court may review for excessiveness the amount of security set by a trial court under Tex. Civ. Prac. & Rem. Code Section 52.002, or under these rules if security is not set under Section 52.002. If the appellate court finds that the amount of security is excessive, the appellate court may reduce the amount.

✓ I hope you will consider an additional area where there seemed to be some confusion as to the ability of a trial court to accept some type (form) of security other than a bond or cash deposit to suspend enforcement of a civil money judgment pending appeal. The Joing Special Committee was informed by Professor Carlson that the language of Rule 47(b), as written by the Advisory Committee and adopted by the Court, allowed such discretion. The Joint Committee, relying on and referencing Professor Carlson's analysis, recommended clarifying the trial court's additional flexibility in setting the type of security but hoped this could be clarified by the Court in any changes to the rules. I do suggest, therefore, that the Advisory Committee make 47(b) more clear (as it is for other types of judgments) to more clearly reflect that amount and type of bond or deposit are discretionary with the court, within the guidelines set otherwise by rule or statute.

47(b)

I am appreciative of the work being done by you and the committee on these rules and your responsiveness to the concerns of and actions by the legislature. Should you undertake to write a rule dealing with the lien portions of the bill, I'll be glad to share with you my comments on that section also.

liens

Thanks for your interest.

Sincerely,

Carl A. Parker

Carl A. Parker

CAP/pl

cc: Justice Nathan L. Hecht
Senator Kent Caperton
Senator Bob Glasgow
Senator Cyndi Krier
Senator Carl Parker
Representative Patricia Hill
Representative Senfronia Thompson

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TRAP 47
49

October 16, 1989

Senator Carl A. Parker
Law Offices of Carl A. Parker
One Plaza Square
Port Arthur, Texas 77642

Dear Senator Parker:

Thank you very much for your letter of September 18 regarding TRAP 47 and 49. My apologies for not responding sooner. I enclose an interlined mark-up of the rules with some ideas on how to address your very appropriate suggestions. I will call you in a few days to determine whether you feel these interlineations are adequate to resolve your concerns.

I would like to discuss with you the "excessiveness" matter that you raise. I had perceived, although perhaps erroneously so, that the insertion beginning in the fifth line of TRAP 49(b) of the words "appellate court for insufficiency or excessiveness" reached that concern. If it does not, then I simply have not understood your suggestion, and I certainly want to fully understand it and respond to it. I certainly agree with you that discretion should be expressed in the rule for review of excessiveness for security set under either Rule 47 or Section 52.002.

I have tried to capture your excellent suggestion on varying the "type" of security by making insertions in proposed Rule 47(b) to cover instances where security is set either under Rule 47 or Section 52.002.

I would like also to discuss with you your suggestion to include in TRAP 49(d) a specific rule reference to Section 52.002. The proposed amendment deletes the current reference in TRAP 49 to "Rule 47" so as to broaden the scope of TRAP 49. If you desire a specific statutory reference, I will recommend that. However, perhaps the use of language such as "by law or these rules" to generalize to both legislation and other civil rules

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600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
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TEXAS BOARD OF LEGAL SPECIALIZATION
† BOARD CERTIFIED CIVIL TRIAL LAW
‡ BOARD CERTIFIED CIVIL APPELLATE LAW
* BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW

may be adequate, and even perhaps safer in event subsequent legislation or rule-making generates additional sources and TRAP 49 not be contemporaneously adjusted due to oversight.

I am indeed interested in your thoughts on the lien matters and will work with you in any way you ask to fully harmonize the rules with the statutes.

We are most appreciative of the time that you spend to improve the administration of justice in Texas, and particularly the attention that you have given to assisting with TRAP Rules 47 and 49 and Section 52.002.

Very truly yours,

Luther H. Soules III

LHSIII:gc
Enclosure
C:/DW4/LHS/LETTERS/405.DOC

cc: Justice Nathan L. Hecht
Senator Kent Caperton
Senator Bob Glasgow
Senator Cyndi Krier
Representative Patricia Hill
Representative Senfronia Thompson

TRAP 47. Suspension of Enforcement of Judgment Pending Appeal in Civil Cases

(a) Suspension of Enforcement. Unless otherwise provided by law or these rules, a judgment debtor may suspend the execution of the judgment by filing a good and sufficient bond to be approved by the clerk, subject to review by the court on hearing, or making the deposit provided by Rule 48, payable to the judgment creditor in the amount provided below, conditioned that the judgment debtor shall prosecute his appeal or writ of error with effect and, in case the judgment of the Supreme Court or court of appeals shall be against him, he shall perform its judgment, sentence or decree and pay all such damages and costs as said court may award against him. If the bond or deposit is sufficient to secure the costs and is filed or made within the time prescribed by Rule 40 [41], it constitutes sufficient compliance with Rule 46. The trial court may make such orders as will adequately protect the judgment creditor against any loss or damages occasioned by the appeal.

(b) Money Judgment. When the judgment awards recovery of a sum of money, the amount of the bond or deposit shall be at least the amount of the judgment, interest, and costs.

The trial court may make an order to provide for security in an amount or type deviating from this general rule if after notice to all parties and a hearing the trial court finds [:

(1) as to civil judgments rendered in a bond forfeiture proceeding, a personal injury or wrongful death action, a claim covered by liability insurance or a workers' compensation claim] that posting the amount of the bond or deposit will cause irreparable harm to the judgment debtor, and not posting such bond or deposit will cause no substantial harm to the judgment creditor. In such a case, the trial court may stay enforcement of the judgment based upon an order which adequately protects the judgment creditor against any loss or damage occasioned by the appeal;

[(2) as to civil judgments rendered other than in a bond forfeiture proceeding, a personal injury or wrongful death action, a claim covered by liability insurance or a workers' compensation claim, that posting the security at an amount of the judgment, interest, and costs would cause irreparable harm to the judgment debtor, and ordering the security at a lesser amount would not substantially decrease the degree to which a judgment creditor's recovery under the judgment would be secured after the exhaustion of all appellate remedies.]

(c) (No change.)

(d) (No change.)

(e) (No change.)

(f) (No change.)

(g) Conservatorship or Custody. When the judgment is one involving the conservatorship or custody of a child [minor], the appeal, with or without security shall not have the effect of suspending the judgment as to the conservatorship or custody of

the ~~child~~ [minor], unless it shall be so ordered by the court rendering the judgment. However, the appellate court, upon a proper showing, may permit the judgment to be superseded in that respect also.

(h) (No change.)

(i) (No change.)

(j) (No change.)

(k) (No change.)

[COMMENT TO 1990 CHANGE: To conform the rule to statute.]

TRAP 49. Appellate Review of Bonds in Civil Cases

(a) (No change.)

(b) Appellate Review of [Order Setting Security or] Suspending Enforcement of Judgment Pending Appeal. The trial court's order ₱ЧґѕЧаńŧ/ŧ₱/₹ЧІ₴/47 [setting security or staying enforcement of a judgment] is subject to review ₱ў [on] a motion to the ₵₱Чґŧ/₱ғ/ѧ₱₱₴ѧІ₴ [appellate court for insufficiency or excessiveness]. Such motions shall be heard at the earliest practical time. The appellate court may issue such temporary orders as it finds necessary to preserve the rights of the parties.

The ₵₱Чґŧ/₱ғ/ѧ₱₱₴ѧІ₴ [appellate court] reviewing the trial court's order may require a change in the trial court's order. The ₵₱Чґŧ/₱ғ/ѧ₱₱₴ѧІ₴ [appellate court] may remand to the trial court for findings of fact or the taking of evidence.

(c) (No change.)

[COMMENT TO 1990 CHANGE: To make clear that within any jurisdictional limitations, all appellate courts may review a trial court order for insufficiency or excessiveness.]

4543.001

hjr
LHS

9-22-89

880

CARL A. PARKER
President Pro Tempore
DISTRICT 4

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TRAP 49

September 18, 1989

Mr. Luther H. Soules III
Soules and Wallace
10th Floor
Republic of Texas Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Dear Luke:

I appreciated you giving me the opportunity to comment on your proposed rules to implement the provisions of SB 134. While I believe that your draft accurately captures the intent of the law with regard to the subject of the change made in the burden required of a defendant to obtain a reduced bond requirement, I offer the following additional comments.

The draft you sent me fails to incorporate the change made in Sec. 52.004 of the bill, which reinstates statutorily the old, pre-amendment Rule 49(b), "Excessiveness". As you may be aware, this provision was dropped by the Supreme Court Advisory Committee when the rules were rewritten in the spring and summer of 1987, and took effect January 1, 1988. The new rules allowed for a review for "Sufficiency" (Rule 49(a)), but dropped excessiveness.

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47(b)

I am appreciative of the work being done by you and the committee on these rules and your responsiveness to the concerns of and actions by the legislature. Should you undertake to write a rule dealing with the lien portions of the bill, I'll be glad to share with you my comments on that section also.

Liens

Thanks for your interest.

Sincerely,

Carl A. Parker

CAP/pl

cc: Justice Nathan L. Hecht
Senator Kent Caperton
Senator Bob Glasgow
Senator Cyndi Krier
Senator Carl Parker
Representative Patricia Hill
Representative Senfronia Thompson

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TRAP 47
TRAP 49

October 16, 1989

Senator Carl A. Parker
Law Offices of Carl A. Parker
One Plaza Square
Port Arthur, Texas 77642

Dear Senator Parker:

Thank you very much for your letter of September 18 regarding TRAP 47 and 49. My apologies for not responding sooner. I enclose an interlined mark-up of the rules with some ideas on how to address your very appropriate suggestions. I will call you in a few days to determine whether you feel these interlineations are adequate to resolve your concerns.

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I would like also to discuss with you your suggestion to include in TRAP 49(d) a specific rule reference to Section 52.002. The proposed amendment deletes the current reference in TRAP 49 to "Rule 47" so as to broaden the scope of TRAP 49. If you desire a specific statutory reference, I will recommend that. However, perhaps the use of language such as "by law or these rules" to generalize to both legislation and other civil rules

may be adequate, and even perhaps safer in event subsequent legislation or rule-making generates additional sources and TRAP 49 not be contemporaneously adjusted due to oversight.

I am indeed interested in your thoughts on the lien matters and will work with you in any way you ask to fully harmonize the rules with the statutes.

We are most appreciative of the time that you spend to improve the administration of justice in Texas, and particularly the attention that you have given to assisting with TRAP Rules 47 and 49 and Section 52.002.

Very truly yours,

Luther H. Soules III

LHSIII:gc
Enclosure
C:/DW4/LHS/LETTERS/405.DOC

cc: Justice Nathan L. Hecht
Senator Kent Caperton
Senator Bob Glasgow
Senator Cyndi Krier
Representative Patricia Hill
Representative Senfronia Thompson

TRAP 49. Appellate Review of Bonds in Civil Cases

(a) (No change.)

(b) Appellate Review of [Order Setting Security or] Suspending Enforcement of Judgment Pending Appeal. The trial court's order ~~þÝÝ$ÝÁÑŦ/Ŧþ/ŘÝÍ¢/47~~ [setting security or staying enforcement of a judgment by law or these rules] is subject to review ~~þý~~ [on] a motion to the ~~¢ÓÝŦ/Óf/ÁÞÞ¢Á Í$~~ [appellate court for insufficiency or excessiveness]. Such motions shall be heard at the earliest practical time. The appellate court may issue such temporary orders as it finds necessary to preserve the rights of the parties.

The ~~¢ÓÝŦ/Óf/ÁÞÞ¢Á Í$~~ [appellate court] reviewing the trial court's order may require a change in the trial court's order. The ~~¢ÓÝŦ/Óf/ÁÞÞ¢Á Í$~~ [appellate court] may remand to the trial court for findings of fact or the taking of evidence.

(c) (No change.)

[COMMENT TO 1990 CHANGE: To make clear that within any jurisdictional limitations, all appellate courts may review a trial court order for insufficiency or excessiveness.]

TRAP 49

13. Strike "to" in the title.

TRAP 49. Appellate Review of Bonds in Civil Cases

(a) (No change.)

(b) Appellate Review of [Order Setting Security or] Suspending ~~to~~ Enforcement of Judgment Pending Appeal. The trial court's order ~~pursuant to Rule 47~~ [setting security or staying enforcement of a judgment] is subject to review ~~by~~ [on] a motion to the ~~court of appeals~~ [appellate court for insufficiency or excessiveness]. Such motions shall be heard at the earliest practical time. The appellate court may issue such temporary orders as it finds necessary to preserve the rights of the parties.

The ~~court of appeals~~ [appellate court] reviewing the trial court's order may require a change in the trial court's order. The ~~court of appeals~~ [appellate court] may remand to the trial court for findings of fact or the taking of evidence.

(c) (No change.)

[COMMENT TO 1990 CHANGE: To make clear that within any jurisdictional limitations, all appellate courts may review a trial court order for insufficiency or excessiveness.]

Sincerely,

Carol Baker

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

TRAP 51. The Transcript on Appeal

(a) Contents. (No change.)

(b) Written Designation. At or before the time prescribed for perfecting the appeal, any party may file with the clerk a written designation specifying matter for inclusion in the transcript; the designation must be specific and the clerk shall disregard any general designation such as one for "all papers filed in the cause." The failure of the designation will not be grounds for complaint on appeal if the designation specifying matter is not timely filed. The party making the designation shall serve a copy of the designation on all other parties. [Failure to timely make the designation provided for in this paragraph shall not be grounds for refusing to file a transcript or supplemental transcript tendered within the time provided by Rule 54(a); however, if the designation specifying such matter is not timely filed, t] The failure of the clerk to include designated matter will not be grounds for complaint on appeal if the designation specifying such matter is not timely filed.

(c) Duty of Clerk. (No change.)

(d) Original Exhibits. (No change.)

[COMMENT TO 1990 CHANGE: To eliminate any consideration that timely designation is a jurisdictional requisite for appeal.]

Court of Appeals
Fifth District of Texas at Dallas
CRAIG T. ENOCH
CHIEF JUSTICE
DALLAS COUNTY COURTHOUSE
DALLAS, TEXAS 75202-4658
(214) 653-6920

December 7, 1989

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

TRAP 4
TRAP 41
TRAP 54
TRAP 130
TRAP 5
TRAP 40
TRAP 9
TRAP 40
TRAP 74

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

Dear Nathan:

A. Late designation of the transcript and late request to the court reporter. The rules have always provided that the trial court clerk is to prepare a transcript according to rule when a bond is filed; if an appellant does not designate the contents, the rule itself does. *See* Tex. R. App. P. 51(a). A late designation can be accommodated, if it has to be, by a supplemental transcript. Hence the timeliness of an appellant's designation does not affect our jurisdiction.

While a late designation does not affect our jurisdiction, we repeatedly get appellees filing motions to dismiss, arguing that it does. Tex. R. App. P. 51(b) is being amended to reduce (we hope) the number of such motions, which routinely get denied anyway.

The request to the court reporter is a somewhat different matter. The reason is that filing a bond with the trial court clerk suffices in itself to inform the clerk that an appeal has been initiated. The reporter, however, knows to begin preparing the statement of facts only if an appellant makes the request. Thus, a late request to the reporter is a consideration that we must take into account in determining whether to grant an extension for the statement of facts. *See* Tex. R. App. P. 54(c). Nonetheless, Tex. R. App. P. 53(a) is being amended to clarify that a late request is something to consider in our discretion, but nothing of jurisdictional dimension. If a reporter timely files the statement of facts despite a late request, the lateness of the request is immaterial.

Regards,

Craig T. Enoch
Chief Justice

00517

TRAP 52. Preservation of Appellate Complaints

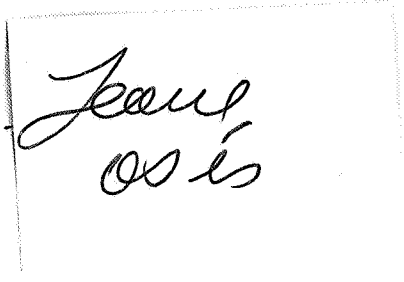
(a) General Rule. (No change.)

(b) Informal Bills of Exception and Offers of Proof. (No change.)

(c) Formal Bills of Exception. (No change.)

(d) Necessity for Motion for New Trial in Civil Cases. A point in a motion for new trial is prerequisite to appellate complaint in those instances provided in paragraph (b) of Rule 324 of the Texas Rules of Civil Procedure. [A party desiring to complain on appeal in a non-jury case that the evidence was legally or factually insufficient to support a finding of fact, that a finding of fact was established as a matter of law or was against the overwhelming weight of the evidence, or of the inadequacy or excessiveness of the damages found by the court shall not be required to comply with subdivision (a) of this rule.]

[COMMENT TO 1990 CHANGE: To clarify appellate requisites from non-jury trials.]



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November 26, 1989

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

Dear Judge Hecht:

6. The following proposed amendments use the word "nonjury": Texas Rules of Appellate Procedure 41(a)(1) and 54(a). The following proposed amendments use the word "non-jury": Texas Rules of Appellate Procedure 41 comment, 52(d), 52 comment, and 54 comment. The court may wish to standardize the terminology. The term "non-jury" currently appears in Texas Rules of Civil Procedure 90, 156, 216(1), 249, 307, and 542. The term "nonjury" currently appears in Texas Rule of Civil Procedure 324(a) and Texas Rule of Judicial Administration 6(b)(2).

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

Respectfully,

Charles A. Spain, Jr.

TRAP 53. The Statement of Facts on Appeal

(a) Appellant's Request. The appellant, at or before the time prescribed for perfecting the appeal, shall make a written request to the official reporter designating the portion of the evidence and other proceedings to be included therein. A copy of such request shall be filed with the clerk of the trial court and another copy served on the appellee. [Failure to timely request the statement of facts under this paragraph shall not prevent the filing of a statement of facts or a supplemental statement of facts within the time prescribed by Rule 54(a).]

(b) Other Requests. (No change.)

(c) Abbreviation of Statement. (No change.)

(d) Partial Statement. (No change.)

(e) Unnecessary Portions. (No change.)

(f) Certification by Court Reporter. (No change.)

(g) Reporter's Fees. (No change.)

(h) Form. (No change.)

(i) Narrative Statement. (No change.)

(j) Free Statement of Facts. (No change.)

(k) Duty of Appellant to File. (No change.)

(l) Duplicate Statement in Criminal Cases. (No change.)

(m) When No Statement of Facts Filed in Appeals of Criminal Cases. (No change.)

[COMMENT TO 1990 CHANGE: To eliminate any consideration that timely request is a jurisdictional requisite for appeal.]

Local Rules Sub-Committee
TRAP

W. HUGH HARRELL
ATTORNEY AND COUNSELOR AT LAW
1708 METRO TOWER, 1220 BROADWAY AVENUE
LUBBOCK, TEXAS 79401
RES. (806) 795-1825
OFFICE (806) 763-4411

November 22, 1989

TRCP 13
305

Justice Nathan L. Hecht
Box 12248
Austin, Texas-78711

Dear Judge Hecht:

As per the request of the Texas Supreme Court, I would like to offer the following suggestions concerning the Rules.

1. Rescind ALL local rules and do not permit local Courts to trap the practicing attorney by making Rules.

2. Require a party taking the deposition or a party or witness to furnish the other attorney a copy of the deposition at the expense of the one taking the deposition.

3. Require the Appellant to deliver the copy of the Transcript and the Statement of Facts to the Appellee's attorney the day of or after the Appellant's Brief is mailed to the Court of Appeals; and, thereafter the Appellee's attorney will file same with the Clerk of the trial Court.

TRAP 53

4. Remove, rescind, delete ALL sanctions by opposing counsel for alleged bad faith or frivilous law suits, because opposing counsel NOT having any counter-claim or cross-action is using these allegations alone to intimidate and coerce the opposing side. These allegations have become just as abusive as the party allegedly bringing a bad faith law suit. IF, retained in any manner, let JUST the trial Judge file a Motion and a hearing, and if a fact issue to be tried by a jury.

5. Require that a Judge NOT discuss any matter concerning the case with one attorney when the other attorney is NOT present, where there are opposing counsel. And, you might ought to say an attorney will not discuss matters with the Court unless the other attorney is present.

6. A Rule which would follow due process would require that NO order or judgment of the Court would be rendered or entered unless a hearing is set and notice served on all parties. This business of Courts just signing orders and/or judgments without opposing counself being afforded an opportunity to be heard is for the birds. This would not apply as to a default judgment and this might be clarified as to default judgments and say no motion need be served upon the defaulting party. Other jurisdictions require a Motion asking for a default judgment, and that it be served and a date, time and palce set for a hearing thereon.

7. A Rule that any appeal from an administrative agency will in fact be trial de novo and not test an Administrative Order under the substantial evidence rule.

Yours very truly, Hugh Harrell

WHH:wh cc: Ret.

00521

Court of Appeals
First Supreme Judicial District
1307 San Jacinto, 10th Floor
Houston, Texas 77002

PHONE 713-655-2700

TRAP 50(c)
- 53(k)
- 54(c)

September 27, 1989

Hon. Nathan Hecht
Texas Supreme Court
P.O. Box 12248
Austin, Texas 78711

Re: Amendments to Texas Rules of Appellate Procedure

Dear Justice Hecht:

I want to thank you for an excellent presentation to appellate judges assembled last week at the Judicial Conference. We appreciate the opportunity to discuss our rules of civil and appellate procedure with those who have a direct influence in making them.

I would like to respectfully recommend two changes in our appellate rules.

My second recommendation is that rules of appellate procedure 53(k) and 54(c) be changed to provide that it is the court reporter's duty, not the appellant's duty, to file the statement of facts in the Court of Appeals and to obtain extensions of time for late filing. The present rules place this duty upon the appellant, which causes considerable inconvenience to lawyers in dealing with the many court reporters and substitute court reporters who are often involved in different parts of the case. Our rules should recognize that the court reporter is an officer of the court, and usually a full-time employee, who is well paid to perform this sole function. It is unreasonable to impose on a lawyer, who in most criminal cases will be working for a court-appointed fee, the duty of going to the court reporter's home or office, picking up the record, and transporting it downtown to the Court of Appeals.

Likewise, I can imagine no good reason for requiring the lawyer to obtain an extension of time for filing the statement of facts. The lawyer has no control over the statement of facts and makes no money from producing it. This burdensome responsibility should be placed upon the court reporter because the court reporter has sole control of the statement of facts and is the only one who makes money from producing it.

I recommend that appellate rule 53(k) read as follows:

(k) **Duty of ~~Appellant~~ Court Reporter to File** It is the ~~appellant's~~ court reporter's duty to cause the statement of facts to be filed with the Clerk of the Court of Appeals.

TRAP 54. Time to File Record

(a) In Civil Cases -- Ordinary Timetable. The transcript and statement of facts, if any, shall be filed in the appellate court within sixty days after the judgment is signed, or, if a timely motion for new trial or to modify the judgment has been filed by any party [or if any party has timely filed a request for findings of fact and conclusions of law in a ~~nonjury~~ case], within one hundred twenty days after a writ of error has been perfected record shall be filed within sixty d writ of error. Failure to file ei statement of facts within such time diction of the court, but shall be appeal, affirming the judgment a materials filed, or applying presumpt either on appeal or on the court's ow determine. The court has authority t transcripts and statements of facts, but shall have no authority to consider a late filed transcript or statement of facts, except as permitted by this rule.

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

TRAP 54. Time to File Record

(a) In Civil Cases -- Ordinary Timetable. The transcript and statement of facts, if any, shall be filed in the appellate court within sixty days after the judgment is signed, or, if a timely motion for new trial or to modify the judgment has been filed by any party [or if any party has timely filed a request for findings of fact and conclusions of law in a ~~nonjury~~ case], within one hundred twenty days after the judgment is signed. If a writ of error has been perfected to the court of appeals the record shall be filed within sixty days after perfection of the writ of error. Failure to file either the transcript or the statement of facts within such time shall not affect the jurisdiction of the court, but shall be ground for dismissing the appeal, affirming the judgment appealed from, disregarding materials filed, or applying presumptions against the appellant, either on appeal or on the court's own motion, as the court shall determine. The court has authority to consider all timely filed transcripts and statements of facts, but shall have no authority to consider a late filed transcript or statement of facts, except as permitted by this rule.

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

imposed or suspended in open court or the order appealed from has been signed.

(c) No change.

[COMMENT TO 1990 CHANGE: To make the appellate timetable for non-jury cases conform more to that in jury cases. To conform paragraph (b) to the rule amendment adopted by the Court of Criminal Appeals.]

Court of Appeals
Fifth District of Texas at Dallas

CRAIG T. ENOCH
CHIEF JUSTICE

DALLAS COUNTY COURTHOUSE
DALLAS, TEXAS 75202-4658

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December 7, 1989

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

→

TRAP 4
TRAP 41
TRAP 54
TRAP 130
TRAP 5
TRAP 40
TRAP 9
TRAP 40
TRAP 74

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

Dear Nathan:

B. Effect of filing a request for findings of fact and conclusions of law. The proposed amendments provide that a request for findings of fact and conclusions of law is to be filed within 20 days of judgment after a nonjury case. Tex. R. Civ. P. 296. If one is timely filed, the appellate timetable is extended the same as if a motion for new trial is timely filed. Tex. R. App. P. 41(a)(1) & 54(a).

The impetus seems to be to give appellants' attorneys time to get the findings and conclusions in hand, so that they can assess realistically the desirability of an appeal. *See Garcia v. Kastner Farms, Inc.*, 774 S.W.2d 668, 669 (Tex. 1989), *overruling Garcia v. Kastner Farms, Inc.*, 761 S.W.2d 444 (Tex. App.--Corpus Christi 1988).

Nonetheless, the comment to the proposed new rule states only that the amendment is "[t]o make the appellate timetable for non-jury cases conform more to that in jury cases," without further elaboration. This comment is somewhat mystifying, because a motion for new trial could be filed in either a jury or a nonjury case. And there are problems that caselaw will have to resolve. For example, what if a party does not make a timely reminder and fails to obtain any findings or conclusions--is the timetable still extended? A motion for new trial is overruled by operation of law if the trial court doesn't act; a request for findings and conclusions can simply be ignored if there's not a timely reminder.

What if a request is filed in a case in which a request is inappropriate (such as a summary judgment case)--is the timetable still extended? A motion for new trial can be so deficient that it should be overruled as a matter of law, but it still operates to extend the timetable. *See Vasquez v. Carmel Shopping Center Co.*, 777 S.W.2d 532, 533-34 (Tex. App.--Corpus Christi 1989, n.w.h.). On the other hand, a motion for new trial in an interlocutory appeal is totally ineffective to do anything. *See Leone v. S. Nordhaus Co., Inc.*, 678 S.W.2d 129, 130 (Tex. App.--San Antonio 1984, no writ) (on mot. for reh'g). A request in a summary judgment case, if analogized to a legally deficient motion, would extend the timetable, but, if analogized to a motion filed in the wrong kind of case, would not. The draft rule does not give much guidance.

The clerks' office will have to be instructed to file in any transcript showing a request for findings and conclusions filed within 20 days of the judgment when the transcript is timely under the 90/120-day timetable. We can't risk the clerks refusing to file a transcript as untimely when it might in fact be timely.

Regards,

Craig T. Enoch
Chief Justice

Court of Appeals
First Supreme Judicial District
1307 San Jacinto, 10th Floor
Houston, Texas 77002

TRAP 80(c)
~ 53(k)
~ 54(c)

September 27, 1989

Hon. Nathan Hecht
Texas Supreme Court
P.O. Box 12248
Austin, Texas 78711

Re: Amendments to Texas Rules of Appellate Procedure

Dear Justice Hecht:

My second recommendation is that rules of appellate procedure 53(k) and 54(c) be changed to provide that it is the court reporter's duty, not the appellant's duty, to file the statement of facts in the Court of Appeals and to obtain extensions of time for late filing. The present rules place this duty upon the appellant, which causes considerable inconvenience to lawyers in dealing with the many court reporters and substitute court reporters who are often involved in different parts of the case. Our rules should recognize that the court reporter is an officer of the court, and usually a full-time employee, who is well paid to perform this sole function. It is unreasonable to impose on a lawyer, who in most criminal cases will be working for a court-appointed fee, the duty of going to the court reporter's home or office, picking up the record, and transporting it downtown to the Court of Appeals.

Likewise, I can imagine no good reason for requiring the lawyer to obtain an extension of time for filing the statement of facts. The lawyer has no control over the statement of facts and makes no money from producing it. This burdensome responsibility should be placed upon the court reporter because the court reporter has sole control of the statement of facts and is the only one who makes money from producing it.

Similarly, rule 54(c) should be changed to read as follows:

> (c) **Extension of Time** An extension of time may be granted for late filing in a court of appeals of a transcript or statement of facts, if a motion reasonably explaining the need therefor is filed, by appellant in the case of the late transcript and by the court reporter in the case of a late statement of facts, with the court of appeals not later than 15 days after the last date for filing the record. Such motion shall also reasonably explain any delay in the request required Rule 53(a).

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TELECOPY NUMBER:
(512) 478-1976

November 26, 1989

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

Dear Judge Hecht:

5. The following proposed amendments use the word "nonjury": Texas Rules of Appellate Procedure 41(a)(1) and 54(a). The following proposed amendments use the word "non-jury": Texas Rules of Appellate Procedure 41 comment, 52(d), 52 comment, and 54 comment. The court may wish to standardize the terminology. The term "non-jury" currently appears in Texas Rules of Civil Procedure 90, 156, 216(1), 249, 307, and 542. The term "nonjury" currently appears in Texas Rule of Civil Procedure 324(a) and Texas Rule of Judicial Administration 6(b)(2).

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

Respectfully,

Charles A. Spain, Jr.

TRAP 57. Docketing the Appeal

(a) (No change.)

(b) Attorneys' Names. Before an attorney has filed his [or her] brief he [or she] may notify the clerk in writing of the fact that he [or she] represents a named party to the appeal, which fact shall be ÞÝ/ÞÞ¢/¢Ì¢ÝÝ noted [by the clerk] upon the docket, opposite the name of the party for whom Þ¢ [the attorney] appears, and shall be regarded by the court as having whatever effect is given to the appearance of a party to a case without [a] brief [having been] filed. After briefs have been filed, the name of [each] ÞÞ¢ attorney ØÝ/¢ÞÞØÝÞ¢Ý$ sign¢d/ÞØ[ing] the brief shall be entered by the clerk on the docket, opposite the name of the appropriate party if such names have not already been so entered. The clerk shall add the names of additional counsel [up]on request.

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

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November 26, 1989

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

Dear Judge Hecht:

5. Texas Rule of Appellate Procedure 57(a)(1) refers to "supreme judicial district." Perhaps this should be changed to "court of appeals district" or simply "district" in keeping with the proposed amendments to rules 12, 74, and the appendix for criminal cases.

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

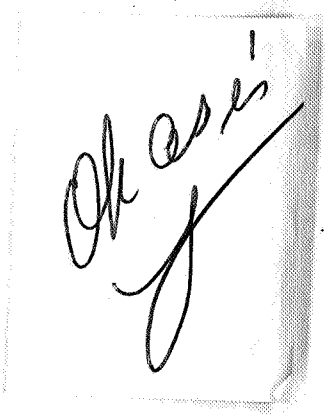
Respectfully,

Charles A. Spain, Jr.

TRAP 72. Motions to Dismiss for Want of Jurisdiction

Motions to dismiss for want of jurisdiction to decide the appeal and for such [other] defects as defeat the jurisdiction in the particular case and [which] cannot be waived shall also be made, filed and docketed within thirty days after the filing of the transcript in the court of appeals; provided, however, if made afterwards they may be entertained by the court upon such terms as the court may deem just and proper.

[COMMENT TO 1990 CHANGE: Textual corrective change only.]



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

January 2, 1990

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

Dear Justice Hecht:

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

TRAP

Rule 72. Why is this rule necessary? If the defect is truly jurisdictional, it can't be waived and, therefore, can be raised at any time.

Change to 11 Dec '97

TRAP 74. Requisites of Briefs

Briefs shall be brief. Briefs shall be filed with the Clerk of the Court of Appeals. They shall be addressed to "The Court of Appeals" of the correct ~~Supreme Judicial~~ [d]istrict. In civil cases the parties shall be designated as "Appellant" and "Appellee", and in criminal cases as "Appellant" and "State".

(a) Names of All Parties [to the Trial Court's Final Judgment]. A complete list of the names [and addresses] of all parties [to the trial court's final judgment and their counsel in the trial court, if any] shall be listed at the beginning of the appellant's brief, so the members of the court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case [and so the clerk of the court of appeals may properly notify the parties to the trial court's final judgment and their counsel, if any, of the judgment and all orders of the court of appeals].

(b) Table of Contents and Index of Authorities. (No change.)

(c) Preliminary Statement. (No change.)

(d) Points of Error. (No change.)

(e) Brief of Appellee. (No change.)

(f) Argument. (No change.)

(g) Prayer for Relief. (No change.)

(h) Length of Briefs. Except as specified by local rule of the court of appeals, appellate briefs in civil cases shall not exceed 50 pages, exclusive of pages containing the [list of names and addresses of parties,] table of contents, index of

authorities, points of error, and any addendum containing statutes, rules, regulations, etc. The court may, upon motion, permit a longer brief. A court of appeals may direct that a party file a brief, or another brief, in a particular case. If any brief is unnecessarily lengthy or not prepared in conformity with these rules, the court may require same to be redrawn.

(i) Number of Copies. (No change.)

(j) Briefs Typewritten or Printed. (No change.)

(k) Appellant's Filing Date. (No change.)

(l) Failure of Appellant to File Brief. (No change.)

(m) Appellee's Filing Dates. (No change.)

(n) Modifications of Filing Time. (No change.)

(o) Amendment or Supplementation. (No change.)

(p) Briefing Rules to be Construed Liberally. (No change.)

[(q) Service of Briefs. All briefs filed in the appellate court shall at the same time be served on all parties to the trial court's final judgment.]

[COMMENT TO 1990 CHANGE: This amendment, together with other similar amendments conforming other appellate rules, requires the parties to any appeal to serve copies of all papers filed with the clerk of the appellate court (except the statement of facts and the transcript), and the clerk of the appellate court to mail notice and copies of all appellate court orders and opinions on all parties to the trial court's judgment.]

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

January 2, 1990

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

Dear Justice Hecht:

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

TRAP Rule 74. This rule as well as other previous rules and comments suggests that the clerk of the court of appeals notify the parties to the trial court's final judgment and their counsel, if any, of the orders of the court. There are 2 problems with this requirement. First, the appellate courts should notify counsel only, not the party and their counsel. Second, all parties to the trial court's judgment may not be involved in the appellate process. In other words, if ten parties are named in the judgment but only three are involved in the appeal, then there is no need to send routine notices to the other seven parties no longer involved. In addition, this rule requires that the brief contain a list of the names and addresses of all parties to the trial court's final judgment and their counsel in the trial court. Again, shouldn't counsel on appeal be the important factor. For example, one party may have had attorney A for trial counsel and now has retained attorney B. The notice provisions throughout the appellate rules will cause a great increase in expense if the appellate courts are required to notify all parties to the judgment and their trial counsel and their appellate counsel. For example, a will contest involving several heirs.

THE SUPREME COURT OF TEXAS

Justice Nathan L. Hecht *Court Rules Liaison*

MEMORANDUM

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

January 15, 1990

RE: Rules 74(h), 131(i), Texas Rules of Appellate Procedure
Length of Briefs (1 page)

To meet the 50-page limit on briefs without sparing the appellate court the full benefit of their views, counsel occasionally reduce the page margins and type size rather dramatically. Some members of the Court have raised the issue of whether the rules should specify printing standards for briefs to eliminate this practice. I would prefer to await that ironic crisis when counsel's determination to add a few very important words will yield a brief with type too small to be read.

My own view is that the problem, when it occurs, can be dealt with under Rules 131(j), and the corresponding provision of Rule 74(h), irrespective of the actual number of pages in the brief. The issue raised is but a smaller part of a larger problem which takes myriad forms: placement of materials in appendices, reference to other parties' briefs, etc. The point is, good counsel will not burden a court with more than it can or will consider in a given case. Page limits and other such standards are only rules of thumb. I do not see much to be gained by being more specific. However, the Court has asked for the Committee's counsel.

Court of Appeals
Fifth District of Texas at Dallas
DALLAS COUNTY COURTHOUSE
DALLAS, TEXAS 75202-4658
(214) 653-6920

CRAIG T. ENOCH
CHIEF JUSTICE

December 7, 1989

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

TRAP 4
TRAP 41
TRAP 54
TRAP 130
TRAP 5
TRAP 40
TRAP 9
TRAP 40
→ TRAP 74

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

Dear Nathan:

C. Parties to be served

The proposed rules contain provisions throughout stating, in substance, that anything part of the record on an appeal (except for the transcript and the statement of facts) is to be served on all "parties to the trial court's judgment." *See* comment to Tex. R. App. P. 40. This change applies to our own notices, orders, opinions, and judgments. *See* Tex. R. App. P. 91.

The clerks' office will have to be informed. The clerks will also have to make sure that every party to the judgment is on the Court's mailing list for every case.

The change is probably to prevent the disaster that occurred in *Hexcel Corp. v. Conap, Inc.*, 738 S.W.2d 359 (Tex. App.--Fort Worth 1987, writ denied). *Hexcel* involved multiple parties, with claims for contribution. The appellant served a copy of its bond upon the party against whom it directly asserted a claim, but not upon all parties to the judgment. As a result, the appellant's direct adversary was unable to timely perfect an appeal against the third party from whom the adversary sought contribution, if the appellant should ultimately prevail. Because the appellant's failure to serve all parties prejudiced its adversary's rights against the third party, the appeal was dismissed.

Yet this change, seemingly innocuous enough, is probably going to impact upon our day-to-day operations the most. Even when a party attempts to limit an appeal so that not all parties are affected, all "parties to the trial court's judgment" must still be served. *See* Tex. R. App. P. 40(a)(4). An immediate problem for us will be to identify just who is and who is not a party to the judgment. Not all parties to the suit are parties to the judgment: for example, a named defendant whom a plaintiff voluntarily nonsuits before trial. Conversely, the rules make clear that a party to the judgment must be served even if he appears to be not a party directly interested in the appeal.

Presently, the transcript department of the trial court clerks' office types the names and addresses of the parties on appeal on the cover of the transcript. The transcript department gets this information from the bond: the appellant is the principal on the bond, and the appellee is the obligee. Thus, the transcript cover identifies only the parties to the appeal. When the transcript is filed, our clerks note who the parties are by looking at the cover. Notice of the filing of the transcript is then sent immediately to the parties.

About all that we can do, on adoption of these amendments, is our best to identify the proper parties that require notice. Now there will be other parties (aside from the parties to the appeal) who will also require notice.

The clerks should look at the final judgment in the transcript to determine who is named in that judgment, instead of referring to the parties given on the cover of the transcript.

Despite *Hexcel*, the proposed changes requiring us to give notice to all parties to the judgment do not completely absolve prospective appellants from making sure that all interested parties are served. Tex. R. App. P. 74(a) has a proposed amendment, to provide that parties must include the names and addresses of all parties to the judgment in their briefs, for the express purpose of assisting our clerks in determining to whom notice should be sent. We will also be assisted by the new requirement that certificates of service give the names and addresses of all parties served. We can check our own notice list against a specific certificate to eliminate variances or omissions. (This the clerks already do, when a motion is filed; the problem is when the transcript is filed, before there are any motions.)

The *Hexcel* problem is likely to remain. The most critical (and jurisdictional) deadlines occur at the beginning of an appeal. By the time we get the transcript, the time to file a motion to extend the time to file a bond has usually completely expired. Thus, although the clerks do not have the ultimate responsibility to keep all interested parties informed, the proposed rule changes

will achieve their full purpose only if the clerks do attempt to establish who the parties to the judgment are as soon as possible. Because the clerks can't do so without examining the inside of the transcript, the task of sending out our initial notice letters will be considerably more difficult.

Also, the clerks will have to brace themselves for phone calls from anxious attorneys. Attorneys whose clients have no direct interest in an appeal are prone to panic when they hear from the Court; they conclude that we must know something about the appeal that they don't. The clerks' office has even been asked in the past to review an appellant's brief and assure an attorney that he need not respond to it on behalf of his client. We inform the attorney, of course, that that kind of determination is beyond the clerks' capacity, but the proposed change means that we will be giving that answer out far more frequently.

Regards,

Craig T. Enoch
Chief Justice

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OF COUNSEL

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

TELECOPY NUMBER
(512) 478-1976

November 26, 1989

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

Dear Judge Hecht:

7. In amending Texas Rules of Appellate Procedure 74(a) and 131(a), the court may wish to consider United States Supreme Court Rule 28.1, which requires a corporation to name all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates.

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

Respectfully,

Charles A. Spain, Jr.

SMEAD, ANDERSON, WILCOX & DUNN
ATTORNEYS AT LAW
425 NORTH FREDONIA, SUITE 100
P. O. BOX 3343
TELEPHONE (214) 757-2868
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H. P. SMEAD, JR.
SOS ANDERSON
MELVIN R. WILCOX, III
MICHAEL L. DUNN

KYLE KUTCH
PETER L. BREWER

November 30, 1989

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

Re: Tex. R. App. P. 74(k)

To The Committee:

In response to the Court's invitation in the November, 1989 issue of the Texas Bar Journal, the following suggestion regarding the Rules of Appellate Procedure is made. Rule 74(k) of the Texas Rules of Appellate Procedure concerns the deadline for filing Appellant's Brief in the Court of Appeals. It states: "Appellant shall file his brief within 30 days after the filing of the transcript and statement of facts, if any . . . ."

This rule is slightly ambiguous where the transcript and facts are not filed on the same day. The rule could be clarified as rephrasing that portion of the Rule as follows: Appellant shall file his brief within 30 days after both the transcript and statement of facts, if any, have been filed . . . ."

Sincerely,

SMEAD, ANDERSON, WILCOX AND DUNN

BY: _____
Peter L. Brewer
Former Briefing Attorney,
Texas Supreme Court
1987-88 term

dl

TRCP 18(b)

TRAP 74(a) 90

November 29, 1989

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

Dear Justice Hecht:

This letter is in response to the invitation to comment on the proposed amendments to the Texas Rules of Civil and Appellate Procedure. This letter will be confined to expressing concerns as to two major changes in the Rules of Appellate Procedure as viewed by the office of Clerk of the Second Court of Appeals.

Appellate Rule 74(a) as amended will require briefs to list all parties to the trial court's final judgment and their counsel so that the Clerk of the court of appeals may send those parties copies of all orders, opinions and judgments of the court of appeals. Rule 91 similarly requires the appellate clerk to send copies of the opinion and judgment to all parties to the trial court's judgment. This proposed rule does not aid the legal system to "reduce the cost and delay of litigation," nor does it "increase both the efficiency and the fairness of the justice system," professed goals of the rules committee as stated on p.1147 of the November Texas Bar Journal.

Court clerks already face a heavy load of paperwork. Now over-burdened copy machines and expensive supplies of paper and envelopes as well as precious hours of labor must be wasted sending copies of every order an appellate court issues to people who are not parties to the appeal. Additionally, those persons who chose not to appeal might have to pay legal fees to their trial attorneys who will receive those orders, opinions and judgments, and pass them along to their clients at a suitable billing rate. The office of Clerk of this court strongly opposes such a wasteful, time-consuming change in the Rules of Appellate Procedure.

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

Sincerely,

Yvonne Palmer

Yvonne Palmer
Chief Clerk
2nd Court of Appeals

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TRAP 90. Opinions, Publication and Citation

(a) Decision and Opinion. The court of appeals shall hand down a written opinion which shall be as brief as practicable but which shall address every issue raised and necessary to final disposition of the appeal. Where the issues are clearly settled, the court shall write a brief memorandum opinion. ~~which should not be published.~~

(b) Signing of Opinions. A majority of the justices participating in the decision of the case shall determine whether the opinion shall be signed by a justice or issued per curiam. The names of the justices participating in the decision shall be noted on all written opinions or orders handed down by a panel.

~~(c)~~ <u>[c)]</u> Determination to Publish. A majority of the justices participating in the decision of a case shall determine, prior to the time it is issued, whether an opinion meets the criteria for publishing, and if it does not meet the criteria for publication, the opinion shall be distributed only to the persons specified in Rule 91, but a copy may be furnished to any interested person. On each opinion a notation shall be made to "publish" or "do not publish." <u>[Any party may move the appellate court to reconsider the determination whether to publish an opinion. The justices participating in the decision of a case may reconsider their determination whether to publish an opinion after it has issued. However, the appellate court shall not order any unpublished opinion to be published after the Supreme Court or Court of Criminal Appeals has acted on any party's application for writ of error, discretionary review, or any other</u>

relief. The Supreme Court or the Court of Criminal Appeals may on request of any party or non-party to a court of appeals decision order a court of appeals opinion published at any time.]

(c) [(d)] Standards for Publication. An opinion by a court of appeals shall be published only if, in the judgment of a majority of the justices participating in the decision, it is one that (1) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority.

(d) [(e)] Concurring and Dissenting Opinions. Any justice may file an opinion concurring in or dissenting from the decision of the court of appeals. A concurring or dissenting opinion may be published if, in the judgment of its author, it meets one of the criteria established in paragraph (c), but in such event the majority opinion shall be published as well.

(f) (No change.)

(g) Action of Court En Banc. The court en banc may modify or overrule a panel's decision with regard to the signing or publication of the panel's opinion or opinions in a particular case. A majority of justices shall determine whether written opinions handed down by the court en banc shall be signed by a justice or issued per curiam, and whether they should be published. [However, the appellate court shall not order any unpublished opinion to be published after the Supreme Court or

Court of Criminal Appeals has acted on any party's application for writ of error, discretionary review, or any other relief.]

(h) Order of the Supreme Court. Upon the grant or refusal of an application for writ of error, ~~when by order of the court an~~ an opinion previously unpublished shall forthwith be released [by the clerk of the court of appeals] for publication. ~~If the Supreme Court orders~~

[Upon the denial or dismissal of an application for writ of error, an opinion previously unpublished shall forthwith be released by the clerk of the court of appeals for publication, if the Supreme Court so orders].

(i) (No change.)

[COMMENT TO 1990 CHANGE: To preclude publication of an unpublished opinion by a court of appeals after court action in the appeal by the Supreme Court or the Court of Criminal Appeals; to provide that anyone, whether or not a party, can seek an order from the Supreme Court or Court of Criminal Appeals to publish any such opinion at any time; to require the clerks of the courts of appeals to release for publication all court of appeals opinions following grant or refusal of writ of error by the Supreme Court of Texas and to make other textual changes.]

STATE BAR OF TEXAS

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TO: Texas Supreme Court

FROM: Committee on Administration of Justice

RE: Proposed Rule Changes

DATE: December 18, 1989

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

3. Recommendation that TRAP 90 remain unchanged.

The advisory committee's proposed TRAP 90 would significantly alter present law concerning the publishing of court of appeals opinions. We believe the present rule is working well and should not be changed.

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

January 2, 1990

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

Dear Justice Hecht:

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

TRAP
Rule 90[c)]. This should be corrected to include a full set of ( ). Does section (c) allow for a request by a court of appeals to the Supreme Court or Court of Criminal Appeals to publish a previously unpublished court of appeals opinion? If not, the rule should do so.

TRAP
Rule 90(h). This rule states that, if an application for writ of error is granted or refused, automatically, the previously unpublished opinion of the Court of Appeals shall be published. There may be times when the Court initially grants, and then withdraws the decision. Publishing should simply be ordered by the Court when necessary, and not be an automatic occurrence.

Court of Appeals
Fifth District of Texas at Dallas
DALLAS COUNTY COURTHOUSE
DALLAS, TEXAS 75202-4658
(214) 653-6920

CRAIG T. ENOCH
CHIEF JUSTICE

December 7, 1989

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

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

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

Dear Nathan:

B. Publication of opinions. The amended rules clarify publication policy. We can publish an opinion upon motion, provided that a higher court has not yet granted any relief to a party appealing our decision. *See* Tex. R. App. P. 90(g). Once a higher court has granted some relief, it has the exclusive prerogative to determine whether our opinion should be published.

Regards,

Craig T. Enoch
Chief Justice

DALLAS COUNTY
DISTRICT ATTORNEY
JOHN VANCE

90(c) & (g)

November 21, 1989

TRAP

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

RE: Comments on Proposed Amendments to Texas Court Rules-
Texas Rules of Appellate Procedure - TRAP 90

Dear Justice Hecht:

Pursuant to the invitation for public comment on the proposed rule changes found in the November issue of Texas Bar Journal, please consider the following:

TRAP[1] 90(c) and (g)

In my opinion both the present and proposed rules suffer from the same species of flaw. Under both rules it is possible that a Court of Appeals opinion may be changed from unpublished to published after the parties have decided not to file a petition for discretionary review. While the proposed rules have the "advantage" of at least making it clear that this can occur, they also appear to broaden the categories of persons who may request a post-decision change in the publication status of the opinion.

This problem is not theoretical in nature, it has already happened to me. In my case, the unpublished opinion of the Court of Appeals was changed to a published opinion by way of an order signed 2 days before the expiration of the time to file a petition for discretionary review. Due to delays in delivery of this order to me, I became aware of the fact that this change was made approximately 4 hours before the State's petition for discretionary

[1] In this acronym conscious age, I wonder if any one but me has noticed the unfortunate "trap" produced by the abbreviation used in the Bar Journal article.

review was due to be filed.

As the head of the appellate division of a major metropolitan District Attorney's office my concerns about the severity of this problem may be somewhat atypical. However, I think that there may be other appellate litigators (and some on the civil side as well) who may share my concerns.

These concerns arise from the fact that our office is in many instances concerned with the rationale and holding of a particular opinion for reasons outside of the resolution of the case(s) which the opinion may decide. Because of the large number of cases which have identical or near identical issues in them, this office must be concerned with the effect that the published opinions may have on the jurisprudence of this State.

The State of Texas may "lose" a particular case based upon certain holdings of the Court of Appeals which are questionable, unclear, or simply wrong. Yet, the attorney for the State may feel that further appeal of a particular unpublished opinion would be fruitless in light of other known reasons supporting reversal of the conviction which are not stated in the unpublished opinion. In such a situation the State's attorneys may decide to simply stop beating the dead horse in question, and proceed to a speedy retrial of the case. However, such a conclusion might not have been reached if the opinion had been published and therefore of precedental value pursuant to TRAP 90(i). To allow the published/unpublished status of the opinion to be changed after the time for filing a petition for discretionary review has substantially elapsed or expired, allows for an alteration of this portion of the decision-making equasion to be changed after the time for doing anything about correcting the erroneous opinion has effectively passed.

In addition, it may be that in a rare situation, a particular unpublished opinion of the Court of Appeals may "affirm" the conviction but still contain a holding deemed unsatisfactory to the State. Again, this actually happened to me in a particular case. Where the unsatisfactory opinion is unpublished, the State's attorney may be content to take the win (never take points off the board is the theory, originating in the NFL, behind such a decision) and, as they say in East Texas, "go to the house." However, the State may wish to seek discretionary review of an improperly decided point if it is contained in a published opinion, particularly where the defendant has sought petition for discretionary review on another issue in the case.[2]

Another related concern is based on my perception that

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[2] But this is not the only instance where this may occur. I once had the State's Attorney (in Austin) seek a petition in a case I had won in the Court of Appeals without consulting me, even though the defendant had not filed a petition.

court of appeals justices may take more care in crafting an opinion (by including appropriate limiting language, etc.) where the justice believes that he is not writing for publication.

I propose that if the Court desires that there be a mechanism in the appellate rules to allow for the change of the publication status of a court of appeals opinion (and I concede some such rule is desirable), that the Rules be structured to allow either party to the case in question a full 30 days from the day the appellate court orders such a change in status (from unpublished to published) to file a petition for discretionary review, writ of error, or other relief.

In addition, I believe it would be useful to specifically require any party or non-party requesting a change in the publication status of an opinion to serve copies of the request on the opposing party (or both parties in the case of a non-party request) and to specifically require at least 15 days for the parties to respond to such requests before the appellate court to which such a request is made may rule on the request. This will allow the appellate court to rule on the request with a maximum amount of input from the attorneys who have handled the case.

I have also enclosed a recently published article written by Justice O'Connor of the Houston Court of Appeals which suggests that a more thorough evaluation of the policies informing the initial publication decision by the Court of Appeals is in order. I realize that the rule changes in question were not designed to deal specifically with such issues, but this topic should be put forward for consideration by the Court.

Respectfully yours,

Jeffrey B. Keck
Assistant District Attorney
Frank Crowley Criminal Courts Bldg.
Dallas County, Texas
(214) 653-3628

JBK/sn

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

TRAP 90

September 29, 1989

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

Dear Justice Hecht:

On September 21, 1989, at the Annual meeting of the Council of Justices of the Courts of Appeals the enclosed resolution was adopted unanimously.

We earnestly request that you favorably consider this Resolution at the time of the proposed changes to the Rules of Civil Procedure.

Kindest personal regards,

Norman L. Utter

NLU:mjd
Enclosure
cc: Hon. Bob Dickenson
Hon. Jimmy Carroll
Hon. John T. Boyd

BE IT RESOLVED THAT THE COUNCIL OF JUSTICES OF THE COURTS OF APPEALS REQUESTS THE SUPREME COURT OF TEXAS TO REJECT THE RECOMMENDATION OF THE RULES ADVISORY COMMITTEE TO REQUIRE THE AUTOMATIC PUBLICATION OF ALL OPINIONS WHEN AN APPLICATION FOR WRIT OF ERROR IS GRANTED.

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301 CONGRESS AVENUE
SUITE 1400
AUSTIN, TEXAS 78701
(512) 320-4111
TELECOPIER (512) 320-4161

November 29, 1989

TRAP 90

VIA FEDERAL EXPRESS

Justice Nathan Hecht
Supreme Court of Texas
15th at Colorado
Austin, Texas 78711

RE: Proposed 1990 Change to Tex. R. App. P. 90 (publication of court of appeals decisions)

Dear Judge Hecht:

I would suggest a couple of minor textual changes in proposed Tex. R. App. P. 90. These changes would, I believe, better reflect the Court's intent in amending the rule.

(c) Determination to Publish. . . . Any party may move the ~~appellate court~~ Court of Appeals to reconsider the determination whether to publish an opinion. The justices participating in the decision of a case may reconsider their determination whether to publish an opinion after it has issued. However, the ~~appellate court~~ Court of Appeals shall not order any unpublished opinion to be published after the Supreme Court or Court of Criminal Appeals has acted on any party's application for writ of error, discretionary review, or any other relief.

(g) Action of Court En Banc. . . . However, the ~~appellate court~~ court of appeals shall not order any unpublished opinion to be published after the Supreme Court or Court of Appeals has acted on any party's application for writ of error, discretionary review, or any other relief.

The purpose for these suggested minor changes is to make it perfectly clear that the phrase "the appellate court" really refers to the Court of Appeals, and not both the Court of Appeals and the Supreme Court.

In addition, I have a number of substantive concerns regarding the proposed rule change. I understand the Court's concern with possible abuse of power by courts of appeals. I also assume that the Supreme Court Advisory Committee considered the proposed changes in detail. I am curious, however, whether the following matters have been considered:

1. The new rule would apparently permit the Texas Supreme Court to order a court of appeals opinion published even when no party has ever sought an application for writ of error or otherwise invoked the Texas Supreme Court's jurisdiction. Is a decision by the Texas Supreme Court to order an opinion published under these circumstances consistent with the general prohibition on advisory opinions? Is it practical or desirable for the Texas Supreme Court to make a determination regarding whether a court of appeals opinion should be ordered published without the benefit of briefing or argument by either party to the case? Is it courteous or wise to reverse the decision of a court of appeals to order an opinion not published without formally consulting that court or giving that court an opportunity to rule on a motion to order publication?

2. As currently worded, the proposed rule change permits a non-party to ask the Texas Supreme Court to order publication of an originally unpublished decision. Is there any reason for not permitting the same option to a non-party on application to the court of appeals, while that court has authority to amend its publication decision?

3. As currently worded, the rule is silent regarding the authority of a court of appeals to order post-hac publication of a "no writ" decision, months or years after that decision is final. Should some provision be made for this situation?

4. In addition to giving the Texas Supreme Court the authority to determine whether to publish an opinion in a case where jurisdiction is final in the court of appeals (e.g., a temporary injunction proceeding), the revised rule also appears to give the Court the power to determine whether to order publication of a criminal decision. Is this intended?

5. For the limited classes of cases in which jurisdiction is made final in the court of appeals, certiorari review by the United States Supreme Court may be available. The United States Supreme Court certiorari process is to some extent influenced by the jurisprudential importance of a case which, in turn, is somewhat influenced by whether or not a decision is published. Would it not make sense to curtail the power of a court of appeals to retroactively order publication in situations in which the United States Supreme Court has acted on a petition for writ of certiorari?

6. In light of the new provision in Tex. R. App. P. 90(h) permitting the Texas Supreme Court to order opinions published after denial or dismissal of writ applications, attorneys will inevitably speculate about what such an order "really" means. I assume that the Court anticipates using this authority only in unusual circumstances. Accordingly, the Court might decrease speculation by adding a sentence at the end of Tex. R. App. P. 90(h), like the following: "Such decision to order or not order publication is not intended and should not be construed as expressing any opinion on the legal merits of the lower court's decision."

Again, I expect that all of these matters have been fully taken into consideration. If any clarification or explanation for my comments is desired, however, I would be more than happy to discuss them with any member of the Committee.

Sincerely,

Jim Paulsen

James W. Paulsen

JWP/eaj

CHIEF JUSTICE
MAX N. OSBORN

JUSTICES
LARRY FULLER
JERRY WOODARD
WARD L. KOEHLER

Court of Appeals
Eighth Judicial District

500 CITY-COUNTY BUILDING
EL PASO, TEXAS
79901 - 2490
915 546-2240

November 22, 1989

CLERK
BARBARA B. MORRIS

DEPUTY CLERK
DENISE PACHECO

STAFF ATTORNEY
JAMES T. CARTER

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

Dear Justice Hecht:

I take this opportunity to write concerning the proposed changes in the Texas Appellate Practice Rules as set forth in the November issue of the Texas Bar Journal.

I also favor the proposed change in TRAP 90(h). I believe all opinions by the Courts of Appeals should be published where an application for writ of error is granted. If a case is reversed the Supreme Court disagrees with either the facts or law as set forth by the intermediate court and that opinion should be of record to disclose the difference to those who are interested. I urge the adoption of this change.

Sincerely,

Max N. Osborn

TRAP 90

Dear Justice Hecht:

This letter is in response to the invitation to comment on the proposed amendments to the Texas Rules of Civil and Appellate Procedure. This letter will be confined to expressing concerns as to two major changes in the Rules of Appellate Procedure as viewed by the office of Clerk of the Second Court of Appeals.

The second rule change we are concerned about is found in Rule 90. Part of our concern arises from the conflict between subsections (c) and (h). Subsection (c) in and of itself makes perfect sense in forbidding the appellate court to publish an opinion after the Supreme Court has acted on the case. Subsection (h), however, then requires the court of appeals to automatically publish all court of appeals' opinions in which writ is granted or refused. Perhaps (c) should be amended to read:

> However, the appellate court shall not order any unpublished opinion to be published after the Supreme Court or Court of Criminal Appeals has acted on any party's application for writ of error, discretionary review, or any other relief, **except as provided in (h).**

If granting or refusing a writ makes all opinions printworthy, perhaps the Standards for Publication set out in (d) should also be amended to add: **; or (5) if writ of error is granted or refused.** A problem then arises in that (h) does not tell the appellate court whether it must publish opinions in which discretionary review is granted or refused, as the Court of Criminal Appeals is not mentioned in (h), although it is in (c).

A further problem arises for the appellate clerks in the instances under (h) where writ is granted and the Supreme Court later holds writ was improvidently granted. Should the court of appeals then attempt to withdraw from publication its unpublished opinion that was published only because writ had been granted? It would be helpful to appellate court clerks if the rules addressed this question.

These comments on Rule 90 are based on the assumption that (h) is only addressing cases in which the court of appeals' opinion is marked "do not publish" under Rule 90(c). If, however, we have misread (h) and it is intended that the court of appeals withhold publication on all opinions until the Supreme Court has acted, we do oppose such a construction of (h). This construction of (h) would seriously delay publication of opinions by courts of appeals. As a practical result, attorneys could not use a court of appeals opinion for legal research or authority unless they were fortunate enough to have Westlaw or Lexis. Legal research is extremely difficult with only slip opinions.

If these constructions of (h) are not what the Rules Committee intended, please clarify rule 90(h) so that your intent is clear and there is no internal conflict with 90(c).

Sincerely,

Yvonne Palmer

Yvonne Palmer
Chief Clerk
2nd Court of Appeals

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TRAP 91. Copy of Opinion and Judgment to ***Attorneys*** [Interested Parties, and Other Courts]

On the date an opinion of an appellate court is handed down, ***it shall be the duty of*** the clerk of the appellate court ***to*** [shall] mail or deliver to the clerk of the trial court, to the trial judge who tried the case, and to ***one of the parties*** [the State and each of the defendants in a criminal case and to each of the parties to the trial court's final judgment in a civil case] a copy of the opinion ***delivered*** [handed down] by the appellate court and a copy of the judgment rendered by ***such*** [the] appellate court as entered in the minutes. [Delivery to a party having counsel indicated of record shall be made to counsel.] The ***copy*** ***received*** ***by*** clerk of the trial court shall ***be*** ***by*** ***him*** filed [the copy of the opinion] among the papers of the cause in such court. When there is more than one attorney ***on*** ***each*** ***side*** [for a party], the attorneys may designate in advance the one to whom the copies of the opinion and judgment shall be mailed. In criminal cases, copies shall also be provided to the State Prosecuting Attorney, P. O. Box 12405, Austin, Texas 78711 and to the Clerk of the Court of Criminal Appeals ***and*** ***any*** ***appellant*** ***representing*** ***himself***.

[COMMENT ON 1990 CHANGE: This amendment, together with other similar amendments conforming other appellate rules, requires the parties to any appeal to serve copies of all papers filed with the clerk of the appellate court (except the statement of facts

STATE BAR OF TEXAS

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TO: Texas Supreme Court

FROM: Committee on Administration of Justice

RE: Proposed Rule Changes

DATE: December 18, 1989

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

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

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

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

January 2, 1990

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

Dear Justice Hecht:

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

TRAP

Rule 91. Again this rule requires the clerk of the court to notify parties that might not be parties to the appeal. This rule, unlike the prior rules, specifically allows for service to be on counsel indicated of record instead of the party. What counsel? Previous rules require a listing of trial counsel, but, again, appellate counsel is what is important. There should be a provision here, as well as a general provision applying to all of the appellate rules, that, if more than one attorney represents a party and if the attorneys fail to designate in advance the one to whom copies of all correspondence is to be sent, then the appellate court may so designate.

TRAP 100. Motion and ~~second~~ [Further] Motion for Rehearing

(a) Motion for Rehearing. (No change.)

(b) Reply. (No change.)

(c) Decision on Motion. (No change.)

(d) ~~Second~~ [Further] Motion for Rehearing. (No change.)

(e) Amendments. (No change.)

(f) En Banc Reconsideration. A majority of the justices of the court en banc may order an en banc reconsideration of any decision of a panel within ~~fifteen/days/after/such/decision/is issued~~ [the period of the court's plenary jurisdiction[with or without a motion for reconsideration en banc. A majority of the justices may call for an en banc review by (1) notifying the clerk in writing within said ~~fifteen/day~~ period, or (2) ~~by~~ issuing a written order ~~issues~~ within said ~~fifteen/day~~ period, either with or without en banc conference. In such event, the panel decision shall not become final, and the case shall be resubmitted to the court for an en banc review and disposition.

(g) Extensions of Time. (No change.)

[COMMENT TO 1990 CHANGE: To provide that en banc review may be conducted at any time within the period of plenary jurisdiction of a court of appeals.]

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

January 2, 1990

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

Dear Justice Hecht:

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

TRAP
Rule 100. Since the rule discusses the plenary power of the appellate court, then "plenary power" should be defined. In other words, if a motion for rehearing is overruled by a court of appeals and then later, on the 29th day afterwards but prior to the filing of an application for writ of error, a majority of the justices order an en banc reconsideration on their own motion, is that okay? What about reconsideration by the panel itself? There is no provision to allow for the reconsideration by a panel itself during the court's "plenary power."

MEMORANDUM

To: Justice Nathan L. Hecht

From: Robert W. Coleman

Date: December 11, 1989

Re: Proposed Amendments to Texas Court Rules

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

(15) TRAP100: There is a textual error in subparagraph f. I believe the word "within" has been inadvertently omitted.

note: This has already been corrected.

120a
166
166(a)
271(4)
TRAP 100(f)

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Stanley G. Schneider
W. Troy McKinney
Thomas D. Moran

November 16, 1989

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

RE: Proposed 1990 Rule Changes.

Dear Justice Hecht:

After reviewing the proposed rule changes, I offer the following comments and suggestions:

4. Texas Rules of Appellate Procedure 100(f):

The proposed change in the first full textual sentence would produce a rule that said:

A majority of the justices of the court en banc may order an en banc reconsideration of any decision of a panel [-] the period of the court's plenary jurisdiction . . . "

Either the striken word "within" or some other similar word should remain between "panel" and "the".

Respectfully,

W. TROY McKINNEY

WTM/agl

TRAP 100

14. Do not strike "within".

15. For parallel structure and verb tense, (f)(2) should say "issuing a written order within said period, . . ."

TRAP 100. Motion and ~~Second~~ [Further] Motion for Rehearing

(a) Motion for Rehearing. (No change.)

(b) Reply. (No change.)

(c) Decision on Motion. (No change.)

(d) ~~Second~~ [Further] Motion for Rehearing. (No change.)

(e) Amendments. (No change.)

(f) En Banc Reconsideration. A majority of the justices of the court en banc may order an en banc reconsideration of any decision of a panel ~~within fifteen days after such decision is issued~~ [the period of the court's plenary jurisdiction] with or without a motion for reconsideration en banc. A majority of the justices may call for an en banc review by (1) notifying the clerk in writing within said ~~fifteen day~~ period, or (2) ~~by~~ written order ~~issues~~ within said ~~fifteen day~~ period, either with or without en banc conference. In such event, the panel decision shall not become final, and the case shall be resubmitted to the court for an en banc review and disposition.

(g) Extensions of Time. (No change.)

issuing a

Sincerely,

Carol Baker

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

TRAP 90(h)

2. Appellate Rule 90(h) conflicts with (c) and makes no sense. If (h) means that a court of appeals must automatically publish all opinions in which writ was filed, I oppose such a change. The number of pulished opinions would increase greatly. The quality of law published would not be increased, but the time lawyers must spend wading through useless appellate opinions will certainly increase -- further slowing legal research and raising legal fees. Law libraries will be hard pressed to find room for all the new reporters.

If, on the other hand, (h) means courts of appeals should withhold from publication all their opinions until time for Supreme Court action has passed, I oppose the change. This would seriously delay publication of court of appeals opinions. Not everyone has slip opinions and access to Westlaw and Lexis. If I am incorrect in these interpretations of (h), please re-write the section and clarify the committee's intent.

These may not be the type of comments the committee sought, but I felt they needed to be made. Thank you for your time and attention.

Sincerely,

Carol Baker

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

SECTION NINE. APPLICATION FOR WRIT OF ERROR AND BRIEF IN RESPONSE [IN THE SUPREME COURT]

TRAP 130. Filing of Application in Court of Appeals

(a) Method of Review. (No change.)

(b) [Number of Copies;] Time and Place of Filing. [Twelve copies of] T[t]he application shall be filed with the Clerk of the Court of Appeals within thirty days after the ~~ruling of the last~~ [on all] timely [filed] motion[s] for rehearing~~/filed by any party~~. [An application filed prior to the filing of a motion for rehearing by a party shall not preclude a party, including the party filing the application, from filing a motion for rehearing, or the court of appeals from ruling on such motion. An application filed prior to the last ruling on all timely filed motions for rehearing shall be deemed to have been filed on the date of but subsequent to the last ruling on any such motion].

(c) Successive Applications. (No change.)

(d) Extension of Time. (No change.)

[COMMENT TO 1990 CHANGE: To provide that the court of appeals shall rule on all timely filed motions for rehearing regardless of any prematurly filed application for writ of error and to deem that all premature applications for writ of error are filed on the date of but subsequent to the last ruling by the court of appeals on the last timely filed motion for rehearing.]

THE SUPREME COURT OF TEXAS

Justice Nathan L. Hecht — *Court Rules Liaison*

MEMORANDUM

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

January 15, 1990

RE: Rule 130(c), Texas Rules of Appellate Procedure
Time for Filing Successive Applications for Writ of Error (1 page)

A question has arisen whether the deadline for filing successive applications for writ of error should be determined by reference to the actual filing of the first application or by reference to the event from which the deadline for the first application is measured, the overruling of the last timely motion for rehearing filed by any party. It has been suggested that the present rule is confusing. The following amendment is proposed:

(c) Successive Applications. If any party files an application within the time specified or as extended by the Supreme Court any other party who was entitled to file ~~such~~ an application ~~but failed to do so shall have ten additional days from the date of filing any preceding application in which to file it~~ may do so within forty days after the overruling of the last timely motion for rehearing filed by any party.

The Court requests the Committee's counsel regarding this matter.

Unanimous
~~Eff~~ Change as shown
TRAP/30(c)

Court of Appeals
Fifth District of Texas at Dallas
CRAIG T. ENOCH
CHIEF JUSTICE
DALLAS COUNTY COURTHOUSE
DALLAS, TEXAS 75202-4658
(214) 653-6920

December 7, 1989

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

TRAP 4
TRAP 41
TRAP 54
→ TRAP 130
TRAP 5
TRAP 40
TRAP 9
TRAP 40
TRAP 74

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

Dear Nathan:

C. Prematurely filed applications for writ of error. The Supreme Court has listened to us and has attempted to resolve the problem stated in our *Wadsworth* opinions, beginning with *Wadsworth Business Center-Willowbrook Limited Partnership*, 775 S.W.2d 663 (Tex. App.--Dallas 1989, writ pending). Whether it has been resolved, only time can tell. Tex. R. App. P. 130(b) now expressly provides that a writ application "filed prior to the filing of a motion for rehearing by a party shall not preclude . . . the court of appeals from ruling on such motion." In such cases, the application is treated as a premature application, deemed filed on the date of, but subsequent to, the filing of the motion.

I note that the wording of the amended rule only contemplates that the application be filed before the motion; it does not literally address the situation in which a motion is filed, but just not ruled upon, before the application is filed. (Because of the different deadlines--15 days for a motion, 30 days for an application--the latter situation is far more likely.) Nonetheless, if we have jurisdiction to issue an order on a motion that is filed after a writ application, we must have jurisdiction to issue an order, after a writ application, on a motion that was filed before the application. Additionally, the comment to the rule states that the amendment is "[t]o provide that the court of appeals shall rule on *all* timely filed motions for rehearing regardless of any prematurely filed application for writ of error . . . " (emphasis added). Thus, the rule seems sufficiently clear, but it may need caselaw explounding.

The clerks' office will have to be told that, from now on, they file all timely motions for rehearing whether or not an application for writ of error has already been filed.

Regards,

Craig T. Enoch
Chief Justice

00571

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November 26, 1989

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

TRAP 130

Dear Judge Hecht:

9. In light of the language of footnote 5 to Judge Ray's concurring opinion in *Donwerth*, the court may wish to add the following language to the end of Texas Rule of Appellate Procedure 130(c): "in which to file it **[with the Clerk of the Court of Appeals]**. *Donwerth v. Preston II Chrysler-Dodge, Inc.*, 775 S.W.2d 634, 643 n.5 (Tex. 1989) (Ray, J., concurring). Conversely, the court may wish to allow successive applications to be filed directly with the clerk of the supreme court. In any event, it would be unfortunate if under the current rule a successive application was mistakenly filed in the supreme court and opposing counsel argued that no jurisdiction existed to consider that application. This is the sort of appellate trap the court has sought to do away with.

The court may also wish to address the other appellate trap highlighted in *Donwerth*: the requirement that a motion for rehearing in the court of appeals be filed before a successive application for writ of error may be filed. *Donwerth*, 775 S.W.2d at 643 n.6. Texas Rule of Appellate Procedure 130(c) appears to be a savings clause that allows a party who originally did not intend to file an application for writ of error to file an application if the opposing party files an application. This savings clause is largely nullified by the jurisdictional requirement of filing a motion for rehearing in the court of appeals. The court may wish to consider either waiving the requirement of a motion for rehearing in the court of appeals for a successive application or specifically stating in rule 130(c) that a motion for rehearing is still required.

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

Respectfully,

Charles A. Spain, Jr.

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November 26, 1989

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

Dear Judge Hecht:

8. The proposed amendments to Texas Rules of Appellate Procedure 130(b) and 132(a) refer to the court of appeals ruling on all timely filed motions for rehearing. I assume this language is intended to prevent the situation that occurred in *Rose*. *Rose v. Court of Appeals*, 32 Tex. Sup. Ct. J. 279 (Mar. 9, 1989). I am concerned, however, that unless these rules specifically apply only when the court of appeals finally **overrules** all timely filed motions for rehearing, then the proposed amendments will not solve the problem.

Under the proposed amendments, what happens if the court of appeals rules on all timely filed motions for rehearing, granting one and overruling the other? Proposed rule 133(a), if read literally, appears to require the clerk of the court of appeals to forward the record and any applications for writ of error to the clerk of the supreme court. In addition, proposed rule 130(b) appears to require a party to file an application for writ of error thirty days after a rehearing is granted. Does this mean that a party no longer has a right to another motion for rehearing in the court of appeals if the judgment is changed on rehearing, and that this second motion for rehearing is no longer a jurisdictional prerequisite for an application for writ of error?

Finally, is there a typographical error in the *Bar Journal* where "prematurely" is spelled "prematurly" in the comment?

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

Respectfully,

Charles A. Spain, Jr.

TRAP 131. Requisites of Applications

The application for writ of error shall be addressed to "The Supreme Court of Texas," and shall state the name of the party or parties applying for the writ. The parties shall be designated as "Petitioner" and "Respondent." Applications for writs of error shall be as brief as possible. The respondent should file a brief in response. The application shall contain the following:

(a) Names of All Parties. A complete list of the names [and addresses] of all parties [to the trial court's final judgment and their counsel in the trial court, if any] shall be listed on the first page of the application, so the members of the court may at once determine whether they are disqualified to serve or should recuse themselves from participation in the decision of the case [and so the clerk of the court may properly notify the parties to the trial court's final judgment and their counsel, if any, of the judgment and all orders of the Supreme Court].

(b) (No change.)

(c) (No change.)

(d) (No change.)

(e) (No change.)

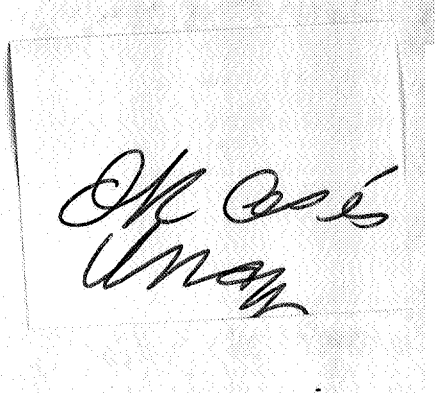
(f) (No change.)

(g) (No change.)

(h) (No change.)

(i) (No change.)

(j) (No change.)



[COMMENT TO 1990 CHANGE: This amendment, together with other similar amendments conforming other appellate rules, requires the parties to any appeal to serve copies of all papers filed with the clerk of the appellate court (except the statement of facts and the transcript), and the clerk of the appellate court to mail notice and copies of all appellate court orders and opinions on all parties to the trial court's judgment.]

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

January 2, 1990

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

Dear Justice Hecht:

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

TRAP
Rules 131
and 132. Again, this rule requires notification by the clerk on all trial parties instead of appellate parties (counsel). See previous comments.

TRAP 131

TRAP 90 156 216(1) 249 307 542 324(a)

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Ped Rules Series

TRAP 21a 237a 41, 202, 210 57(a)(1) 12 14 41(a)(1) 54(a) (2)(d)

November 26, 1989

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

Dear Judge Hecht:

7. In amending Texas Rules of Appellate Procedure 74(a) and 131(a), the court may wish to consider United States Supreme Court Rule 28.1, which requires a corporation to name all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates.

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

Respectfully,

Charles A. Spain, Jr.

TRAP 132. Filing and Docketing Application in Supreme Court

(a) Duty of Clerk of Court of Appeals. When an application for writ of error to the Supreme Court is filed with the Clerk of the Court of Appeals, he shall record the filing of the application, and shall [, after the court of appeals has ruled on all timely filed motions for rehearing,] promptly forward it to the Clerk of the Supreme Court with the original record in the case and the opinion of the court of appeals, the motions filed in the case, and certified copies of the judgment and orders of the court of appeals. The clerk need not forward any exhibits that are not documentary in nature unless ordered to do so by the Supreme Court.

(b) Expenses. (No change.)

(c) Duty of the Clerk of the Supreme Court. The Clerk of the Supreme Court shall receive the application for writ of error, shall file it and the accompanying record from the court of appeals, and shall enter the filing upon the docket, but he shall not be required to receive the application and record from the post office or express office unless the postage or express charges shall have been paid. The clerk shall notify ŧĥɇ/ɨŧŧøŗŧ ńɇɣɨ/øf/ŗɇɇøŗđ [each party to the trial court's final judgment, as listed on the first page of the application,] by letter of the filing of the application in the Supreme Court. [Notification to parties having counsel indicated of record shall be made to counsel.]

[COMMENT TO 1990 CHANGE: This amendment, together with other similar amendments conforming other appellate rules, requires the

parties to any appeal to serve copies of all papers filed with the clerk of the appellate court (except the statement of facts and the transcript), and the clerk of the appellate court to mail notice and copies of all appellate court orders and opinions on all parties to the trial court's judgment.]

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

January 2, 1990

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

Dear Justice Hecht:

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

TRAP
Rules 131 and 132. Again, this rule requires notification by the clerk on all trial parties instead of appellate parties (counsel). See previous comments.

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November 26, 1989

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

Dear Judge Hecht:

8. The proposed amendments to Texas Rules of Appellate Procedure 130(b) and 132(a) refer to the court of appeals ruling on all timely filed motions for rehearing. I assume this language is intended to prevent the situation that occurred in *Rose*. *Rose v. Court of Appeals*, 32 Tex. Sup. Ct. J. 279 (Mar. 9, 1989). I am concerned, however, that unless these rules specifically apply only when the court of appeals finally **overrules** all timely filed motions for rehearing, then the proposed amendments will not solve the problem.

Under the proposed amendments, what happens if the court of appeals rules on all timely filed motions for rehearing, granting one and overruling the other? Proposed rule 133(a), if read literally, appears to require the clerk of the court of appeals to forward the record and any applications for writ of error to the clerk of the supreme court. In addition, proposed rule 130(b) appears to require a party to file an application for writ of error thirty days after a rehearing is granted. Does this mean that a party no longer has a right to another motion for rehearing in the court of appeals if the judgment is changed on rehearing, and that this second motion for rehearing is no longer a jurisdictional prerequisite for an application for writ of error?

Finally, is there a typographical error in the *Bar Journal* where "prematurely" is spelled "prematurly" in the comment?

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

Respectfully,

Charles A. Spain, Jr.

TRAP 133. Orders on Applications for Writ of Error

(a) (No change.)

(b) Conflict in Decisions. In cases of conflict ~~named in~~ [under] subsection (a)(2) of section 22.001 of the Government Code, the Supreme Court will grant the application for writ of error, unless it is in agreement with the decision of the court of appeals in the case in which the application is filed. In that event said Supreme Court will so state in its order, with such explanatory remarks as may be deemed appropriate. If the decision of the court of appeals is in conflict with an opinion of the Supreme Court, is contrary to the Constitution, the statutes or any rules promulgated by the Supreme Court, the Supreme Court may, upon granting writ of error and without hearing argument in the case, reverse, reform or modify the judgment of the court of appeals, making, at the same time, such further orders as may be appropriate.

(c) (No change.)

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

THE SUPREME COURT OF TEXAS

Justice Nathan L. Hecht — *Court Rules Liaison*

MEMORANDUM

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

January 15, 1990

RE: Rule 133(b), Texas Rules of Appellate Procedure
Supreme Court Per Curiam Opinions (3 pages)

When the Supreme Court grants an application, it is not required by the Constitution or statutes to hear oral argument. In certain cases, the Court does not hear oral argument and issues its decisions in per curiam opinions. The Court also sometimes issues a per curiam opinion with the denial of an application.

Although Rule 133(b), Texas Rules of Appellate Procedure, does not refer expressly to per curiam opinions, it purports to state the applicable procedure in the Supreme Court, as follows:

> **Conflict in decisions.** In cases of conflict named in subsection (a)(2) of section 22.001 of the Government Code, the Supreme Court will grant the application for writ of error, unless it is in agreement with the decision of the court of appeals in the case in which the application is filed. In that event said Supreme Court will so state in its order, with such explanatory remarks as may be deemed appropriate. If the decision of the court or appeals is in conflict with an opinion of the Supreme Court, is contrary to the Constitution, the statutes or any rules promulgated by the Supreme Court, the Supreme Court may, upon granting writ of error and without hearing argument in the case, reverse, reform or modify the judgment of the court of appeals, making, at the same time, such further orders as may be appropriate.

In effect, the rule is advisory and informational only, and not binding upon the Court. The Court has the power to issue per curiam opinions in cases in which the predicate conflict required by the rule does not exist. Arguably, some might argue that it does so already, although the Court has at least attempted to adhere to the policy stated in the rule. It is less certain that the Court has the power to issue a per curiam opinion when an application is denied.

The Court is considering whether to expand the category of cases in which per curiam opinions should issue to include, particularly, cases in which the issue is so clear, simple and well-defined, and the briefs so thorough, that it is very unlikely that oral argument could in any way influence the outcome of the case. The kind of language the Court may consider is set out below.

The Court requests the counsel of the Committee regarding these matters.

PROPOSED AMENDMENTS

Rule 133. Orders on Applications for Writ of Error

(a) Notation on Denial of Application. In all cases where the judgment of the court of appeals is correct and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation "Refused." In all cases where the Supreme Court is not satisfied that the opinion of the court of appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error of law which requires reversal or which is of such importance to the jurisprudence of the State as to require correction, the court will deny the application with the notation "Writ Denied." In all cases where the Supreme Court is without jurisdiction of the case as presented in the application, it will dismiss the application with the docket notation "Dismissed for Want of Jurisdiction." The Court may accompany the denial of an application with such explanatory remarks as it may consider appropriate.

~~**(b) Conflict in Decisions.** In cases of conflict named in subsection (a)(2) of section 22.001 of the Government Code, the Supreme Court will grant the application for writ of error, unless it is in agreement with the decision of the court of appeals in the case in which the application is filed. In that event said Supreme Court will so state in its order, with such explanatory remarks as may be deemed appropriate. If the decision of the court of appeals is in conflict with an opinion of the Supreme Court, is contrary to the Constitution, the statutes or any rules promulgated by the Supreme Court, the Supreme Court may, upon granting writ of error and without hearing argument in the case, reverse, reform or modify the judgment of the court of appeals, making, at the same time, such further orders as may be appropriate.~~

~~(c)~~ (b) **Moot Cases.** If a cause or an appealable portion thereof is moot, the Supreme Court may, in its discretion and after notice to the parties, upon granting writ of error and without hearing argument with reference thereto, dismiss such

TRAP 33(a) & (b)
Memorandum

cause or the appealable portion thereof without reference to the merits of the appeal.

Rule 170. ~~Order of~~ Submission

Causes may be heard and submitted in such order as the Supreme Court may deem to be in the best interest and convenience of the parties or their attorneys. The Supreme Court may determine that causes should be submitted without oral argument.

upon the vote of 6 members.

TRAP 170
Unan adopted

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November 26, 1989

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

Dear Judge Hecht:

10. Since Texas Rule of Appellate Procedure 133(b) is going to be amended anyway, the court may wish to codify its decision in *Eichelberger v. Eichelberger*, 582 S.W.2d 395 (Tex. 1980). I propose the following language:

> If the decision of the court of appeals is in conflict with an opinion of the Supreme Court **[or the United States Supreme Court]**, **[or]** is contrary to the **[United States or Texas]** Constitution, ~~the statutes~~ **[state or federal law,]** or any rules promulgated by the Supreme Court, the Supreme Court may, upon granting writ of error and without hearing argument in the ~~case~~ **[cause]**, reverse, reform or modify the judgment of the court of appeals, making, at the same time, such further orders as may be appropriate.

Deletion of "the statutes" and insertion of "state or federal law" would clarify that the court may issue a per curiam opinion whenever the opinion of the court of appeals conflicts with any state or federal law, regardless of whether it is a statute, treaty, or agency rule.

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

Respectfully,

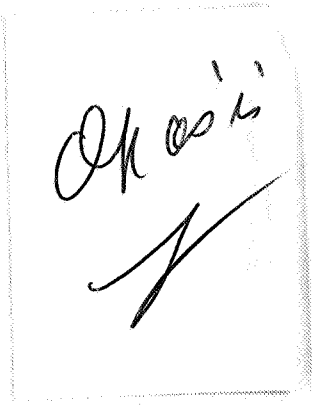
Charles A. Spain, Jr.

Change Caption

TRAP 181. Announcement of Judgments ~~in Open Court~~

In all cases decided by the Supreme Court, its judgments or decrees will be ~~pronounced in open~~ [announced through the clerk of the] court; and the opinion of the court will be reduced to writing in such cases as the court deems of sufficient importance to be reported. Where the court, after the submission of a case, is of the opinion that the court of appeals has entered a correct judgment, and that the writ should not have been granted, the court may set aside the order granting the writ, and dismiss or ~~refuse~~ [deny] the application as though the writ had never been granted, without writing any opinion.

[COMMENT TO 1990 CHANGE: To conform Rule 181 to the Supreme Court's current method of announcing its orders.]



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November 26, 1989

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

Dear Judge Hecht:

11. To be consistent with other references to the clerk, the court may wish to alter the proposed amendment to Texas Rule of Appellate Procedure 181 to "**[announced through the Clerk of the Supreme Court]** ~~court~~;".

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

Respectfully,

Charles A. Spain, Jr.

TRCE 614. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person or the spouse of such natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause. [This rule is not applicable to discovery proceedings.]

[COMMENT TO 1990 CHANGE: See Rules 200 and 208, Texas Rules of Civil Procedure, relating to depositions.]

No change

LAW OFFICES
OF
PAT MALONEY
PROFESSIONAL CORPORATION

December 4, 1989

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

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

RE: Proposed Revisions to Texas Rules

Dear Mr. Justice Doggett:

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

Texas Rules of Civil Evidence:

614:

The rule should be more explicit in stating that "the Rule" can be invoked in depositions, for while it appears that such will be the case under the proposed amendments to the Rules of Civil Procedure regarding notices of depositions, this rule is less-than-clear in stating that to be its purport. Thus, if it is the intention of the Supreme Court to allow for the exclusion of non-parties and non-spouses, it should be clearly stated so. If it was not the Supreme Court's intention to do the same, it should be.

Very truly yours,

LAW OFFICES OF PAT MALONEY, P.C.

By: Virgil W. Yanta
VIRGIL W. YANTA

VWY:naj

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

WHITE, HUSEMAN, PLETCHER & POWERS

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TRCP 200

TRC 614

November 14, 1989

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

Re: Proposed Changes to the Rules of Civil Procedure

Dear Justice Hecht:

Please note my opposition to the proposed change to TEX. R. CIV. P. 200. The proposed change would simply create problems in taking depositions; the change would not cure any problems which may now exist.

The amendment appears to deal obliquely with the question of which persons may properly appear at a deposition. The amendment, however, provides no guidance on the question, and the proposed amendement to TEX. R. CIV. EVID. 614 would expressly make "the rule" inapplicable to depositions. Instead the proposed change to Rule 200 simply creates another needless battleground for issues such as who constitutes "employees of counsel," what constitutes reasonable notice of identity of other persons, and the nature of the notice that is required. The question of sanctions for violations of this rule also should be interesting.

This aspect of the rules is not broken. Please don't fix it.

Sincerely,

Paul Dodson

PD:jd

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ERNEST REYNOLDS III

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TELECOPY 817/877-2807
ATTORNEY'S DIRECT DIAL
877-2852

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305
TRCP 614
TRE 702

November 21, 1989

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

Dear Justice Hecht:

Regarding the proposed change for evidence rule 614, and as I have noted above, my thought is that this proposal to clarify the applicability of the rule probably is a good proposal, but the language probably should appear as a comment below the rule, not as a part of the rule. I would not presume to speak for the other members of the evidence committee, but I would say this: my best speculation is that the other members of the committee would probably have some interest in this approach, also.

TRCE 703. Bases of Opinion Testimony

The facts or data in the particular case upon which an expert bases an ɦiɨ opinion or inference may be those perceived by or ɦɨɗɗɇ/ɮɦɸɯɦ/ɮɸ [reviewed by the expert] ɦiɨɦ at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

[COMMENT TO 1990 CHANGE: This amendment conforms this rule of evidence to the rules of discovery in utilizing the term "reviewed by the expert." See also comment to Rule 166b.]

R 703
Was
adm.

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TRCP 614
TRE 703

November 21, 1989

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

Dear Justice Hecht:

Regarding the proposed change for evidence rule 703, I am strongly of the opinion that it should not be made. Apparently, somebody has decided that this needs to be made in order to bring language of evidence rule 703 into some semblance of conformity with proposed changes to certain procedural rules dealing with discovery. There is a difference of purpose and scope between the discovery rules and the evidence rules. Things are often discoverable, yet not admissible. Broadening, or narrowing, the scope of discovery is often done for purposes that have nothing to do with the considerations made when determining what proper evidentiary rules will be applied in a trial court with regard to preferred evidence (whether testimonial or tangible). Furthermore, in adopting the proposed change to evidence rule 703 there is the possibility of subsequent re-interpretation of the rule in ways that I would wager were never intended: by doing away with the language "made known to" the door is opened to an argument about whether or not hypothetical questions may be used; on the other hand, if the language "made known to" is retained, it is clearly broad enough to include any information "reviewed by the expert". I would strongly urge that the proposed changes to evidence rule 703 should not be adopted.

SUBCOMMITTEE REPORT
RULES 1-14
TEXAS RULES OF CIVIL PROCEDURE

Rule 6: There were comments from some of the constables who objected to not being able to serve process on Sunday. Again, since this had not been dealt with previously by the committee as a whole, we reserve for future action.

Respectfully,

Kenneth D. Fuller

Kenneth D. Fuller

Sub C

OFFICE OF
WALTER H. RANKIN, CONSTABLE
PRECINCT NO. 1, HARRIS COUNTY
HOUSTON, TEXAS

November 28, 1989

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Rule 6. Suits commenced on Sunday

No civil suit shall be commenced nor process issued or served on Sundays,... .

COMMENT: Although this rule is not on the agenda for a proposed amendment, I would like to offer one suggestion. At your first opportunity I would appreciated your consideration on a amendment to Rule 6 of the Texas Rules of Court. Rule 6 presently prohibits service of civil citations on Sundays. Our society has changed greatly to a progressive, mobile one. Law enforcement operates on a 24 hour, 7 day a week schedule. The service of all civil process on Sunday would be one more step toward expediting the civil process system.

SUBCOMMITTEE REPORT
RULES 1-14
TEXAS RULES OF CIVIL PROCEDURE

Rule 13: This rule, dealing with frivolous pleadings, drew several very strong coments from judges and others. However, this was of such a volatile nature that we felt further consideration by this sub-committee and the committee as a whole when not under the present time constraints would be advisable.

Respectfully,

Kenneth D. Fuller '58

Kenneth D. Fuller

GUY JONES
DISTRICT JUDGE
202ND JUDICIAL DISTRICT

BI-STATE JUSTICE BUILDING 100 NORTH STATE LINE TEXARKANA, TEXAS 75501

PHONE (214) 798-3004

December 13, 1989

TRCP 13

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

Dear Justice Hecht:

I sincerely appreciate the privilege of appearing before the Supreme Court to express my view regarding the revision of Rule 13. I applaud the Court for conducting the hearings and trust that it will be helpful in your rule revision process.

I, again, strongly urge the Court to amend Rule 13 so that the trial judges of this state can have an effective tool to deal with frivolous cases and slip-shod law practice. It is our duty to do everything in our power to restore in the legal profession higher standards so that it once again will have the respect it deserves.

Sincerely,

Guy Jones

GJ/cfc

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

RULE 13 - PROPOSED SUBSTITUTION

The signatures of attorneys or parties constitute by them that they have read the pleading, motion, or other paper and that to the best of their knowledge, information and belief, formed after reasonable inquiry, the instrument is not groundless, brought in bad faith, or for the purpose of harassment or delay. Attorneys or parties who shall bring a fictitious suit, or file a fictitious pleading, motion, or other paper, and/or file any paper for experiment, or for harassment, or who shall make any statement in pleadings or other papers knowing same to be false, groundless, frivolous, or file any instrument for the purpose of delay or harassment, or who shall file any instrument without having first made reasonable inquiry as to the accuracy thereof, may be adjudged guilty of contempt. Any attorney or party found, after hearing, to have violated this Rule may be sanctioned as provided under Rule 215-2b, and additionally, any other sanctions the Court may wish to impose as may reasonably be necessary to do equity to an offended party.

No sanctions under this Rule may be imposed except upon hearing after notice, and any sanctions imposed shall be subject to Appellate Review.

A general denial or request for damages does not offend this Rule.

W. HUGH HARRELL
ATTORNEY AND COUNSELOR AT LAW
1708 METRO TOWER, 1220 BROADWAY AVENUE
LUBBOCK, TEXAS 79401
RES. (806) 795-1825
OFFICE (806) 763-4411

Local Rules Subc
Jo Ha
TRAP

November 22, 1989

TRCP 13
305

Justice Nathan L. Hecht
Box 12248
Austin, Texas-78711

Dear Judge Hecht:

As per the request of the Texas Supreme Court, I would like to offer the following suggestions concerning the Rules.

1. Rescind ALL local rules and do not permit local Courts to trap the practicing attorney by making Rules.

2. Require a party taking the deposition or a party or witness to furnish the other attorney a copy of the deposition at the expense of the one taking the deposition.

3. Require the Appellant to deliver the copy of the Transcript and the Statement of Facts to the Appellee's attorney the day of or after the Appellant's Brief is mailed to the Court of Appeals; and, thereafter the Appellee's attorney will file same with the Clerk of the trial Court.

4. Remove, rescind, delete ALL sanctions by opposing counsel for alleged bad faith or frivilous law suits, because opposing counsel NOT having any counter-claim or cross-action is using these allegations alone to intimidate and coerce the opposing side. These allegations have become just as abusive as the party allegedly bringing a bad faith law suit. IF, retained in any manner, let JUST the trial Judge file a Motion and a hearing, and if a fact issue to be tried by a jury.

TRCP 13

5. Require that a Judge NOT discuss any matter concerning the case with one attorney when the other attorney is NOT present, where there are opposing counsel. And, you might ought to say an attorney will not discuss matters with the Court unless the other attorney is present.

6. A Rule which would follow due process would require that NO order or judgment of the Court would be rendered or entered unless a hearing is set and notice served on all parties. This business of Courts just signing orders and/or judgments without opposing counself being afforded an opportunity to be heard is for the birds. This would not apply as to a default judgment and this might be clarified as to default judgments and say no motion need be served upon the defaulting party. Other jurisdictions require a Motion asking for a default judgment, and that it be served and a date, time and palce set for a hearing thereon.

7. A Rule that any appeal from an administrative agency will in fact be trial de novo and not test an Administrative Order under the substantial evidence rule.

Yours very truly, Hugh Harrell Hugh Harrell

WHH:wh cc: Ret.

00600

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LONDON
ZURICH

LBRIGHT JAWORSKI &
REAVIS McGRATH
NEW YORK
LOS ANGELES

January 11, 1990

TO: SUPREME COURT ADVISORY COMMITTEE

FROM: Subcommittee on Rules 15 to 165

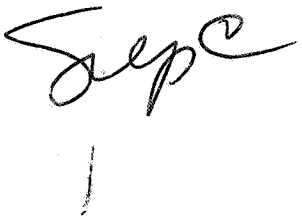
At our subcommittee meeting held on January 8, 1990, we considered (i) the various comments made at the public hearing held on November 30, 1989 addressing the proposed changes in the Texas Rules of Civil Procedure, (ii) the written suggestions and comments of attorneys forwarded to our subcommittee,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

9. Rule 20. The existing rule deals with the minutes of the court. The concern expressed is that "a special judge" is required to sign the minutes of proceedings that were had before him. However, the current practice apparently is that visiting judges never sign the minutes. The subcommittee believes that the concern expressed raises the more basic question of whether rule 20 is an anachronism. The subcommittee therefore believes that, unless there is some unknown reason why this rule should exist, repeal should be considered. In the alternative, the subcommittee recommends that the last sentence of the rule be deleted.

RECOMMENDED NEW RULE
RELATIVE TO READING AND SIGNING MINUTES

Rule 20. Minutes Read and Signed

On the last day of the session, the minutes shall be read, corrected and signed in open court by the judge. [~~Each special judge shall sign the minutes of such proceedings as were had by him.~~]



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4543.001

JUDGE B. F. (BILL) COKER
3823 Calculus Drive
Dallas, Texas 75244
(214) 247-8974

December 30, 1989

Mr. Luther H. Soules
Chairman, Rules Advisory Committee
175 E. Houston Street
San Antonio, Texas 78205-2230

Re: Suggested rule changes

Dear Mr. Soules:

Enclosed are recommended changes and additions to the Texas Rules of Civil Procedure. Additions to existing rules and new rules are designated by underlined text of the rule. Portions of existing rules which are deleted are enclosed in brackets and lined through. Please submit these suggestions to your committee for consideration.

Reading and Signing Minutes:

My recommendation relative to Rule 20, Texas Rules of Civil Procedure, is a pragmatic recommendation.

Rule 20, as it now exists, requires each judge who acts on behalf of a court to sign the minutes of that court at the end of each session. As a visiting judge, I frequently serve a large number of different courts in different areas of the state. I have never been offered an opportunity to sign the minutes of any court at any time in the three years I have been serving as a visiting judge.

The most direct method of remedying this logistic problem is to eliminate it. Therefore, I recommend requiring the judge of the court to sign for all who have served the court. This is accomplished by deleting the last sentence of Rule 20.

A copy of my proposed change to Rules 20 is attached to this letter.

Clean & Approved

and any verification

Rule 45. Definition and System

Pleadings in the district and county courts shall

(a) (No change.)

(b) (No change.)

(c) (No change.)

and copy of ~~attached~~ any verification

(d) be in writing, on paper measuring approximately 8 1/2 inches by 11 inches, signed by the party or his attorney, and the signed original or copy of said original be filed with the court.

When a copy of the signed original is tendered for filing, the party or his attorney filing such copy is required to maintain the signed original for inspection by the court or any party incident to the suit, should a question be raised as to its authenticity.

All pleadings ...

New paragraph

Back to margin b/f

last paragraph

HSH

Type them again.

00604

TRCP 45. Definition and System

Pleadings in the district and county courts shall . . .

(a) (No change.)

(b) (No change.)

(c) (No change.)

(d) be in writing, on paper measuring approximately 8 1/2 inches by 11 inches, and signed by the party or his attorney, and [either the signed original and any verification or copy of said original and copy of any such verification] shall be filed with the court.

(e) When a copy of the signed original is tendered for filing, the party or his attorney filing such copy is required to maintain the signed original for inspection by the court or any party incident to the suit, should a question be raised as to its authenticity.

[COMMENT TO 1990 CHANGE:]

I don't understand this. Does this help?

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January 11, 1990

TO: SUPREME COURT ADVISORY COMMITTEE

FROM: Subcommittee on Rules 15 to 165

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10. Rules 45 and 57, and 74. The proposed suggestion is that the existing rule be amended to require that the signed original *or* a copy thereof be filed with the clerk. The proposal also suggests that when a copy is filed, the party should be required to maintain the signed original in the event the authenticity of the writing is questioned. The suggested change in Rule 57 would expressly permit the filing of *a copy* of the original signed pleading.

Rule 74. The suggested change in this rule would make the same amendment as in Rules 45 and 57. The subcommittee does *not* recommend any of these changes.

Rule 45

(d) be in writing, on paper measuring approximately 8 1/2 inches by 11 inches. Signed by the party or his attorney,

* and the signed original or copy of said original

be filed with the clerk.

* When a copy of the signed original is tendered for filing, the party or his attorney filing such copy is required to maintain the signed original for inspection by the court or any party incident to the suit, should a question be raised as to its authenticity.

Rule 57

* A copy of the original signed pleading is acceptable for filing with the clerk or court.

* STAR INDICATES ADDITIONAL TEXT

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W/ HLA, Esq
SCAC Equities
COA Jenkins Heckt Lyf 4543.001

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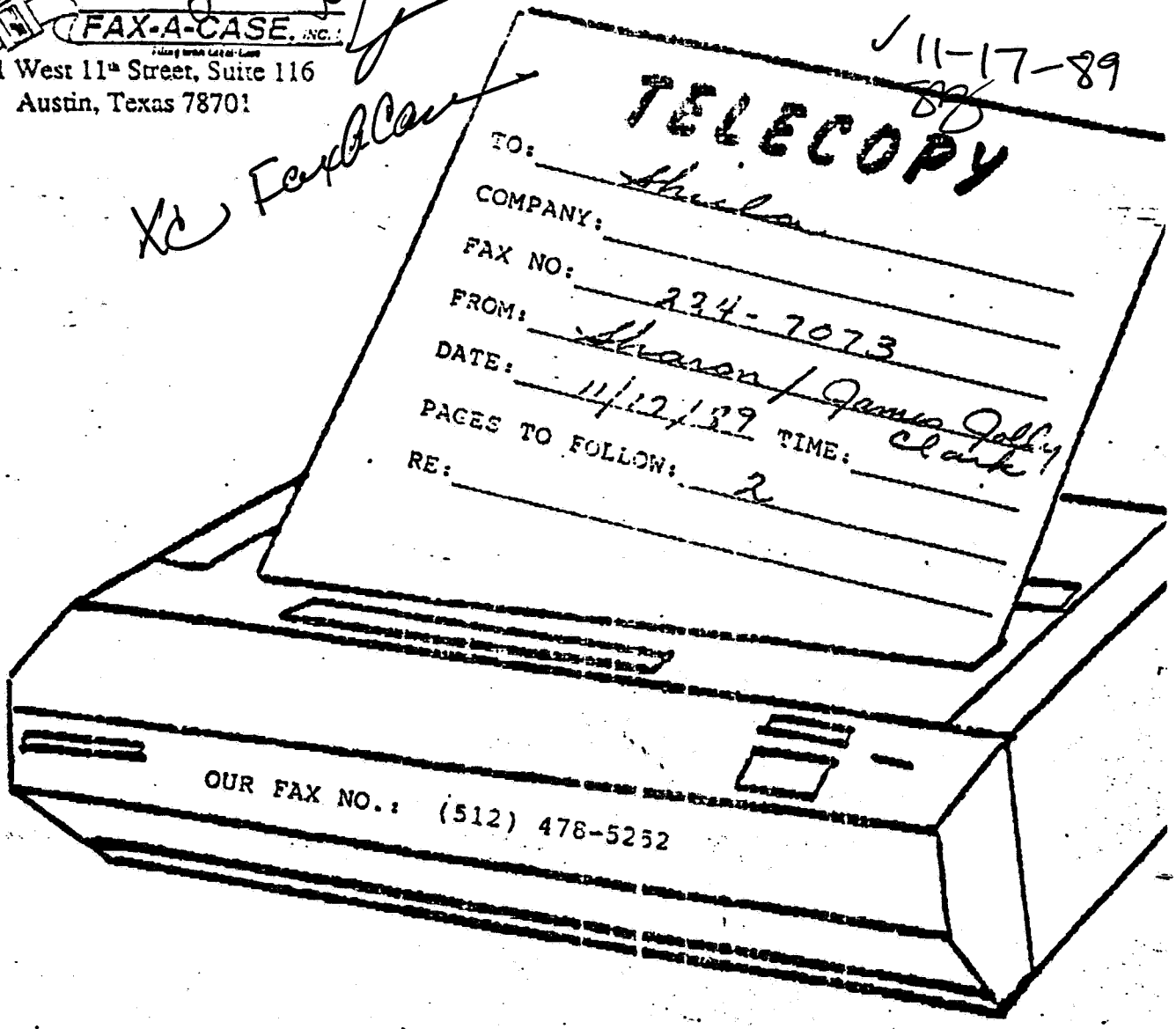
11-17-89

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

XC Fax & Cover



If you do not receive all pages, or if mechanical problems develop, please call (512) 478-4131.

SPECIAL INSTRUCTIONS: If M. Hanlon has any questions, please have him call Mr Clark asap Thanks
Sharon

00607

Rule 47. Claims for Relief

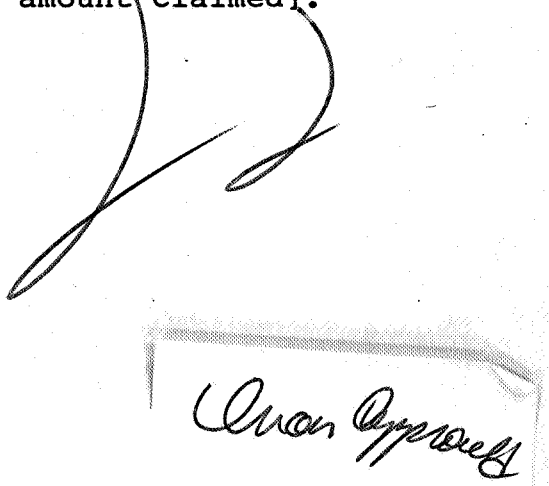
An original pleading which sets forth a claim for relief, whether an original petition, counterclaim cross-claim, or third party claim, shall contain

(a) a short statement of the cause of action sufficient to give fair notice of the claim involved,

(b) in all claims for unliquidated damages only the statement that the damages sought are within [~~exceed~~] the [~~minimum~~] jurisdictional limits of the court, and

(c) a demand for judgment for all the other relief to which the party deems himself entitled.

Relief in the alternative or of several different types may be demanded [; provided, further, that upon special exception the court shall require the pleader to amend so as to specify the maximum amount claimed].



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---

11. Rule 47. The suggested change would have the effect of requiring that a party allege that a claim for unliquidated damages "are within" the jurisdictional limits of the court. The existing rule requires that a party allege that the damages sought "exceed" the "minimum jurisdictional limits" of the court. The subcommittee recommends this change.

4543.001

JUDGE B. F. (BILL) COKER
3823 Calculus Drive
Dallas, Texas 75244
(214) 247-8974

December 30, 1989

Mr. Luther H. Soules
Chairman, Rules Advisory Committee
175 E. Houston Street
San Antonio, Texas 78205-2230

Re: Suggested rule changes

Dear Mr. Soules:

Enclosed are recommended changes and additions to the Texas Rules of Civil Procedure. Additions to existing rules and new rules are designated by underlined text of the rule. Portions of existing rules which are deleted are enclosed in brackets and lined through. Please submit these suggestions to your committee for consideration.

My recommendations relate to changes in the rules relative to:

1. claims for damages;

2. reading and signing minutes;

3. assessment of costs associated with service of process and other notices; and

4. requests and fees for a jury trial.

Each area of recommended change is addressed separately.

Claims for Damages:

My recommended changes which are associated with claims for damages relate to pleading jurisdictional amounts and granting judgments on default.

Rule 47, Texas Rules of Civil Procedure, as it now exists, significantly increases the cost of litigation and wastes

valuable judicial resources. This rule makes it impossible to plead a claim for unliquidated damages without being required to re-plead the same claim. The rule requires a statement that only advises the opposing party that the claim exceeds the jurisdictional limits of the court. Further, the rule invites the opposing party to except to the lack of a specific amount claimed, and follows that with a mandate that the trial court sustain the special exception and require the pleader to re-plead with more specifics. On the other hand, if the pleader anticipates the special exception and pleads a specific, a trial would be required to sustain a special exception that claimed the pleader failed to follow Rule 47. Basically, this creates a "Catch 22" because a litigant seeking damages cannot plead in such a way as to avoid the necessity of re-pleading.

As a housekeeping matter, I also recommend sub-part (b) of Rule 47 be amended to require the assertion that the claim is within the jurisdictional limits rather than above the minimum limit. The rule, as now written, prevents affirmatively stating a claim within the limits of a limited-jurisdiction court.

In addition to the above recommendations relative to Rule 47, I recommend repealing Rules 241 and 243, enacting two new rules (which will be referred to as Rules 47a and 242).

Rule 47a requires each damages claimant to advise the person from whom damages is sought the amount of damages which will be requested from the court in the event no answer is filed in response to the suit. Such a rule provides information from which a defendant can assess maximum risk and make a business decision relative to the desirability of contesting the claim.

Rule 242 replaces the current Rules 241 and 243.

Rules 241 and 243 speak to a dichotomy the law has created relative to liquidated and unliquidated claims. This dichotomy serves very little, if any, purpose. In limited circumstances, it permits the law to indulge in a presumption upon default. However, in my view, that presumption is not consistent with reality.

In suits involving unliquidated claims, we presume that a defaulting party admits liability due to fault, but that same defaulting party does not admit the amount of damages caused by the admitted fault.

I believe my experiences would be similar to those of other judges across the state. Letters I have received from defendants frequently admit they had no money to pay damages, but they deny they did anything wrong. Human nature is such that people

cannot admit failure, but they can and do admit a debt. People will admit a debt, even an unliquidated debt. Our presumption is wrong.

It is also my belief that defaulting defendants do not rely on the Court to conduct hearings for the presentment of evidence of unliquidated debts.

With those basic beliefs, I recommend that the rules be amended to provide trial courts with an option of hearing evidence or granting judgment without hearing evidence in those cases where the claimant has advised the opposing party of the amount to be sought on default.

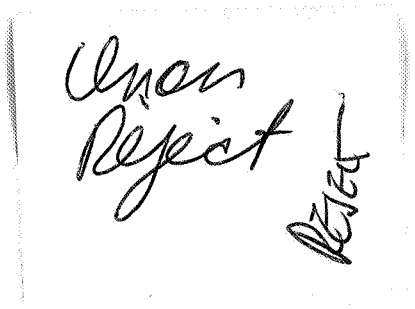
These proposed new Rules 241 and 243 will permit trial courts which have computer support to automatically process default judgments if the Court is satisfied with the reasonableness of the amounts claimed. The Court will also have the option of requiring evidence if a claim appears to be out of the ordinary.

By changing these rules to permit automated judgments, valuable Court resources and time can be devoted to contested issues.

A copy of my proposed changes to Rules 47, 47a, 241, 242, and 243 is attached to this letter.

Rule 47a. Claims on Default

Each original pleading which seeks damages, with or without a claim for attorney fees, shall contain a statement sufficient to give fair notice to a defendant of the amount, or amounts, which will be requested if default judgment is granted against that defendant.



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12. Rule 47a. The suggested change would require that each original pleading which seeks damages give "fair notice" of the amount which will be requested in the event of a default judgment.

The subcommittee does *not* recommend such change.

4543.001

JUDGE B. F. (BILL) COKER
3823 Calculus Drive
Dallas, Texas 75244
(214) 247-8974

December 30, 1989

Mr. Luther H. Soules
Chairman, Rules Advisory Committee
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Rule 242 replaces the current Rules 241 and 243.

Rules 241 and 243 speak to a dichotomy the law has created relative to liquidated and unliquidated claims. This dichotomy serves very little, if any, purpose. In limited circumstances, it permits the law to indulge in a presumption upon default. However, in my view, that presumption is not consistent with reality.

In suits involving unliquidated claims, we presume that a defaulting party admits liability due to fault, but that same defaulting party does not admit the amount of damages caused by the admitted fault.

I believe my experiences would be similar to those of other judges across the state. Letters I have received from defendants frequently admit they had no money to pay damages, but they deny they did anything wrong. Human nature is such that people

cannot admit failure, but they can and do admit a debt. People will admit a debt, even an unliquidated debt. Our presumption is wrong.

It is also my belief that defaulting defendants do not rely on the Court to conduct hearings for the presentment of evidence of unliquidated debts.

With those basic beliefs, I recommend that the rules be amended to provide trial courts with an option of hearing evidence or granting judgment without hearing evidence in those cases where the claimant has advised the opposing party of the amount to be sought on default.

These proposed new Rules 241 and 243 will permit trial courts which have computer support to automatically process default judgments if the Court is satisfied with the reasonableness of the amounts claimed. The Court will also have the option of requiring evidence if a claim appears to be out of the ordinary.

By changing these rules to permit automated judgments, valuable Court resources and time can be devoted to contested issues.

A copy of my proposed changes to Rules 47, 47a, 241, 242, and 243 is attached to this letter.

Rule 57. Signing of Pleadings

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, with his State Bar of Texas identification number, address and telephone number. A party not represented by an attorney shall sign his pleadings, state his address and telephone number. A copy of the original signed pleading is acceptable for filing with the clerk or court.

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FULBRIGHT JAWORSKI &
REAVIS McGRATH
NEW YORK
LOS ANGELES

January 11, 1990

TO: SUPREME COURT ADVISORY COMMITTEE

FROM: Subcommittee on Rules 15 to 165

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

10. Rules 45 and 57, and 74. The proposed suggestion is that the existing rule be amended to require that the signed original *or* a copy thereof be filed with the clerk. The proposal also suggests that when a copy is filed, the party should be required to maintain the signed original in the event the authenticity of the writing is questioned. The suggested change in Rule 57 would expressly permit the filing of *a copy* of the original signed pleading.

Rule 74. The suggested change in this rule would make the same amendment as in Rules 45 and 57. The subcommittee does *not* recommend any of these changes.

Rule 45

(d) be in writing, on paper measuring approximately 8 1/2 inches by 11 inches. Signed by the party or his attorney,

* and the signed original or copy of said original

be filed with the clerk.

* When a copy of the signed original is tendered for filing, the party or his attorney filing such copy is required to maintain the signed original for inspection by the court or any party incident to the suit, should a question be raised as to its authenticity.

Rule 57

* A copy of the original signed pleading is acceptable for filing with the clerk or court.

* STAR INDICATES ADDITIONAL TEXT

11/17/89 09:43 FAX

W/ Hall, Sybil
SCAC Espuela
Co-H Jenkins Hecht
Tyl 4543.001

high
lhs

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

11-17-89

Xc Fax Copy

TELECOPY

TO: Sharon
COMPANY:
FAX NO: 224-7073
FROM: Sharon / James Jolly Clark
DATE: 11/17/89 TIME:
PAGES TO FOLLOW: 2
RE:

OUR FAX NO.: (512) 478-5252

If you do not receive all pages, or if mechanical problems develop, please call (512) 478-4131.

SPECIAL INSTRUCTIONS: If Ms. Hanlon has any questions, please have him call Mr. Clark @ 5252. Thanks

Sharon

4543.001

nyh
UNS
✓ 1-29-90

DAVIS, WELCH, EWBANK, OTTO & WILKERSON, P.C.
ATTORNEYS AT LAW

DAVID M. DAVIS*
STEVEN R. WELCH
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KELLY A. MCDONALD
SHARON M. SCHWEITZER

January 25, 1990

Supl TRCP 63

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

RE: Proposed Rule Changes

II. Change Rule 63

A. Change Rule 63 from 7 days prior to trial to 30 Days Prior to trial.

B. Modify the Rules of Pleading, Rules 63 & 67, to provide that the pleadings shall not be amended within 30 days of trial absent leave of court, further providing that the Court shall have discretion to permit leave to file the amended pleadings but that the burden is on the MOVANT SEEKING LEAVE TO SHOW THAT SURPRISE IS NOT SHOWN OR THAT "GOOD CAUSE" OTHERWISE EXISTS TO PERMIT LEAVE TO BE FILED.

Judge, the reasons for the above rules are many, but I will give you only a few.

PLEADINGS.

The Texas time periods of 7 days (pleadings) and 30 days (experts etc.) are ridiculous for anyone who has ever engaged in any serious lawsuits at all. The notion that a mere 7 days before trial after 75 depositions and 3 years of preparation a party can "amend" their pleadings and that such "amendment" will be granted "absent a showing of surprise" can only be viewed as absurd from the point of view of "streamlining" or "fairness or efficiency". We have all of this discovery, all these "rules", and we are AUTHORIZED, should I say invited!, to wait until 7 days prior to trial to "amend".

We know to a certainty that lawyers wait to amend and put off doing until 7 days what they could and should do earlier. At the minimum, NO AMENDMENT TO THE PLEADINGS WITHIN 30 DAYS OF TRIAL.

Rule 74. Filing With the Court Defined

The filing of pleadings, other papers and exhibits as required by these rules shall be made by filing the original or a copy of the signed original ~~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 time and forthwith transmit them to the office of the clerk. When a copy of the signed original is tendered for filing, the party or his attorney filing such copy is required to maintain the signed original for inspection by the court or any party incident to the suit, should a question be raised as to its authenticity.

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FULBRIGHT JAWORSKI & REAVIS McGRATH
NEW YORK
LOS ANGELES

January 11, 1990

TO: SUPREME COURT ADVISORY COMMITTEE

FROM: Subcommittee on Rules 15 to 165

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Rule 74. The suggested change in this rule would make the same amendment as in Rules 45 and 57. The subcommittee does *not* recommend any of these changes.

Rule 74 FILING WITH THE COURT DEFINED

The filing of pleadings, other papers and exhibits as required by these rules shall be made by filing

* the original or a copy of the signed original

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 time and forthwith transmit them to the office of the clerk.

* When a copy of the signed original is tendered for filing, the party or his attorney filing such copy is required to maintain the signed original for inspection by the court or any party incident to the suit, should a question be raised as to its authenticity.

* STAR INDICATES ADDITIONAL TEXT

11/17/89 09:48

W/ Hall, Sorrels, Warren, Ruiz & Hecht
cc: Jenkins & Gilchrist
Attn: Jeff Ruiz 4543.001

high
lhs

FAX-A-CASE, INC.
601 West 11th Street, Suite 116
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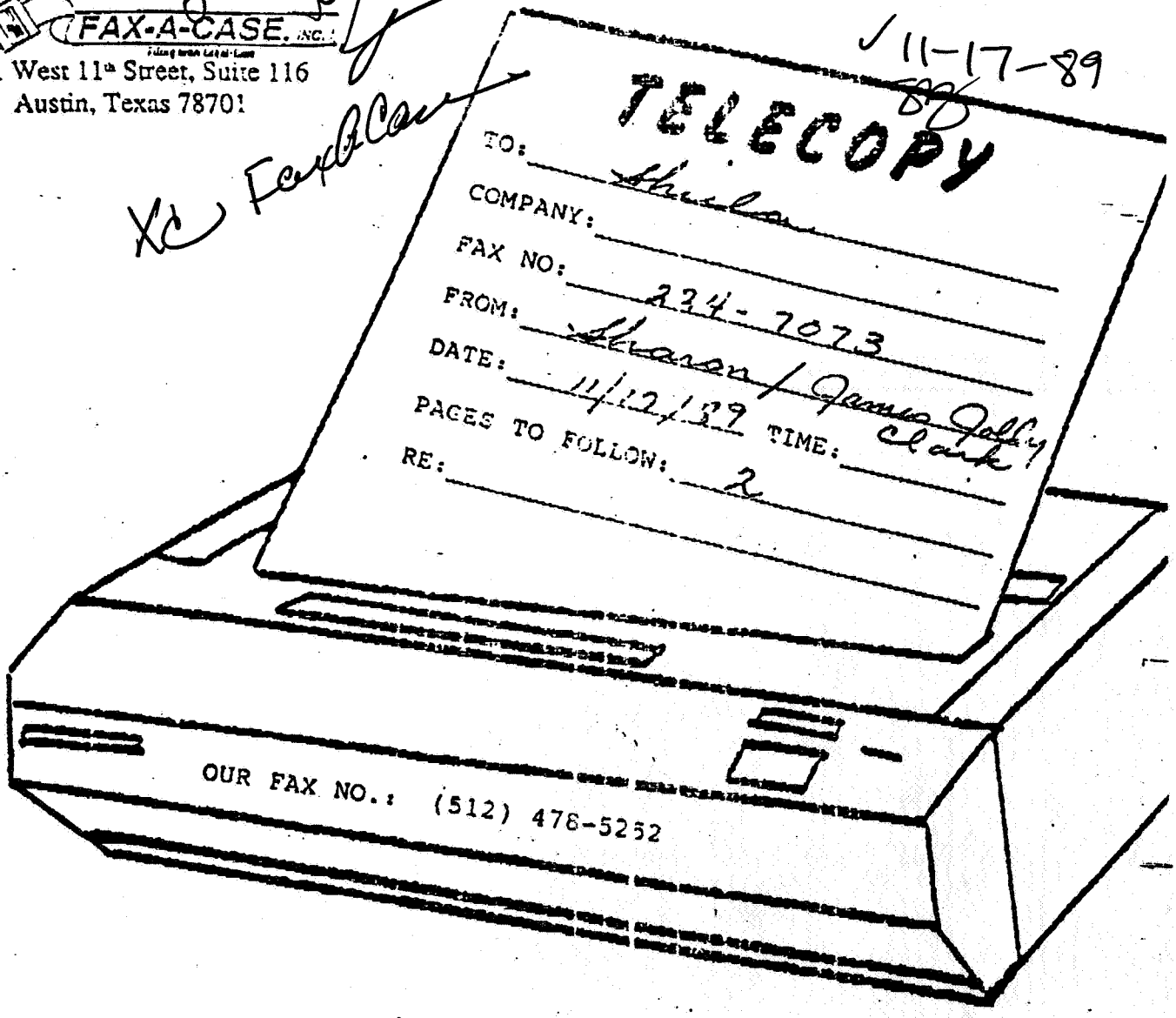
✓ 11-17-89

XC Fax-A-Case



If you do not receive all pages, or if mechanical problems develop, please call (512) 478-4131.

SPECIAL INSTRUCTIONS: If Mr. Hanlon has any questions, please have him call Mr. Clark ASAP. Thanks
Sharon

00627

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December 26, 1989

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

Re: Proposed Changes to Rules 21a, 45, 57 and 74
Texas Rules of Civil Procedure

Dear Mr. Beck:

Enclosed herewith please find a copies of letters sent to me by James Jolly Clark, Paul R. Clevenger, John F. Campbell, and Judge J. David Phillips regarding proposed changes to the above captioned 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 Nathan L. Hecht
Honorable David Peeples
Honorable J. David Phillips
Mr. Reagan M. Martin
Mr. John F. Campbell
Mr. James Jolly Clark

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OF COUNSEL

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CHARLES A. SPAIN, JR.
(512) 480-5679

November 26, 1989

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

Dear Judge Hecht:

6. The following proposed amendments use the word "nonjury": Texas Rules of Appellate Procedure 41(a)(1) and 54(a). The following proposed amendments use the word "non-jury": Texas Rules of Appellate Procedure 41 comment, 52(d), 52 comment, and 54 comment. The court may wish to standardize the terminology. The term "non-jury" currently appears in Texas Rules of Civil Procedure 90, 156, 216(1), 249, 307, and 542. The term "nonjury" currently appears in Texas Rule of Civil Procedure 324(a) and Texas Rule of Judicial Administration 6(b)(2).

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

Respectfully,

Charles A. Spain, Jr.

4662.001

ANDREWS & KURTH
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DALLAS, TEXAS 75201

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1-31-90

TRCP 98a

January 29, 1990

The Honorable David Peeples
San Antonio Court of Appeals
500 County Courthouse
San Antonio, Texas 78205

Re: Proposal for Texas Rule for Offer of Judgment

Dear Judge Peeples:

I enclose a copy of a letter from Hugh E. Hackney of Fulbright & Jaworski regarding the above referenced matter.

Sincerely yours,

Charles R. Haworth

270/lfk
Enclosure

cc: Members of the Committee
on the Administration of Justice (w/encls.)

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FULBRIGHT JAWORSKI &
REAVIS MCGRATH
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LOS ANGELES

January 26, 1990

Sep C
R98a
David Beck

VIA FAX

Charles R. Haworth, Esq.
Andrews & Kurth
4400 Thanksgiving Tower
Dallas, Texas 75201

RE: Proposal for Texas Rule for Offer of Judgment

Dear Charles:

Thank you very much for sending me the draft memorandum regarding the proposal for a Texas offer of judgment rule. I have review both the memorandum and the proposed rule, and offer the following comments.

While the rule is very well drafted, I would suggest several changes or additions to further achieve the ends sought. For example, I feel that the defendant should be given the option of a dismissal with prejudice or entry of a judgment; this procedure would enable the defendant, if he or she so chooses, to avoid the potential preclusive effects of a judgment. The proposed rule also provides (in subsection [b]) that the offer shall remain open for thirty days unless withdrawn by writing served on the offeree before it is accepted. It may be wise to include in this section a provision (similar to Texas Rule 11 regarding agreements between counsel) that the offer may also be withdrawn "in open court" (i.e., on the record during a hearing or in a deposition). This approach would enable the party who has made an outstanding offer to revoke it during an evidentiary hearing or deposition in which particularly helpful testimony is

elicited which may induce him to withdraw the offer. The proposed rule does not require that an acceptance be in writing, so it may also be wise to include a provision for acceptance in writing or "on the record".

Section (f) of the proposed rule outlines the post-judgment procedure for seeking sanctions for rejection of an offer. It may be advisable to include in this section a provision governing the time limits for the filing of such a motion; however, the general rules regarding the plenary power of the court after final adjudication may provide this time limit.

It is interesting to note that the proposed rule consistently refers to sanctions being imposed "on the offeree, or his attorney, or both." This conforms to the current practice regarding discovery sanctions, which also may be imposed on the party or his attorney or both. The primary drawback to this phraseology is that the court will be called upon to determine who is responsible for the rejection of the offer. Obviously, this may require the disclosure of attorney/client communciations, particularly if the sanctions imposed are severe. While the rules of privilege clearly provide an exception for situations involving a breach of duty between attorney and client, the prospects of an appeal of the judgment and subsequent new trial require that any abrogation of the privilege be undertaken only after careful consideration by the trial court. Perhaps the issues of responsibility for sanctions could be deferred until such time as appeals of the judgment are exhausted or are time-barred.

Section (f) also provides that, when the judgment finally entered is less favorable to the offeree than the rejected offer, the offeree (or his attorney, or both) "shall pay the offeror _____ times the cost incurred" after the offer was made. In keeping with the proposed rule's intent to provide the trial court discretion in setting the amount of sanctions, the legislature (or rules committee) may wish to include a range of multiples (i.e., between two and four times the costs incurred) in the rule, and leave the multiple chosen in the discretion of the court.

Finally, the provision permitting an award of sanctions for filing a frivilous motion to reduce the sanctions imposed for rejection of the offer is particularly interesting. It appears to be an attempt to incorporate into the Texas rules some of the "bite" of Rule 11 of the Federal Rules. It may seem a bit odd, in the context of the other Texas rules, to impose sanctions for the frivilous filing of a motion under this rule only. However, I like it because, if

accepted, application of such a rule may ultimately lead to a general rule prohibiting the filing of frivilous motions.

I hope you find these comments helpful. Again I, appreciate your giving me the opportunity to provide some input on this matter. As you know, I have pushed for the adoption of such a rule for some time, and would be very interested to hear from you regarding how this proposal is received.

Very truly yours,

Hugh E. Hackney

HEH:ds

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NEW YORK
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January 11, 1990

TO: SUPREME COURT ADVISORY COMMITTEE

FROM: Subcommittee on Rules 15 to 165

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---

14. Rule 103. The suggested change, requested by the Constables, is that the existing rule be amended to require in writing a motion showing "good cause" before "any person authorized by law or by written order of the court who is not less than 18 years of age" be authorized to serve citation and other notices.

The subcommittee does *not* recommend this change,

PARKER COUNTY
Weatherford, Texas 76086

4
534
536
103

November 29, 1989

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

Re: Proposed Amendments to Texas Rules of Civil Procedure

Dear Justice Hecht:

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

We would like to restate our opposition to Rule 103 here. Firstly, and foremost from a county financial prospective, utilization of private process servers cost the county taxpayers money. Sheriffs and constables are mandated by the Constitution; they have a wide variety of duties other than the service of civil process, all of which are an expense to the taxpayers. In the case of civil process served in private lawsuits by sheriffs and constables, the county is authorized to charge a fee. These fees help offset the cost to the county of maintaining the offices. Private process servers take only the revenue-generating work and leave all the nonrevenue-generating work for the counties, which obviously hurts the taxpayer.

Secondly, from the Justice of the Peace standpoint, there is the question of the validity of default judgments based on service of citation by a private individual over whom the court has no control. Currently, the judge of a justice court has control over private service of process and can verify the integrity of the person who is going to serve the citation prior to authorizing the person to do so. We believe this is the much better system.

Ernan Rejects

RECOMMENDED NEW RULE
RELATIVE TO ASSESSMENT OF COSTS
OF SERVICE OF PROCESS AND OTHER NOTICES

Rule 140a. **Costs of Service of Process and Other Notices**

The amount of fee charged by a person authorized by court order for service of citation or other notice pursuant to Rule 103 in excess of the maximum fee authorized to be charged by any sheriff or constable shall not be taxed in the bill of costs.

00636

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January 11, 1990

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---

15. New Rule 140a. The suggested change is that the fees of persons authorized by court order to serve process or other notices that exceed the maximum fee charged by any sheriff or constable should not be taxed as court costs. The subcommittee believes that our rules should not place any arbitrary limitations on fees. In any event, Rule 141 indicates that the court "may, for good cause, adjudge the costs otherwise than as provided by law or these rules." Accordingly, if a court believes that service fees are excessive, the court can deny the motion to tax the fees or a part thereof as costs.

4543.001

JUDGE B. F. (BILL) COKER
3823 Calculus Drive
Dallas, Texas 75244
(214) 247-8974

December 30, 1989

Mr. Luther H. Soules
Chairman, Rules Advisory Committee
175 E. Houston Street
San Antonio, Texas 78205-2230

Re: Suggested rule changes

Dear Mr. Soules:

Enclosed are recommended changes and additions to the Texas Rules of Civil Procedure. Additions to existing rules and new rules are designated by underlined text of the rule. Portions of existing rules which are deleted are enclosed in brackets and lined through. Please submit these suggestions to your committee for consideration.

Assessment of Costs Associated With Service of Process and Other Notices:

My recommendation relative to the assessment of costs associated with service of citations and other notices flows from a recognition that there are no limitations on the fees that may be charged by private process servers.

Those service fees should be costs recoverable as in other actions, but the party using private process services should not be able to unilaterally dictate the amount of risk to which the other party will be subjected. I am not aware of any abuses which now exist, but the inclusion of a new rule limiting the amount of private process fees which can be taxed as costs would prevent any possible future abuse.

I propose a new rule which I refer to as Rule 140a.

A copy of my proposed Rule 140a is attached to this letter.

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IRELAND GRAVES (1885-1969)
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OF COUNSEL

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CHARLES A. SPAIN, JR.
(512) 480-5649

November 26, 1989

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

Dear Judge Hecht:

6. The following proposed amendments use the word "nonjury": Texas Rules of Appellate Procedure 41(a)(1) and 54(a). The following proposed amendments use the word "non-jury": Texas Rules of Appellate Procedure 41 comment, 52(d), 52 comment, and 54 comment. The court may wish to standardize the terminology. The term "non-jury" currently appears in Texas Rules of Civil Procedure 90, 156, 216(1), 249, 307, and 542. The term "nonjury" currently appears in Texas Rule of Civil Procedure 324(a) and Texas Rule of Judicial Administration 6(b)(2).

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

Respectfully,

Charles A. Spain, Jr.

Scac

TRCP 166b.

5. Protective Orders. On motion specifying the grounds and made by any person against or from whom discovery is sought under these rules, the court may make any order in the interest of justice necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights. Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents. Specifically, the court's authority as to such orders extends to, although it is not necessarily limited by, any of the following:

a. (No change.)

b. (No change.)

c. (No change.)

[d. A trial court shall have continuing jurisdiction beyond its plenary power over the merits of a case to rule on motions by any party or non-party to a case seeking to rescind an order relate to ~~seeking~~ discovery.]

this didn't pass?? NO.

4543.001

hjh
UNS
✓ 1-29-9

DAVIS, WELCH, EWBANK, OTTO & WILKERSON, P.C.
ATTORNEYS AT LAW

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SHARON M. SCHWEITZER

January 25, 1990

Scopo

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

RE: Proposed Rule Changes

I. Change Rule 166b(6)(b)

A. Change the Rule 166b(6)(b) from 30 days to, at a minimum, 60 days.

Judge, the reasons for the above rules are many, but I will give you only a few.

THE THIRTY DAY RULE

Further, I talked to a great lawyer a few days ago. This lawyer is one of the best in this state in my opinion . His statement: "my whole life revolves around the 30 day rule. I stay up at night worrying about the 30 day rule".

Judge, if this is true, why not make it 60 days and not 30. The fact is, and all lawyers with any experience now know it, is that the exclusionary provisions of Rule 166b and the cases interpreting it (i.e. excluding experts or witnesses for failure to supplement or supplementation within the "30 day rule") have drastically changed our practice. The Courts are saying: you can NOT wait any more to disclose experts or witnesses. This did not use to be the real Texas practice. I can remember the "old days" when a trial judge would grant a continuance and permit a party to "supplement" as late as the day of trial and even in major cases.

We have moved far away from this, and properly so. But I submit that the time is now to make a realistic decision to get to a realistic number: not 30 days, but a minimum of 60 days prior to trial.

30 days prior to trial is not enough time. If a party does bring in a new expert, the depositions can not be set up, the other party wants new experts etc. The case is put off. Depositions are noticed. Lawyers are unhappy. Rambo tactics become more common within the last "30 days". All of this "pressure" is not necessary. Just back the dates back to. at a minimum. 60 days.

DAN R. PRICE
ATTORNEY AT LAW
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AUSTIN, TEXAS 78703-4204
(512) 476-7086

166
166a
166(b)
166(b)6
167a
168
169

November 28, 1989

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

RE: Comment on Proposed Rules Changes Regarding Discovery

Dear Justice Hecht:

TRCP 166c

Other matters: Rule 166c. I believe new Rule 166c should be clarified. The last part of the rule discusses agreement in non-deposition discovery. The question is whether or not Rule 166c, if read in conjunction with Rule 11, requires that such an agreement be in writing, signed by the parties, and filed with the court? I believe this should be clarified by the new rules.

Sept

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✓ 1-29-90

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January 25, 1990

Sdpc

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

RE: Proposed Rule Changes

IV. New Rule

A. Finally, I would create a new Rule, let us say "Rule 166c".

B. This rule would say in essence:

1. A Lawyer files a Motion "Pursuant to Rule 166c" for Discovery.

2. That is about all that the "Rule 166c Motion" would say.

3. When a lawyer received a "Rule 166c Motion", the content of his/her response would be governed by Rule 166c.

4. Rule 166c would provide that, within 30 days after receipt of a Rule 166c Motion, the respondent would provide the following information:

Suggested Content of Statement Required by Rule 166c

Within 30 days after receipt of a Rule 166c Request, all parties shall each serve on each other, and all other involved counsel a document styled as "Rule 166c Pre-trial Statement of Witnesses, Experts and Documents".

Such statement shall designate and contain the following information:

a. The name, address and telephone number of all persons who have knowledge of relevant facts. The statement shall designate from this list of people identified those persons that a party "will probably call" if the lawyer, in the exercise of good faith, knows that he/she will, in all probability, call that person as a witness at the time of trial.

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b. The name, address and telephone number of all experts which the party filing the statement may call at the time of the trial.

c. The name, address and telephone number of every expert used for consultation who is not expected to be called as a witness at trial, if the consulting expert's opinions or impressions have been reviewed by a testifying expert.[1]

d. As to each such expert identified pursuant to either paragraph b or c above the following information shall be stated in detail:

(1) the subject matter on which the witness is expected to testify;

(2) the mental impressions and opinions held by the expert;

(3) a statement of whether the expert has prepared any report or summary of his opinions or mental impressions;

(4) identification of any document prepared by the expert or used by the expert on which the expert may rely for any opinions at the time of hearing or trial.

e. Identify all documents or tangible items which the party filing the statement believes at this time that it intends to introduce at the time of trial or documents which the party filing the statement believes supports his/her/its claim or defense. All documents shall be designated which the lawyer believes that he/she will probably use at trial, that is, any document that the lawyer, in the exercise of good faith, believes that he/she will, in all probability, introduce the document at the time of trial.

By the term **"identify"**, it is intended that a party shall identify a document by giving the date of the document, a general description of the contents of the document and the source of the document where applicable.

By the term **"identify"**, it is intended that a party shall identify a tangible item by giving a reasonably specific description of the item so that the Court or opposing counsel can be put on notice of the character of the tangible item.

f. As to any tangible item which is not a document, the party identifying the tangible item shall have the duty of notifying all counsel and unrepresented parties that a tangible item has been identified but not produced and shall set a reasonable time and place for the examination and inspection of the tangible item.

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[1] This language follows the proposed language change under Rule 166b(e).

g. EACH Rule 166c PRE-TRIAL STATEMENT SHALL BE SIGNED BY COUNSEL. THIS PROCEDURE SHALL BE CONSIDERED IN LIEU OF INTERROGATORIES AND REQUEST FOR PRODUCTION INQUIRING AS TO (A) WITNESSES WITH KNOWLEDGE OF RELEVANT FACTS; (B) EXPERTS WHO MAY BE CALLED; (C) EXPERTS FOR CONSULTATION WHO WILL NOT BE CALLED BUT WHO MAY BE RELIED ON BY AN EXPERT WHO MAY BE CALLED; AND (D) IDENTIFICATION AND PRODUCTION AS TO RELEVANT DOCUMENTS. COUNSEL NEED NOT OBTAIN THE SIGNATURES OF THE CLIENTS ON THE PRE-TRIAL STATEMENTS.

On or before 60 days prior to any trial setting in the cause, this Rule 166c Pre-Trial Statement shall be supplemented.

All parties shall file in the papers of the cause and serve on counsel this supplementation of the pre-trial statement. This supplementation shall cover each and every item required in the pre-trial statement, including persons with knowledge of relevant facts, experts, identification and production of documents. This first supplementation of this pre-trial statement should be made as soon as practical, but in no event later than 60 days prior to trial. In this supplementation, there is no need or requirement to list again experts, documents or witnesses who were previously named by the party.

No witness or expert shall be permitted to testify or document be introduced unless said witness, expert, or document is properly identified in timely filed pre-trial statements filed on or before 60 days prior to trial as described in this Order except on leave of Court and unless the Court finds that good cause exists for permitting or requiring supplementation not in compliance with the timetable contained in this Rule. [2]

This Rule 166c Motion and Pre-Statement shall not relieve any party from any duty of disclosure or supplementation which is not specifically addressed, controlled or imposed otherwise by the Court or by these Rules.

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[2] The purpose here is to conform to the supplementation requirements of 166b. I have not tracked the language exactly, but that is the general intent. Refinements would have to include making it conform to Rule 166b and to make "Rule 166c" and Rule 166b work together.

Judge, the reasons for the above rules are many, but I will give you only a few.

My New Rule 166c

I am also admitted into the bar of the State of Colorado. That state passed a Rule which is similar, though even broader, that the Rule 166c which I am suggesting.

I do not have the time in this letter to argue at length why such a rule would be helpful. However, I am convinced that it would be of immense help for the Supreme Court to tell every lawyer in this state that within 30 days after getting a "Rule 166c" Motion, a "statement" from the lawyer giving the information which I have set out about would be required and that the content of that response was something that the lawyers were definite about and knew exactly what was coming.

If you are at all interested in following up on this suggestion, I would be willing to do whatever you think is appropriate to flush out my reasons for this suggestion, the Colorado experience, a survey of the literature on it etc.

In conclusion, these suggestions are probably not totally new at all. But I am completely convinced that our Texas practice as it now stands has much going for it. But we need to get utterly realistic, and I strongly believe that our current practice of amending pleading 7 days prior to a trial date and designation of expert 30 days prior to trial is absurd given the realities of practice in 1990.

The unpleasant truth is: when a lawyer has to designate experts and HIRE THEM, and when a lawyer has to finally and truly amend pleadings, then and sometimes only then do many of us think about settlement, getting very realistic with our clients about the cost and probable outcome of this vast litigation process that we have been involved with.

Sepo

RULE 167. DISCOVERY AND PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION, COPYING OR PHOTOGRAPHING

1. Procedure. Any party may serve on any other party a REQUEST:

a. to produce and permit the party making the REQUEST, or someone acting on his behalf, to inspect, sample, test, photograph and/or copy, any designated documents or tangible things which constitute or contain matters within the scope of Rule 166b which are in the possession, custody or control of the party upon whom the request is served; or

b. to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon within the scope of Rule 166b.

c. The REQUEST shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The REQUEST shall specify a reasonable time, place and manner for making the inspection and performing the related acts.

d. The party upon whom the REQUEST is served shall serve a written RESPONSE which shall state, with respect to each item or category of items, that inspection or other requested action will be permitted as requested, and he shall thereafter comply with the REQUEST, except only to the extent that he makes objections in writing to particular items, or categories of items, stating specific reasons why such discovery should not be allowed.

RESPONSES, including any objections, shall be preceded by the REQUEST to which the RESPONSE or objection pertains.

e. All parties to the action shall be served with copies of each REQUEST and RESPONSE.

f. A party who produces documents for inspection shall produce them as they are kept in the usual course of business, or shall organize and label them to correspond with the categories in the request.

g. Testing or examination shall not extend to destruction or material alteration of an article without notice, hearing, and prior approval by the court.

4543.001 HJH CHS

9-11-89 SB

LAW OFFICES OF
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9/11 HJH COAS SCAC Subc SCAC Appt SCAC Agenda Xc John Yelenosky Justice Hecht 9-12-89

September 8, 1989

Mr. Luke Soules
Law Offices of Luther Soules, III
175 E. Houston Street, 10th Floor
San Antonio, Texas 78205

Re: Proposed Amendment of Texas Rules of Civil Procedure

Dear Luke:

This letter is written to you in your capacity as a member of the Supreme Court Advisory Committee for the Texas Rules of Civil Procedure.

Recently, I have had an occasion to notice and appreciate a significant difference in procedural response between Rule 168, T.R.C.P. (Interrogatories to parties) on the one hand, and Rule 167, T.R.C.P. (Discovery and Production of Documents and Things for Inspection, Copying or Photographing) and Rule 169, T.R.C.P. (Requests for Admission), on the other.

Rule 168 (Interrogatories), in an unnumbered paragraph included under Rule 168.5, provides "Answers to interrogatories shall be preceded by the question or interrogatory to which the answer pertains." Much to my surprise, I have discovered that there is no similar provision in Rule 167 (Discovery and Production) or Rule 169 (Admissions).

The subject provision contained in Rule 168 regarding interrogatories is good and makes the record clear. In most circumstances, unless there has been amended or supplemental answers or responses filed, the attorneys have to handle only one document relating to interrogatories and responses. That document contains both the questions and the answers and/or objections. Because there is no similar provision in the rules providing for responses to requests for production (Rule 167) or for requests for admissions (Rule 169), unless the attorney, as a matter of courtesy, has copied the particular requests for production or requests for admission in order that they precede the response or objection thereto (which I have made it my practice to do), then the attorneys are having to constantly flip back and forth between the requests for production or requests for admission and the responses.

It seems to me that for the sake of consistency and for clarity of the record, a provision similar to that quoted and found in Rule 168 should be incorporated in Rules 167 and 169. I have included for your reference copies of Rules 167, 168 and 169, along with the language which I propose should be added to Rules 167 and 169 to make them consistent with Rule 168 and which I believe will ultimately simplify the process. It may require a bit more of the secretaries or paralegals in copying the requests for production or requests for admission that precede the response or objection, but clarity for the record would be greatly enhanced. It is further my contention that such a procedure would not unduly overload the filing capacity of the District Clerks, who seem to not file much of anything anymore anyway.

If there is some reason why the language and change in format I have suggested for Rules 167 and 169 was not included purposefully, then I would like to know that reason. If it was merely oversight, then I believe the language and the slight change in format which I have suggested should be added to those rules would ultimately save time and simplify the process. Ultimately, it would save money, as well.

Please let me hear from you in this regard.

Very truly yours,

TINSMAN & HOUSER, INC.

John F. Younger, Jr.

JFYjr/mlh

Enclosures

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NEW YORK
LOS ANGELES

December 8, 1989

TRCP 166b (4)
TRCP 167
TRCP 168
TRCP 169
TRCP 201

Re: Comments Regarding Proposed Amendments to Texas Court Rules

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

Dear Justice Hecht:

Please consider the following as my personal comments on the proposed amendments to the Texas Rules of Civil Procedure and are not to be construed as the comments of this firm or any of its attorneys:

Rules 167, 168 and 169. The proposed change to Rule 169 gives a Defendant fifty (50) days after service of the citation and petition to respond to requests for admission. However, Rules 167 and 168 allow a defendant fifty (50) days to respond to requests for production and interrogatories only if such discovery requests accompany the citation. I have recently been party to a situation where after the citation is served, the plaintiff has issued discovery requests upon the defendant prior to the time the party appears but after the citation is issued. In such a situation, the defendant may only have thirty (30) days to respond to the discovery request since the request did not accompany the citation.

I would suggest that Rules 167, 168 and 169 be re-drafted so that they are consistent in allowing a defendant fifty (50) days after service of the citation to respond to any discovery requests. In other words, the defendant should not need to respond to any discovery requests for fifty (50) days after citation has been served upon him.

I hope these suggestions are of some benefit.

Yours very truly,

Keith S. Dubanevich

KSD/lc

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167 ←
TRCP 168
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201

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OFFICE LOCATION
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SUITE "I"

December 11, 1989

Texas Supreme Court
Rules Committee
P. O. Box 12248
Austin, Tx 78711

In Re: Recent Discovery Rules Changes

Gentlemen:

I respectfully recommend changes in discovery rules as follows:

1. Limit written interrogatories to 10 single questions, except upon leave of court. (Rule 168(5)

2. Followup or clarification interrogatories: 2 each for any interrogatory imperfectly answered, to which the answer is not understood, or needs clarifying.

3. File discovery papers. Presenty rules dispense with filing. This results in disorder and irresponsibility. Anything important enough to consume a lawyer's time should be kept on record, (including opinions of the Court of Appeals).

4. Limit depositions to one each per attorney per witness, except upon leave of court.

5. Provide for the party taking the depositions to make a deposit to cover time and expense of witness and the attorney representing the witness if the deposition requires more than one day. This should be a requirement in all multiple party or extended depositons where a client and his lawyer are held in a vice grip for several days for a long, long, deposition. Particularly where the witness is a party-witness, and his lawyer's expenses are mounting uncontrollably anyway.

6. Go back to the requirement that the deposition be taken in the county where the witness resides, except by agreement or special leave of court. Should apply to party witnesses as well as others. This is not an unreasonable requirement.

7. Require the party giving notice to take the deposition to also give notice of the subject matter or zone of inquiry, and require the same thing of the opposite attorney if he intends to pursue an independent line of questioning. Allow "free for all" depositions only on leave of court, if at all, and with

limitations. Each deposition notice, whether for oral depositions or interrogatories, should contain the name of the individual court reporter, and the phone number of the court reporter.

8. Require 10 days notice when the witness is required to produce documentary material. "Reasonable notice" is probably adequate in other situations.

Yours very truly,

Ernest L. Sample

Ernest L. Sample

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nyh
LHS

√9-18-89
DB

THE SUPREME COURT OF TEXAS

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

September 14, 1989

HSH,
SCAC SCBC
COAD
SCAC Oglesby
cc Justices Hecht
Charles Griggs

Mr. Luther H. Soules III
Soules and Wallace
Tenth Floor
Republic of Texas Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Dear Luke:

I enclose a copy of a letter from Charles Griggs of Sweetwater to Justice Cook regarding Texas Rules of Civil Procedure 168 and 169. The letter raises the question of how to treat the filing of an instrument which contains both interrogatories and requests for admission, and the responsive instrument.

Please schedule this subject for discussion by the Committee.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

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 DEFIBAUG

September 14, 1989

Mr. Charles R. Griggs
Nunn, Griggs, Jones & Sher[illegible]
P. O. Box 488
Sweetwater, Texas 79556-0488

Dear Mr. Griggs:

Justice Cook has referred to me your letter to him regarding Texas Rules of Civil Procedure 168 and 169. As the Court's liaison to the Rules Advisory Committee, I have sent a copy of your letter to the chairman, Luther H. Soules of San Antonio, for consideration by the Committee.

You have raised a legitimate issue. The Court appreciates your interest in the rules.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

00654

NUNN, GRIGGS, JONES & SHERIDAN

LAWYERS

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235-9928

August 28, 1989

The Honorable Eugene A. Cook, Justice
The Supreme Court of Texas
P. O. Box 12248, Capitol Station
Austin, Texas 78711

Dear Justice Cook:

There is a matter arising out of the discovery process that is causing some confusion at the trial court level. I would bring this to your attention with the thought that the Court may want to clarify discovery rules in order to eliminate this problem.

Sometime ago, the Court put an end to the filing of depositions with the District or County Clerks, probably in the interest of saving storage space. About that time, Rules 168 and 169 were rewritten. Rule 168 contemplates the serving of interrogatories and responses to interrogatories directly upon the parties or their attorneys. The Rule does not forbid the filing of interrogatories or responses with the Clerk but it does not contemplate the filing of copies in that office. Rule 169 specifically provides that requests for admissions and responses to requests for admissions will "be filed promptly in the Clerk's office..."

It is not unusual for an attorney to prepare a discovery document which incorporates both interrogatories and requests for admissions of fact; in fact, this vehicle can be quite useful and can result in increased clarity and efficiency of the discovery process.

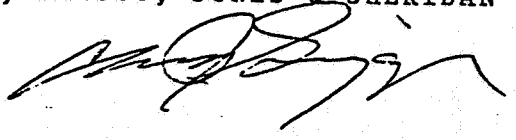
However, Clerks in my part of the country are beginning to refuse to file a discovery document that has the characteristics of interrogatories and of requests for admissions.

I hope the Court will consider an amendment to Rule 169 to eliminate the requirement of a filing with the Clerk in order

that the discovery process may have a bit more flexibility than it has under the current state of affairs.

Sincerely,

NUNN, GRIGGS, JONES & SHERIDAN

By: 

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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 that 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.

2. **Scope.** Interrogatories may relate to any matters which can be inquired into under Rule 166b, but the answers, subject to any objections as to admissibility, may be used only against the party answering the interrogatories. Where the answer to an interrogatory may be derived or ascertained from:

a. public records; or

b. from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served; it is sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and, if applicable, to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. The specification of records provided shall include sufficient detail to permit the interrogating party to locate and to identify as readily as can the party served, the records from which the answers may be ascertained.

3. **Procedure.** Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice requires.

4. **Time to Answer.** The party upon whom the interrogatories have been served shall serve answers on the party submitting the interrogatories within the time specified by the party serving the interrogatories, which specified time shall not be less than thirty days after the service of the interrogatories, except that, if the request accompanies citation, a defendant may serve answers within 50 days after service of the citation and petition upon that defendant. The court, on motion and notice for good cause shown, may enlarge or shorten the time for serving answers or objections.

5. **Number of Interrogatories.** The number of questions including subsections in a set of interrogatories shall be limited so as not to require more than thirty answers. No more than two sets of interrogatories may be served by a party to any other party, except by agreement or as may be permitted by the court after hearing upon a showing of good cause. The court may, after hearing, reduce or enlarge the number of interrogatories or sets of interrogatories if justice so requires. The provisions of Rule 166b are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

The interrogatories shall be answered separately and fully in writing under oath. Answers to interrogatories shall be preceded by the question or interrogatory to which the answer pertains. True copies of the interrogatories, and answers and objections thereto, shall be served on all parties or their attorneys, and copies thereof shall be provided to any additional parties upon request. The answers shall be signed and verified by the person making them and the provisions of Rule 14 shall not apply.

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

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HJH
LHS

9-11-89
SB

LAW OFFICES OF
TINSMAN & HOUSER, INC.

RICHARD TINSMAN
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9/11 HJH
COAS
SCAC Subc
SCAC Agenda
cc John Younger
Justice Hecht
9-12-89

September 8, 1989

Mr. Luke Soules
Law Offices of Luther Soules, III
175 E. Houston Street, 10th Floor
San Antonio, Texas 78205

Re: Proposed Amendment of Texas Rules of Civil Procedure

Dear Luke:

This letter is written to you in your capacity as a member of the Supreme Court Advisory Committee for the Texas Rules of Civil Procedure.

Recently, I have had an occasion to notice and appreciate a significant difference in procedural response between Rule 168, T.R.C.P. (Interrogatories to parties) on the one hand, and Rule 167, T.R.C.P. (Discovery and Production of Documents and Things for Inspection, Copying or Photographing) and Rule 169, T.R.C.P. (Requests for Admission), on the other.

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It seems to me that for the sake of consistency and for clarity of the record, a provision similar to that quoted and found in Rule 168 should be incorporated in Rules 167 and 169. I have included for your reference copies of Rules 167, 168 and 169, along with the language which I propose should be added to Rules 167 and 169 to make them consistent with Rule 168 and which I believe will ultimately simplify the process. It may require a bit more of the secretaries or paralegals in copying the requests for production or requests for admission that precede the response or objection, but clarity for the record would be greatly enhanced. It is further my contention that such a procedure would not unduly overload the filing capacity of the District Clerks, who seem to not file much of anything anymore anyway.

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Please let me hear from you in this regard.

Very truly yours,

TINSMAN & HOUSER, INC.

John F. Younger, Jr.

JFYjr/mlh

Enclosures

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nyh
LHS
9-18-89
BD

THE SUPREME COURT OF TEXAS

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

BD
ASH,
SCAC SCBC
COAS
SAAC Oglesby
cc Justices Hecht
Charles Griggs

September 14, 1989

Mr. Luther H. Soules III
Soules and Wallace
Tenth Floor
Republic of Texas Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Dear Luke:

I enclose a copy of a letter from Charles Griggs of Sweetwater to Justice Cook regarding Texas Rules of Civil Procedure 168 and 169. The letter raises the question of how to treat the filing of an instrument which contains both interrogatories and requests for admission, and the responsive instrument.

Please schedule this subject for discussion by the Committee.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

00660

September 14, 1989

Mr. Charles R. Griggs
Nunn, Griggs, Jones & Sheridan
P. O. Box 488
Sweetwater, Texas 79556-0488

Dear Mr. Griggs:

Justice Cook has referred to me your letter to him regarding Texas Rules of Civil Procedure 168 and 169. As the Court's liaison to the Rules Advisory Committee, I have sent a copy of your letter to the chairman, Luther H. Soules of San Antonio, for consideration by the Committee.

You have raised a legitimate issue. The Court appreciates your interest in the rules.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

00661

NUNN, GRIGGS, JONES & SHERIDAN

LAWYERS

CHAS. L. NUNN (1913-1986)
CHAS. R. GRIGGS
C. E. JONES
PETER F. SHERIDAN

DOSCHER BUILDING
POST OFFICE BOX 488
SWEETWATER, TEXAS 79556-0488
915-236-6647

TELECOPIER
AREA CODE 915
235-9928

August 28, 1989

The Honorable Eugene A. Cook, Justice
The Supreme Court of Texas
P. O. Box 12248, Capitol Station
Austin, Texas 78711

Dear Justice Cook:

There is a matter arising out of the discovery process that is causing some confusion at the trial court level. I would bring this to your attention with the thought that the Court may want to clarify discovery rules in order to eliminate this problem.

Sometime ago, the Court put an end to the filing of depositions with the District or County Clerks, probably in the interest of saving storage space. About that time, Rules 168 and 169 were rewritten. Rule 168 contemplates the serving of interrogatories and responses to interrogatories directly upon the parties or their attorneys. The Rule does not forbid the filing of interrogatories or responses with the Clerk but it does not contemplate the filing of copies in that office. Rule 169 specifically provides that requests for admissions and responses to requests for admissions will "be filed promptly in the Clerk's office..."

It is not unusual for an attorney to prepare a discovery document which incorporates both interrogatories and requests for admissions of fact; in fact, this vehicle can be quite useful and can result in increased clarity and efficiency of the discovery process.

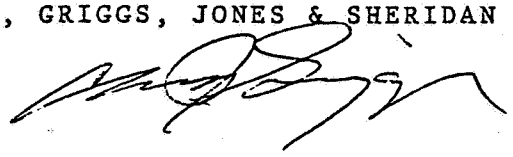
However, Clerks in my part of the country are beginning to refuse to file a discovery document that has the characteristics of interrogatories and of requests for admissions.

I hope the Court will consider an amendment to Rule 169 to eliminate the requirement of a filing with the Clerk in order

that the discovery process may have a bit more flexibility than it has under the current state of affairs.

Sincerely,

NUNN, GRIGGS, JONES & SHERIDAN

By: 

CRG:cw

Copy to LHS
Orig to HJH
7/5/89

SIMON, ANISMAN, DOBY, WILSON & SKILLERN

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ATTORNEYS AND COUNSELORS
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RICHARD U. SIMON (1907-1975)
HENRY W. SIMON (1910-1980)

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METRO 429-3245

TELEFAX NO.
METRO (817) 429-5390

HAROLD D. HAMMETT, P.C.
OF COUNSEL TO THE FIRM

June 27, 1989

Subc

Luther H. Soules, III, Esq., Chairman
Supreme Court Advisory Committee
175 E. Houston, 10th Floor
Two RepublicBank Plaza
San Antonio, TX 78205-2230

Re: 1990 Rules- Tex. R. Civ. P. Rule 169

Dear Luke:

This is to request that the Committee amend Rule 169 to restore the pre-1984 requirement of a sworn statement when the party receiving a request for admissions either denies a request or states that he cannot truthfully admit or deny the matters requested. Also, the signature and oath should be by the party signing the denial or statement, not by its attorney of record.

It seems that the requirement of a sworn statement or denial was deleted in the 1984 amendments. Cf. Reyes v. International Metals Supply Company, 666 S.W.2d 622, 624 (Tex. App.- Hous. 1st 1984, no writ).

It appears incongruous to me that the standard of reliability for responding to requests for admissions should be less strict than for interrogatories. Rule 168, paragraph 5, requires the answers to be in writing, under oath, signed and verified by the person making them, not by the attorney. The same standard should apply to responding to requests for admissions, unless the request is admitted.

Thank you for your consideration of these comments. Also, please know of my gratitude to Holly Halfacre in your office for her gracious and prompt response to my telephone inquiry about this.

Very truly yours,

Harold D. Hammett

Harold D. Hammett

HDH:cjr

cc: Holly Halfacre

00664

LAW OFFICES

SOULES & WALLACE
ATTORNEYS-AT-LAW
A PROFESSIONAL CORPORATION
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REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
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REBA BENNETT KENNEDY
PHIL STEVEN KOSUB
GARY W. MAYTON
J. KEN NUNLEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
JUDITH RAMSEY SALDAÑA
MARC J. SCHNALL *
LUTHER H. SOULES III †‡
WILLIAM T. SULLIVAN
JAMES P. WALLACE ‡

TELEFAX
SAN ANTONIO
(512) 224-7073
AUSTIN
(512) 327-4105

December 26, 1989

Mr. Steve McConnico
Scott, Douglass & Keeton
12th Floor, First City Bank Building
Austin, Texas 78701-2494

Re: Proposed Changes to Texas Rules of Civil Procedure 167, 168, 169, 188, and 206

Dear Steve:

Enclosed herewith please find a copies of letters sent to me by Harold D. Hammett, Jess W. Young, Charles Griggs and John F. Younger, Jr. regarding proposed changes to the above captioned 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 Nathan L. Hecht
Honorable David Peeples
Mr. John F. Younger, Jr.
Mr. Charles Griggs
Mr. Jess W. Young
Mr. Harold D. Hammett

00665

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

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.

Responses, including any objections, shall be preceded by the request for admission to which the response or objection pertains.

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) 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.

2. Effect of Admission. Any matter admitted under this rule is conclusively established as to the party making the admission unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 166

4543.001

HJH
LHS

9-11-89
SB

LAW OFFICES OF
TINSMAN & HOUSER, INC.

RICHARD TINSMAN
FRANKLIN D. HOUSER
JOHN F. YOUNGER, JR.
MARGARET M. MAISEL
DAVID G. JAYNE
ROBERT SCOTT
BRUCE M. MILLER
DANIEL J. T. SCIANO
MICHELE PETTY
W. D. SEYFRIED, III
SHARON COOK
REY PEREZ

900 NATIONAL BANK OF COMMERCE BUILDING
SAN ANTONIO, TEXAS 78205
AREA CODE 512-225-3121

9/11 HJH
cc AS
SAC Subc
SAC Appel
SAC John Younger
Justice Hecht
9-12-89
SB

September 8, 1989

Mr. Luke Soules
Law Offices of Luther Soules, III
175 E. Houston Street, 10th Floor
San Antonio, Texas 78205

Re: Proposed Amendment of Texas Rules of Civil Procedure

Dear Luke:

This letter is written to you in your capacity as a member of the Supreme Court Advisory Committee for the Texas Rules of Civil Procedure.

Recently, I have had an occasion to notice and appreciate a significant difference in procedural response between Rule 168, T.R.C.P. (Interrogatories to parties) on the one hand, and Rule 167, T.R.C.P. (Discovery and Production of Documents and Things for Inspection, Copying or Photographing) and Rule 169, T.R.C.P. (Requests for Admission), on the other.

Rule 168 (Interrogatories), in an unnumbered paragraph included under Rule 168.5, provides "Answers to interrogatories shall be preceded by the question or interrogatory to which the answer pertains." Much to my surprise, I have discovered that there is no similar provision in Rule 167 (Discovery and Production) or Rule 169 (Admissions).

The subject provision contained in Rule 168 regarding interrogatories is good and makes the record clear. In most circumstances, unless there has been amended or supplemental answers or responses filed, the attorneys have to handle only one document relating to interrogatories and responses. That document contains both the questions and the answers and/or objections. Because there is no similar provision in the rules providing for responses to requests for production (Rule 167) or for requests for admissions (Rule 169), unless the attorney, as a matter of courtesy, has copied the particular requests for production or requests for admission in order that they precede the response or objection thereto (which I have made it my practice to do), then the attorneys are having to constantly flip back and forth between the requests for production or requests for admission and the responses.

It seems to me that for the sake of consistency and for clarity of the record, a provision similar to that quoted and found in Rule 168 should be incorporated in Rules 167 and 169. I have included for your reference copies of Rules 167, 168 and 169, along with the language which I propose should be added to Rules 167 and 169 to make them consistent with Rule 168 and which I believe will ultimately simplify the process. It may require a bit more of the secretaries or paralegals in copying the requests for production or requests for admission that precede the response or objection, but clarity for the record would be greatly enhanced. It is further my contention that such a procedure would not unduly overload the filing capacity of the District Clerks, who seem to not file much of anything anymore anyway

If there is some reason why the language and change in format I have suggested for Rules 167 and 169 was not included purposefully, then I would like to know that reason. If it was merely oversight, then I believe the language and the slight change in format which I have suggested should be added to those rules would ultimately save time and simplify the process. Ultimately, it would save money, as well.

Please let me hear from you in this regard.

Very truly yours,

TINSMAN & HOUSER, INC.

John F. Younger, Jr.

JFYjr/mlh

Enclosures

Supc

2/1 HJH, R176 Subc Agenda & Jc J. Hecht.

Art 24.011 Code Crim. Procedure

Suggested by Judge John Spicia 225th Dist. Ct.

By Melton, Glasgow

S.B. No. 669

A BILL TO BE ENTITLED

AN ACT

relating to the use of subpoenas to obtain the testimony of children in criminal cases.

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

SECTION 1. Chapter 24, Code of Criminal Procedure, is amended by adding Article 24.011 to read as follows:

Art. 24.011. SUBPOENAS; CHILD WITNESSES. (a) If a witness is younger than 18 years, the court may issue a subpoena directing a person having custody, care, or control of the child to produce the child in court.

(b) If a person, without legal cause, fails to produce the child in court as directed by a subpoena issued under this article, the court may impose on the person penalties for contempt ~~provided by this chapter~~. The court may also issue a writ of attachment for the person and the child, in the same manner as other writs of attachment are issued ~~under this chapter~~.

SECTION 2. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

TRCP 188

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√ 10-16-89

SB

JESS W. YOUNG, INC.
LAWYER
P. O. BOX 15948
SAN ANTONIO, TEXAS 78212
TELEPHONE (512) 490-5299

JESS W. YOUNG

RONALD S. SCHMIDT
OF COUNSEL

October 12, 1989

AWH, SCAC Subc Agenda ~ COAS Tex Xo Justice Hecht

Mr. Luke Soules, III
c/o Soules & Wallace
Republic of Texas Plaza Bldg.
175 E. Houston Street
San Antonio, TX 78205

Dear Luke:

Confirming my conversation with you of the hiatus between Rules 188 (Foreign Jurisdiction Depositions) and 206 (Domestic Depositions and Return) please note the highlighted portions.

As I explained to you, I had reason to take out-of-state depositions in my daughter's divorce case, and this led to the problem of the court reporter in the foreign jurisdiction adhering to Rule 188 and returning the depositions and bill of costs back to our District Clerk. On such occasion, they were returned to the court reporter in the foreign jurisdiction, both deposition and cost bill.

Rule 206 states that the lawyer that asks the first question gets the honor of being the custodian, and of course when you send it out to a foreign jurisdiction you never know who's going to ask the first question. It would occur to me that it would be better stated to cause the return of the foreign deposition to the party who caused the issuance of the same, without regard to who asks the first question. The bill of costs should be filed with the Clerk of the proper Court to be compiled as part of the costs of court.

The foreign court reporters in reading Rule 188 have seized upon the unnumbered second paragraph of paragraph number 2 of Rule 188 and returned the depositions to the Clerk. The Clerk then, pursuant to Rule 206, 2, returns it to them as he takes the position, and properly, that he is not the custodian.

In short, it seems to me that the two Rules conflict to some degree, or in any event are confusing to foreign court reporters and clarification, simple if at all possible, should be made when the new Rules are promulgated.

Kindest regards,

JESS W. YOUNG, INC.

Jess
JY/vh

00670

"interrogatories", and a sentence has been added permitting the time and place of taking the deposition to be stated in the order or by means of notice.

Change by amendment effective February 1, 1973: The first sentence of paragraph 4 has been rewritten to make it clear that the taking of a deposition to perpetuate testimony is to be authorized only when the court is satisfied that a failure or delay of justice may be prevented thereby.

RULE 188. DEPOSITIONS IN FOREIGN JURISDICTIONS

1. Whenever the deposition, written or oral, of any person is to be taken in a sister state or a foreign country, or in any other jurisdiction, foreign or domestic, for use in this state, such deposition may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the State of Texas, or (2) before a person commissioned by the court in which the action is pending, and such person shall have the power, by virtue of such person's commission, to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory or a letter of request, or (4) pursuant to the means and terms of any applicable treaty or convention.

A commission, a letter rogatory, or a letter of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission, a letter rogatory or a letter of request that the taking of the deposition in any other manner is impracticable or inconvenient; and a commission, a letter rogatory or a letter of request may all be issued in proper cases.

2. Upon the granting of a commission to take the oral deposition of a person under paragraph 1 above, the clerk of the court in which the action is pending shall immediately issue a commission to take the deposition of the person named in the application at the time and place set out in the application for the commission. The commission issued by the clerk shall be styled: "The State of Texas." The commission shall be dated and attested as other process; and the commission shall be addressed to the several officers authorized to take depositions as set forth in Section 20.001, Civil Practice and Remedies Code. The commission shall authorize and require the officer or officers to whom the commission is addressed immediately to issue and cause to be served upon the person to be deposed a subpoena directing that person to appear before said officer or officers at the time and place named in the commission for the purpose of giving that person's deposition.

Upon the granting of a commission to take the deposition of a person on written questions under paragraph 1 above, the clerk of the court in which the action is pending shall, after the service of the notice of filing the interrogatories has been completed, issue a commission to take the deposition of the person named in the notice. Such commission shall be styled, addressed, dated and attested as provided for in the case of an oral deposition and shall authorize and require the officer or officers to whom the same is addressed to summon the person to be deposed before the officer or officers forthwith and to take that person's answers under oath to the direct and cross interrogatories, if any, a copy of which shall be attached to such commission, and to return without delay the commission, the interrogatories and the answers of the person thereto to the clerk of the proper court, giving his official title and post office address.

3. Upon the granting of a letter rogatory under paragraph 1 above, the clerk of the court in which the action is pending shall issue a letter rogatory to take the deposition of the person named in the application at the time and place set out in the application for the letter rogatory. The letter rogatory issued by the clerk shall be styled, dated and attested as provided for in the case of a commission. The letter rogatory shall be addressed: "To the Appropriate Authority in [here name the state, territory or country]". The letter rogatory shall authorize and request the appropriate authority to summon the person to be deposed before the authority forthwith and to take that person's answers under oath to the oral or written questions which are addressed to that person; the letter rogatory shall also authorize and request that the appropriate authority cause the deposition of the person to be reduced to writing, annexing to the writing any items marked as exhibits and to cause the written deposition, with all exhibits, to be returned to the clerk of the proper court under cover duly sealed and addressed.

4. Upon the granting of a letter of request, or any other device pursuant to the means and terms of any other applicable treaty or convention, to take the deposition, written or oral, of any person under paragraph 1 above, the clerk of the court in which the action is pending shall issue a letter of request or other device to take the deposition of the person named in the application at the time and place set out in the application for the letter of request or other device. The letter of request or other device shall be styled in the form prescribed by the treaty or convention under which the deposition is to be taken, such form to be presented to the clerk by the party seeking the deposition. Any error in the form of the letter of request or other device shall be waived unless objection thereto is filed and served on or before the time fixed in the order granting the letter of request or other device.

5. Evidence obtained in response to a letter rogatory or a letter of request need not be excluded

Eddie Morris Court Reporters, Inc.
6243 N.W. Expressway, Suite 430
San Antonio, Texas 78201
(512) 734-5396

1/31/91

HJH, TRCP 206(5)
SCAC Subc
+ Agenda

TELECOPIER TRANSMITTAL SHEET

DATE: 1/30/90

TO: Luke Soules

FROM: EDDIE MORRIS

SENDING TO TELECOPIER NUMBER: 224-7073

NUMBER OF PAGES (INCLUDING THIS PAGE) _____

IF ALL PAGES ARE NOT RECEIVED, PLEASE CALL 512-734-5396 AND ASK FOR _____

MESSAGE

Luke, This is a letter from Tinsman + Houser substantiating my discussion with you earlier that Rule 206.2 will increase the costs of original depositions + interrogatories The court reporting community cannot survive this type of situation. Thanks — EDDIE.

OUR TELECOPIER NUMBER IS: 734-7962

THE LAW OFFICES OF
TINSMAN & HOUSER
INCORPORATED

FRANKLIN D. HOUSER
MARGARET M. MAISEL
BRUCE M. MILLER
DANIEL J. T. SCIANO
ROBERT SCOTT
RICHARD TINSMAN
JOHN F. YOUNGER, JR.

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DAVID G. JAYNE
OF COUNSEL

ONE RIVERWALK PLACE, 14TH FLOOR
700 NORTH ST. MARY'S STREET
SAN ANTONIO, TEXAS 78205
(512) 225-3121

January 29, 1990

Sibley McConnico & Beck

Mr. G. Thomas Coghlan
LANG, LADON, GREEN,
COGHLAN & FISHER
1700 NCNB Plaza
San Antonio, Texas 78205

Re: Cause No. 89-CI-09116
Universal Underwriters Insurance
Company vs. Constant C. Laskowski

Dear Mr. Coghlan:

Enclosed with regard to the referenced cause is a copy of Cross-Questions we are submitting to the Custodian of Records for:

Dr. James Strauch Dr. Barry Beller

In addition, pursuant to Rule 206.2, Texas Rules of Civil Procedure, request is hereby made that you produce for inspection and photocopying the original deposition transcripts, including all exhibits attached thereto, of these records as soon as the same are received by your office.

Please call my secretary, Mrs. Sylvia Escobedo, and let her know when these transcripts can be picked up. We will photocopy them and return them to you immediately.

Very truly yours,

TINSMAN & HOUSER, INC.

Rey Perez

Rey Perez

RP/sse
Enclosure
cc: Mr. Constant Laskowski
Eddie Morris Court Reporters

4543.001 high Uno

TRCP 206

JESS W. YOUNG, INC.
LAWYER
P. O. BOX 15948
SAN ANTONIO, TEXAS 78212
TELEPHONE (512) 490-5299

JESS W. YOUNG

RONALD S. SCHMIDT
OF COUNSEL

10-16-89
SB

October 12, 1989

HNH, SCAC Subc Agenda COAS Tex Yo Justice Hecht

Mr. Luke Soules, III
c/o Soules & Wallace
Republic of Texas Plaza Bldg.
175 E. Houston Street
San Antonio, TX 78205

Dear Luke:

Confirming my conversation with you of the hiatus between Rules 188 (Foreign Jurisdiction Depositions) and 206 (Domestic Depositions and Return) please note the highlighted portions.

As I explained to you, I had reason to take out-of-state depositions in my daughter's divorce case, and this led to the problem of the court reporter in the foreign jurisdiction adhering to Rule 188 and returning the depositions and bill of costs back to our District Clerk. On such occasion, they were returned to the court reporter in the foreign jurisdiction, both deposition and cost bill.

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In short, it seems to me that the two Rules conflict to some degree, or in any event are confusing to foreign court reporters and clarification, simple if at all possible, should be made when the new Rules are promulgated.

Kindest regards,

JESS W. YOUNG, INC.

Jess
JY/vh

00674

together with a statement of the reasons given by the witness for making such changes. The changes and the statement of the reasons for the changes shall be attached to the deposition by the deposition officer. The deposition transcript and any changes shall then be subscribed by the witness under oath, before any officer authorized to administer an oath, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the witness does not sign and return the original deposition transcript within twenty days of its submission to him or his counsel of record, the deposition officer shall sign a true copy of the transcript and state on the record the fact of the waiver of examination and signature or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor. The copy of the deposition transcript may then be used as fully as though signed, unless on motion to suppress, made as provided in Rule 207, the Court determines that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(Added Dec. 5, 1983, eff. April 1, 1984; amended July 15, 1987, eff. Jan. 1, 1988.)

This is a new rule effective April 1, 1984. Former Rule 205 is incorporated into Rule 204. This new rule is former Rule 209 with modification. The modification gives the court reporter authority to file an unsigned deposition for both party and non-party witnesses.

Comment to 1988 Change: The amendments to this rule are to update the rule to conform to the usual practices used in finalizing the deposition.

RULE 206. CERTIFICATION BY OFFICER; EXHIBITS; COPIES; NOTICE OF DELIVERY

1. Certification. The officer shall attach as part of the deposition transcript a certificate duly sworn by such officer which shall state the following:

(i) that the witness was duly sworn by the officer;

(ii) that the transcript is a true record of the testimony given by the witness;

(iii) the amount of charges for the officer's preparation of the completed deposition transcript and any copies of exhibits;

(iv) that the deposition transcript was submitted on a specified date to the witness or to the attorney of record for a party who was the witness for examination, signature and return to the officer by a specified date;

(v) that changes, if any made by the witness, in the transcript and otherwise are attached thereto or incorporated therein;

(vi) that the witness returned or did not return the transcript;

(vii) that the original deposition transcript, or a copy thereof in event the original was not returned to the officer, together with copies of all exhibits, was delivered or mailed in a postpaid properly addressed wrapper, certified with return receipt requested, to the attorney or party who asked the first question appearing in the transcript for safekeeping and use at trial;

(viii) that a copy of the certificate was served on all parties pursuant to Tex.R.Civ.P. 21a.

The officer shall file with the court in which the cause is pending a copy of said certificate, and the clerk of the court where such certification is filed shall tax as costs the charges for preparing the original deposition transcript and making and attaching copies of all exhibits to the original deposition.

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.

3. Exhibits. Original documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to the deposition transcript and may be inspected and copied by any party, except that the person producing the materials may (a) offer copies to be marked for identification and annexed to the deposition transcript and to serve thereafter as originals if he affords to all parties fair opportunity at the deposition to verify the copies by comparison with the originals, or (b) offer the originals to be marked for identification, in which event the materials may then be used in the same manner as if annexed to the deposition transcript. In the event that original exhibits rather than copies are marked for identification, the deposition officer shall make copies of all original exhibits to be annexed to the original deposition transcript for delivery, and shall thereafter return the originals of the exhibits to the witness or

HJH

Agenda

M E M O R A N D U M

TO: Sub-Committee on Rules 166-216

FROM: Steve McConnico

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

DATE: January 30, 1990

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

As to TRCP 215, Phillip Gilbert of Dallas recommends specific limitations on those cases where extreme sanctions may be applied. Others have also suggested that there should be some limitation on the use of extreme sanctions. We believe this matter should be submitted to the COAJ for study.

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WILLIAM W. KILGARLIN
OF COUNSEL

September 15, 1989

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

RE: Proposed amendments, Texas Rules of Civil Procedure

Dear Mr. Chief Justice:

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

6. TRCP 215. I could find no proposed changes for this rule. I share the court's concern that there has been abuse of this rule, with people seeking sanctions on the slightest pretext. I think the court might consider going back to the rule that before sanctions can be assessed there must be a violation of a court order. Alternatively, there needs to be a strengthening of the rule in respect to frivolous initiating motions for sanctions.

Sincerely,

William W. Kilgarlin

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November 28, 1989

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

RE: Comment on Proposed Rules Changes Regarding Discovery

Comm on

Dear Justice Hecht:

Rules 166b(6) and 215(5) = "Good Cause" Exception. With respect to the "good cause" exception to admit untimely disclosed evidence, Rule 166b(6) states that supplementation is required not less then 30 days before trial "unless the court finds that a good cause exists for permitting or requiring later supplementation," and Rule 215(5) states that late-supplemented evidence is excluded "unless the trial court finds that good cause sufficient to require admission exists." First, these two rules should be made to read exactly the same, or confusion will arise. I prefer the wording in Rule 215(5). Second, and more importantly, the wording in the present rules has caused several recent cases to expressly or impliedly hold that the "good cause" which must be shown only encompasses evidence related to whether the late-supplemented evidence should be or is required to be admitted into evidence. Most courts, including the Supreme Court, have expressly or impliedly held, and I believe correctly, that the "good cause" which must be shown must relate to why the discovery request was not timely supplemented. But, the rules are not clear on this point. I suggest clarifying the issue by the following amendments. Amend Rule 166b(6) to read as follows:

> A party. . . unless the court finds good cause exists for the late supplementation and that good cause exists for requiring late supplementation.

Then, amends Rule 215(5) to read as follows:

> A party . . . unless the court finds good cause exists for the failure to initially respond or for late supplementation and that good cause exists for requiring the admission of the undisclosed, improperly disclosed or untimely disclosed evidence.

Thus, the rules will read more like each other, and the "good cause" exception would expressly apply to (1) why the evidence was not properly/timely disclosed and (2) why such evidence is required to be admitted. This should settle any conflicting case law.

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Phillip W. Gilbert
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November 22, 1989

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

Re: Proposed Amendments to Texas Court Rules

Dear Justice Hecht:

I am writing in connection with the proposed amendments to the Texas Court Rules. I have been practicing law in Texas since 1961. I am Board Certified in Civil Trial Law and in Civil Appellate Law by the Texas Board of Legal Specialization. As chairman of a litigation section in our law firm, I have become increasingly aware of a regressive tendency among Texas state courts to decide cases on the basis of "sanctions" rather than upon their merits.

As a victim of discovery delays and obstacles, I applaud the use of sanctions for discovery violations. However, use of the most extreme sanctions (stricken pleadings, default or dismissal) completely changes the course of an entire case and prevents the case from being decided on its merits. These extreme sanctions provide tremendous temptations to procure victory by a plaintiff or a defendant based upon the most inconsequential discovery mistakes by their opponent. At times, even when there was no violation, attorneys are able to convince trial courts that there was a violation, by the clever use of pure rhetoric combined with a measure of deception. Current review standards leave these miscarriages of justice largely unchecked.

The dangers to the judicial process in diverting a case from a trial on the merits are compounded by leaving the choice of sanctions completely in the hands of one person --the trial judge. The Federal system has recognized this jeopardy to the judicial system by requiring certain standards to be met before permitting these ultimate sanctions.

I would propose that Rule 215, Tex. R. Civ. P. be amended to provide, in a new paragraph 2d, as follows:

d. Standards for Extreme Sanctions. Before a trial court may make an order under paragraphs (3), (4) or (5) of paragraph 2b of this rule, the trial court must (1) base such sanctions on evidence of a contumacious refusal to provide discovery; (2) explain how lesser sanctions have been considered and why they are inadequate; (3) identify a nexus between the misconduct and any prejudice to the opponent; and (4) determine that the fault rests, at least partly, with the client rather than their attorney.

Unless corrected, the problem of improperly applied sanctions will act like a cancer on our state's jurisprudence. The federal courts have already recognized this problem and are dealing with it by court decision. It would be a great boon to our profession to have adequate standards appear in our rules of procedure. A system of cost awards and "fines" will police most discovery abuses without victimizing innocent plaintiffs and defendants. The ability to win cases by sanction has made our state trial courts battlegrounds for "Discovery Wars" and has diverted the trial courts from their primary task -- to try cases on their merits.

Some of the federal cases dealing with standards for extreme sanctions are as follows: John v. State of Louisiana, 828 F.2d 1129, 1132 (5th Cir. 1987); Marshall v. Segona, 821 F.2d 763, 768 (5th Cir. 1980); M.E.N. Co. v. Control Fluidics, Inc., 834 F.2d 869, 873 (10th Cir. 1987); Shea v. Donohoe Construction Co., 795 F.2d 1071, 1075 (D.C. Cir. 1986); Fjelstad v. American Honda Motor Co., 762 F.2d 1334, 1338 (9th Cir. 1985); Halaco Engineering v. Costle, 843 F.2d 376, 381 (9th Cir. 1988); Dove v. Codesco, 569 F.2d 807, 810 (4th Cir. 1978). The above proposal combines principles expressly set forth in Halaco and John, supra.

I understand that Justice Kilgarlin has proposed some similar moderation to the extreme sanctions itemized in Rule 215. Although he and I have virtually opposite views in many areas, we apparently agree that the current Texas sanctions system is seriously defective.

RECOMMENDED NEW RULE
RELATIVE TO REQUEST AND FEE FOR A JURY TRIAL

Rule 216. Request and Fee for Jury Trial

1. **Request.** Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than thirty days after the service of the last pleading directed to such issue, or not less than thirty days in advance of the date set for trial of the cause on the non-jury docket, whichever is earlier. Such demand may be endorsed upon a pleading of the party. [~~No jury trial shall be had in any civil suit, unless a written request for a jury trial is filed with the clerk of the court a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance.~~]

2. **Jury Fee.** 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.

3. **By the Court.** Issues not demanded for trial by jury as provided by paragraph 1 herein, shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the curt in its discretion, upon motion and payment of the proper fee, may order a trial by a jury of any or all issues.

Supe

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REAVIS McGRATH
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LOS ANGELES

January 11, 1990

TO: SUPREME COURT ADVISORY COMMITTEE

FROM: Subcommittee on Rules 15 to 165

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

16. Rule 216. The proposed change here seeks to make the request for a jury trial consistent with the practice in federal court in which a party must make a demand for trial within a prescribed period of time after the filing of the first pleading. The subcommittee is of the view that the rule was only recently amended, effective January 1, 1988, and that there is *no* compelling reason for change at the present time.

4543.001

JUDGE B. F. (BILL) COKER
3823 Calculus Drive
Dallas, Texas 75244
(214) 247-8974

December 30, 1989

Mr. Luther H. Soules
Chairman, Rules Advisory Committee
175 E. Houston Street
San Antonio, Texas 78205-2230

Re: Suggested rule changes

Dear Mr. Soules:

Enclosed are recommended changes and additions to the Texas Rules of Civil Procedure. Additions to existing rules and new rules are designated by underlined text of the rule. Portions of existing rules which are deleted are enclosed in brackets and lined through. Please submit these suggestions to your committee for consideration.

Request and Fees for a Jury Trial:

I recommend that Texas adopt a modified version of Rules 38(b) and 39(b), Federal Rules of Civil Procedure.

Texas courts are being subjected to greater and greater scrutiny relative to their efficiency. Many people accept the idea that our judicial system was not intended to be efficient. I am on of those people. However, it is reasonable to incorporate efficiencies where those efficiencies do not detract from the judiciary's obligation to provide a proper forum for the resolution of disputes.

Frequently, the court's ability to schedule and manage its docket is hampered, if not frustrated, by late requests for cases to be decided by a jury. Many times these late requests are part of a trial strategy intended to frustrate the opposing party. Many times attorneys come to expect judges to overlook the attorneys' failure to make a timely request for a jury.

Better discipline in the timeliness of requesting a jury has the potential to help attorneys, clients, and courts.

My recommendation is to require jury requests to be made within thirty days after the service of the live trial pleadings, or not later than thirty days before trail date, whichever is earlier.

Such a requirement will permit court personnel to provide better management over the business aspects of the court without significantly reducing any party's right to a jury trial.

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A copy of my proposed change to Rules 216 is attached to this letter.

Rule 241 [Repealed].

Rule 242. Evidence needed for Default Judgment

(a) Discretion of the Court. Where the plaintiff has given notice of the amount, or the amounts, to be requested against the defendant, or all of several defendants, the court in its discretion, may require evidence as to plaintiff's claim, or claims, or any part thereof.

(b) Where Evidence is Required by the Court. As to any portion of plaintiff's claim for which the court has elected to require evidence pursuant to sub-paragraph (a), the court shall hear evidence as to damages and shall render judgment therefore.

(c) Where Evidence not Required by the Court. As to every portion of plaintiff's claim for which the court has not elected to require evidence pursuant to sub-paragraph (a), the court shall enter judgment in the amount, or the amounts, requested pursuant to Rule 47a.

Rule 243. [Repealed].

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My recommendations relate to changes in the rules relative to:

1. claims for damages;

2. reading and signing minutes;

3. assessment of costs associated with service of process and other notices; and

4. requests and fees for a jury trial.

Each area of recommended change is addressed separately.

Claims for Damages:

My recommended changes which are associated with claims for damages relate to pleading jurisdictional amounts and granting judgments on default.

Rule 47, Texas Rules of Civil Procedure, as it now exists, significantly increases the cost of litigation and wastes

valuable judicial resources. This rule makes it impossible to plead a claim for unliquidated damages without being required to re-plead the same claim. The rule requires a statement that only advises the opposing party that the claim exceeds the jurisdictional limits of the court. Further, the rule invites the opposing party to except to the lack of a specific amount claimed, and follows that with a mandate that the trial court sustain the special exception and require the pleader to re-plead with more specifics. On the other hand, if the pleader anticipates the special exception and pleads a specific, a trial would be required to sustain a special exception that claimed the pleader failed to follow Rule 47. Basically, this creates a "Catch 22" because a litigant seeking damages cannot plead in such a way as to avoid the necessity of re-pleading.

As a housekeeping matter, I also recommend sub-part (b) of Rule 47 be amended to require the assertion that the claim is within the jurisdictional limits rather than above the minimum limit. The rule, as now written, prevents affirmatively stating a claim within the limits of a limited-jurisdiction court.

In addition to the above recommendations relative to Rule 47, I recommend repealing Rules 241 and 243, enacting two new rules (which will be referred to as Rules 47a and 242).

Rule 47a requires each damages claimant to advise the person from whom damages is sought the amount of damages which will be requested from the court in the event no answer is filed in response to the suit. Such a rule provides information from which a defendant can assess maximum risk and make a business decision relative to the desirability of contesting the claim.

Rule 242 replaces the current Rules 241 and 243.

Rules 241 and 243 speak to a dichotomy the law has created relative to liquidated and unliquidated claims. This dichotomy serves very little, if any, purpose. In limited circumstances, it permits the law to indulge in a presumption upon default. However, in my view, that presumption is not consistent with reality.

In suits involving unliquidated claims, we presume that a defaulting party admits liability due to fault, but that same defaulting party does not admit the amount of damages caused by the admitted fault.

I believe my experiences would be similar to those of other judges across the state. Letters I have received from defendants frequently admit they had no money to pay damages, but they deny they did anything wrong. Human nature is such that people

cannot admit failure, but they can and do admit a debt. People will admit a debt, even an unliquidated debt. Our presumption is wrong.

It is also my belief that defaulting defendants do not rely on the Court to conduct hearings for the presentment of evidence of unliquidated debts.

With those basic beliefs, I recommend that the rules be amended to provide trial courts with an option of hearing evidence or granting judgment without hearing evidence in those cases where the claimant has advised the opposing party of the amount to be sought on default.

These proposed new Rules 241 and 243 will permit trial courts which have computer support to automatically process default judgments if the Court is satisfied with the reasonableness of the amounts claimed. The Court will also have the option of requiring evidence if a claim appears to be out of the ordinary.

By changing these rules to permit automated judgments, valuable Court resources and time can be devoted to contested issues.

A copy of my proposed changes to Rules 47, 47a, 241, 242, and 243 is attached to this letter.

Rule 241 [Repealed].

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TRCP 242

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January 25, 1990

Supreme
ATRP70

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

RE: Proposed Rule Changes

III. New Rule Regarding Motions in Limine

A. Create a new rule which provides that all Motions in Limine of all parties in a jury trial case shall be filed in the papers of the cause at least 7 days before trial.

B. The new rule would further provide that in the event the Motion was not timely filed, the Court would have the discretion to consider a late filed Motion in Limine if the Court found that the opponent was not prejudiced because of the late filing or that justice required consideration of the contents of the Motion. In short, give the trial court discretion, but state that the trial court should not hear the late filed Motion in general, but it would have discretion to consider is the merits of the trial required consideration.

C. Further, the trial court would be told that it could consider what sanctions, if any, in its discretion would be appropriate if a party wanted to urge an untimely Motion and the Court found that justice required a consideration and even granting of the Motion. In short, some message to the trial court that it has the power to prevent lawyers from "late filing" even though a particular trial required a that a late motion to be considered.

Judge, the reasons for the above rules are many, but I will give you only a few.

MOTIONS IN LIMINE

Nothing in our rules, to my knowledge, even mentions Motions in Limine. But they are a vital part of a trial jury practice, a technique for the trial court to get involved early in what the case is <u>really about.</u> Also, it is way to alert the lawyers about evidentiary issues of vital importance.

All experienced trial lawyers have had the experience of handling in the Motion stage the decisive issues in the case: whether "other accident" would be admitted; whether the plaintiffs drinking would come in etc. The list could go on and on. I am sure that you have had many cases that turned on the ruling at the Motion stage.

Why not provide a simple rule that the lawyer must file these critical motions 7 days before trial. Why wait? Why put off? Why leave uncertain? Why leave it to local rules and local "practice"?

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BEN F. VAUGHAN, III
OF COUNSEL

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

November 26, 1989

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

Dear Judge Hecht:

6. The following proposed amendments use the word "nonjury": Texas Rules of Appellate Procedure 41(a)(1) and 54(a). The following proposed amendments use the word "non-jury": Texas Rules of Appellate Procedure 41 comment, 52(d), 52 comment, and 54 comment. The court may wish to standardize the terminology. The term "non-jury" currently appears in Texas Rules of Civil Procedure 90, 156, 216(1), 249, 307, and 542. The term "nonjury" currently appears in Texas Rule of Civil Procedure 324(a) and Texas Rule of Judicial Administration 6(b)(2).

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

Respectfully,

Charles A. Spain, Jr.

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November 26, 1989

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

Respectfully,

Charles A. Spain, Jr.

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Court of Appeals
Eighth Judicial District

500 CITY-COUNTY BUILDING
EL PASO, TEXAS
79901 - 2490
915 546-2240

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HJH.

RCP 324 Sub C
Agenda
COAS

January 9, 1990

Mr. Luther H. Soules III
Soules & Wallace
10th Floor, Republic of Texas Plaza
175 East Houston Street
San Antonio, Texas, 78205

Re: Amendments to TRAP & TRCP

Dear Mr. Soules:

For some time I have been concerned about consideration of "no evidence" points of error when that issue had not been raised in an objection or motion in the trial court. As I read Tex. R. Civ. P. 324 a "no evidence" point need not be raised in a motion for new trial. We have know since the holdings in J. Weingarten, Inc. v. Razey, 426 S.W.2d 538 (Tex. 1968) that a no evidence point could get a reversal, if not a rendition, where the proper complaint had not been made for a rendition.

In the enclosed opinion in First American Title Company v. Prata I have attempted to raise the issue in a footnote. It seems to me the courts holding in Aero Energy clearly conflicts with the present language in Rule 324. I also realize that at the time that opinion was written it was consistent with the language then in the rule. But it seems the Courts of Appeals and perhaps the Supreme Court also are still following the Aero Enery holding after the rule change removed the language about "a complaint which had not otherwise been ruled upon."

Of course if a "no evidence" point is not required to be raised by Rule 324, and was not raised by the four procedures Justice Calvert wrote about in Texas Law Review, then are we not back to "resurrecting the rejected fundamental error rule" Justice Pope mentioned in Litton Industrial Products, Inc. v. Gammage, 668 S.W.2d 319 at 324 (Tex. 1984)?

I have no idea who on your committee reviews screwball issues an appellate judges raise for the first time in dictum in a footnote. A copy goes forward to a couple of people who may review these nutty questions.

Sincerely,

Max N. Osborn

cc: Justice Nathan Hecht
Prof. Wm. Dorsaneo III

00700

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

FIRST AMERICAN TITLE COMPANY OF EL PASO AND CORONADO STATE BANK, Appellants, v. SYLVIA V. PRATA, Appellee.	)	No. 08-88-00235-CV Appeal from 243rd District Court of El Paso County, Texas. (TC# 86-4066)

O P I N I O N

This suit was filed by the owner of a house who lost a possible sale when the prospective buyer learned of pending condemnation proceedings which had been filed prior to the owner's purchase of the property from the Bank. The owner sued the Bank for damages under the Deceptive Trade Practices Act and the company which issued the title policy under the Texas Insurance Code. Based upon a favorable jury verdict, judgment was entered for the owner of the house. We reverse and remand the judgment against the Title Company and reverse and render judgment for the Bank.

On February 7, 1984, Coronado State Bank purchased a house which had been owned by Sylvia Prata's mother and stepfather at a sheriff's sale. The day before the foreclosure sale, El Paso Community College had filed a condemnation statement to obtain the same property. No lis pendens notice was filed and notice of the proceedings was not served upon the owner. Without any notice of the condemnation proceedings, the Bank sold the house to Sylvia Prata for $56,000.00 on May 18, 1984, and conveyed title to her by a special

warranty deed. The closing was handled by First American Title Company of El Paso which issued a title commitment and a title insurance policy. The title commitment made no reference to condemnation proceedings, but the title insurance policy had an exclusion as to condemnation proceedings. The College did not serve anyone as owner of the property until Sylvia Prata was served on May 21, 1987, more than three years after the condemnation statement had been filed.

Sylvia Prata testified that the attorney for the Bank represented to her that she would receive "free and clear title" or "clear title" to the house. She said, at the closing, representatives of the Title Company represented that she was getting free and clear title to the property.

In November 1984, Prata entered into a contract to sell the house to Tito Gonzalez, a realtor who was acting as trustee for William Abraham, for $250,000.00. That contract had a proviso that it was "subject to inspection and approval of property within 20 working days." The property was never inspected for any type of approval and no sale was consummated because of the pending condemnation proceedings.

In answer to questions submitted, the jury found: (1) that the Title Company engaged in a false, misleading or deceptive act or practice or made misrepresentations in connection with the purchase of the property or in the issuance of the title policy on the property, (2) that such conduct was a producing cause of damages to Prata, (3) that the Title Company and Prata entered into an agreement based upon the title commitment instrument, (4) that the Title Company breached that agreement, (4A) that such breach was a proximate cause

of damages to Prata, (5) that Prata sustained damages of $39,000.00 for loss of a sale, $5,850.00 for loss of rental value, $2,000.00 for loss of credit reputation in the past, $9,500.00 attorney's fees in the condemnation proceeding, $2,000.00 for travel expenses and that $39,000.00 was the difference in the value of the property as received and the value it would have had if it had been as represented, $2,000.00 for inconvenience, $1,000.00 for physical pain in the past and $2,500.00 for mental anguish in the past.

With regard to the Bank, the jury found: (6) that the Bank engaged in a false, misleading or deceptive act or practice in the sale of the house, (7) that such conduct was a producing cause of any damages of Prata, (8) damages identical to those found as to the Title Company except they increased the attorney's fees for condemnation proceeding to $9,713.75, and (9) failed to find that the Bank knowingly committed the false, misleading acts or practices. The jury found Prata's reasonable attorney's fees for trial to be $19,213.75, with additional attorney's fees of $16,750.00 depending on appellate proceedings. They failed to find Prata's suit against the Bank and against the Title Company was groundless and brought in bad faith or for harassment.

Under the statute then in effect, the court trebled the damages against the Title Company and with prejudgment interest awarded a recovery of $192,685.63, and awarded a recovery of $79,735.63 against the Bank. In addition, the judgment awarded attorney's fees as found by the jury, plus interest and costs.

Initially, a contention is made that the trial court lacked subject matter jurisdiction and that it erred in overruling a plea in abatement. The argument presented is that there was no justiciable

issue ripe for adjudication because all issues were contingent upon the condemnation case which had not been decided at the time this case was tried. The assertion is made that only an advisory judgment could be entered prior to disposition of the exercise of any right of condemnation. Appellants rely upon **City of Garland v. Louton**, 691 S.W.2d 603 (Tex. 1985) and **California Products, Inc. v. Puretex Lemon Juice, Inc.**, 160 Tex. 586, 334 S.W.2d 780 (1960). To be an advisory decision, the judicial determination must be based upon some hypothetical or contingent situation. **Freeport Operators, Inc. v. Home Insurance Company**, 666 S.W.2d 566 (Tex.App.--Houston [14th Dist.] 1984, no writ). The facts in this case were established at the time of trial and the pleadings were based upon prior conduct involving these parties and a third party condemnor. Whether the condemnation case proceeded to its final disposition would not affect the claims asserted in this case since the condemnor had not been joined as a party defendant. The Bank's Points of Error Nos. One and Two and the Title Company's Point of Error No. Fifteen are all overruled.

Turning to the merits of the case, the controlling issue is not whether the Title Company or the Bank committed the acts found by the jury, but whether such conduct was a producing cause of the damages found by the jury. For the sake of discussion only, we assume that both Appellants committed the various acts found by the jury. With that assumption, did the Title Company's acts or misrepresentations in connection with the purchase of the property by Sylvia Prata or the issuance of the title insurance policy produce damages to her, all of which arose out of her failure to sell such property to William Abraham?

The Title Company asserts, in its third point of error, that

there was no evidence or insufficient evidence to support the jury finding of causation. The argument is made that the filing of the condemnation suit was the only producing cause of any damages sustained by Sylvia Prata. The Title Company argues that even assuming that there was a misrepresentation about the title at the time of the loan closing, the title which Prata received had absolutely nothing to do with her failure to complete the sale to William Abraham. We agree and note that the contention in this point of error perhaps should have been directed to the jury's answer to question number two as well as number five particularly since the reference to the motion for new trial relates to the answer to issue two as well as five. In any event, it is the contentions under the points and not the points themselves which are controlling. O'Neil v. Mack Trucks, Inc., 542 S.W.2d 112 (Tex. 1976).

The testimony with regard to the question of causation is set out verbatim from those persons who were involved in the sale. First, Sylvia Prata, the owner and prospective vendor, testified as follows:

> Q (BY MR. STEWART) Did you actually, yourself, attend at some point in December, any kind of meeting concerning this property?
>
> A Yes; I did.
>
> . . .
>
> Q And what was your understanding of that meeting?
>
> . . .
>
> THE WITNESS: They showed us the condemnation paper and said that the house had been condemned and I had to tell Mr. Gonzalez and I lost the sale.
>
> Q (BY MR. STEWART) Did you -- were you aware of

any other reason the sale was lost?

A Because of the condemnation.

Q Were you aware of any other reason?

A No.

Next, Mr. William Abraham, the prospective purchaser, testified as follows:

Q Okay. Did those problems have anything to do with the house or solely to do with this proceeding that came to your attention?

A Well, to be honest with you I didn't. I don't think we ever got to the -- to the inspection and approval stage. I think that shortly after submittal it had come to our attention or come not to my attention but to Mr. Gonzalez' attention in that there was some problem as far as condemnation that was down the road.

Q Were you interested in buying a property or was this condemnation proceeding it?

A No, sir.

Finally, Tito Gonzalez, the realtor who represented Mr. Abraham and had signed the purchase agreement in his capacity as trustee testified as follows:

Q And what happened with the contract?

A Well, the contract -- one thing that I asked Sylvia was to make sure it wasn't, you know, being condemned and she made sure and found out the opposite. It was being condemned. So that killed the contract.

There is no evidence the sale was not completed because Sylvia Prata had a defective title to the property, or her title insurance policy was not as represented to her or that she could not deliver clear title to the property. The only reason the sale fell

through was because a condemnation suit had been filed, a matter totally unrelated to any representations or misrepresentations made by the Title Company at the time of the closing of the sale by the Bank to Sylvia Prata.

In order to recover damages for any deceptive acts under Tex.Ins.Code Ann. art. 21.21 (Vernon 1981), it was necessary to prove that the conduct inquired about in question number one was a producing cause of any damages sustained by Sylvia Prata. **Weitzel v. Barnes**, 691 S.W.2d 598 (Tex. 1985); **Chambless v. Barry Robinson Farm Supply, Inc.** 667 S.W.2d 598 (Tex.App.--Dallas 1984, writ ref'd n.r.e.). A producing cause is "an efficient, exciting or contributing cause, ..." **Rourke v. Garza**, 530 S.W.2d 794 (Tex. 1975); **Dubow v. Dragon**, 746 S.W.2d 857 (Tex.App.-- Dallas 1988, no writ). Neither reliance nor forseeability are necessary elements of recovery. **Weitzel v. Barnes; Hycel, Inc. v. Wittstruck**, 690 S.W.2d 914 (Tex.App.--Waco 1985, writ dism'd). But, the proof must establish that the damages alleged were factually caused by the defendant's conduct. **Dubow v. Dragon; Rotello v. Ring Around Products, Inc.**, 614 S.W.2d 455 (Tex.Civ.App.--Houston [14th Dist.] 1981, writ ref'd n.r.e.). Where the evidence does not establish that the alleged false, misleading or deceptive act or practice was a producing cause of the plaintiff's actual damages, there is no cause of action. **MacDonald v. Texaco, Inc.**, 713 S.W.2d 203 (Tex.App.--Corpus Christi 1986, no writ).

In passing on a no evidence point, the reviewing court considers only that evidence and reasonable inferences therefrom viewed in its most favorable light and reject all evidence and reasonable inferences to the contrary. **Glover v. Texas General**

Indemnity Company, 619 S.W.2d 400 (Tex. 1981). We have found no evidence which suggests that the lost sale resulted from anything other than the condemnation suit. That conclusion is supported by the acknowledgment in Appellee's brief which, when analyzing the testimony of Mr. William Abraham, says "[h]e testified the reason he did not proceed further with the contract was that a pending condemnation came up." The loss of the proposed sale was not factually caused by any conduct of the Title Company and there is no evidence to support the jury finding of producing cause of any damages.

In passing on the insufficient evidence point, we consider all of the evidence, including that which is contrary to the verdict. **In re King's Estate**, 150 Tex. 662, 244 S.W.2d 660 (1951). In this case, there is no testimony from either of the parties to the proposed sale that the sale was not completed because Sylvia Prata did not have a good, merchantable title to the house in question. All of the evidence is that the sale could not be completed because the Community College had pending a condemnation suit. That controlling evidence which we consider on this point has been set out verbatim. We sustain the insufficient evidence argument also. Point of Error No. Three is sustained.

Since this point is directed only to the overruling of a motion for new trial, may we reverse and render when we sustain a no evidence contention? Under the holding in **J. Weingarten, Inc. v. Razey**, 426 S.W.2d 538 (Tex. 1968), we could not. In **Bluebonnet Express, Inc. v. Employers Insurance of Wausau**, 651 S.W.2d 345 (Tex.App.--Houston [14th Dist.] 1983, no writ), the Court, on motion for rehearing, 655 S.W.2d 327 (1983), with one judge dissenting, concluded that the holding in **Razey** was no longer applicable. That

case was tried to the court without a jury. More recently, in City of Garland v. Vasquez, 734 S.W.2d 92 (Tex.App.--Dallas 1987, writ ref'd n.r.e.), the Court concluded that where a no evidence point is first raised by assignment in a motion for new trial, the assignment is sufficient to obtain a remand for a new trial, but is not sufficient to obtain a rendition of judgment. That case was tried to a jury. See also Commercial Insurance Company of Newark, New Jersey v. Puente, 535 S.W.2d 948 (Tex.Civ.App.--Corpus Christi 1976, writ ref'd n.r.e.). We conclude, as did Justice Calvert, when he wrote on this issue nearly thirty years ago and said:

> The controlling consideration with an appellate court in passing on a point of error directed at the state of the evidence is not whether the point uses the preferable, or even the proper, terminology, but is whether the point is based upon and related to a particular procedural step in the trial and appellate process and is a proper predicate for the relief sought.

Robert W. Calvert, "No Evidence" and "Insufficient Evidence" Points of Error, 38 Texas L.Rev. 361 at 361-62 (1960). See also Robert W. Calvert, How an Errorless Judgment Can Become Erroneous, 20 St. Mary's L.J. 229 (1989). Having raised the sufficiency issue in only a motion for new trial and having raised a point of error complaining of the trial court's action on the motion for new trial, we can only grant a new trial when we sustain that particular point of error.[1]

---

1. A somewhat related problem arises from any current application of the holding in Aero Energy, Inc. v. Circle C Drilling Company, 699 S.W.2d 821 (Tex. 1985), that a no evidence point must be raised through one of five procedural steps, the last one of the five being a motion for new trial. We assume that case was tried under the 1978 language in Rule 324 which required a motion for new trial in order to present a complaint which had not otherwise been ruled upon. See Litton Industrial Products, Inc. v. Gammage, 668 S.W.2d 319 (Tex.

In a motion for judgment non obstante veredicto, the Bank asserted that it was entitled to judgment because there was no evidence that it had engaged in any false, misleading or deceptive act and it had not violated the Deceptive Trade Practices Act. The controlling issue revolves around the testimony of Sylvia Prata that the Bank's attorney represented to her that following the foreclosure sale, the Bank would transfer to her clear title to the property in question. She testified he told her "the reason he was doing it this way was to guarantee us we would have clear title to whatever we were purchasing." She also said "after Coronado Bank already owned the property that was going to get free and clear title."

The Bank in fact transferred the property by a special warranty deed. There has been no breach of warranty and it was undisputed at the time of oral argument that Sylvia Prata owned fee title to the property in question. Accepting Sylvia Prata's testimony as true, we find no misrepresentation as to what she said she was told. The terms "good title" and "clear title" are synonymous, and mean that the land should be free from litigation, palatable defects and grave doubts and should consist of both legal and equitable title.

1984). The court restated its holding in **Steves Sash & Door Company, Inc. v. Ceco Corporation,** 751 S.W.2d 473 (Tex. 1988), in a case apparently tried several months after the April 1, 1984 amendment to Rule 324 which deleted the language about presenting a complaint which had not otherwise been ruled upon. We find nothing in Rule 324 which requires a complaint about "no evidence" in a motion for new trial as a prerequisite to a complaint on appeal. We are unable to determine if **Security Savings Association v. Clifton,** 755 S.W.2d 925 (Tex.App.--Dallas 1988, no writ) and **Tribble & Stephens Co. v. Consolidated Services, Inc.,** 744 S.W.2d 945 (Tex.App.--San Antonio 1987, writ denied), were tried before or after April 1, 1984. If Tex.R.App.P. 52(a) is the basis for such requirement, and no court has said so, does that rule conflict with Tex.R.Civ.P. 324(a)?

Veselka v. Forres, 283 S.W. 303 (Tex.Civ.App.--Austin 1926, no writ). Likewise, merchantable, marketable title means a title free and clear from reasonable doubt as to matters of law and fact and is one not clouded by any outstanding contract, covenant, interest, lien or mortgage sufficient to form a basis of litigation. Lieb v. Roman Development Company, 716 S.W.2d 653 (Tex.App.--Corpus Christi 1986, writ ref'd n.r.e.). In this connection, it should be noted that condemnation does not involve the question of title to land. Thompson v. Janes, 245 S.W.2d 718 (Tex.Civ.App.--Austin), aff'd, 251 S.W.2d 953 (Tex. 1952); 32 Tex.Jur. 3d, Eminent Domain, sec. 177).

In Lansburgh v. Market St. Ry. Co., 220 P.2d 423 (Cal.App.Div. 1950), 21 A.L.R. 2d 785, the Court considered an issue involving a proposed condemnation and an agreement to sell land in San Francisco. In that case, there was a recision after the purchaser learned of the proposed condemnation, but prior to the proceedings actually being commenced. Suit was filed to recover a deposit paid on the contract to purchase. Recovery was denied. The Court noted that at the time for performance, no right existed because of the contemplated future condemnation. It noted the condemning authority had no more than the same inchoate right of eminent domain which they had in all other properties within their boundaries, "a right which clearly is not an encumbrance or defect of title." The Court went on to note that in California, the first step with regard to condemnation "is the issuance of summons, ..." A similar rule applies in Texas. In Rayburn on Condemnation, sec. 13.08 (1989), the author states:

> It is now settled law in Texas, that until the statutory provisions as to service and return of notice have been complied with, that there is no jurisdiction that can be exercised over the land, or real estate in question, ...

This is the clear holding in **City of Houston v. Kunze**, 153 Tex. 42, 262 S.W.2d 947 (1953); **Parker v. Ft. Worth & D. C. Ry. Co.**, 84 Tex. 333, 19 S.W. 518 (1892); **Rotello v. Brazos County Water Control & Improvement District**, 574 S.W.2d 208 (Tex.Civ.App.--Houston [1st Dist.] 1978, no writ). In the latter case, Chief Justice Coleman noted that condemnation proceedings must be conducted in strict compliance with the statute authorizing the procedure. The Court concluded that where the condemnation proceedings which are pending in the county court are void for want of power or jurisdiction, such proceedings may be enjoined. **See also** 32 Tex.Jur.3d, Eminent Domain, sec. 216. We can only conclude that where the proceedings are void and the court has no jurisdiction, the petition for condemnation could just as well have been posted on the public square or the back of a cow barn for all the effect it would have. The Bank, having delivered to Sylvia Prata good, clear title to the land in question, was not guilty of any false, misleading or deceptive practice and did not violate the Deceptive Trade Practices Act. If the filing of a condemnation proceeding without proper notice to Sylvia Prata resulted in a loss of sale, the resulting damages arose from the conduct of the Community College and not the Bank. Points of Error Nos. Four and Five are sustained.

That part of the judgment of the trial court awarding damages against First American Title Company of El Paso is reversed and the cause remanded for a new trial and that part of the judgment

awarding damages against Coronado State Bank is reversed and rendered that plaintiff have and recover nothing from the Bank, and the suit as against the two defendants is severed.

/s/Max N. Osborn
December 27, 1989 MAX N. OSBORN, Chief Justice

Before Panel No. 3
Osborn, C.J., Fuller and Woodard, JJ.

(Publish)

Court of Appeals
Eighth Judicial District

500 CITY-COUNTY BUILDING
EL PASO, TEXAS
79901 - 2490
915 546-2240

324
TRAP 5
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November 22, 1989

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

Dear Justice Hecht:

I take this opportunity to write concerning the proposed changes in the Texas Appellate Practice Rules as set forth in the November issue of the Texas Bar Journal.

With the present Rule 324 a motion for new trial is required in only limited instances and most often is filed to assert insufficency of the evidence. Even in a complicated case with numerous issues, that can be done in 10 days. In about 90% of the cases where a motion for new trial is filed it is overruled by operation of law and there is no hearing and no order entered by the trial judge. Yet, we allow 75 days for this to happen. That is a waste of time in the appellate procedure and one which can be reduced without adversely affecting substantial appellate rights. If the Court is interested in reducing delay I would urge that all motions for new trial be filed and amended within 20 days after the signing of the judgment and acted upon or overruled 30 days later. That would reduce the time table by 25 days from the current standards. Requiring the filing of a bond within another 10 days would mean the show would be on the road 60 days after judgment and not 90 days under the present rules. This saving of 30 days on the 8,905 appeals filed last fiscal year would have reduced the appellate time table for disposition of those cases by a time equal to 742 years. That is not a small item.

Having spent 18 years as an appellate lawyer I would not want to see changes that would adversely affect the appellate rights of any litigant. But, after 16 years as an appellate judge, I believe we are wasting lots of time on motions for new trial that will never be heard and the proposal will still allow for motions that should be heard and duly considered by a trial judge.

For the sake of argument I must agree that conformity is good, but for the sake of appellate review I cannot agree that more delay is good.

Sincerely,

Max N. Osborn

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(512) 480-5709

TELECOPY NUMBER:
(512) 478-1976

November 26, 1989

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

Dear Judge Hecht:

6. The following proposed amendments use the word "nonjury": Texas Rules of Appellate Procedure 41(a)(1) and 54(a). The following proposed amendments use the word "non-jury": Texas Rules of Appellate Procedure 41 comment, 52(d), 52 comment, and 54 comment. The court may wish to standardize the terminology. The term "non-jury" currently appears in Texas Rules of Civil Procedure 90, 156, 216(1), 249, 307, and 542. The term "nonjury" currently appears in Texas Rule of Civil Procedure 324(a) and Texas Rule of Judicial Administration 6(b)(2).

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

Respectfully,

Charles A. Spain, Jr.

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

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November 28, 1989

DONE

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

RE: PROPOSED AMENDMENTS TO TEXAS COURT RULES

Dear Justice Hecht:

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

Further, I request that the Rules Advisory Committee consider changing Rule 533 by changing the following language which states in part: "Every writ or process from the justice courts shall be issued by the justice, shall be in writing and signed by him officially." to read: "Every writ or process from the justice courts shall be in writing and signed by the justice officially or issued and signed by the clerk under seal of the court."

In addition, I request that the Rules Advisory Committee consider recommending to the Supreme Court the enlargement of the membership of the Rules Advisory Committee to include a representative from the Justice of the Peace Section of the State Bar. Such representation on the Rules Advisory Committee would help to coordinate the unique rules governing the justice court with the rules of the district and county courts.

Thank you for the opportunity to make these comments.

Sincerely,

Paul Heath Till

Paul Heath Till
Justice of the Peace
Precinct 5, Position 1
6000 Chimney Rock, Suite 102
Houston, Harris County, Texas 77081
Telephone: 713/661-2276
Past Chairman
Justice of the Peace Section
State Bar of Texas
Bar No. 20020600

00716

By_____ __B. No._____

A BILL TO BE ENTITLED

AN ACT

relating to a seal for justice courts.

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

SECTION 1. Subchapter C, Chapter 27, Government Code, is amended by adding Section 27.058 to read as follows:

Sec. 27.058. JUSTICE OF THE PEACE SEAL. (a) Each justice of the peace shall be provided with a seal that has a star with five points engraved in the center. The seal must also have "Justice Court Precinct _____, _____ County, Texas" engraved on it.

(b) The impress of the seal shall be attached to all process other than subpoenas issued out of the justice court and shall be used to authenticate the official acts of the justice clerk and the justice of the peace.

SECTION 2. This Act takes effect April 1, 1990.

SECTION 3. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

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November 26, 1989

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

Dear Judge Hecht:

6. The following proposed amendments use the word "nonjury": Texas Rules of Appellate Procedure 41(a)(1) and 54(a). The following proposed amendments use the word "non-jury": Texas Rules of Appellate Procedure 41 comment, 52(d), 52 comment, and 54 comment. The court may wish to standardize the terminology. The term "non-jury" currently appears in Texas Rules of Civil Procedure 90, 156, 216(1), 249, 307, and 542. The term "nonjury" currently appears in Texas Rule of Civil Procedure 324(a) and Texas Rule of Judicial Administration 6(b)(2).

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

Respectfully,

Charles A. Spain, Jr.

PAUL HEATH TILL
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November 28, 1989

Done

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

RE: PROPOSED AMENDMENTS TO TEXAS COURT RULES

Dear Justice Hecht:

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

PROPOSED CHANGE TO TRCP RULE 4 - COMPUTATION OF TIME

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

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

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

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November 28, 1989

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

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

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

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

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

TRCP 696-

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HARDY MOORE
BILL PAYNE
A. W. CLEM*

BOARD CERTIFIED
*RESIDENTIAL REAL ESTATE LAW

April 10, 1989

Silpc

Chairman of the Committee
on Administration of Justice
State Bar of Texas
P.O. Box 12487
Capitol Station
Austin, Texas 78711

Dear Sir:

It seems to me our sequestration procedure should be clarified.

The amount of the bond for sequestration is set by the court and also, in the same order, the amount of defendant's replevy bond, "...which shall be in an amount equivalent to the value of the property sequestered or to the amount of plaintiff's claim and one year's accrual of interest if allowed by law on the claim, whichever is the lesser amount, and the esti mated costs of court." (Rule 696). If the plaintiff replevies his replevy bond is to be "...in a sum of money not less than the amount fixed by the court's order." (Rule 708). The plaintiff's sequestration bond may also serve as a replevy bond, if properly conditioned, "...in the amount fixed by the court's order." (Rule 698).

The bond for sequestration is not infrequently fairly nominal. What should be the amount of its penalty if combined with a replevy bond? For example, you sue in trespass to try title to a ranch worth $1,000,000.00. The rule says the defendant's replevy bond must be in the amount of the value of the property. The plaintiff does not need a $1,000,000.00 bond for his protection and it would not be unusual if the defendant could not afford the bond premium, probably about $10,000.00, if he could arrange to be bonded. Will the plaintiff's replevy bond also be $1,000,000.00? If so, he is faced with the same problems as the defendant. And if the amount of plaintiff's replevy bond is in the court's discretion , it would appear the defendant is being denied equal protection of the law. (So what does the rule refer when it says "...not less than the amount fixed by the court's order")?

Perhaps I am missing something, and if so, I would like to know what it is. If not, I think the Rules should be changed to specify the replevy bonds are to be in the amount the court estimates will fairly protect the adverse party's interests and likewise if a combination sequestration and replevy bond is tendered by the plaintiff.

Yours very truly,

HARDY MOORE

HM:orc

TRCP 698

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BOARD CERTIFIED
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April 10, 1989

Sept 2

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P.O. Box 12487
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Yours very truly,

HARDY MOORE

HM:orc

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Sues

TRCP 708

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BOARD CERTIFIED
*RESIDENTIAL REAL ESTATE LAW

April 10, 1989

Chairman of the Committee
on Administration of Justice
State Bar of Texas
P.O. Box 12487
Capitol Station
Austin, Texas 78711

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Yours very truly,

HARDY MOORE

HM:orc

00724

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November 28, 1989

Done

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

RE: PROPOSED AMENDMENTS TO TEXAS COURT RULES

Dear Justice Hecht:

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

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

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Scott
SubC

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November 28, 1989

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

RE: PROPOSED AMENDMENTS TO TEXAS COURT RULES

Dear Justice Hecht:

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

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SUBCOMMITTEE REPORT/TRCP 737-813

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

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

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

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

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

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749c

November 28, 1989

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

VIA FEDERAL EXPRESS
AIRBILL #5000353945

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

Dear Justice Hecht,

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

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

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

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

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

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

Respectfully submitted,

HOOVER, BAX & SHEARER

Joe G. Bax
Attorney for the
Houston Apartment Association

JGB:df

cc: Mr. Paul Heiberger

SUBCOMMITTEE REPORT/TRCP 737-813

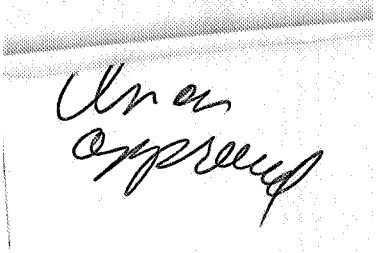
The subcommittee reviewed written comments as well as testimony before the Texas Supreme Court in its hearing on November 30, 1989 concerning proposed rule amendments as published in the Texas Bar Journal in November, 1989. We recommend the following changes be considered by the full committee at its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

3. Rule TRCP 792

Payments received concerning 1987 amendments to Rule 792, expressed concern that the rule is then amended does not no longer precisely coordinate with Rule 793. That is, Rule 793 prescribes the form of abstract of title and has loaned it the description of written instruments or documents. Rule 792 is amended, permits the court after notice and hearing, prior to the beginning of trial, to order that no evidence of the claim or title of a party who failed to file an abstract of title be given at the trial. The amended Rule 792 does not facially limited to written instruments. Accordingly, the following change might be made to Rule 792, to wit.

RULE 792. TIME TO FILE ABSTRACT

Such abstract of title shall be filed with the papers of the cause that within thirty days after the service of the notice, or within such further time that the court on good cause shown may grant; and in default thereof, the court may, after notice and hearing prior to the beginning of trial, order that no <u>written instruments which are</u> evidence of the claim or title of such opposite party be given on trial.
Subcommittee notation: this is a textual change only.



TRCP 792

798 ←

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BEN A. BARING, JR.
JAMES J. TYLER

ALBERT J. DE LANGE
(1892-1963)

C. M. HUDSPETH
OF COUNSEL

LUCY J. YEAGER
SUSAN J. TAYLOR
WARREN H. FISHER
STEPHEN C. REID
ROSA S. SILBERT
CYNTHIA S. WINZENRIED
S. BRADLEY TODES

December 12, 1989

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

Gentlemen:

This letter is written pursuant to the verbal invitation of the Chief Justice in his recent speech to the Trial Section of the Houston Bar Association, concerning the proposed revision of the Texas Rules of Civil Procedure.

In Section 7 of the Rules relating to special proceedings (Trespass to Try Title), Rule 792 was amended July 15, 1987, to add a provision permitting the Court after notice and hearing, prior to the beginning of trial, to order that no evidence of the claim or title of a party who failed to file an Abstract of Title could be given on trial.

Rule 793 prescribes the form an Abstract of Title should take, and is limited to description of written instruments or documents. Rule 794, which provides for an Amended Abstract, still provides that:

> "But in all cases the documentary evidence of title shall at the trial be confined to the matters contained in the Abstract of Title" (emphasis ours).

Prior to the July 15, 1987 amendment of Rule 792, the Courts had, with fair consistency, held that only written instruments supporting the claim of title were precluded from evidence by a failure to file an Abstract of Title. Evidence of possession (both prior uninterrupted possession and adverse possession) was admissible, even in absence of filing a requested Abstract of Title.

The language of the addition to Rule 792 casts doubt upon a continuation of this construction, but instead indicates that no evidence of any character can be introduced, showing a claim or title, in the absence of filing a requested Abstract of Title. We

do not believe that this was the intention of that amendment and would request that another amendment to Rule 792 clarify the intention to preclude only written instruments which are evidence of the claim or title.

Also, in Rule 798, relating to common source of title, the third sentence, reading "before any such certified copies shall be read in evidence, they shall be filed with the papers of the suit three days before the trial and the adverse party served with notice of such filing as in other cases", seems outdated.

When adopted, the evidence statutes required such filing and notice of certified copies, as a prerequisite to their introduction in evidence. Those statutes have now been repealed, however, and replaced by the Texas Rules of Civil Evidence, including Rule 803(14) and Rule 902(4), neither of which require such notice and filing.

We would request that this requirement be removed from Rule 798.

Sincerely,

Eugene J. Pitman

EJP/bjw

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FULBRIGHT JAWORSKI & REAVIS McGRATH
NEW YORK
LOS ANGELES

January 11, 1990

TO: SUPREME COURT ADVISORY COMMITTEE

FROM: Subcommittee on Rules 15 to 165

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

17. Section 51.803(a) of the Government Code. This rule says that the "Supreme Court shall adopt rules and regulations to regulate the use of electronic copying devices for filing in the courts." The subcommittee is of the unanimous view that filing with courts by electronic means should *not* be adopted at the present time. The rationale is that we should wait to determine the experience of electronic filings between lawyers to determine the extent, if any, of the problems. Also, courts are not yet presently equipped to handle such filings.

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

January 2, 1990

MISC. TRAP

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

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

In addition to the above rules, we would like to suggest that the higher Courts adopt a rule regarding filings made by fax machine. For your reference, we have enclosed our internal rule regarding this Court's policy on fax filings.

Also, what about bankruptcy cases? A rule requiring the Court of Appeals to abate the appeal if <u>any</u> party to the appeal files a petition for bankruptcy might be helpful. Our present procedure is to abate the entire appeal for administrative purposes and allow reinstatement of the whole appeal when the stay has been lifted. We find that abating the entire case has worked much better than a piecemeal abatement as to one or two parties only.

In addition, we would like to see the Court of Criminal Appeals adopt rules regarding appeals by the State. I.e., timetables, etc.

Also any procedural rules presently contained in the Code of Criminal Procedure should be written as rules in the Rules of Appellate Procedure. I.e. 44.45(d)9.

4543.001

Webb, Kinser & Luce

A Professional Corporation

Attorneys and Counselors at Law

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Board Certified - Family Law
Texas Board of Legal Specialization
Katherine A. Kinser
Buddy Luce

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TELEPHONE (214) 744-4620

October 2, 1989

Mr. Luther H. Soules
Chairman, Supreme Court Advisory
Committee
10th Floor, NCNB Texas Plaza
175 East Houston
San Antonio, Texas 78205

Dear Mr. Soules:

Over the last few months, I have had several discussions with Justice Linda Thomas concerning the need for Rules of Civil Procedure which address sanctionable behavior at the Court of Appeals and Supreme Court level. Specifically, I believe there is a need for Rules with would permit motions for sanctions to be filed either at the Court of Appeals and Supreme Court level or at the trial court level while appeals are pending to address behavior such as parties and/or attorneys communicating directly with the Courts without notice to the opposing side. It is my understanding that, at this point, there are no rules which permit motions for sanctions to be filed in the appellate courts, nor does this trial court have the power to hear such a motion while an appeal is pending. Speaking from personal experience, this situation is not only frustrating, but certainly is difficult to explain to a client who believes their case is being harmed by behavior of an opposing party, which simply would not be tolerated at the trial court level.

I have spoken with several attorneys who practice family law in the Dallas County area and everyone I have spoken to believes that this is a problem that needs to be addressed. I would appreciate any consideration you and your Committee may be able to give to this matter and am certainly willing to volunteer my time to work on Rule amendments directed towards this issue.

Thank you very much for your cooperation.

Very truly yours,

Katherine A. Kinser

KAK/sa

cc: Honorable Linda Thomas
Mr. Kenneth Fuller
Mr. Harry Tindall

Bebe

9/13 HJH.
COAJ
SCAC Sub C TAP
SCAC Agenda.

FRANK G. EVANS
Chief Justice
First Court of Appeals
1307 San Jacinto
Houston, Texas 77002

September 8, 1989

Xc Justice Heclist
C.J. Evans

Hon. Thomas R. Phillips
Chief Justice
Texas Supreme Court
P.O. Box 12248
Austin, TX 78711

Dear Chief Justice Phillips:

I have discussed with Justice Murry Cohen several subjects that might be considered by the panels at the meeting of the appellate section at the Judicial Conference.

1. I feel sure that you and the members of your court are as concerned as the justices on the intermediate appellate courts about the impact of mandamus and other extraordinary proceedings. I respectfully suggest, therefore, that this subject be considered as an item for discussion by the panels at our section meeting. Mr. Roger Townsend, the current President of the Appellate Section of the State Bar, has indicated that his section would be glad to assist you and the judiciary in trying to find some solutions for this growing problem.

2. Another problem of less magnitude, but one which continues to plague us, is the publication (or non-publication) of opinions. I know that many justices feel we should be able to develop a better system for Texas, so that unpublished opinions might be of greater benefit to the bar and the judiciary.

Third, but certainly not last in importance, is the matter of compensating our permanent legal staff. Thanks to you and your leadership, the legislature provided substantial increases in the salaries of the judges and the briefing attorneys. Our permanent staff did not, however, receive similar benefits. Particularly, our research attorneys are sorely underpaid, and our entire permanent legal staff are entitled to some increase in their salaries. I would hope that this could be a high item of priority in the 1991 Legislative Session.

I would appreciate your panel's consideration of these matters, if time permits.

Yours sincerely,

Frank G. Evans

FGE:cc

00737

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

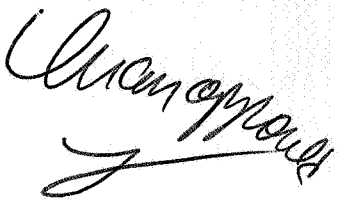
January 2, 1990

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

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP
Rule 3(b). Since appeals are now allowed by the State, the parties should be referred to as the appellant and the appellee, not appellant and the State.



United States Posta k affixed by the United States Posta evidence of the date of mailing.

How should this be changed?

TRAP 4

(c) Number of

(1) Each ies of briefs, petitions, mo he Clerk of the Court of Appe ng. Any court of appeals may b ling of fewer or more copies.

as indicated

(2) Each party shall file twelve copies of its application for writ of error ~~with the Clerk of the Court of Appeals. In addition to filing his original~~ or of its petition for discretionary review with the Clerk of the Court of Appeals. ~~the filing party shall deliver eleven copies. The State Prosecuting Attorney may deliver the eleven copies to the Clerk of the Court of Criminal Appeals.~~

(3) Each party shall file twelve copies of all other papers addressed to the Supreme Court or Court of Criminal Appeals with the clerk of the court to which it is addressed.

(d) (No change.)

(e) (No change.)

(f) Manner of Service. Service may be personal[,] ~~or~~ by mail[, or by telephonic document transfer to the party's current telecopier number]. Personal service includes delivery of the copy to a clerk or other responsible person at the office of

United States Postal Service or a legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing.

TRAP 4

(c) Number of Copies.

(1) Each party shall file six copies of briefs, petitions, motions and other papers with the Clerk of the Court of Appeals in which the case is pending. Any court of appeals may by local rule authorize the filing of fewer or more copies.

(2) Each party shall file twelve copies of its application for writ of error ~~with the Clerk of the Court of Appeals. In addition to filing~~ or of its original petition for discretionary review with the Clerk of the Court of Appeals, ~~the filing party shall deliver eleven copies. The State Prosecuting Attorney may deliver the eleven copies to the Clerk of the Court of Criminal Appeals.~~

(3) Each party shall file twelve copies of all other papers addressed to the Supreme Court or Court of Criminal Appeals with the clerk of the court to which it is addressed.

(d) (No change.)

(e) (No change.)

(f) Manner of Service. Service may be personal[,] ~~or~~ by mail[, or by telephonic document transfer to the party's current telecopier number]. Personal service includes delivery of the copy to a clerk or other responsible person at the office of

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

January 2, 1990

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

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 4(c). The number of copies should be uniform for the Supreme Court and the Court of Criminal Appeals, that is, an original and 11 copies or no original and 12 copies. (This should be done in parts 2 and 3 of this rule.)

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

January 2, 1990

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

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 5(b)(5). This rule should specifically state that a finding by the trial judge is required (as to the date on which notice was first required) after proof in the trial court on sworn motion has been made. This would benefit the clerks in checking in the transcript. An order signed by a trial judge stating the date upon which the appellate timetable begins would be most helpful.

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

January 2, 1990

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

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 11. Often we receive questions about whose duty it is to prepare the exhibits for transmission to the appellant court -- the court reporter or the trial court clerk. This would be cleared up by a specific rule.

30741

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

January 2, 1990

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

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP
Rule 12. References in this rule should be to the district not Supreme Judicial District.

Sept

00742

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

January 2, 1990

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

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP
Rule 13(i). The clerk should be able to decline to file the record, etc. AND (not or) the Court should be able to dismiss.

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

January 2, 1990

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

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 16. This rule allows for a cause requiring immediate action to be taken to the nearest court of appeals. However, once a cause is taken to the nearest court, does that court have any power to issue a writ to a judge outside its district?

Is the nearest court of appeals acting as itself or as the original court of appeals?

The only appendix attached to the rules pursuant to R51(c) and 53(h) governs criminal cases only. More and more, we are receiving requests about the proper way to prepare a transcript and statement of facts in a civil case. When the Supreme Court repealed the predecessor rules to 51(c) and 53(h), it was unclear whether the orders issued pursuant to those rules were also repealed. Upon inquiry to the Supreme Court about the situation, we were told new orders would issue. As of yet, we have not been informed as to the decision by the Supreme Court.

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

January 2, 1990

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

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 40(a)(3)(B). This rule should clarify the time for paying costs when improper notice has been given. I.e., otherwise, he shall not be entitled to prosecute the appeal without paying the costs or giving security therefor within the time limit allowed by rule 41.

Rule 40(a)(3)(E). The last sentence should read: "If no written signed order is is made on the contest . . . ."

Rule 40(a)(3)(F). This rule should read: ". . . he shall be required to make such payment or give such security (one or both) to the extent of his ability within the time limit provided by rule 41(a)."

Rule 40(b)(1). Was this rule meant to change 44.02 proviso? Rule 40(b)(1) not consistent with art. 26.13(a)(3). Should 40(b)(1) apply only to felonies? If 40(b)(1) applies only to felonies, is 26.13 in conflict with non-proviso 44.02?

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

January 2, 1990

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

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 41(a)(2). This rule should read: "If a timely contest to an affidavit in lieu of bond is timely sustained . . . ." Also, the rule should provide what the consequences are, if the trial court finds and recites that the affidavit is not filed in good faith.

00746

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AUSTIN, TEXAS 78767
TELEPHONE: (512) 480-5600

IRELAND GRAVES (1885-1968)
BEN F. VAUGHAN, III, P.C.
OF COUNSEL

TELECOPY NUMBER:
(512) 478-1976

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

November 26, 1989

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

Dear Judge Hecht:

4. The court may wish to consider adopting the amendments to Texas Rules of Appellate Procedure 41, 202, and 210 as adopted by the court of criminal appeals on June 5, 1989. *See Order Adopting Amendments to Texas Rules of Appellate Procedure*, 52 Tex. B.J. 893 (1989).

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

Respectfully,

Charles A. Spain, Jr.

Order Adopting Amendments To Texas Rules of Appellate Procedure

Effective July 1, 1989

BE IT ORDERED by the Court of Criminal Appeals that the following appended amendments to Texas Rules of Appellate Procedure are hereby adopted and promulgated to govern criminal cases and criminal law matters [Article V, §5 and Article 4.04, C.C.P.], under authority of and in conformity with Acts 1985, 69th Leg., Ch. 685, p. 5136, §§1-4, and Articles 44.33 and 44.45, Code of Criminal Procedure. Intended and designed to be interim measures to treat specific situations, these amended rules shall govern posttrial, appellate and review procedures only in criminal cases and criminal law matters. This order does not amend any existing rule, promulgate any new rule nor repeal any rule in the Texas Rules of Civil Procedure. No rule amended by this order shall be applicable to any civil case ["actions of a civil nature" (Rule 2, T.R.Civ. P.)] unless and until it has been promulgated by the Supreme Court of Texas.

BE IT FURTHER ORDERED that the Texas Rules of Appellate Procedure be and they are hereby made applicable to appeals by the State taken pursuant to Acts 1987, 70th Leg., Ch. 382, p. 1884, codified as Article 44.01, Code of Criminal Procedure.

BE IT FURTHER ORDERED that the Clerk of this Court shall file with the Secretary of State of the State of Texas, for and in behalf and as the act of this Court, a duplicate original copy of this order and Rule 54(b), and the Clerk shall cause them to be published in the Texas Register and the Texas Bar Journal, as provided by the above Act.

BE IT FURTHER ORDERED that these amended rules become effective July 1, 1989 [illegible] dis- and the rules the and t as y of

Do we need to add this to TRAP 41? Yes All of these must be added.

Sam Houston Clinton, Judge

/S/
Marvin O. Teague, Judge

/S/
Chuck Miller, Judge

/S/
Charles F. (Chuck) Campbell, Judge

/S/
Bill White, Judge

/S/
M. P. Duncan, III, Judge

/S/
David Berchelmann, Jr., Judge

Rule 41. Ordinary Appeal—When Perfected.
(a) [Appeals in Civil Cases.] (No Change)
(b) Appeals in Criminal Cases.
(1) *Time to Perfect Appeal.* Appeal is perfected when notice of appeal is filed within thirty *(fifteen by the state)* days after the day sentence is imposed or suspended in open court or the day an appealable order is signed by the trial judge; except, if a motion for new trial is timely filed, notice of appeal shall be filed within ninety days after the sentence is imposed or suspended in open court.
(2) [*Extension of Time.*] (No Change)
(c) [*Prematurely Filed Documents.*] (No Change)

Rule 202. Discretionary Review With Petition.
(a) (No Change)
(b) (No Change)
(c) (No Change)
(d) (No Change)
(1) [*Index.*] through (6) [*Prayer for Relief.*] (No Change)
(7) *Appendix.* A copy of any opinions delivered upon rendering the judgment by the court of appeals whose decision is sought to be reviewed shall be included.
(8) [7] (Renumbered, otherwise no change)
(9) [8] (Renumbered, otherwise no change)

Rule 210. Direct Appeals in Death Penalty Cases.
(a) [Record.] (No Change)
(b) Briefs. Appropriate provisions of Rule 74 govern preparation and filing of briefs in a case in which the death penalty has been assessed, except that a brief may exceed fifty pages and an original and ten copies of it shall be filed.

00748

Order Adopting Amendments To Texas Rules of Appellate Procedure

Effective July 1, 1989

BE IT ORDERED by the Court of Criminal Appeals that the following appended amendments to Texas Rules of Appellate Procedure are hereby adopted and promulgated to govern criminal cases and criminal law matters [Article V, §5 and Article 4.04, C.C.P.], under authority of and in conformity with Acts 1985, 69th Leg., Ch. 685, p. 5136, §§1-4, and Articles 44.33 and 44.45, Code of Criminal Procedure. Intended and designed to be interim measures to treat specific situations, these amended rules shall govern posttrial, appellate and review procedures only in criminal cases and criminal law matters. This order does not amend any existing rule, promulgate any new rule nor repeal any rule in the Texas Rules of Civil Procedure. No rule amended by this order shall be applicable to any civil case ["actions of a civil nature" (Rule 2, T.R.Civ. P.)] unless and until it has been promulgated by the Supreme Court of Texas.

BE IT FURTHER ORDERED that the Texas Rules of Appellate Procedure be and they are hereby made applicable to appeals by the State taken pursuant to Acts 1987, 70th Leg., Ch. 382, p. 1884, codified as Article 44.01, Code of Criminal Procedure.

BE IT FURTHER ORDERED that the Clerk of this Court shall file with the Secretary of State of the State of Texas, for and in behalf and as the act of this Court, a duplicate original copy of this order and Rule 54(b), and the Clerk shall cause them to be published in the Texas Register and the Texas Bar Journal, as provided by the above Act.

BE IT FURTHER ORDERED that these amended rules become effective July 1, 1989, and remain in effect unless and until disapproved, modified or changed by the Legislature or unless and until supplemented or amended by this Court pursuant to the above Act.

BE IT FURTHER ORDERED that this order and these rules shall be recorded in the minutes of this Court, and that the original of this order signed by the members of this Court and of these rules shall be preserved by the Clerk of this Court as a permanent record of this Court.

SIGNED and ENTERED in duplicate originals this 5th day of June, 1989.

/S/
Michael J. McCormick
Presiding Judge

/S/
W.C. Davis, Judge

/S/
Sam Houston Clinton, Judge

/S/
Marvin O. Teague, Judge

/S/
Chuck Miller, Judge

/S/
Charles F. (Chuck) Campbell, Judge

/S/
Bill White, Judge

/S/
M. P. Duncan, III, Judge

/S/
David Berchelmann, Jr., Judge

Rule 41. Ordinary Appeal—When Perfected.
(a) [Appeals in Civil Cases.] (No Change)
(b) Appeals in Criminal Cases.
(1) *Time to Perfect Appeal.* Appeal is perfected when notice of appeal is filed within thirty *(fifteen by the state)* days after the day sentence is imposed or suspended in open court or the day an appealable order is signed by the trial judge; except, if a motion for new trial is timely filed, notice of appeal shall be filed within ninety days after the sentence is imposed or suspended in open court.
(2) [*Extension of Time.*] (No Change)
(c) [*Prematurely Filed Documents.*] (No Change)

Rule 202. Discretionary Review With Petition.
(a) (No Change)
(b) (No Change)
(c) (No Change)
(d) (No Change)
(1) [*Index.*] through (6) [*Prayer for Relief.*] (No Change)
(7) *Appendix.* A copy of any opinions delivered upon rendering the judgment by the court of appeals whose decision is sought to be reviewed shall be included.
(8) [7] (Renumbered, otherwise no change)
(9) [8] (Renumbered, otherwise no change)

Rule 210. Direct Appeals in Death Penalty Cases.
(a) [Record.] (No Change)
(b) Briefs. Appropriate provisions of Rule 74 govern preparation and filing of briefs in a case in which the death penalty has been assessed, except that a brief may exceed fifty pages and an original and ten copies of it shall be filed.

00748

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

January 2, 1990

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

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 42(a)(3). This rule should specifically state whether the time limit required in ordinary appeals to file a motion for extension of time to file a perfecting instrument or the record is required to be followed in this rule.

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

January 2, 1990

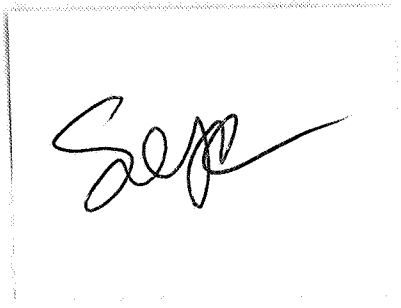
Hon. Nathan L. Hecht
Justice, Supreme Court of Texas
P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 43(g). Does this rule really mean that an appellate court may modify its decision after issuing a mandate, other than to correct clerical errors?



00750

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

January 2, 1990

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

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 44. This rule does not provide a time limit as to when a notice of appeal is due to be filed. In addition, the rule states that the deadline for filing the record runs from the date the notice of appeal is filed. The rule could be amended to conform with the time limits set forth in civil accelerated appeals. That is, the notice of appeal could be due 20 days from the date of the signed order, the record due 30 days from the date of the signed order, the appellant's brief due 20 days after the record, and the appellee's brief due 20 days after the filing of the appellant's brief. Of course, the rule should continue to provide the court with broad flexibility as does rule 42 in civil cases. Here, as in rule 42, it should be clarified if the extensions of time are governed as in ordinary appeals.

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

January 2, 1990

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

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 46(e). This rule should also include making arrangements for payments to the trial clerks.

00752

SMEAD, ANDERSON, WILCOX & DUNN
ATTORNEYS AT LAW
425 NORTH FREDONIA, SUITE 100
P. O. BOX 3343
TELEPHONE (214) 757-2868
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LONGVIEW, TEXAS 75606-3343

H. P. SMEAD, JR.
BOB ANDERSON
MELVIN R. WILCOX, III
MICHAEL L. DUNN

KYLE KUTCH
PETER L. BREWER

November 30, 1989

48

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

Re: Tex. R. App. P. 48

To The Committee:

In response to the Court's invitation in the November, 1989 issue of the Texas Bar Journal, the following suggestion regarding the Rules of Appellate Procedure is presented. Rule 48 of the Texas Rules of Appellate Procedure allows an Appellant to "deposit cash or a negotiable obligation of the government of the United States of America or any agency thereof" in lieu of filing a cost bond. This portion of the Rule is commendable and should be retained. However, the rule goes on to state that "with leave of Court" an Appellant may "deposit a negotiable obligation of any bank or savings and loan association chartered by the government of the United States of America or any state thereof . . . ."

My question is: Why is it necessary to obtain leave of court in this instance? The trial courts of this state have better things to do than to worry about whether party's check is going to bounce or whether their bank is solvent at the moment. Further, it is most inconvenient for an Appellant to file this motion and obtain an order granting same when something which is as good as cash, such as a cashiers check, is presented.

I submit that there are better ways to protect the trial court's interest in being reimbursed for its costs. For example, if the negotiable obligation tendered for some reason fails, the Appellant could be given 10 days in which to tender a new obligation or face dismissal of his appeal with prejudice. Such a provision could be applied for

any obligation, and such would greatly shorten Rule 48. For that matter, Rule 48 could be conveniently made a part of Rule 46(a) regarding the cost bond thereby furthering the Court's mission of simplifying the Rules.

Sincerely,

SMEAD, ANDERSON, WILCOX AND DUNN

BY: _____
Peter L. Brewer
Former Briefing Attorney,
Texas Supreme Court
1987-88 term

dl

4543.301 high Lhs 9-22-99 TRAP 49

CARL A. PARKER
President Pro Tempore
DISTRICT 4

Committees:

EDUCATION, Chairman
Administration
Finance
Jurisprudence

The Senate of
The State of Texas

CAPITOL OFFICE:
Post Office Box 12068
Austin, Texas 78711
512/463-0104

DISTRICT OFFICE:
One Plaza Square
Port Arthur, Texas 77642
409/985-2591

September 18, 1989

Done

Mr. Luther H. Soules III
Soules and Wallace
10th Floor
Republic of Texas Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Dear Luke:

I appreciated you giving me the opportunity to comment on your proposed rules to implement the provisions of SB 134. While I believe that your draft accurately captures the intent of the law with regard to the subject of the change made in the burden required of a defendant to obtain a reduced bond requirement, I offer the following additional comments.

The draft you sent me fails to incorporate the change made in Sec. 52.004 of the bill, which reinstates statutorily the old, pre-amendment Rule 49(b), "Excessiveness". As you may be aware, this provision was dropped by the Supreme Court Advisory Committee when the rules were rewritten in the spring and summer of 1987, and took effect January 1, 1988. The new rules allowed for a review for "Sufficiency" (Rule 49(a)), but dropped excessiveness.

The Joint Committee heard testimony from Professor Elaine Carlson, who chaired the subcommittee of the Advisory Committee which proposed the rules, that discretion still existed for excessiveness review. The Joint Committee in this instance, however, believed that because a positive action had been taken (the deletion of an existing rule), that the rule would need to be readopted or statutorily imposed to be effective. Thus the passage of Sec. 52.004 of SB 134.

I would suggest that appropriate language for a rule to implement this change read as follows:

> Rule 49(d). In a manner similar to appellate review under this rule of the sufficiency of the amount set by a trial court, an appellate court may review for excessiveness the amount of security set by a trial court under Tex. Civ. Prac. & Rem. Code Section 52.002, or under these rules if security is not set under Section 52.002. If the appellate court finds that the amount of security is excessive, the appellate court may reduce the amount.

I hope you will consider an additional area where there seemed to be some confusion as to the ability of a trial court to accept some type (form) of security other than a bond or cash deposit to suspend enforcement of a civil money judgment pending appeal. The Joing Special Committee was informed by Professor Carlson that the language of Rule 47(b), as written by the Advisory Committee and adopted by the Court, allowed such discretion. The Joint Committee, relying on and referencing Professor Carlson's analysis, recommended clarifying the trial court's additional flexibility in setting the type of security but hoped this could be clarified by the Court in any changes to the rules. I do suggest, therefore, that the Advisory Committee make 47(b) more clear (as it is for other types of judgments) to more clearly reflect that amount and type of bond or deposit are discretionary with the court, within the guidelines set otherwise by rule or statute.

I am appreciative of the work being done by you and the committee on these rules and your responsiveness to the concerns of and actions by the legislature. Should you undertake to write a rule dealing with the lien portions of the bill, I'll be glad to share with you my comments on that section also.

Thanks for your interest.

Sincerely,

Carl A. Parker

CAP/pl

cc: Justice Nathan L. Hecht
Senator Kent Caperton
Senator Bob Glasgow
Senator Cyndi Krier
Senator Carl Parker
Representative Patricia Hill
Representative Senfronia Thompson

LAW OFFICES

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PHIL STEVEN KOSUB
GARY W. MAYTON
J. KEN NUNLEY
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(512) 327-4105

December 26, 1989

Professor William V. Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Re: Proposed Changes to Texas Rules of Civil Procedure

Dear Bill:

Enclosed herewith please find a copies of letters sent to me by Katherine A. Kinser, Justice Murray D. Cohen, Chief Justice Frank G. Evans, and Senator Carl A. Parker regarding proposed changes to the above captioned 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 Nathan L. Hecht
Honorable David Peeples
Honorable Murray D. Cohen
Honorable Frank G. Evans
Senator Carl A. Parker
Ms. Katherine A. Kinser

00757

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

January 2, 1990

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

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 51(c). In criminal cases, the clerk is required to retain a duplicate of the transcript for use by the parties with permission of the court. The rule should specify which court. I.e. trial court or appellate court.

My second recommendation is that rules of appellate procedure 53(k) and 54 (c) be changed to provide that it is the court reporter's duty, not the appellant's duty, to file the statement of facts in the Court of Appeals and to obtain extensions of time for late filing. The present rules place this duty upon the appellant, which causes considerable inconvenience to lawyers in dealing with the many court reporters and substitute court reporters who are often involved in different parts of the case. Our rules should recognize that the court reporter is an officer of the court, and usually a full-time employee, who is well paid to perform this sole function. It is unreasonable to impose on a lawyer, who in most criminal cases will be working for a court-appointed fee, the duty of going to the court reporter's home or office, picking up the record, and transporting it downtown to the Court of Appeals.

Likewise, I can imagine no good reason for requiring the lawyer to obtain an extension of time for filing the statement of facts. The lawyer has no control over the statement of facts and makes no money from producing it. This burdensome responsibility should be placed upon the court reporter because the court reporter has sole control of the statement of facts and is the only one who makes money from producing it.

I recommend that appellate rule 53(k) read as follows:

(k) **Duty of ~~Appellant~~ Court Reporter to File** It is the ~~appellant's~~ court reporter's duty to cause the statement of facts to be filed with the Clerk of the Court of Appeals.

Similarly, rule 54(c) should be changed to read as follows:

(c) **Extension of Time** An extension of time may be granted for late filing in a court of appeals of a transcript or statement of facts, if a motion reasonably explaining the need therefor is filed, by appellant in the case of the late transcript and by the court reporter in the case of a late statement of facts, with the court of appeals not later than 15 days after the last date for filing the record. Such motion shall also reasonably explain any delay in the request required Rule 53(a).

Please let me know if there is any other information I can furnish concerning these suggestions. I would be happy to discuss these suggestions with you or your committee or any other interested committees at any time.

Sincerely,

Murry B. Cohen

4543.001

Court of Appeals
First Supreme Judicial District
1307 San Jacinto, 10th Floor
Houston, Texas 77002

9-29

September 27, 1989

Luther Soules, Attorney at Law
175 E. Houston
10th Floor
San Antonio, Texas

Re: Amendments to Texas Rules of Appellate Procedure

Dear Luke:

I have two proposals for changing our rules of appellate procedure. These changes have been discussed at a meeting of the Houston Bar Association Committee on the Appellate Judiciary and among various appellate judges, and I believe both proposals have considerable support.

First, I suggest that Rule 80(c) be amended to authorize the Court of Appeals to abate an appeal and remand the case to the District Court to conduct a hearing on any issue the Court of Appeals deems necessary in order to decide the appeal appropriately. This authority exists and is often used in the federal system and in many other states. It is arguable that such a procedure is already permissible under the existing rule that allows the court to make "any other appropriate order, as the law and the nature of the case may require." Nevertheless, there has been significant discussion in several recent cases of the need for such a rule. See Read v. State, 768 S.W.2d 919 (Tex. App.-Beaumont 1989), where Justice Brookshire advocated such a rule, and Mitchell v. State, 762 S.W.2d 916 (Tex. App.--San Antonio 1988, pet. ref'd), where the court used such a procedure, over the dissent of Justice Butts. Similar approaches have been used in Murphy v. State, 663 S.W.2d 604 (Tex. App.--Houston [1st Dist.] 1983, no writ), and Guillory, 638 S.W.2d 73 (Tex. App.--Houston [1st Dist.] 1982, no writ), both decided before the rules were enacted.

I propose that rule 80(c) provide:

In addition, the court of appeals may make any other appropriate order as the law and the nature of the case may require, including abating the appeal and remanding the cause to the trial court for a hearing on any issue.

Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
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Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 54(c). This rule should also include a requirement to reasonably explain any delay in the request required by rule 51(b).

The Court discusses a line of ... the U.S. Supreme Court that de... of factual warrantless admini... cases. The Court finds that the ... held that except in certain caref... of cases, a search of privat... proper consent is unreasonabl... authorized by a valid search war... *Municipal Court of City and County of San Fran... cisco*, 387 U.S. 523 (1967).

The Court notes that the Supreme Court held that the same rule applies where commercial property is involved. *See v. City of Seattle*, 387 U.S. 541 (1967).

The Court finds that the liquor industry has long been one of the most heavily regulated industries and that Congress has granted federal agents power to make warrantless searches and seizures of parties under the liquor laws. The Court notes that in *Colonnade Catering Corp. v. United States*, the Supreme Court held that "[w]here Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply."

The Court holds that in the context of a regulatory inspection system of business premises that is carefully limited in time, place and scope, the legality of the search depends not on consent, but on the authority of a valid statute. The Court concludes that "where, as here, regulatory inspections further [an] urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute."

The Court finds that by accepting a liquor license or permit, an individual agrees not to engage in or permit conduct on the premises that is lewd or immoral, or that constitutes an offense of public decency, including, but not limited to, possession of a narcotic or any equipment used or designed for the administering of a narcotic or permitting a person on the premises to use a narcotic.

The Court holds that the overwhelming and undisputed evidence reveals that the agents went to the defendant's club to determine whether intoxicated persons were actually being allowed to remain on the premises and to make a general regulatory liquor license inspection. The Court finds that there is no credible evidence that would cause one to conclude that the only and main purpose of the agents' visit to the club was to search for controlled substances.

The Court notes that the agent's discovery of the drugs was inadvertent and that the drugs were in plain view, thus an arrest, search or seizure based on testimony concerning an informant who allegedly reported narcotics violations in the defendant's club is not applicable when agents or peace officers are acting pursuant to §101.04 and are on licensed premises solely to make an inspection to determine compliance with the statute.

The Court finds that although the agents might have had a hunch that narcotics could be found somewhere on the premises, when they entered ... was only to make a general, but thor... section for violations of the Alcoholic ... Code.

... instance, the inspection that was con... as done by individuals who are commis... make just the kind of inspection that was ... this cause. Therefore, the administrative ...n, that resulted in the finding of the co... which inspection was made pursuant to T.A.B.C. §101.04 in this cause, did not violate [the defendant's] rights under the Fourth and Fourteenth Amendments to the United States Constitution, nor did it violate his rights under Art. I, §9 of the Texas Constitution."

OPINION: Teague, J.; Duncan, J. concurring; White, J. not participating.

CONCURRENCE: Berchelmann, J.; McCormick, P.J. and Campbell, J. joining. The concurrence finds that the U.S. Supreme Court enunciated three criteria for measuring the constitutional validity of statutes which provide for warrantless searches of closely regulated businesses in *New York v. Burger*, 107 S.Ct. 2636 (1987): (1) there must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made; (2) the warrantless inspections must be necessary to further the regulatory scheme; and (3) the inspection program, in terms of certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant.

The concurrence would hold that §101.04 clearly meets the first two criteria set forth in *Burger* and would hold that the operative sections of the Alcoholic Beverage Code meet the third criteria by providing an adequate substitute for a warrant.

DISSENT: Clinton, J.; Miller, J. joining. The dissent states that the majority failed to demonstrate that §101.04 meets the criteria enunciated in *Burger*.

ATTORNEYS: Ken J. McLean, Houston, for the defendant; Criminal District Attorney George J. Filley III and Assistant DA Lorretta Owen, Victoria County, for the State.

TRIAL COURT: Clarence N. Stevenson; 24th District, Victoria County.

Texas Appeals Courts Civil Cases

Appellate Procedure

MOTION FOR REHEARING/ TRANSCRIPT REQUESTS/ MOTION FOR LEAVE TO SUPPLEMENT RECORD

- *Where there is an untimely request for a statement of facts, a motion for extension of time with a reasonable explanation for delay is necessary.*
- *Where a timely motion for new trial has been filed, a party must perfect his appeal within 90 days after the final judgment or order is signed.*
- *A timely request for a statement of facts can be*

The Court discusses a line of cases decided by the U.S. Supreme Court that deal with the validity of factual warrantless administrative inspection cases. The Court finds that the Supreme Court has held that except in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant, *Camera v. Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967).

The Court notes that the Supreme Court held that the same rule applies where commercial property is involved. *See v. City of Seattle*, 387 U.S. 541 (1967).

The Court finds that the liquor industry has long been one of the most heavily regulated industries and that Congress has granted federal agents power to make warrantless searches and seizures of parties under the liquor laws. The Court notes that in *Colonnade Catering Corp. v. United States*, the Supreme Court held that "[w]here Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply."

The Court holds that in the context of a regulatory inspection system of business premises that is carefully limited in time, place and scope, the legality of the search depends not on consent, but on the authority of a valid statute. The Court concludes that "where, as here, regulatory inspections further [an] urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute."

The Court finds that by accepting a liquor license or permit, an individual agrees not to engage in or permit conduct on the premises that is lewd or immoral, or that constitutes an offense of public decency, including, but not limited to, possession of a narcotic or any equipment used or designed for the administering of a narcotic or permitting a person on the premises to use a narcotic.

The Court holds that the overwhelming and undisputed evidence reveals that the agents went to the defendant's club to determine whether intoxicated persons were actually being allowed to remain on the premises and to make a general regulatory liquor license inspection. The Court finds that there is no credible evidence that would cause one to conclude that the only and main purpose of the agents' visit to the club was to search for controlled substances.

The Court notes that the agent's discovery of the drugs was inadvertent and that the drugs were in plain view, thus an arrest, search or seizure based on testimony concerning an informant who allegedly reported narcotics violations in the defendant's club is not applicable when agents or peace officers are acting pursuant to §101.04 and are on licensed premises solely to make an inspection to determine compliance with the statute.

The Court finds that although the agents might have had a hunch that narcotics could be found somewhere on the premises, when they entered the club, it was only to make a general, but thorough, inspection for violations of the Alcoholic Beverage Code.

"In this instance, the inspection that was conducted was done by individuals who are commissioned to make just the kind of inspection that was made in this cause. Therefore, the administrative inspection, that resulted in the finding of the cocaine, which inspection was made pursuant to T.A.B.C. §101.04 in this cause, did not violate [the defendant's] rights under the Fourth and Fourteenth Amendments to the United States Constitution, nor did it violate his rights under Art. I, §9 of the Texas Constitution."

OPINION: Teague, J.; Duncan, J. concurring; White, J. not participating.

CONCURRENCE: Berchelmann, J.; McCormick, P.J. and Campbell, J. joining. The concurrence finds that the U.S. Supreme Court enunciated three criteria for measuring the constitutional validity of statutes which provide for warrantless searches of closely regulated businesses in *New York v. Burger*, 107 S.Ct. 2636 (1987): (1) there must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made; (2) the warrantless inspections must be necessary to further the regulatory scheme; and (3) the inspection program, in terms of certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant.

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TRIAL COURT: Clarence N. Stevenson; 24th District, Victoria County.

Texas Appeals Courts Civil Cases

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- *Where there is an untimely request for a statement of facts, a motion for extension of time with a reasonable explanation for delay is necessary.*
- *Where a timely motion for new trial has been filed, a party must perfect his appeal within 90 days after the final judgment or order is signed.*
- *A timely request for a statement of facts can be*

made up to the final day appeal could have been perfected, even though the appeal has actually been perfected at some date prior to the deadline.

- *An untimely request for a statement of facts can be made without a motion and reasonable explanation if the statement of facts will be filed before the 60-day deadline under T.R.App.P 54(a), but if the statement of facts cannot be filed by that time, then a motion for an extension must be filed within 15 days after the last date for filing the record in accordance with Rule 54(c).*

Rodriguez v. American General Fire & Casualty Co., No. 08-89-00153-CV (El Paso), 11/27/89, 4 pp.

FACTS: The final order of judgment dismissing this case was signed on Feb. 24, 1989. A motion for rehearing was heard and denied March 17. An appellate bond for costs was subsequently filed with the district clerk on March 23. The insured requested a transcript of the hearing March 31, but did not request a statement of facts of the March 17 hearing until May 17.

The insured filed his brief on May 24, and thereafter, on June 19, the insurance company filed its brief. On July 11, the insured filed his motion for leave to supplement the record. Attached to that motion was an affidavit from the court's reporter, not giving any explanation for the late preparation or filing, but asserting rather that there was no evidentiary hearing on March 17 and implying that there had been no evidentiary hearing at any other time.

The insurance company filed a response, requesting that the insured's motion be denied and that the statement of facts not be filed. The insured's motion for leave to supplement the record was granted and the insurance company moved for rehearing.

HOLDING: Prior order granting the insured leave to supplement the record is set aside and motion for leave to supplement denied.

"Where a timely motion for new trial has been filed, [a party] must perfect his appeal within ninety days after the final judgment or order is signed." The Court holds that in this case, the insured had until May 25 to file his bond and thereby perfect his appeal. The Court notes that the insured filed his bond March 23, therefore it was timely filed.

The Court holds that if the insured's motion for leave to supplement the record, supported by his oral argument, is to be taken at face value as an effort to amend or supplement the record on appeal under T.R.App.P. 55(b), then it must fail because that rule applies only where a statement of facts had previously been timely filed with the court of appeals.

"Where no statement of facts had been filed, as in the instant case, the rules for amendment and supplementation of the record are inapplicable."

The Court finds that if the insured's motion could be construed as a motion to extend the time for filing a statement of facts under T.R.App.P. 54(c), it still must fail. "For one thing, no explanation, reasonable or otherwise, was offered in the motion or accompanying affidavit for the late filing request. For another, the motion was filed beyond the fifteen day time period after the last date for filing the record, as allowed by 54(c)."

The Court holds that the last day for filing would have been 125 days from Feb. 24, or June 24. The Court finds that the last day for filing the motion for extension of time would have been July 10, because the 15th day was a Sunday. The Court notes that the insured filed his motion July 11.

"Under the holding in *Monk v. Dallas Brake and Clutch Service Company, Inc.*, 683 S.W.2d 107 (Tex. App. — Dallas 1984, no writ), a motion for extension of time with a reasonable explanation for delay is necessary where there is an untimely request for a statement of facts under Rule 53(a), which will not be filed within the time prescribed by Rule 54(a)."

The Court notes the 14th Court of Appeals has taken a narrower view of Rule 53(a) and that in *Caldwell & Hurst v. Myers*, 705 S.W.2d 703 (Tex. App. — Houston [14th Dist] 1985, no writ), it held that the request to the court reporter must be made on or before the date prescribed for perfecting the appeal and the time to make such a request cannot be extended beyond that deadline under [Rule] 54(c) even though the statement of facts could be prepared and filed within the time required by Rules 54(a) and (c).

The Court states that language of Rule 53(a) seems to support the *Myers* ruling, although a proposed change in the rule would support the *Monk* interpretation by making it unnecessary to make a timely request for a statement of facts where the statement of facts or supplement will be filed within the time prescribed by Rule 54(a).

The Court holds that a timely request for a statement of facts can be made up to the final day appeal could have perfected, even though the appeal has actually been perfected at some date prior to the deadline.

The Court concludes that an untimely request for a statement of facts can be made without a motion and reasonable explanation if the statement of facts will be filed before the Rule 54(a) deadline, but if the statement of facts cannot be filed by that time, then a motion for an extension must be filed in accordance with Rule 54(c).

OPINION: Koehler, J.; panel consisting of Fuller, Woodard and Koehler, JJ.

ATTORNEYS: James F. Scherr and Lark H. Fogel, El Paso, for the insured; Karl O. Wyler III with Kemp, Smith, Duncan, & Hammond, El Paso, Brenda J. Norton with Diamond, Rash, Leslie, Smith & Samaniego, El Paso, and Paul Bracken, El Paso, for the insurance company.

TRIAL COURT: William E. Moody; 34th District, El Paso County.

Discovery

INTERROGATORIES/ AFFIDAVITS/ MOTIONS TO EXTEND TIME/ REQUESTS FOR ADMISSIONS/ SUMMARY JUDGMENT/

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

January 2, 1990

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

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 57(b). This rule should allow the clerk to add additional counsel on request; however, the clerk should be allowed to designate one attorney for each party for the purpose of receiving notice and for the filing of papers, if the attorneys fail to timely designate lead counsel.

Seike

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

January 2, 1990

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Justice, Supreme Court of Texas
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Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP
Rule 59(b). Provides that the clerk of the appellate court forward a duplicate copy of the motion to dismiss the appeal to the clerk of the trial court. This is not necessary since the filing of the motion does not represent any action by the court. The ruling by the appellate court is what is determinative.

Done

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

January 2, 1990

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Justice, Supreme Court of Texas
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In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 61. This rule should provide for the disposition of all papers in all cases, with reference to the appropriate statutes governing disposition of exhibits, etc.

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

January 2, 1990

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Justice, Supreme Court of Texas
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Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP
Rule 72(i). When an extension of time is requested for the filing of the transcript, the facts relied upon to reasonably explain the need for an extension must be supported by the affidavit of the trial clerk. This requirement should be added to this rule.

Sylpa

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

January 2, 1990

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

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 74. Should refer to judicial district not Supreme Judicial District.

Rule 74(h). This rule should apply to the length of briefs in both civil and criminal cases.

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

January 2, 1990

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P. O. Box 12248
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP
Rule 75(f). A party to the appeal desiring oral argument shall make request therefor at the time he files his brief in the case by noting on the front right-hand corner of his brief that he is requesting oral argument. This addition states the specific place to request the oral argument, as opposed to letters, cards, notes, etc. that are kept in files away from the briefs. Also the court should be able to advance both civil and criminal cases for submission without oral argument where oral argument would not materially aid the court. Also the time limit for notice to the parties should be changed from 21 days to 2 weeks so that the notice provisions concerning argument and no argument cases is the same. See Rule 77.

00770

4543.001

Court of Appeals
First Supreme Judicial District
1307 San Jacinto, 10th Floor
Houston, Texas 77002

September 27, 1989

Luther Soules, Attorney at Law
175 E. Houston
10th Floor
San Antonio, Texas

Re: Amendments to Texas Rules of Appellate Procedure

Dear Luke:

I have two proposals for changing our rules of appellate procedure. These changes have been discussed at a meeting of the Houston Bar Association Committee on the Appellate Judiciary and among various appellate judges, and I believe both proposals have considerable support.

First, I suggest that Rule 80(c) be amended to authorize the Court of Appeals to abate an appeal and remand the case to the District Court to conduct a hearing on any issue the Court of Appeals deems necessary in order to decide the appeal appropriately. This authority exists and is often used in the federal system and in many other states. It is arguable that such a procedure is already permissible under the existing rule that allows the court to make "any other appropriate order, as the law and the nature of the case may require." Nevertheless, there has been significant discussion in several recent cases of the need for such a rule. See Read v. State, 768 S.W.2d 919 (Tex. App.-Beaumont 1989), where Justice Brookshire advocated such a rule, and Mitchell v. State, 762 S.W.2d 916 (Tex. App.--San Antonio 1988, pet. ref'd), where the court used such a procedure, over the dissent of Justice Butts. Similar approaches have been used in Murphy v. State, 663 S.W.2d 604 (Tex. App.--Houston [1st Dist.] 1983, no writ), and Guillory, 638 S.W.2d 73 (Tex. App.--Houston [1st Dist.] 1982, no writ), both decided before the rules were enacted.

I propose that rule 80(c) provide:

In addition, the court of appeals may make any other appropriate order as the law and the nature of the case may require, including abating the appeal and remanding the cause to the trial court for a hearing on any issue.

00771

My second recommendation is that rules of appellate procedure 53(k) and 54 (c) be changed to provide that it is the court reporter's duty, not the appellant's duty, to file the statement of facts in the Court of Appeals and to obtain extensions of time for late filing. The present rules place this duty upon the appellant, which causes considerable inconvenience to lawyers in dealing with the many court reporters and substitute court reporters who are often involved in different parts of the case. Our rules should recognize that the court reporter is an officer of the court, and usually a full-time employee, who is well paid to perform this sole function. It is unreasonable to impose on a lawyer, who in most criminal cases will be working for a court-appointed fee, the duty of going to the court reporter's home or office, picking up the record, and transporting it downtown to the Court of Appeals.

Likewise, I can imagine no good reason for requiring the lawyer to obtain an extension of time for filing the statement of facts. The lawyer has no control over the statement of facts and makes no money from producing it. This burdensome responsibility should be placed upon the court reporter because the court reporter has sole control of the statement of facts and is the only one who makes money from producing it.

I recommend that appellate rule 53(k) read as follows:

(k) **Duty of ~~Appellant~~ Court Reporter to File** It is the ~~appellant's~~ court reporter's duty to cause the statement of facts to be filed with the Clerk of the Court of Appeals.

Similarly, rule 54(c) should be changed to read as follows:

(c) **Extension of Time** An extension of time may be granted for late filing in a court of appeals of a transcript or statement of facts, if a motion reasonably explaining the need therefor is filed, by appellant in the case of the late transcript and by the court reporter in the case of a late statement of facts, with the court of appeals not later than 15 days after the last date for filing the record. Such motion shall also reasonably explain any delay in the request required Rule 53(a).

Please let me know if there is any other information I can furnish concerning these suggestions. I would be happy to discuss these suggestions with you or your committee or any other interested committees at any time.

Sincerely,

Murry B. Cohen

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In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 86(a)(4). The time limit for issuing a mandate should be increased to allow for the filing deadline of a motion for rehearing in the higher courts to elapse. In most instances within 15 days after receipt by the clerk of the order of the Supreme Court denying writ, we have not yet received the record back from the higher court. Therefore, we should be allowed to wait for the return of the record until we issue our mandate.

Rule 86(e). Once a mandate issues, a court of appeals should not be able to vacate, modify, correct or reform its judgment unless it is to correct a clerical error.

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In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 87(b)(1). It is not necessary for the trial clerk to acknowledge receipt of the mandate to this Court. Also it is not necessary for the sheriff to notify us when the mandate has been carried out and executed. We would suggest that this language be deleted.

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TRAP

Rule 88. This rule should allow the appellate court to collect costs after issuance of a mandate also.

The appendix should apply to both civil and criminal cases and should delete references to supreme judicial district and to appellant and the state . It should read appellant and appellee since the State is now allowed to appeal. Also the thickness of each volume of the transcript should be set forth.

THE SUPREME COURT OF TEXAS

Justice Nathan L. Hecht — *Court Rules Liaison*

MEMORANDUM

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

January 17, 1990

RE: Rule 100(g), Texas Rules of Appellate Procedure
Extension of Time to File Motion for Rehearing
in the Court of Appeals

Before the Texas Rules of Appellate Procedure were adopted, extensions of time for filing motions for rehearing in the court of appeals were governed by Rule 21(c), Texas Rules of Civil Procedure, which stated in pertinent part:

> Any order of the court of appeals granting or denying a motion for late filing of any such instruments shall be reviewable by the supreme court for arbitrary action or abuse of discretion.

The granting of a motion for extension of time to file a motion for rehearing can be reviewed on application for writ of error. However, if the motion is denied, the procedure is more problematic because denial of a motion for rehearing is a predicate to application for writ of error. The Supreme Court confronted this problem and defined the proper procedures in *Banales v. Jackson*, 610 S.W.2d 732 (Tex. 1980). *Accord Anderson v. Coleman*, 626 S.W.2d 301 (Tex. 1981). (A copy of each of these two cases is attached.)

With the adoption of the Texas Rules of Appellate Procedure, Rule 21 (c) was repealed. Now, extensions of time for filing motions for rehearing in the court of appeals are governed by Rule 100(g), Texas Rules of Appellate Procedure, which states:

> **(g) Extensions of Time.** An extension of time may be granted for a late filing in a court of appeals of a motion or a second motion for rehearing, if a motion reasonably explaining the need therefor is filed with the court of appeals not later than fifteen days after the last date for filing the motion.

The language from Rule 21(c), quoted above, was not carried over into the app rules and did not survive in the civil rules. Thus, the procedure for review of a

of appeals' denial of a motion to extend time for filing a motion for rehearing has been cast into doubt. Several alternatives present themselves, among which are:

1. No review. The court of appeals' denial of a motion to extend time for filing a motion for rehearing ends appeal. I doubt the Supreme Court would seriously entertain this alternative.

2. Review by application for writ of error. The party whose motion for extension is denied files a motion for rehearing of that denial. When that motion for rehearing is denied, the party then applies to the Supreme Court for writ of error on that single ruling. If the party prevails, the case is remanded to the court of appeals for consideration of the late motion for rehearing on the case itself. Any party can then apply again to the Supreme Court for writ of error on the merits of the case.

3. Review by mandamus. This would be treated like any other mandamus, except that the standard of review might be reduced to a simple abuse of discretion rather than the ordinary heightened standard of clear abuse of discretion.

4. Review under *Banales*. This procedure would simply be retained, despite the repeal of Rule 21(c). Also, the appeal would be treated like a motion, as stated in *Anderson*.

There may be other alternatives as well, which should be explored. The language from former Rule 21(c) should perhaps be added to Rule 100(g), and perhaps the applicable procedure should also be spelled out in the rules.

The Court requests the views of the Committee on this matter.

Court of Appeals
Second Court of Appeals District
The Courthouse
Fort Worth, Texas 76196
817/334-1900

TRAP 120

November 20, 1989

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

Sec R

Dear Judge Hecht:

Please present the following comment regarding a proposed amendment to Texas Rules of Appellate Procedure, Rule 120, to the Supreme Court meeting on November 30, 1989, the present rule and suggested amendments being as follows:

Rule 120 Habeas Corpus in Civil Cases

(d) Action on Petition. If the court is of the tentative opinion that ~~the writ should issue~~ **[relator is entitled to the relief sought,]** the court will **[issue the writ]**, set the amount of bond, order relator released and schedule the petition for oral argument. Otherwise, the court shall deny the writ without further hearing.

(g) Order of Court. If after hearing oral argument, the court determines that ~~the writ should be granted~~, **[relator should be dicharged from custody,]** it shall enter an order to that effect. Otherwise, the court shall remand relator to custody and direct the clerk to issue an order of committment. If relator is not available for return to custody, pursuant to the order of committment, the court may declare the bond to be forfeited.

In most original proceedings in appellate courts, the issuance of the writ is the vehicle by which relief is granted to the relator at the conclusion of the proceedings. In habeas corpus, however, the issuance of the writ must occur as the initial act of the court and prior to the court's hearing the matter upon oral argument and determination if the relator is entitled to be discharged from custody. In fact, the court does not arquire jurisdiction over the person of the relator until it causes the writ to issue or its issuance is waived by the respondent. See Ex parte Alderete, 203 S.W. 763, ___ (Tex.Crim. App. 1918).

Even a casual inspection of the only substantive statutes defining the writ, prescribing its form, and delineating the court's duties when presented with an application for relief, reveals that the court cannot be of the "tenative opinion that the writ should issue" referred to in Rule 120(d). The court is required to issue the writ without delay or deny the application. See Code of Criminal Procedure, art. 11.01 et seq.

As to Rule 120(g), it is submitted that, after hearing the matter, it is inappropriate for the court to determine "that the writ should be granted" since the writ should already have been granted in order to initiate the proceedings. By definition, the writ is "an order issued by a court or judge . . . directed to any one having a person in his custody . . . commanding him to produce such person . . . and show why he is in custody or under restraint." (C.C.P. art. 11.01)

In summary, the relief requested by the relator in a habeas corpus proceeding is always two-fold, the first part of which prays for the writ to issue to determine lawfulness of custody, and the second part being a prayer for discharge from custody. By comparison, the granting of leave to file petition for writ of mandamus equates to the issuance of the writ of habeas corpus because those acts are necessary to the exercise of jurisdiction. Similarly, after hearing, the issuance or denial of the writ of mandamus equates with the final decision in habeas corpus, either to discharge the relator or to remand him to custody. It is submitted that the amendments above suggested take into account the basic difference in the two types of original proceedings.

Sincerely yours,

Fred Fick
Chief Staff Attorney

THE SUPREME COURT OF TEXAS

Justice Nathan L. Hecht

Court Rules Liaison

MEMORANDUM

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

January 17, 1990

RE: Rule 140, Texas Rules of Appellate Procedure
Direct Appeals

The Supreme Court has jurisdiction over direct appeals in certain cases authorized by the Constitution and the Legislature. Article V, section 3-b of the Texas Constitution states:

> The Legislature shall have the power to provide by law, for an appeal direct to the Supreme Court of this State from an order of any trial court granting or denying an interlocutory or permanent injunction on the grounds of the constitutionality or unconstitutionality of any statute of this State, or on the validity or invalidity of any administrative order issued by any state agency under any statute of this State.

Section 22.001(c) of the Government Code states:

> An appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state. It is the duty of the supreme court to prescribe the necessary rules of procedure to be followed in perfecting the appeal.

The Supreme Court has complied with this mandate by promulgating Rule 140, Texas Rules of Appellate Procedure, which states:

Rule 140. Direct Appeals

In compliance with section 22.001(c) of the Government Code, the following rules of procedure for direct appeals to the Supreme Court are promulgated.

In obedience to an act of the Regular Session of the Forty-eighth Legislature approved February 16, 1943, and entitled "An Act authorizing

appeals in certain cases direct from trial courts to the Supreme Court; authorizing the Supreme Court to prescribe rules of procedure for such appeals; and declaring an emergency," which act was passed by authority of an amendment known as section 3-b of Article 5 of the Constitution, the following procedure is promulgated:

(a) In view of section 3 of Article 5 of the Constitution which confines the appellate jurisdiction of the Supreme Court to questions of law only, this court under the present and later amendment, above cited, and such present and any future legislation under it, has and will take appellate jurisdiction over questions of law only, and in view of sections 3, 6, 8 and 16 of such Article 5, will not take such jurisdiction from any court other than a district or county court.

(b) When a trial court has granted or denied an interlocutory or permanent injunction and its decision is based on the grounds of the constitutionality or unconstitutionality of any statute of this State, the Supreme Court shall have jurisdic-tion of a direct appeal of the trial court's order when the appeal contests that court's holding regarding the constitutionality or unconstitutionality of the statute.

(c) Such appeal shall be in lieu of an appeal to the court of appeals and shall be upon such question or questions of law only. A statement of facts shall not be brought up except to the extent it is necessary to show that the appellant has an interest in the subject matter of the appeal. If the Supreme Court would be required to determine any contested issue of fact in order to rule on the constitutionality of the statute in question as ruled on by the trial court, the appeal will be dismissed.

(d) The rules governing appeals to the courts of appeals apply to direct appeals to the Supreme Court except when inconsistent with Section 22.001 of the Government Code and with this rule.

Besides being unusually cumbersome relative to the main body of appellate rules, Rule 140 is deficient in at least two respects. First, the procedure for this Court to note jurisdiction of the appeal is not specified. Second, whether the Court's exercise of jurisdiction is mandatory or discretionary is not stated. It is proposed that the existing rule be repealed and the following substituted in its place:

Rule 140. Direct Appeals

(a) Application. This rule governs direct appeals to the

Supreme Court authorized by the Constitution and by statute. The rules governing appeals to the courts of appeals apply to direct appeals to the Supreme Court except when inconsistent with statute or this rule.

(b) Jurisdiction. The Supreme Court may not take jurisdiction over a direct appeal from the decision of any court other than a district court or a county court, or of any question of fact. The Supreme Court may decline to exercise jurisdiction over a direct appeal of an interlocutory order if the record is not adequately developed, or if its decision would be advisory, or if the case is not of such importance to the jurisprudence of the state that a direct appeal should be allowed.

(c) Statement of Jurisdiction. Appellant shall file with the record in the case a statement fully, clearly and plainly setting out the basis asserted for exercise of the Supreme Court's jurisdiction. Appellee may file a response to appellant's statement of jurisdiction within ten days after such statement is filed.

(d) Preliminary Ruling on Jurisdiction. If the Supreme Court notes probable jurisdiction over a direct appeal, the parties shall file briefs as in any other case. If the Supreme Court does not note probable jurisdiction over a direct appeal, the appeal shall be dismissed for want of jurisdiction.

(e) Direct Appeal Exclusive. An appellant who has attempted to perfect a direct appeal to the Supreme Court may not, during the pendency of that appeal, pursue an appeal to the court of appeals. A direct appeal dismissed for want of jurisdiction shall not preclude appellant from pursuing any other appeal ~~then~~ available.

The Court requests the Committee's counsel regarding these issues.

What is end of sentence?

at the time the direct appeal was filed and for ~~?~~ if the other appeal is pursued within time periods prescribed by these rules ~~except~~ the days during which direct appeal was pending

cause or the appealable portion thereof without reference to the merits of the appeal.

Rule 170. ~~Order of~~ Submission

Causes may be heard and submitted in such order as the Supreme Court may deem to be in the best interest and convenience of the parties or their attorneys. The Supreme Court may determine that causes should be submitted without oral argument.

The Court is considering whether to expand the category of cases in which per curiam opinions should issue to include, particularly, cases in which the issue is so clear, simple and well-defined, and the briefs so thorough, that it is very unlikely that oral argument could in any way influence the outcome of the case. The kind of language the Court may consider is set out below.

The Court requests the counsel of the Committee regarding these matters.

Done

PROPOSED AMENDMENTS

Rule 133. Orders on Applications for Writ of Error

(a) Notation on Denial of Application. In all cases where the judgment of the court of appeals is correct and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation "Refused." In all cases where the Supreme Court is not satisfied that the opinion of the court of appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error of law which requires reversal or which is of such importance to the jurisprudence of the State as to require correction, the court will deny the application with the notation "Writ Denied." In all cases where the Supreme Court is without jurisdiction of the case as presented in the application, it will dismiss the application with the docket notation "Dismissed for Want of Jurisdiction." The Court may accompany the denial of an application with such explanatory remarks as it may consider appropriate.

~~**(b) Conflict in Decisions.** In cases of conflict named in subsection (a)(2) of section 22.001 of the Government Code, the Supreme Court will grant the application for writ of error, unless it is in agreement with the decision of the court of appeals in the case in which the application is filed. In that event said Supreme Court will so state in its order, with such explanatory remarks as may be deemed appropriate. If the decision of the court of appeals is in conflict with an opinion of the Supreme Court, is contrary to the Constitution, the statutes or any rules promulgated by the Supreme Court, the Supreme Court may, upon granting writ of error and without hearing argument in the case, reverse, reform or modify the judgment of the court of appeals, making, at the same time, such further orders as may be appropriate.~~

~~(c)~~ (b) **Moot Cases.** If a cause or an appealable portion thereof is moot, the Supreme Court may, in its discretion and after notice to the parties, upon granting writ of error and without hearing argument with reference thereto, dismiss such

THE SUPREME COURT OF TEXAS

Justice Nathan L. Hecht *Court Rules Liaison*

MEMORANDUM

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

January 15, 1990

RE: Rule 133(b), Texas Rules of Appellate Procedure
Supreme Court Per Curiam Opinions (3 pages)

When the Supreme Court grants an application, it is not required by the Constitution or statutes to hear oral argument. In certain cases, the Court does not hear oral argument and issues its decisions in per curiam opinions. The Court also sometimes issues a per curiam opinion with the denial of an application.

Although Rule 133(b), Texas Rules of Appellate Procedure, does not refer expressly to per curiam opinions, it purports to state the applicable procedure in the Supreme Court, as follows:

> **Conflict in decisions.** In cases of conflict named in subsection (a)(2) of section 22.001 of the Government Code, the Supreme Court will grant the application for writ of error, unless it is in agreement with the decision of the court of appeals in the case in which the application is filed. In that event said Supreme Court will so state in its order, with such explanatory remarks as may be deemed appropriate. If the decision of the court or appeals is in conflict with an opinion of the Supreme Court, is contrary to the Constitution, the statutes or any rules promulgated by the Supreme Court, the Supreme Court may, upon granting writ of error and without hearing argument in the case, reverse, reform or modify the judgment of the court of appeals, making, at the same time, such further orders as may be appropriate.

In effect, the rule is advisory and informational only, and not binding upon the Court. The Court has the power to issue per curiam opinions in cases in which the predicate conflict required by the rule does not exist. Arguably, some might argue that it does so already, although the Court has at least attempted to adhere to the policy stated in the rule. It is less certain that the Court has the power to issue a per curiam opinion when an application is denied.

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IRELAND GRAVES (1883-1969)
BEN F. VAUGHAN, III, P.C.
OF COUNSEL

TELECOPY NUMBER:
(512) 478-1976

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

November 26, 1989

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

Dear Judge Hecht:

4. The court may wish to consider adopting the amendments to Texas Rules of Appellate Procedure 41, 202, and 210 as adopted by the court of criminal appeals on June 5, 1989. *See Order Adopting Amendments to Texas Rules of Appellate Procedure*, 52 Tex. B.J. 893 (1989).

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

Respectfully,

Charles A. Spain, Jr.

Order Adopting Amendments To Texas Rules of Appellate Procedure

Effective July 1, 1989

BE IT ORDERED by the Court of Criminal Appeals that the following appended amendments to Texas Rules of Appellate Procedure are hereby adopted and promulgated to govern criminal cases and criminal law matters [Article V, §5 and Article 4.04, C.C.P.], under authority of and in conformity with Acts 1985, 69th Leg., Ch. 685, p. 5136, §§1-4, and Articles 44.33 and 44.45, Code of Criminal Procedure. Intended and designed to be interim measures to treat specific situations, these amended rules shall govern posttrial, appellate and review procedures only in criminal cases and criminal law matters. This order does not amend any existing rule, promulgate any new rule nor repeal any rule in the Texas Rules of Civil Procedure. No rule amended by this order shall be applicable to any civil case ["actions of a civil nature" (Rule 2, T.R.Civ. P.)] unless and until it has been promulgated by the Supreme Court of Texas.

BE IT FURTHER ORDERED that the Texas Rules of Appellate Procedure be and they are hereby made applicable to appeals by the State taken pursuant to Acts 1987, 70th Leg., Ch. 382, p. 1884, codified as Article 44.01, Code of Criminal Procedure.

BE IT FURTHER ORDERED that the Clerk of this Court shall file with the Secretary of State of the State of Texas, for and in behalf and as the act of this Court, a duplicate original copy of this order and Rule 54(b), and the Clerk shall cause them to be published in the Texas Register and the Texas Bar Journal, as provided by the above Act.

BE IT FURTHER ORDERED that these amended rules become effective July 1, 1989, and remain in effect unless and until disapproved, modified or changed by the Legislature or unless and until supplemented or amended by this Court pursuant to the above Act.

BE IT FURTHER ORDERED that this order and these rules shall be recorded in the minutes of this Court, and that the original of this order signed by the members of this Court and of these rules shall be preserved by the Clerk of this Court as a permanent record of this Court.

SIGNED and ENTERED in duplicate originals this 5th day of June, 1989.

/S/
Michael J. McCormick
Presiding Judge

/S/
W.C. Davis, Judge

/S/
Sam Houston Clinton, Judge

/S/
Marvin O. Teague, Judge

/S/
Chuck Miller, Judge

/S/
Charles F. (Chuck) Campbell, Judge

/S/
Bill White, Judge

/S/
M. P. Duncan, III, Judge

/S/
David Berchelmann, Jr., Judge

Rule 41. Ordinary Appeal—When Perfected.
(a) [Appeals in Civil Cases.] (No Change)
(b) Appeals in Criminal Cases.
(1) *Time to Perfect Appeal.* Appeal is perfected when notice of appeal is filed within thirty *(fifteen by the state)* days after the day sentence is imposed or suspended in open court or the day an appealable order is signed by the trial judge; except, if a motion for new trial is timely filed, notice of appeal shall be filed within ninety days after the sentence is imposed or suspended in open court.
(2) [*Extension of Time.*] (No Change)
(c) [*Prematurely Filed Documents.*] (No Change)

Rule 202. Discretionary Review With Petition.
(a) (No Change)
(b) (No Change)
(c) (No Change)
(d) (No Change)
(1) [*Index.*] through (6) [*Prayer for Relief.*] (No Change)
(7) *Appendix.* A copy of any opinions delivered upon rendering the judgment by the court of appeals whose decision is sought to be reviewed shall be included.
(8) [7] (Renumbered, otherwise no change)
(9) [8] (Renumbered, otherwise no change)

Rule 210. Direct Appeals in Death Penalty Cases.
(a) [Record.] (No Change)
(b) Briefs. Appropriate provisions of Rule 74 govern preparation and filing of briefs in a case in which the death penalty has been assessed, except that a brief may exceed fifty pages and an original and ten copies of it shall be filed.

GRAVES, DOUGHERTY, HEARON & MOODY
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IRELAND GRAVES (1885-1969)
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OF COUNSEL

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(512) 478-1976

CHARLES A. SPAIN, JR.
(512) 480-5789

November 26, 1989

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

Dear Judge Hecht:

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

Respectfully,

Charles A. Spain, Jr.

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Effective July 1, 1989

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BE IT FURTHER ORDERED that the Texas Rules of Appellate Procedure be and they are hereby made applicable to appeals by the State taken pursuant to Acts 1987, 70th Leg., Ch. 382, p. 1884, codified as Article 44.01, Code of Criminal Procedure.

BE IT FURTHER ORDERED that the Clerk of this Court shall file with the Secretary of State of the State of Texas, for and in behalf and as the act of this Court, a duplicate original copy of this order and Rule 54(b), and the Clerk shall cause them to be published in the Texas Register and the Texas Bar Journal, as provided by the above Act.

BE IT FURTHER ORDERED that these amended rules become effective July 1, 1989, and remain in effect unless and until disapproved, modified or changed by the Legislature or unless and until supplemented or amended by this Court pursuant to the above Act.

BE IT FURTHER ORDERED that this order and these rules shall be recorded in the minutes of this Court, and that the original of this order signed by the members of this Court and of these rules shall be preserved by the Clerk of this Court as a permanent record of this Court.

SIGNED and ENTERED in duplicate originals this 5th day of June, 1989.

/S/
Michael J. McCormick
Presiding Judge

/S/
W.C. Davis, Judge

/S/
Sam Houston Clinton, Judge

/S/
Marvin O. Teague, Judge

/S/
Chuck Miller, Judge

/S/
Charles F. (Chuck) Campbell, Judge

/S/
Bill White, Judge

/S/
M. P. Duncan, III, Judge

/S/
David Berchelmann, Jr., Judge

Rule 41. Ordinary Appeal—When Perfected.
(a) [Appeals in Civil Cases.] (No Change)
(b) Appeals in Criminal Cases.
(1) *Time to Perfect Appeal.* Appeal is perfected when notice of appeal is filed within thirty *(fifteen by the state)* days after the day sentence is imposed or suspended in open court or the day an appealable order is signed by the trial judge; except, if a motion for new trial is timely filed, notice of appeal shall be filed within ninety days after the sentence is imposed or suspended in open court.
(2) [*Extension of Time.*] (No Change)
(c) [*Prematurely Filed Documents.*] (No Change)

Rule 202. Discretionary Review With Petition.
(a) (No Change)
(b) (No Change)
(c) (No Change)
(d) (No Change)
(1) [*Index.*] through (6) [*Prayer for Relief.*] (No Change)
(7) *Appendix.* A copy of any opinions delivered upon rendering the judgment by the court of appeals whose decision is sought to be reviewed shall be included.
(8) [7] (Renumbered, otherwise no change)
(9) [8] (Renumbered, otherwise no change)

Rule 210. Direct Appeals in Death Penalty Cases.
(a) [Record.] (No Change)
(b) Briefs. Appropriate provisions of Rule 74 govern preparation and filing of briefs in a case in which the death penalty has been assessed, except that a brief may exceed fifty pages and an original and ten copies of it shall be filed.

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

January 2, 1990

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

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

APPENDIX FOR CRIMINAL CASES

Rule 2. This section of the appendix should be completely deleted. The rule should be that a supplemental transcript shall conform to the rules governing the original transcript. If this rule is kept, then a proper reference to the correct rule should be modified. It now refers to rule 45.

Seerden

4543.001

2-6-90
SB

TO: Texas Supreme Court Advisory Committee

FROM: Chuck Herring
Lefty Morris
Co-Chairs; Ad Hoc Subcommittee on Sealing of Court Records

DATE: February 9, 1990

RE: Proposed Rule 76a, Sealing Court Records

I. Introduction. The Texas Legislature adopted section 22.010 of the Texas Government Code effective September 1, 1989. Section 22.010 provides as follows:

> SEALING OF COURT RECORDS. The Supreme Court shall adopt rules establishing guidelines for the courts of this state to use in determining whether in the interest of justice the records in a civil case, including settlements, should be sealed.

Accordingly, the Texas Supreme Court submitted the issue to the Advisory Committee for recommendation and Chairman Luke Soules appointed a subcommittee to propose a draft rule. The subcommittee conducted two public hearings, on November 18, 1989 and December 15, 1989, and also received substantial input at the Texas Supreme Court's public hearing on November 30, 1989. Twenty-seven participants, including several representatives of public interest and citizen's groups, as well as several media attorneys and representatives, attended and provided valuable input at the hearings. (A list of participants is enclosed as Attachment "I.") The subcommittee accumulated several hundred pages of draft proposals, court decisions, law review commentaries and position statements from many sources.

Done

We have attached as Attachment "A" a draft proposal for a new Rule 76a, concerning sealing of court records. Because most of the subcommittee members were unable to attend all of the committee hearings, this draft is merely the Co-Chairs' effort to consolidate the hard work of many other participants on points that came the closest to a consensus.

Attached hereto as Attachments "B" through "H" are the most current other drafts that we have received from various participants. Attachments "I-1" through "I-16" are selected letter comments received from several sources.

II. Draft Rule. The draft rule attached as Attachment "A" defines the "compelling need" and "protectible interests" standards (paragraphs (A)(1) and (A)(2)) that the moving party must meet to obtain an order sealing "court records," which the rule also defines (paragraph (A)(3)). The draft also provides procedures for the motion to seal (paragraph (B)(2)), notice to the public (paragraph (B)(2)) and the hearing required before court records may be sealed (paragraph (B)(1)). The draft further provides for specific findings (paragraph (B)(4)), sets out the requirements for sealing orders (paragraph (B)(5)), and provides for emergency temporary sealing orders (paragraph (B)(3)). Finally, the draft specifies the trial court's continuing jurisdiction (paragraph (C)) and the parties' appeal rights (paragraph (D)).

A. Compelling Need and Protectible Interests. The "compelling need" standard adopted in paragraph (A)(1) recognizes a strong presumption that court records are open to public scrutiny. The rule also recognizes that the right to inspect and copy court records is not absolute, and that courts have supervisory powers over their own files.

Paragraph (A)(1) requires that the movant satisfy four specified requirements. The "protectible interests" specifically enumerated in paragraph (A)(2) are an attempt to draw attention to special problem areas -- such as family law and tort cases involving sexual abuse of children, and trade secrets cases -- in which sealing is sometimes necessary.

B. "Court Records." In paragraph (A)(3) the draft defines the "court records" that are subject to this rule as materials filed of record in any civil state court, and excludes discovery materials. As noted below, however, the Co-Chairs could not agree on this treatment of discovery materials.

C. Motion, Notice. Paragraph (B)(2) provides the procedure for motion and notice. After filing a motion to seal, the moving party posts a public notice at the location where notices for meetings of county governmental bodies are posted, at least fourteen days before the date set for hearing. The rule also specifies the contents of the notice and requires that a copy be served on the clerk of the Texas Supreme Court, who shall post the notice in a public place.

D. Temporary Sealing Orders. Paragraph (B)(3) provides the procedure for emergency temporary sealing orders in those instances when there is insufficient time to comply with the normal notice and hearing procedure set out in (B)(1) and (B)(2). The procedure is based upon temporary restraining order practice as set out in Rule 680.

E. Sealing Order, Findings. Paragraphs (B)(4) and (B)(5) require specific findings and other matters to be set forth in the sealing order.

F. Continuing Jurisdiction, Appeal. Because a number of challenges to sealing orders have failed on procedural grounds after trial courts have lost plenary jurisdiction, the rule provides for continuing jurisdiction in the trial court and sets out specific procedures for appeal of sealing decisions.

III. Unresolved Issues. Matters on which the Co-Chairs could not agree were:

> whether the rule should apply to discovery materials, and thus also whether to amend Rule 166b(5) (which now provides for orders that "for good cause shown results of discovery be sealed or otherwise adequately protected; that its distribution be limited; or that its disclosure be restricted");
>
> whether the rule should apply to settlements that are not filed of record;
>
> whether the showing of "compelling need" should be by a preponderance of the evidence or by clear and convincing evidence;
>
> whether the reference to "trade secrets" as a "protectible interest" should be broadened to apply to other intangible property rights.

IV. Conclusion. The attached draft is the result of hundreds of hours of work and input from many persons, but as with almost any compromise, it is certainly imperfect and in some respects cumbersome. Because the rule inevitably involves a difficult and delicate balance of public access and private interests, the draft reflects many important policy decisions that we want the Advisory Committee to feel free to rethink and rewrite. We will both be present at the Advisory Committee meeting to explain the draft in detail as well as other options that were presented to the subcommittee.

PROPOSED TEXAS RULE OF CIVIL PROCEDURE 76a:
COURT RECORDS

A. Definitions

1. Compelling Need: "Compelling Need" means the existence of a specific protectible interest which overrides the presumption that all court records are open to the general public. The moving party must establish the following:

(a) that a specific interest of the person or entity sought to be protected by the sealing of the court records clearly outweighs the interest in open court records and the specific interest will suffer immediate and irreparable harm if the court records are not sealed;

(b) that no less restrictive alternative will adequately protect the specific interest of the person or entity sought to be protected;

(c) that sealing will effectively protect the specific interest of the person or entity sought to be protected without being overbroad; and

TRCP 76a

(d) that sealing will not restrict public access to information that is detrimental to public health or safety, or to information concerning the administration of public office or the operation of government that violates any law or involves misuse of public funds or public office.

2. Protectible Interests: "Protectible interests" which may be the basis of an order under this rule include, but are not limited to, the following:

(a) a right of privacy or privilege established by law, including but not limited to, privileges established by these rules or by the Texas Rules of Civil Evidence;

fair trial — (b) constitutional rights;

(c) trade secrets;

(d) the protection of the identity or privacy of an individual who has been the subject of a sexually related assault or injury.

3. Court Records: For purposes of this rule, the term "court records" shall include all documents and records filed in connection with any matter before any civil court in the State of Texas. This rule shall not apply to discovery materials not filed with a court or to documents filed with a court in camera solely for the purpose of obtaining a ruling on the discoverability of such documents.

B. Unless provided to the contrary by statute or other law, before a judge may seal any court records, the following prerequisites must be satisfied:

1. Hearing: A hearing shall be held in open court, open to the public, at which the parties may present evidence to support or oppose the motion to seal court records; however, ~~the hearing~~ may be ~~conducted~~ in camera upon request by any party, ~~if the court finds from affidavits submitted or other evidence~~ that an open ~~hearing~~ would reveal the information which is sought to be protected. At the hearing the court may consider affidavit evidence if the affiant is present and available for cross examination. Any person, not a party, desiring to support or oppose the sealing of court records, may intervene for the limited purpose of participating in the hearing and in any subsequent proceedings involving the motion to seal or the grant or denial of a sealing order.

2. Notice: The party seeking sealing shall file a written motion in support of the sealing request. After filing the motion, the moving party shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, at least fourteen days before the date set for the hearing, stating that a hearing will be held in open court on a motion to seal court records, stating that any person has an opportunity to appear and be heard concerning the sealing of court records, and stating the specific time and place of the hearing, the general type of case, the style of the case, and the case number. After posting such notice, the moving party shall file a copy of the notice with the clerk of the court in which the matter is pending and shall serve a copy of the notice with the clerk of the Texas Supreme Court, who shall post the notice in a public place.

3. Temporary Sealing Order: A temporary sealing order may be entered without the hearing or public notice provided for in paragraphs (B)(1) and (B)(2) above, upon the filing of a sworn motion showing compelling need and that immediate and irreparable harm will result before notice can be posted and a hearing can be held as otherwise provided herein. Whenever possible, the moving party shall serve the motion upon any other party who has already appeared. Every temporary sealing order granted without posted notice or public hearing shall be filed, shall be endorsed with the date and hour of

issuance, shall contain the findings required by paragraph (B)(5), shall state why the order was granted without notice, and shall expire by its terms no more than fourteen days after its issuance, unless within the time so fixed, for good cause shown, the order is 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. If a temporary sealing order is granted without public notice and hearing, a motion for sealing order shall be filed, notice provided and a hearing set as elsewhere provided in these rules. On two days' notice to the party who obtained the temporary sealing order or on such shorter notice to that party as the court may prescribe, any person, whether or not a party to the lawsuit, may move dissolution or modification of the order and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

4. Findings: In order to seal court records, the court shall make specific findings demonstrating that a compelling need has been shown, but the findings shall not reveal the information sought to be protected.

5. Sealing Order: A sealing order shall be specific and shall state the case number, the style of the case, the specific findings, the conclusions of law, the time period for which the sealed portions of the court records are to remain sealed, and shall identify those portions of the court records which are to be sealed and those portions which are to remain open. The order shall not reveal the information sought to be protected. The motion to seal and the sealing order shall remain in the open portion of the file.

C. Continuing Jurisdiction: Any person may intervene as a matter of right at any time before or after judgment in connection with any motion to seal or to unseal court records. Notwithstanding the rights of appeal provided in this Rule, a court that enters a sealing order maintains continuing jurisdiction to enforce, alter, or vacate that order.

D. Appeal: Except as to a temporary sealing order under paragraph (B)(3), any sealing order, any sealing provision contained in any judgment, and any order granting or denying a motion to alter, vacate or enforce a sealing order shall be deemed to be a separate and independent final judgment and shall be subject to immediate and independent appeal by any party or intervenor who has requested, supported or opposed any sealing order.

THE SUPREME COURT OF TEXAS

Justice Nathan L. Hecht — *Court Rules Liaison*

MEMORANDUM

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

January 15, 1990

RE: Canon 3A(9), Code of Judicial Conduct
Use of Cameras in Courtrooms (1 page)

Your letter of January 10, 1990, inquires whether drafting has been done on the referenced canon, or on related changes in the Texas Rules of Civil Procedure or the Texas Rules of Appellate Procedure, and whether the Committee should consider such changes.

Among the recent amendments to the Code of Judicial Conduct, Canon 3A(9) was renumbered 3A(10), with the following statement:

> This renumbered subsection 10 is to be repealed at such time as the Texas Rules of Civil Procedure and the Texas Rules of Appellate Procedure are amended to govern recorded court proceedings and those amendments become effective.

The transfer of this matter to the rules appears to comport with proposed changes in the Draft Revisions of the ABA Code of Judicial Conduct.

The Supreme Court is considering whether to allow cameras at its proceedings, either as a rule, or upon invitation of the Court at specific times, or on the basis of a pilot project. However, no decision has been made, and the Court would welcome the views of the Committee and any specific language for rules changes on these issues, as well as the general matter of cameras in trial and appellate courtrooms. The only suggested language I am aware of to date has been the following, proposed by Justice Doggett for inclusion in the Texas Rules of Appellate Procedure:

> Upon the motion of any party or upon its own initiative, the Supreme Court may permit the filming, videotaping or broadcasting of any proceeding pending before it in accordance with such conditions as it deems appropriate.

5656 North Jackson Street
Jacksonville, Texas 75766
214 586-5644

An NBC Affiliate

56 KETK-TV EAST TEXAS

December 29, 1989

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

Dear Justice Hecht:

I am News Director of KETK-TV Region 56 in Jacksonville, Texas. We serve the communities of Tyler, Longview, and Lufkin-Nacogdoches, among others.

I am writing to add my voice of support to those who favor the re-introduction of cameras into Texas Courtrooms. I have been a Texas News Director for about a dozen years, now. I believe the communities I serve have been missing a vital part of their community life in not witnessing the judicial arm of the government in action.

As you know, there has been a movement over the decades of the 70's and 80's to include cameras in many of the courtrooms of the country. I believe this has led to an increased respect and understanding of the courts.

Recently a critical decision was made in a Florida Courtroom on a case which it was feared would split the community into racial factions fighting with one another. Many experts have credited full television coverage of the final phase of the trial for keeping the streets calm by showing the court proceedings, live, all day.

Just three or four weeks ago, I testified with others at a change of venue hearing in a local case which also had potential for splitting the community. My perception was that rumor had caused the community to be split, but that television and newspaper coverage pictures had helped stop those rumors and bring the facts into local conversations. In the same way, pictures (which are critical to any in-depth coverage by television) can help the community to better understand the process of the court in all cases.

It is my understanding that the court is in the process of considering courtroom access by cameras. I strongly urge the court to endorse this proposal.

Sincerely yours,

Jon McCall
News Director

JM:bc

00801

December 18, 1989

Justice Nathan Hecht
Texas Supreme Court
P.O. Box 12248
Capital Station
Austin, TX 78711

Dear Justice Hecht:

I encourage you and the your fellow justices to vote to allow television coverage of Court proceedings.

I know many of the arguments against cameras in courtrooms deal with the disruptive nature of cameras and equipment. I worked as a news photographer in Oklahoma where courts allowed local stations to pool coverage by allowing one camera in the courtroom and all other equipment was operated outside the courtroom. Advances in technology since then would make that system even easier and less obtrusive.

I also believe television can educate the public better on the justice system if it is allowed to show exactly what happens in court. By televising cases in the Supreme Court, we could show the judicial process at its highest level, and perhaps by proving the medium's value there, eventually be allowed to show district court proceedings to local viewers.

Please open the Court to television coverage.

Sincerely,

David Lowell

David Lowell
News Director

KAMR TV
2000 N. POLK
BOX 751
AMARILLO, TEXAS 79189
806 / 383-3321

December 19, 1989

The Honorable Nathan Hecht
c/o Texas Supreme Court
P.O. Box 12248
Capital Station
Austin, Texas 78711

Dear Justice Hecht,

I am pleased to learn the Texas Supreme Court is considering opening proceedings to television camera coverage. This would be a wise move toward keeping judicial proceedings in step with evolving technology of news and information dissemination.

Most citizens today receive most of their news through the electronic media. It is vital that our coverage be accurate, comprehensive and understandable. Opening court proceedings to cameras would help us meet that obligation to the public.

Some early experiments with cameras in the courtroom failed. This occurred in an earlier age of television when neither the media nor the courts entirely understood the potential for disruption, and when television news operations were perhaps less mature and conscientious. Equipment in that era was bulky and obtrusive.

Nowadays, most television news operations are more sophisticated and more sensitive to potential problems caused by the presence of cameras. Today's equipment is smaller, more refined, and less obtrusive. Pool feeds enable several stations to take video from a single camera inside the courtroom.

Citizens are more accustomed to the presence of news cameras in their lives. Cameras simply do not stir the curiosity and excitement they once stirred.

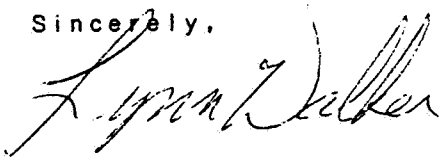
The perceived obtrusiveness of the cameras lies at the heart of this issue. If that perceived obtrusiveness is eliminated, courts and television cameras can co-exist peacefully and productively. A notepad in the hand of a newspaper reporter no more guarantees accuracy or safeguards against sensationalism than a camera on the shoulder of a television photographer. The camera is just more visible.

CANNAN COMMUNICATIONS, INC.
BOX 1224
WICHITA FALLS, TEXAS 76307
817 / 322-3252

In any arrangement, the court would set the ground rules for television coverage and the television stations, mindful of the fragile nature of the arrangement, would be willing to cooperate.

I hope you will give this matter all due consideration and set an example for other courts in Texas to follow.

Sincerely,



Lynn Walker
News Director

KDAF
8001 John Carpenter Freeway Dallas Texas 75247 214 634 8833

Gayle Brammer-Paul
Vice President General Manager

December 12, 1989

Justice Nathan Hecht
Texas Supreme Court
P.O. Box 12248
Capital Station
Austin, Texas 78771

Dear Justice Hecht:

I am writing to demonstrate my support of the rule change proposed by Justice Lloyd Doggett allowing television coverage of the Texas Supreme Court.

As general manager of Fox Television in Dallas/Fort Worth, I have witnessed many changes in the telecommunications industry in the recent years. For the most part these changes have benefitted the Texas citizen.

The right to know is inherently married to the right to see as broadcast news is the number one source of information for todays citizen.

Limitations set forth by judges would be adhered to as television stations execute their licensed responsibility to entertain and inform our viewers.

Respectfully,

Gayle Brammer
Vice President
General Manager

GB/vj

KPRC Television
Post Office Box 2222
Houston, Texas 77252
(713) 771-4631

2 KPRC TV HOUSTON

December 15, 1989

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

Dear Justice Hecht:

I'm writing in support of the resolution before the court to allow television coverage of the Texas Supreme Court. As a broadcast journalist, an officer in the Houston Chapter of of the Society of Professional Journalists and a concerned citizen, it is my firm belief that the time has come for television to emerge from second-class status and fulfill our public responsibility.

As you know, most Americans have only a superficial knowledge of our court system. While the majority of Americans receive their news from the television medium, this same medium does not enjoy the same ability to cover the court system as do other media. As a result, our society has an image of our court system based on entertainment programming. We believe television can do a great deal in changing this sometimes misleading impression.

I'm sure you're aware of the recent television coverage in Miami of a potentially explosive trial situation involving a police officer accused of murdering two minority victims. Much has been written about the role that television coverage of the trial played in maintaining the peace in Miami during the trial and jury deliberations.

A great majority of the states now allow cameras in the courtroom with most reporting very positive experiences such as the recent Miami situation. Technology has virtually eliminated the court's original objections to television coverage; the size of our equipment is no longer a consideration, our equipment now operates at virtually any light level and electronic cameras operate silently.

We would be more than happy to provide you with a demonstration of any equipment involved in our coverage and discuss operating guidelines that are currently in place in other states. We strongly believe that coverage of the court would enhance the public's understanding of the judicial process.

Sincerely,

Paul Paolicelli
Vice President, News

cc: Tom Reiff
Carole Kneeland

00806

WFAA-TV 8
Communications Center
606 Young Street
Dallas, Texas 75202-4810
214-748-9631
An ABC Affiliate

Marty Haag
Vice President &
Executive News Director

December 13, 1989

Justice Nathan Hecht
Texas Supreme Court
P.O. Box 12248
Capital Station
Austin, TX 78711

Dear Justice Hecht:

I am writing to urge that the Texas Supreme Court open its proceedings to television cameras. I believe this action would have a beneficial result in informing the public and giving our citizens more confidence in the judicial system.

In truth, 44 other states allow coverage of courts--not just appellate courts but lower civil and criminal courts. Texas is behind the times. The old images of bright lights and large cameras disrupting proceedings just don't apply. Ten years ago, in conjunction with the American Bar Association meeting in Dallas, WFAA-TV produced tapes of both an appellate and criminal proceedings to show how inobtrusive cameras could be. In that year, Florida became the first state to take down the barriers completely. I truly believe that any fair observer could look at coverage of proceedings in such states as Florida and California and conclude that cameras had, in fact, opened the eyes of the public to the courts, not made a mockery of their dignity.

I strongly urge you to make this important decision next month. Please let us join our journalistic colleagues on equal footing.

Sincerely,

Marty Haag
Exec. News Director

MH:mm

00807

gh Court Loosens Rules ı Judges' Campaign Roles

de Also Includes Anti-Bias Provision

BY DARLA MORGAN

:as judges have much wider de in what they can say during :al campaigns, but are prohib- om endorsing candidates under ıments to the Code of Judicial ıct approved by the Texas Su- Court Dec. 19.

dges can debate the future of :ate Bar or describe their feel- ıbout parole under these new ' said Justice Lloyd Doggett, ıeaded the court's efforts to the rules. "There are no re- ons to keep me from appearing political rally or telling my friends I think a certain candidate is best for the job."

But Doggett said judges are explicitly forbidden from making outright public endorsements of a candidate under the new rules.

Under the old Canon 5C(1), a judge soliciting campaign funds could have violated the code, Doggett said. The canon was revised to say specifically the canon does not prohibit a judge or judicial candidate from soliciting money for campaign or officeholder expenses as permitted by state law.

"The change represents a bipartisan effort to conform the code of conduct with reality," he said.

The court also approved a new canon, 3A(9), that calls for a judge to perform judicial duties without bias or prejudice.

Doggett said the canon was prompted by a model anti-discrimination code recommended by the American Bar Association and by public uproar over Dallas Judge Jack Hampton's comment that he gave a 30-year sentence to a convicted killer in part because the victims were homosexual.

Hampton, of the 283rd District, was publicly censured by the State Commission on Judicial Conduct for commenting on a pending case.

The new canon also prohibits staff members, court officials and lawyers from displaying bias or prejudice in a proceeding based on race, sex, religion or national origin.

Other changes include an amendment to Canon 3A(4) to allow judges to confer separately with parties and lawyers in a suit "in an effort to mediate or settle matters" if judges give notice to all parties and refrain from hearing any contested matters without the parties' consent.

The code still prohibits a full-time judge from acting as an arbitrator or mediator for pay outside the judicial system, however.

"This code does not prevent a judge from encouraging settlement," Doggett said. "We think this change will help reduce the flow of litigation in the courts."

Canon 3A(9), which bans the use of cameras in Texas courtrooms, was renumbered, but Doggett said he expects that section to be repealed when the new Texas Rules of Civil Procedure and Texas Rules of Appellate Procedure are adopted later this year. The prohibition on cameras in Texas courtrooms most likely will be included in the new Rules of Civil Procedure.

Doggett has recommended that language be added to the Rules of Appellate Procedure to give the Supreme Court the option of allowing proceedings before the court to be televised or videotaped.

"I hope to take up that proposal sometime in February," Doggett said. ■

Sealed Records

KVUE-TV
AUSTIN, TEXAS

November 30, 1989

My name is Carole Kneeland. I'm the news director at KVUE television station, Channel 24, which is the ABC affiliate here in Austin. I'm here to speak in support of a resolution to allow television cameras inside this courtroom to record the legal proceedings of the Texas Supreme Court - proceedings normally open to the public and covered regularly now by newsreporters without cameras. We feel opening up the Texas Supreme Court would be a tremendous first step toward television coverage of courtroom proceedings at all levels in Texas.

There are several reasons we think that is important.

First, we feel the public's right to a public trial is abridged if cameras are excluded. When that right was protected originally by our forefathers, television cameras hadn't been invented. But today more citizens say they receive their news through television than any other medium. For most people, unless they're directly involved in a trial as an attorney, a juror or a witness, there's no opportunity to watch the courts in action. We could provide that if we could televise the proceedings. We feel if we're to comply with the spirit of that right to a public trial in this day and age, television coverage is important.

Further, we believe if we could televise court proceedings, it would lead to a much more informed public, giving people more confidence in the judicial process. By providing more accurate and complete court coverage, we could contribute to wider public acceptance and understanding of court decisions. Under our form of government, there must be a constant concern for educating and informing people about all three branches of government. There may be no field of governmental activity where people are as poorly informed as the courts. Many of us complain about the apathy of voters in judicial races, but we feel by banning cameras from courtrooms we are closing the windows of information through which they might see and learn.

Beyond what we feel our coverage could do to promote understanding and respect for what's happening in our courtrooms, we feel it would eliminate some of the chaos that sometimes occurs outside the courtrooms now as we must chase people down in the hallways to get the television pictures we need to illustrate our stories. We wouldn't have to do that if we could get our pictures quietly inside the courtroom.

Once Texas was one of only two states that permitted television cameras in courtrooms. As I'm sure you know, it was the notorious 1965 Texas case of Billie Sol Estes that led to a ban of cameras in the courts. But in 1981, the U.S. Supreme Court ruled that the presence of television cameras is not inherently unconstitutional, throwing the issue back into the state courts.

00809

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AUSTIN, TX 78766-0927

GANNETT

Street Address:
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(512) 459-6521

Since then, 44 other states have allowed cameras access to the courts, and not just the appellate courts, but the lower civil and criminal courts as well. Florida was the state that brought the issue to the U.S. Supreme Court in 1981 and I've brought you a copy of the 1979 Florida ruling the Supreme Court upheld, allowing cameras in the courtroom. It includes the guidelines used in that state to ensure that television cameras are as unobtrusive as possible so as not to prejudice court proceedings in any way.

You'll see their experience has shown that the presence of the cameras in the courtroom has little negative effect on trial participants' perception of the judiciary or the dignity of the proceedings. They've found the cameras disrupt the trial either not at all or only slightly. The ability for jurors and judges to decide the truthfulness of witnesses or concentrate on testimony is unaffected and no one feels self-concious. In fact, the Florida experience shows the presence of the cameras makes the jurors and witnesses feel slightly more responsible for their actions.

Technical advances have reduced the size, noise and light levels of the electronic equipment so cameras can be used unobtrusively. It only requires one camera stationed in one place throughout the proceeding with video fed out of the courtroom through one cable for pool coverage by several television stations at once. Existing sound systems used by court reporters can be modified to provide sound for the television cameras. WFAA, the ABC affiliate in Dallas, has done a tape of television coverage of some mock trials, both appellate and criminal, that I'm getting sent down here to give you as soon as possible so you can see for yourselves what it involves.

Beyond the technical advantages of the latest equipment, the authority given judges to control their own courtrooms in other states has proven to be very effective. Judges can prevent videotaping of juries, children, victims of sex crimes, some informants and particularly timid witnesses who might be unduly affected by the camera. I think, in most cases, television stations will be more than happy to comply with those kinds of limitations, understanding that we do not want to change the outcome of a trial by our presence.

I only heard about this resolution you're considering very recently, so my testimony was prepared very hurriedly. I know there are other news directors around the state who would welcome the opportunity to discuss this further with you. And I would be happy to answer any questions or try to get any other materials you would like to help you make your decision on this.

We feel it's one of the most significant actions you could take to enhance the public's understanding of the important job you have here.

KRGV-TV P.O. BOX 5 WESLACO, TEXAS 78596 (512) 968-5555

December 12, 1989

Hon. Nathan Hecht
Texas Supreme Court
P.O. Box 12248
Capital Station
Austin, Texas 78711

Dear Mr. Justice Hecht:

In January you will have an opportunity to vote for a rule change which would allow television coverage of the Texas Supreme Court. As a fifth generation Texan and a journalist who has covered Texas courts for twenty years, I strongly urge you to approve this change.

Texans have a constitutional right to know what goes on in their courtrooms. The banning of television, Texan's main source of news and information, in effect keeps the doors of justice closed to most Texans.

Televised proceedings, which 44 states allow, would do more than any other action to educate and inform Texans about their court system. It could also provide a more informed electorate, perhaps decreasing voter apathy in judicial elections.

WFAA, the ABC affiliate in Dallas/Fort Worth, has produced a video tape of a mock trial showing how one noise-free camera, with existing court room light, would cover a trial. Carole Kneeland of Austin ABC station KVUE has made this tape available to you. Please watch it before deciding your vote.

Finally, I want to assure you, this news organization would agree to any reasonable rules the court would establish regarding television coverage.

Respectfully,

Michael Jones
Executive Producer

MJ/ls

KERA Channel 13/90.1
3000 Harry Hines Boulevard
Dallas, Texas 75201
214-871-1390 Metro 263-3151

4543.001

hjh
LHS

12-1-90
SB
Xc J. Healy
J. Doggett

January 30, 1990

KERA

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

Dear Mr. Soules:

I am the director of Local Programming at KERA-Channel 13, the public television station in Dallas.

My colleagues and I are pleased to know that the prohibition on television cameras in the courtroom of the Supreme Court has been removed from the Code of Judicial Conduct. We hope that you and the other members of the advisory committee appointed to write the new rules will now allow television journalists to record legal proceedings normally open to the public and previously covered by reporters without cameras.

We believe that by televising court proceedings we can provide more accurate and complete coverage of an area of government often poorly understood by the general public. While the apathy of voters in judicial races can be attributed to many causes, surely one of them is that voters do not see how the courts directly affect their lives. As you are well aware, many people do not have the opportunity to watch the courts in action. Since American citizens today receive the majority of their news from television, we believe that television coverage is essential to maintaining an informed and enlightened public.

We realize that there are concerns about the possibility of cameras sensationalizing the court's proceedings or affecting the participants. The experience of forty-four other states, which allow more television coverage of their courts than Texas, shows that this is not a major problem. Due to technical advances in electronic equipment, we are confident that we can cover the Texas Supreme Court with very little disruption. Only one camera would be placed in the courtroom with video provided to the television stations on a "pool" coverage basis.

We believe that this significant step will enable the public to gain a greater understanding of the important role of the courts in our society. Thank you for your consideration as you write the new guidelines.

Sincerely,

Sylvia Komatsu

Sylvia Komatsu
Director of Local Programming

00812

KERA Channel 13
3000 Harry Hines Boulevard
Dallas, Texas 75201
214/871-1390 Metro 263-3151

KERA

December 11, 1989

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

Dear Justice Hecht:

I am the Director of Local Programming at KERA, Channel 13, the public television station for Dallas/Fort Worth/Denton.

I am writing in support of the resolution to allow television cameras inside the Texas Supreme Court to record legal proceedings normally open to the public and covered regularly by reporters without cameras. My colleagues and I at KERA believe that by televising court proceedings we can provide more accurate and complete coverage of an area of government often poorly understood by the general public.

While the apathy of voters in judicial races can be attributed to many causes, surely one of them is that voters do not see how the courts directly affect their lives. As you are well aware, many people do not have the opportunity to watch the courts in action. Since American citizens today receive the majority of their news from television, we believe that television coverage is essential to maintaining an informed and enlightened public.

We realize that you may be concerned about the possibility of cameras sensationalizing the court's proceedings or affecting the participants. The experience of forty-four other states, which allow more television coverage of their courts than Texas, shows that this is not a major problem. Due to technical advances in electronic equipment, we are confident that we can cover the Texas Suprme Court with very little disruption.

Only one camera would be placed in the courtroom with video provided to the television stations on a "pool" coverage basis.

Some states have also given judges the authority to prevent videotaping when judges feel that witnesses may be unduly affected by the presence of cameras (e.g., cases involving children, sex crimes, informants, etc.). I think you'll find that television stations usually understand these concerns and are willing to comply with restrictions when such sensitive cases are involved. Given these safeguards, we believe the benefits to the public substantially outweigh any possible drawbacks.

Thank you for your consideration. We hope that you will take this very significant step enabling the public to gain a greater understanding of the important role of the courts in our society.

Sincerely,

Sylvia Komatsu

Sylvia Komatsu
Director of Local Programming

2900 17th St
P.O. Box 3257
Port Arthur, TX 77643-3257

The Golden Triangle
Port Arthur-Beaumont-Orange
409-985-5557

KJAC-TV

December 8, 1989

Honorable Nathan Hecht
Texas Supreme Court
P.O. Box 12248
Capital Station
Austin, Texas 78711

Your Honor,

My name is Bob Wright, and I am the news director of KJAC-TV, the NBC television affiliate in Beaumont/Port Arthur. I am writing to support a resolution allowing television cameras inside courtrooms to record legal proceedings of the Texas Supreme Court.

There are many reasons I could express to you for why I am so very much in favor of this resolution. I know you have probably heard each one many times before. I know your time is valuable, so I won't go into too much detail on those reasons, but please let me have a moment to offer my views.

As you know, at one time Texas was one of only two states which permitted television and radio into its courtrooms. We in the electronic media lost that right with the 1965 trial of Billie Sol Estes. But times, and technical abilities have changed since then. Earlier this decade the U. S. Supreme court realized those changes, and gave the decision, on whether to open courts to electronic media, back to the state courts. Today Texas is one of only 6 states still denying cameras and microphones access to its courts.

As 44 states have discovered the presence of cameras and microphones in court proceedings has had little negative effect. Technical advances have reduced the size of our equipment. In 1965 noisy film cameras were humming, and grinding away, today, our equipment is silent. Those film cameras required a great deal of light, today, we can shoot in regular room light. I feel you will find most every news director willing to do whatever is necessary to keep our technical problems from ever interfering with the proceedings.

There are many positives to allowing electronic coverage of our court proceedings. I feel it leads to a better informed public. Current coverage often leaves the public confused as to why certain rulings are made, which leads to fear instead of understanding. I can't tell you how many times I have heard someone in my news room say after a verdict... "why did they rule that?" and my reporter answer... "you would understand if you had been there to see it." In fact, the public is so uninformed about our courts, many do not vote in judicial elections.

But, above all the reasons, I feel its part of a persons right to a public trial. To exclude one form of journalism, or hamper its ability to reflect an accurate picture of the proceedings is breaking with the spirit of the constitution's guarantee of a free and public trial.

I thank you for your time and consideration of this matter which I and many news directors feel is of utmost importance to us and the citizens of Texas.

Sincerely,

Bob Wright

Bob Wright
News Director, KJAC-TV

KXAS-TV

P.O. Box 1780
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News Director

December 11, 1989

Justice Nathan Hecht
Texas Supreme Court
P.O. Box 12248
Capital Station
Austin, Texas 78711

Dear Justice Hecht,

The news department at KXAS is gratified the Court is considering allowing television coverage of its public proceedings.

This is an important step and we agree with our colleagues that televised court proceedings would lead to a more informed public and give the citizens of Texas more confidence in the judicial process.

It has been almost twenty-five years since cameras were allowed in Texas courts. In that quarter century technology has developed to the point that the type of television equipment which would be used in court coverage is unobtrusive.

We urge you to approve the proposal now before you.

Sincerely,

Michael H. McDonald

MHM/jh

in terms of trying to characterize a defense that someone is wishing to urge is some kind of new defense.

To impose upon the plaintiff the burden to define a term that is used in a question is just unfair, and that is what the status of our current rules are, is that the definitions and instructions all have to be substantially requested, or else it's -- it's waived. And that doesn't make any sense. There should be an ability to object to it: "That's not a defense; that's not a ground of recovery, or legitimate theory of recovery," so that you can identify what it is that your complaint is without having to do the other side's work on those theories that you are resisting.

JUSTICE HECHT: Any other questions of Mr. McMains?

Thank you, Mr. McMains.

MR. McMAINS: Thank you, Your Honor.

JUSTICE HECHT: Other comments on this block of rules?

We -- with the Court's leave, we have a couple -- a couple of people to testify about the use of cameras in the courtroom which

have scheduling problems -- who have scheduling problems, and I know everybody has scheduling concerns --

CHIEF JUSTICE PHILLIPS: Let's save at least one of those witnesses so that the press will grace us with their presence.

JUSTICE HECHT: We will go ahead and hear these, unless -- unless there's objection.

Mr. George?

JIM GEORGE,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. GEORGE: I'm Jim George from Austin. I represent KTBC-TV and other television and broadcast companies on a regular basis, and I'm here to support the proposal that this court have the authority to allow truly open proceedings to occur in this court in hope that some day all of the courts in the state of Texas will be authorized to have truly open

proceedings.

As the court is aware, most states in this country, and I believe over 40, allow electronic communications to broadcast or telecast, in some manner, their proceedings. They -- if you go to Florida or California or New York or Illinois, or most every place else in the country, the current technology allows nonobtrusive, nonobstructive communications by broadcast medium of what goes on in the courts.

And in Texas we have failed to keep pace with this trend, and it's truly a tragedy in a state which has a unique -- unique commitment to both freedom of the press, through its constitutional provisions, which are at least as extensive as the United States Constitution -- under this Court's rulings probably more so -- and a unique provision or provisions that do not appear in the Constitution of the United States guaranteeing open courts.

We, the founders -- the people who wrote the Constitution of Texas -- made a commitment in that era that we would truly have an aggressive press and open courts. And today

the medium of television is truly the way that people of this state can have access to their courts to see what happens.

And I believe -- speaking as a lawyer who tries cases day in, day out, of all sorts, as well as representing the communications industry -- that the public confidence in the judiciary in the process of deciding disputes, both criminal and civil -- civil in this particular case -- would be drastically increased if the public, by and large, could see how well those obligations are carried on by the lawyers and the judges. And this Court, the proposal that's currently before you, to allow it to be the first to allow public access, true public access, would enhance its stature.

And in -- in my judgment, in this era when so many of our public issues are going to be decided by this Court and other state courts, it is imperative that we look closely to our traditions of openness and free press in this state, unique traditions, and allow -- begin to put our toe in this water that so many people are freely -- freely swimming in, in the

other parts of this country, and see that truly it is a method allowing the people of the state of Texas to see how well the judges of this state perform, to see how well the juries and lawyers by and large perform, and improve both the access to the courts and the public's informational base through a fully-informed, free press.

CHIEF JUSTICE PHILLIPS: You're not saying that 40 states allow cameras in the trial --

MR. GEORGE: I believe -- and I have not checked that -- but I believe that there are approximately 44 states that allow some sort of broadcast medium in some of their judicial proceedings, and I had --

CHIEF JUSTICE PHILLIPS: Would that include just the states' appellate courts?

MR. GEORGE: In various forms of things. Now, many -- as the Court knows, many jurisdictions -- many jurisdictions -- most of the larger states like Texas; Florida; California; New York; and Illinois, in some current cases -- the big states -- most every one of them allow full access to the trial court

proceedings through electronic media. If you go to Florida or California or New York, or some place, and turn on the local television, you will see a trial judge hearing a case broadcast on television, not unlike C-Span. I mean, they have -- we have, you know, the -- I believe last week the British House of Commons allowed television in for the first time, and the Senate of the United States. And if the British House of Commons and the Senate of the United States can allow television in, it certainly -- the courts of the state of Texas, particularly this Court, ought to be able to allow the same medium to coverage. We see it as -- it is the norm in most parts of the world, particularly in other jurisdictions of the United States, and there is no reason not to do it here.

CHIEF JUSTICE PHILLIPS: As you probably know, twice in this decade this Court has requested a referendum of the trial judges -- of all the judges of this state at the judicial section meeting. In 1981 it was a four to one margin against cameras. Progress being made for your position, it was only slightly more than two to one against it in the most

recent --

MR. GEORGE: Well, one of the advantages --

CHIEF JUSTICE PHILLIPS: What -- what do you suggest we do to -- if there are those of us who believe that there is no reason why the courts should not be open to cameras, what do we do to convince the -- the trial bench that this is not something that will impede the administration of justice in their own courtrooms?

MR. GEORGE: The first -- I think the solution to that is what is proposed: to begin with, this Court standing up and allowing its proceedings to be open to the electronic media. It has the facilities, it has the capacity, and it can show the leadership.

It is a part of this Court's responsibility -- not only in revising these rules, the rules of procedure that we are here today talking about -- to provide leadership to both the appellate -- all the appellate courts and the trial courts, and to provide leadership in other areas. And this is an area of leadership by letting it in -- let my clients

and others in -- to telecast the proceedings in this court, and will go a long way.

I mean, I doubt that the court will fault, and I doubt that the administration of justice will be greatly impeded in this court, and at least those trial judges will have some comfort that it -- it can be, and it is not the end of the world, to allow television in the courtrooms.

JUSTICE DOGGETT: The proposal that you refer to that I have made is aimed just at giving discretion to this court.

MR. GEORGE: Yes.

JUSTICE DOGGETT: We had a videotaping done during the Edgewood case, which was then embargoed under the code of conduct, and this will take the change in the code of conduct, as well as the -- the rules. But is there a way in this court that you can have video for various television stations and not interrupt and -- the strife from the -- from the arguments?

MR. GEORGE: We're doing it today, and --

JUSTICE DOGGETT: Well, we've got

more light in here today than we have had in recent years.

MR. GEORGE: The technology, I'm sure, can be handled. The providing of additional lighting to the courtroom shouldn't be a tremendous problem, but even with the lower lights, there is technology available. If you have ever seen the Friday night football game highlight films, they do manage to videotape the Bastrop Bears playing the Lockhart Lions, and the lighting in those stadiums is not great; and your technology is available to do that. I think that the quality of the medium would be improved with a little -- little more light in the courtroom, but that's not a --

JUSTICE RAY: Some think we need more light, anyway.

MR. GEORGE: Both -- both real and substantive and figuratively.

JUSTICE SPEARS: I have another question which is not new, but I've never heard a good answer for it. We have had requests of this same nature for the 11 years I have been on the Court, and with the two exceptions, we have declined to authorize them.

One of the problems that's been cited is that the coverage of the television media necessarily must be very brief because they are in short segments, and it is interesting to note in that line that there have been two television cameras in the courtroom today, and not until you testified did they jump up and start filming. I'm sure there will be excerpts of your testimony that will appear on news programs, and so forth.

The problem that we perceive is that it's impossible -- and I think that's a fair word -- to accurately portray to television viewers the sense of a trial that maybe lasts over weeks, or even days, in a one-minute segment, and that it necessarily requires an editor to selectively choose certain elements of the testimony or of the evidence that could, in effect, not give a true picture of what the trial is all about. And that -- that can be done by the print media, but it cannot be done in a one-minute segment for the evening news.

JUSTICE GONZALEZ: Thirty-second bite.

MR. GEORGE: There is a -- there's

two responses to that. And the nature of the media is that the electronic medium on commercial television stations, by and large, is local news segments in which they try to cover the events of the world in 30 minutes. By the nature of that medium, it cannot include a two- or three-hour proceeding in this court to determine how the Rules of Civil Procedure are modified, because you just simply don't have the methodology to do so.

We have, however, experienced today -- if you will -- if you have cable on your television, Justice Spears, you will see that the full proceedings of the Senate of the United States debating the entire proceeding are on C-Span. The full proceedings of the House Committee on the impeachment of a federal judge -- the Senate trial of the impeachment of a federal judge was on C-Span, the entire thing. You get up in the morning, you turn it on.

Now, their -- the cable networks provide outlets for extended coverage. That is a reality that exists in all sorts of public forums today. And if you go to other jurisdictions, you will see the cable systems

carry extended coverages. The local news, like the local paper, contain snippets, because that's the only way you can, because it's not the only event happening, to do so. And with all due respect, the nature -- the nature of the press is to edit the world for the rest of us, because we all can't be there, and we all can't see everything.

JUSTICE SPEARS: Some of us find that, in some senses and in some instances, a rather arrogant approach.

MR. GEORGE: Well, you can't all be in Czechoslovakia this morning, and we can't all see what happens there entirely. We have to depend upon some medium to select for the rest of us what part of the events happening in eastern Europe we can see. There's no -- it's simply the physical limits of the world.

The press has always, whether it's electronic, or print, or otherwise, had to play editor, because you can't simply recreate the entire world through a newspaper or a television or a radio broadcast. It has to be selected. And our commitment in this state to the freedom of that selection through our constitutional

provisions is dramatic.

CHIEF JUSTICE PHILLIPS: Well, just as an aside, 44 states have a freedom of speech clause that has some press responsibility language in it, and 39 states have a substantially similar open courts provision to Texas, so --

MR. GEORGE: Most of --

CHIEF JUSTICE PHILLIPS: It's not -- I mean, we are following the majority of other states in being different than the federal constitution on those --

MR. GEORGE: That's true. There is no question about that. But 40 of those states also allowed broadcast medium in their courts. Now that suggests that, you know, maybe those other fellows are reading their constitutions more openly than we have, and I would suggest that -- the federal constitution not particularly a good guide -- the federal courts have never done it, but they have -- there is no open court provision in the federal constitution. There is no -- the free press provisions of the federal constitution is not -- are not as protective as the state constitutions

are.

JUSTICE GONZALEZ: Can you summarize briefly your proposal?

MR. GEORGE: My proposal is essentially the one -- today?

JUSTICE GONZALEZ: Yes.

MR. GEORGE: Today this Court should have the discretion to authorize the telecasting and broadcasting of proceedings it selects. I think we -- if I was to write on the perfect world, I would recreate the systems that are in Florida or California or New York or Rhode Island, or many of the other jurisdictions. I don't think the state trial bench is ready for that.

JUSTICE GONZALEZ: But eventually you would move in the direction that you want the trial proceedings. You will want to have access -- you will want the ability to have TV in your -- you want any -- any barriers that would prohibit you from being in the trial courts where the action is -- a majority of the action -- I mean live action that is sensational in the nature of a -- that can be seen or shown, you know, in a 30-minute -- a 30-second sound

bite.

MR. GEORGE: You would have to couple it with the technology provisions that allow -- if you watch television, or your cable systems have these trials on them here in Austin, you can watch them. They have technology requirements that the court has to be equipped with one camera. There can't be news people standing around the courtroom, for example, in these other jurisdictions. Those kinds of provisions would be included, but the cameras could be turned on in the preceding telecast.

JUSTICE GONZALEZ: There's some concern about invasions of privacy, for example, of showing the jury -- the camera spanning the jury and the trial bench, and there's some legitimate concerns about that. Or a sensational sex trial or rape witness, for example, invasions of privacy.

MR. GEORGE: What is it --

JUSTICE DOGGETT: I think those are the kind of concerns that the Chief mentioned of the poll we took -- a couple of them that have been taken -- that there seemed to be strong

sentiment of trial judges against doing this thing, and why this proposal really is narrow and just simply gives this court and the Court of Criminal Appeals, if it wants to join in, the discretion to do this.

JUSTICE GONZALEZ: The concern of my fellow judges is that, you know, as we go, they will go, you know. And in a --

JUSTICE DOGGETT: Well, I guess that depends on what our experience is. If that experience is not a favorable one, they are not likely to do so.

JUSTICE HECHT: The U.S. Supreme Court has considered this. What is the status of their consideration?

MR. GEORGE: As I understand it, they have considered it. They have never allowed the live broadcast of their proceedings. They have had some videotapes made of some of the oral arguments. The current Chief Justice has suggested that they consider changing that rule. I don't know that there is any great movement afoot in that court to -- to make any change, although I believe that it is something that they are actively considering.

It is again, as we got -- you know, we got the Senate to open up to television last -- two years ago, and the British House of Commons this week. It seems to me that we're making small steps.

And the Supreme Court of the United States hopefully will understand the medium as a -- as a method by the way the people can really see its court. It is, after all, their court, as this court is the court of the people of the state of Texas, and the only true way that they can ever see it. The only way that those folks in Houston can ever see what happens in here is if there is some electronic medium that allows them to participate via television.

JUSTICE RAY: Jim, let me suggest that, as one who had a pretty high profile a couple of years ago, that the hate mail and the kooks all come out of the woodwork when -- when your picture gets shown on TV, even from people that you don't know or never had any contact with.

The folks in the penitentiary start writing and say, "Uh-huh, that's that judge that

must have put me in this institution, or had something to do with putting me in the institution," and the letters started coming saying, "Boy, when I get out of the penitentiary, I'm going to kill you." And they didn't write just one letter; they wrote a lot of letters. And there were a lot of people writing the letters.

And you put judges at risk from the kooks of the world as they get more of a high profile, particularly on television.

MR. GEORGE: Well, I suppose that the problem with that argument just raised is that fundamentally those of you who offer yourself up for service on these courts have chosen to respond to, and appear, and deal with the people of Texas in their entirety, including those kooks. They're your constituents, too.

And it seems to me unfortunate to suggest that lack of information for the people to not know who you are is somehow in the interest of good government and good justice. I think that while that may be that the more well-known people -- Robert Bass was recently --

they arrested somebody trying to kidnap him because he is a well-known person -- maybe a rich person, as well -- but a well-known person. And well-known people are subject to more attention and unusual mail than not well-known people.

But after all, you are elected by all the people of this state of Texas, and you have to choose in some way, by seeking this office, to risk that notariety, because, in fact, it is important -- I think it's important that people do know what Justice Gonzalez looks like and who he is.

JUSTICE RAY: The drug dealers would delight in that. Drug dealers now, you know, are after judges, particularly who are tough on drugs.

MR. GEORGE: There's no question, and --

JUSTICE DOGGETT: Most of those folks know the people who sentence them, though.

MR. GEORGE: Well, I don't know that there is -- those folks probably know who you are already. I mean, it's the rest of the people that don't.

JUSTICE HECHT: Any other questions of Mr. George? Thank you --

MR. GEORGE: Thank you.

JUSTICE HECHT: -- Mr. George.

And Ms. Kneeland is here also to share her views.

CAROLE KNEELAND,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MS. KNEELAND: I brought my remarks written, and I'll read them and try to go through them relatively quickly. We -- we double up a little bit on what we say, but -- and then I -- I would like specifically to address your question, Justice Spears.

My name is Carole Kneeland. I'm the news director at KVUE television station, Channel 24, here in Austin, which is the ABC affiliate here.

I'm here to speak in support of a

resolution to allow television cameras inside this courtroom to record the legal proceedings of the Texas Supreme Court, proceedings normally open to the public and covered regularly now by news reporters without cameras. We feel opening up the Texas Supreme Court would be a tremendous first step toward television coverage of courtroom proceedings at all levels in Texas.

There are several reasons we think that's important. First, we feel the public's right to a public trial is abridged if cameras are excluded.

When that right was protected originally by our forefathers, television cameras hadn't been invented. But today more citizens say they receive their news through television than any other medium.

For most people, unless they are directly involved in a trial as an attorney, a juror, or a witness, there's no opportunity to watch the courts in action. We could provide that if we could televise the proceedings. We feel if we are to comply with the spirit of that right to a public trial in this day and age, television coverage is important.

Further, we believe if we could televise court proceedings, it would lead to a more -- much more informed public, giving people more confidence in the judicial process. By providing more accurate and complete court coverage, we could contribute to wider public acceptance and understanding of court decisions.

Under our form of government, there must be a constant concern for educating and informing people about all three branches of government. There may be no field of governmental activity where people are as poorly informed as the courts. Many of us complain about the apathy of voters in judicial elections, but we feel that by banning cameras from the courtrooms, we are closing the windows of information from which they might see and learn.

Beyond what we feel our coverage could do to promote understanding and respect for what's happening in our courtrooms, we feel it would eliminate some of the chaos that sometimes occurs outside the courtroom now, as we must chase people down in the hallways to get the television pictures we need to illustrate

our stories. We wouldn't have to do that if we could get our pictures quietly in the courtroom.

And this is where, in addressing your -- your concern, I think what -- one of the -- one of the problems that happens with trial judges now is that their only experience is seeing us crashing around in hallways and seeing on the air, you know, defendants kicking at us, or -- or whatever.

And if you think that our editing of what happened in a courtroom would perhaps be mistaken, you know, and misunderstood, I think -- I would argue that right now it's much more misunderstood because of the pictures that you are seeing over what we are saying. They are the only pictures we can get, and they frequently are very distracting from what really happened in the courtroom. We didn't really see a defendant in the courtroom, you know, walking down the hallway with a -- with a book in front of his face kicking at people; that's not what happened there. But that, right now, is the only thing we can show, because that's all we can get, outside of -- unless we have courtroom artists, which also don't depict the actual

thing that happened in the courtroom.

Once Texas was one of only two states that permitted television cameras in the courtroom. As I'm sure you know, it was the notorious 1965 Texas case of Billy Sol Estes that led to a ban of cameras in the courts. But in 1981, the U.S. Supreme Court ruled that the presence of television cameras is not inherently unconstitutional, throwing the issue back into the state courts. Since then, 44 other states have allowed cameras access to the courts, and not just the appellate courts, but in many cases the lower civil and criminal courts, as well.

Florida was the state that brought the issue to the U.S. Supreme Court in 1981. And I brought you a copy of the 1979 Florida guidelines which ensure that television cameras are as unobtrusive as possible so as not to prejudice court proceedings in any way. I will leave that with you.

You will see that the Florida experience has shown that the presence of the cameras in the courtroom has little negative effect on trial participants' perception of the judiciary or the dignity of the proceedings.

They found the cameras disrupt the trial either not at all or just slightly. The ability for jurors and judges to decide the truthfulness of witnesses or concentrate on testimony is unaffected, and no one seems to feel self-conscious. In fact, the Florida experience showed the presence of the cameras makes the jurors and witnesses feel slightly more responsible for their actions.

Technical advances have reduced the size, noise, and light levels of the electronic equipment so cameras can be used unobtrusively. And while you may find these lights distracting today, if we were -- if we were shooting in here on a regular basis, we could work out a better lighting arrangement that would more -- more fill in the room without having these spotlights like we have now. It's just that -- and I don't mean this in any -- in any more powerful way than I say it, but it's kind of dark in this room. It only --

JUSTICE HECHT: Literally.

MS. KNEELAND: Yeah, I mean it literally. No offense, please.

It only requires one camera

stationed in one place throughout the proceeding with video fed out of the courtroom through one cable for pool coverage by several television stations at once. Existing sound systems used by court reporters can be modified to provide sound for the television cameras.

WFAA, the ABC affiliate in Dallas, has done a tape of television coverage of some mock trials, both appellate and criminal, and I'm getting that sent down to you as soon as possible for you to see for yourselves what it involved. They actually -- they shot video of the -- the camera involved.

Beyond the technical advantages of the latest equipment, the authority given judges in Florida and other states to control their own courtrooms has proven to be very effective. Judges can, themselves, prevent videotaping of juries, children, victims of sex crimes, some informants, and particularly timid witnesses who might be unduly affected by the -- by the camera. I think in most cases, television stations will be more than happy to comply with those kinds of limitations, understanding that we do not want to change the outcome of a trial

by our presence.

I only heard about this resolution you're considering very recently, so my testimony was prepared rather hurriedly. I know there are other news directors around the state who would welcome the opportunity to discuss this with you further, and I'd be happy to answer any questions or try gather other materials for you that would help you make the decision on this. In fact, I brought a documentary that we did at KVUE a couple of years ago for you to look at, if you would like to, about the issue.

We feel this is one of the most significant actions you can take to enhance the public's understanding of the important job that you have.

JUSTICE HECHT: Have you left us a copy of your --

MS. KNEELAND: Yeah. Here's my remarks, and here is the copy of the Florida -- the 1979 opinion that the Florida court rendered, with their guidelines, which was upheld by the U.S. Supreme Court in 1981.

CHIEF JUSTICE PHILLIPS: Ms.

Kneeland, are you aware of the Arizona experiment with their Supreme Court --

MS. KNEELAND: No, I'm not.

CHIEF JUSTICE PHILLIPS: -- on public television?

MS. KNEELAND: I'm not.

CHIEF JUSTICE PHILLIPS: They selected a few cases to broadcast their proceedings, and -- and the public television station in Arizona provided background on the case, went to the scene of where the --

MS. KNEELAND: Oh, uh-huh.

CHIEF JUSTICE PHILLIPS: -- the facts -- where the occurrence in question occurred and interviewed the attorneys and made a broadcast out of it.

Do you think that there would be enough interest in some of our proceedings for your station, or perhaps a public station or a cable station, to provide the background information --

MS. KNEELAND: Certainly.

CHIEF JUSTICE PHILLIPS: -- that would make our proceedings understandable? You -- you have sat here this morning through a

lot of discussions of our rules, and I must admit they are fairly arcane, even to lawyers.

MS. KNEELAND: I'm not sure that's the one we will want to cover, but....

CHIEF JUSTICE PHILLIPS: But most of our cases that come to us do not come on a -- on a judgment of the entire facts. We have no basis to review those facts. We are looking at one or two narrow points of law that we are reviewing, and would be unintelligible, perhaps -- many of our cases -- to viewers as a whole without background explanation.

MS. KNEELAND: Sure. And it might be that there would only be a few cases a year, even, that we actually were very interested in.

We would have been thrilled to have been able to use the video from the Edgewood case. It certainly would have made it very much more understandable, and that's probably one of the most important cases you -- you have dealt with this year, certainly, and we already had plenty of video to illustrate that story. We had video of the school -- the school -- the very school districts that you talked about your -- in the -- in the case, and -- and had

that kind of thing that would have provided background.

One thing I wanted to say, and this kind of relates to that in terms of what you asked about, although, you know, you mentioned a minute. We actually get a minute and thirty. I'm sure that really soothes your mind, doesn't it, and makes you feel a lot better? We get between a minute thirty and two minutes to present it.

And I would argue that, you know, almost anything you go to could use some editing. You may have felt that way about what you heard this morning. I don't -- I mean, I -- I -- I didn't -- I don't know what you -- you know, I'm no lawyer, so I didn't understand part of what you're talking about, but I would think you wouldn't have minded to have heard the -- a summary, and --

JUSTICE SPEARS: No argument there.

MS. KNEELAND: Okay. And that's essentially what we do. And maybe sometimes we don't do it as well as you would like, or even we would like, but we try very hard to -- our philosophy is that we're trying to take the

viewer to the scene of whatever we witnessed, whether it's a trial, or the Legislature in action, or an accident, or a fire; whatever it is. But you are trying to go and get the essence of what happened there, the most important thing that happened, and present it. And in the case of trials, you are trying to present both sides, because there's usually at least two.

And maybe we don't succeed all the time, but that certainly is our -- our effort, and we could succeed at it a whole lot -- we would be a whole lot more likely to succeed at it if we could actually show what's said in here by intelligent people presenting the argument, and witnesses, than this business that we do now, which is, you know, people running -- chasing people down stairways and through hallways trying to get them to repeat what they said in the courtroom. I think that does the whole judicial system a real disservice.

JUSTICE SPEARS: I hope you understand the spirit in which I said it.

MS. KNEELAND: Sure.

JUSTICE SPEARS: Often what is news

is what's bizarre, or strange, or unexpected, or dramatic. And sometimes that doesn't -- very often doesn't portray what is really at issue and the issue that the court, whether trial court or appellate court, is trying to focus upon.

MS. KNEELAND: Yeah. I would agree with you that sometimes that's --

JUSTICE SPEARS: The distractions is not a problem with me.

MS. KNEELAND: Uh-huh.

JUSTICE SPEARS: The technology today is -- is good enough that you can have a television camera, and you can have sound, and not disturb any of the proceedings. And I have been in one of those as a trial judge, and after about an hour, the jury forgets all about it, so I don't think it's a problem there.

My concern is its coverage in the way that it is edited and presented to the people, that it be an accurate portrayal of what the trial is really about, rather than some dramatic side issue or side event. Do you see?

MS. KNEELAND: Yeah, and I -- I absolutely agree with you and appreciate it and

realize that -- that, you know, in the short period of time, it's true that sometimes it is always, of course, the most dramatic and it's going to be reported.

But if you cover a trial over a week's time, you know, that may be one thing that happens one day, but there will be -- you know, I -- I would hope that in the course of that time, you would cover the essence of the -- of the whole issue. I certainly don't --

JUSTICE SPEARS: Those are usually criminal. Those are usually criminal trials in which --

MS. KNEELAND: Yeah. I'm not sure how much you had that was bizarre and dramatic in the school finance case. I -- I -- you know, if there were, we missed that completely.

JUSTICE SPEARS: It was absorbing.

MS. KNEELAND: I'm sure it was.

We would -- you know, and that's why, I think, starting here would be a good place to start. And, you know, you would -- you wouldn't be giving up control of your courtroom. You would -- you would have the authority to decide which cases we would get to do,

essentially. But we sure would like the opportunity, because we feel it would be -- it would be more accurate.

JUSTICE HECHT: Any other questions of Ms. Kneeland?

Thank you very much for coming.

And there's no other witnesses signed up on this subject -- Professor?

PROFESSOR PATRICK HAZEL,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

PROFESSOR HAZEL: I would -- if you don't mind, I'm going to say something very briefly again -- Patrick Hazel -- for another audience that would be most interested, at least in the videotapes of the proceedings before this Court, and those are the law schools. I think it would be of a tremendous asset for us to be able to have those arguments, and how the Court questioned the lawyers, and all of the

proceedings, for all the law schools.

Now, our students in Austin can come down here, but I'm sure you know with class schedules, parking, and all the other, they don't do it very often unless they are in a class that's related to the topic, or something.

But in Houston and in Waco and in -- out in Lubbock, those don't have that much availability. So if videotapes were available, you might even benefit. We might be able to provide you with people who could argue a little better before the Court after seeing the others, so I speak in behalf of that.

JUSTICE HECHT: Any others on that subject? All right. Then returning to the Texas Rules of Civil Procedure, we had gotten through Rule 295. Any comments on Rules 296 through 330?

HARRY TINDALL,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

TRCP 90 156 216(1) 249 307 542 324(a)

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Fed Rules Comm

November 26, 1989

TRCP 21a 237a 41, 202, 210 57(a)(1) 12 14 41(a)(1) 54(a) (2)(d)

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

Dear Judge Hecht:

1. Is there a reason why the rules are initially subdivided in different ways? Some use parenthetical numbers (e.g., Tex. R. Civ. P. 3a); some use parenthetical letters (e.g., Tex. R. Civ. P. 298); some use plain numbers (e.g., Tex. R. Civ. P. 273); some use plain letters (e.g., Tex. R. Civ. P. 216); and others use no subdivision at all (e.g., Tex. R. Civ. P. 296). It would probably be best to continuing the current method of subdivision for existing rules that ~~are merely being modified~~, but the court may wish to consider a uniform method of subdivision for new and totally rewritten rules ~~similar to the system employed~~ in the Texas Rules of Appellate Procedure.

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

Respectfully,

Charles A. Spain, Jr.

Fed Rules Comm

00853

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November 28, 1989

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

RE: Comment on Proposed Rules Changes Regarding Discovery

Dear Justice Hecht:

Overhaul Needed: Finally, I personally believe that the entire area of discovery rules needs a complete reworking. I have read them a hundred times, have analyzed them sentence by sentence, written on them, given speeches on them, litigated them, etc., and I still have a hard time trudging through all of the different rules, all the different uses of terminology, all of the internal definitions, etc. I honestly believe that a complete overhaul of the discovery rules would greatly decrease the confusion among the bar and the litigation resulting therefrom. I realize the initial reaction to this suggestion is to try to pull one's hair out, but I honestly believe that this reorganization needs to be undertaken. These rules have got to be simplified. They have got to be better organized, less redundant, and written in language that a lay person could almost understand. The long run-on sentences need to be shortened. Perhaps this overhaul could be done under a new set of rules entitled "Texas Rules of Discovery." Start with a comprehensive list of definitions that will apply throughout the rules. Next, have a separate rule on "Permissible Forms of Discovery." See Rule 166b(1). Next, have a rule on "Permissible Scope of Discovery." See Rule 166b(2). Relying upon the prior definitions, state that the following is discoverable: facts, opinions, contentions, etc., relevant to the cause. Then state that these facts, etc., may be contained within oral testimony, documents, or tangible things (which terms would have already been defined above). Next, under another rule, set out examples of what may be discoverable, such as witness statements, the identity of experts, party communications, etc., all of which rules will be substantially shortened by the original "definition" section. Use short sentences, in laymen's language. Use standardized phrases, such as "requests" and "responses" to discovery. Next, have a separate rule on the "Duty to Initially Respond," which I discussed above. Next, have a separate rule on "Objections" wherein the four or five specific grounds for objections are set out in clear terms. Next, have a separate rule entitled, for example, "Objections Waived If Not Timely Raised," containing a simple statement that if a "discovery response" is not timely made, any objection thereto shall be deemed waived, "unless good cause . . . ." Next, have a separate rule entitled "Preservation Of Objections," which would be similar to present Rule 166b(4); however, having already set out the permissible objections, this rule would be more specific in how to preserve a particular type of objection. (Again, this is similar to present Rule 166b(4), except that I think it should be simpler language with shorter sentences per subject matter). Follow this by a new rule on "Protective Orders." See Rule 166b(5). Next, have a separate rule on the "Duty to Supplement," which would be similar to present Rule 166b(6). And so on.

Rules Committee

Committee to Comprehensively Review all Rules and Consider Fed. R. Civ. P. Order or adoption of Substance

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November 15, 1989

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

Re: Suggested Modification of Texas Rules of Civil Procedure

Dear Justice Hecht:

If the Court is truly serious about changing our rules of civil procedure in a way which will (i) increase the efficiency and fairness of the justice system; (ii) decrease the number and complexity of the rules; (iii) eliminate the need for constant amendments and the concomitant reeducation of bench and bar; (iv) reduce the cost and delay of litigation; and (v) bring Texas jurisprudence within the mainstream of litigation practice across the country, I offer the following recommendation, most seriously, and most urgently:

ADOPT RULES WHICH PARALLEL THE FEDERAL RULES.

This suggestion comes to you from a practitioner with 17 years of experience whose practice is limited exclusively to civil litigation.

The complexity and confusion of our current rules, and the constant process of amending them, is a disgrace to our judicial system. The rules have many pitfalls and perils which regularly trap or embarrass even the most experienced litigator and trial judge. The discovery rules, with automatic sanctions for exclusion of evidence, etc., are a source of constant squabble. They discourage professionalism between counsel and they virtually emasculate trial judges. The constantly changing appellate constructions of the rules make the trial practitioner's job something akin to Russian roulette. Compare e.g. your Court's opinion in **McKinney I** with the opinion on rehearing in **McKinney II**.

Fifty years ago last year the United States Supreme Court promulgated the Federal Rules of Civil Procedure. All of our law schools teach federal procedure. Lawyers all across the country are familiar with them, and, although many Texas "state court" practitioners eschew federal court, any competent litigator should be familiar with these rules. These rules entrust and empower trial judges with considerable discretion

concerning procedure and discovery. They work quite well -- both in federal courts and in the courts of many of our sister states.

The trends in Texas practice over the past decade have been in the general direction of harmony with the federal rules. For example, we have abolished the cumbersome Plea of Privilege "trials", and gravitated towards submission of "questions" to juries which more closely parallels the federal system (although we still do not trust our jurors to really know the effects of their answers).

Most importantly from the standpoint of actually persuading the Texas bench and bar that adoption of rules which parallel the federal rules would be a step in the right direction, in 1983 the Court promulgated Texas Rules of Evidence which closely parallel the federal rules. I sincerely believe that the time has come to seriously consider doing the same with respect to the Rules of Civil Procedure, and would volunteer my time to work on such a project if the Court was seriously interested in pursuing it.

Thank you for the opportunity to provide this comment. Please feel free to contact me if I can be of any further assistance.

Sincerely yours,

Arnold Anderson Vickery

AAV:v

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Local Rules Subc to 20 to TRAP Rules

November 22, 1989

Refer to Supreme Court

TRCP 13 ✓305

Justice Nathan L. Hecht
Box 12248
Austin, Texas-78711

Dear Judge Hecht:

As per the request of the Texas Supreme Court, I would like to offer the following suggestions concerning the Rules.

LOCAL RULES

1. Rescind ALL local rules and do not permit local Courts to trap the practicing attorney by making Rules.

2. Require a party taking the deposition or a party or witness to furnish the other attorney a copy of the deposition at the expense of the one taking the deposition.

3. Require the Appellant to deliver the copy of the Transcript and the Statement of Facts to the Appellee's attorney the day of or after the Appellant's Brief is mailed to the Court of Appeals; and, thereafter the Appellee's attorney will file same with the Clerk of the trial Court.

4. Remove, rescind, delete ALL sanctions by opposing counsel for alleged bad faith or frivilous law suits, because opposing counsel NOT having any counter-claim or cross-action is using these allegations alone to intimidate and coerce the opposing side. These allegations have become just as abusive as the party allegedly bringing a bad faith law suit. IF, retained in any manner, let JUST the trial Judge file a Motion and a hearing, and if a fact issue to be tried by a jury.

5. Require that a Judge NOT discuss any matter concerning the case with one attorney when the other attorney is NOT present, where there are opposing counsel. And, you might ought to say an attorney will not discuss matters with the Court unless the other attorney is present.

6. A Rule which would follow due process would require that NO order or judgment of the Court would be rendered or entered unless a hearing is set and notice served on all parties. This business of Courts just signing orders and/or judgments without opposing counself being afforded an opportunity to be heard is for the birds. This would not apply as to a default judgment and this might be clarified as to default judgments and say no motion need be served upon the defaulting party. Other jurisdictions require a Motion asking for a default judgment, and that it be served and a date, time and palce set for a hearing thereon.

7. A Rule that any appeal from an administrative agency will in fact be trial de novo and not test an Administrative Order under the substantial evidence rule.

Yours very truly, Hugh Harrell

WHH:wh cc: Ret.

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