RULE 279. OMISSIONS FROM THE CHARGE

Amended Text

Sources and Dispositions

1. Omission of Entire Ground. ~~Upon appeal all~~ **Any** independent grounds of recovery or of defense **which is** not conclusively established under the evidence and ~~no element of which is submitted or requested~~ **all elements of which are omitted from the charge without preservation of appellate complaint by the party relying thereon** ~~are~~ **is** waived.

2. Omission of One or More Elements. When **an independent** ground of recovery or defense consists of more than one element, ~~if~~ **and** one or more of ~~such~~ **the** elements necessary to sustain such ground of recovery or defense, and necessarily referable thereto, ~~are~~ **is** submitted to and found by the jury, and one or more of such elements ~~are~~ **is** omitted from the charge, ~~without request or objection, and there is factually sufficient evidence to support a finding thereon~~, the ~~trial~~ court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted element or elements ~~in support of the judgment~~, **if the party aggrieved by the findings has failed to preserve appellate complaint with respect to the omitted elements**. If no such written findings are made, ~~such~~ **the** omitted elements shall be deemed found by the court in such manner as to support the judgment **if such deemed findings are supported by legally and factually sufficient evidence. The legal or factual sufficiency of the evidence to support express findings made under this rule may be challenged in the same manner as challenges to express findings in nonjury cases.** ~~A claim that the evidence was legally or factually insufficient to warrant the submission of any question may be made for the first time after verdict, regardless of whether the submission of such question was requested by the complainant.~~

Disposition: Later in same sentence

Disposition: Second sentence of New Rule 279(2)

Disposition: Omitted as unnecessary

Source: Language conformed to Current Rule 299

Source: Second sentence of Current Rule 279

Source: New; to conform to Tex. R. App. P. 52(d)

Disposition: New Rule 274(5), in modified form

Proposed Amendment: Rule 226a

Rule 226a. ~~Admonitory~~ Instructions to Jury Panel and Jury.

The ~~court~~ judge shall give ~~such admonitory~~ the following instructions to the jury panel and to the jury ~~as may be prescribed by the Supreme Court in an order or orders entered for that purpose~~. If the case is to tried to a six-person jury, the references to ten or eleven jurors in these instructions should be changed to read "five." New

Part 1 - Jury Panel

~~That the following oral instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jurors~~ After ~~they~~ the members of the panel have been sworn as provided in Rule 226 and before the voir dire examination, the judge shall read the following instructions, with such modifications as the circumstances of the particular case may require, to the jury panel.

The case that is now on trial is _____ v. _____. This is a civil lawsuit ~~action~~ that will be tried before a jury. Your duty as jurors will be to decide the disputed facts. It is the duty of the judge to see that the case is tried in accordance with the rules of law. ~~In this case, as in all cases, the actions of the judge, parties, witnesses, attorneys and jurors must be according to law. The Texas law permits proof of any violation of the rules of proper jury conduct. By this I mean that jurors and others may be called upon to testify in open court about acts of jury misconduct.~~ It is very important that you follow carefully all instructions that I give you now and later during the trial ~~which I am now~~

~~going to give you, as well as others which you will receive while this case is on trial.~~ If you do not obey these instructions ~~the instructions I am about to give you~~, it may become necessary for another jury to retry this case with all of the attendant waste of your time here and the expense to the litigants and the taxpayers of this county for another trial. Throughout your service, you must obey the following instructions:

1. Do not mingle with or talk with the parties, the lawyers, the witnesses, or any other person who might be connected with or interested in this case, except for casual greetings. You may not even have casual conversation about things completely unrelated to this lawsuit with any of those people. ~~They have to follow these same instructions and you will understand it when they do.~~

2. Do not accept ~~from, nor give to, any of those persons~~ any favors ~~however slight~~ from these people, and do not give them any favors. You must avoid even slight favors, such as rides, food, or refreshments.

3. Do not discuss ~~anything about~~ this case ~~, or even mention it to anyone whomsoever, including your wife or husband, nor permit anyone to mention it in your hearing until you are discharged as jurors or excused from this case~~ with anyone, including your spouse. Do not let anyone discuss the case in your presence. If anyone ~~attempts to discuss this case~~ tries to talk about the case with you or in your hearing, tell ~~report it to~~ me immediately ~~at once~~.

4. The attorneys will now have an opportunity to talk with you about the case and the people involved, and to ask you some questions about your backgrounds, experiences, attitudes, and opinions. ~~The parties through~~

~~their attorneys have the right to direct questions to each of you concerning your qualifications, background, experiences, and attitudes. In questioning you, they are not meddling in your personal affairs, but are trying to select fair and impartial jurors who are free from any bias or prejudice in this particular case.~~ Listen to the questions and give true ~~full~~ and complete answers. Do not conceal information ~~or give answers which are not true~~. If you cannot hear or understand the questions, please let me know.

5. ~~4b.~~ ~~If the attorneys ask some questions directed to you as a group which require an answer on your part individually, hold up your hand until you have answered the questions.~~ If a question is asked of the whole panel that requires an answer from you, please raise your hand, and keep it raised long enough for everyone to make a quick note of the people who responded.

~~Do you understand these instructions? If you, please let me know now.~~

~~Whether you are selected as a juror for this case or not, you are performing a significant service which only free people can perform. We shall try the case as fast as possible consistent with justice, which requires a careful and correct trial. If selected on the jury, unless I instruct you differently, you will be permitted to separate at recesses and for meals, and at night.~~

~~The attorneys will now proceed with their examination.~~

Part 2 - Jury

~~That the following oral and written instructions, with such modifications as the circumstances of~~

~~the particular case may require shall be given by the court to the jury immediately after the jurors are selected for the case:~~
Immedidately after the jurors are selected and have been sworn as provided in Rule 236, the judge shall give each juror a copy of the following written instructions and then read them to the jury.

Written Instructions

By ~~the~~ your oath ~~which you take as jurors~~, you ~~become~~ are now officials of this court, and active participants in the ~~public~~ administration of justice. ~~I now give you further instructions which you must obect throughout this trial.~~

~~It is your duty to listen to and consider the evidence and to determine fact issues later submitted to you, but I, as judge, will decide matters of the law. You will now receive written instructions which you will observe during this trial, together with such other instructions as I may hereafter give, or as heretofore I have given to you. (A copy of the written instructions set out below in this Section II shall thereupon be handed to each juror.) As you examine the instructions which have just been handed to you~~ See new paragraph 3

~~you~~, we will go over them briefly together. ~~The first three instructions have previously been stated, and you will continue to observe them throughout the trial. These and the other instructions just handed to you are as follows:~~ See paragraph 1 It is essential to the administration of fair and impartial justice that you follow these instructions:

1. You must continue to obey the instructions I gave you earlier. Do not talk about the case with anyone, and do not have any contact with the parties, attorneys, witnesses, or other

interested persons outside the courtroom. ~~Do not mingle with nor talk to the lawyers, the witnesses, the parties, or any other person who might be connected with or interested in this case, except for casual greetings. They have to follow these same instructions and you will understand it when they do.~~

~~2. Do not accept from, nor give to, any of those persons any favors however slight, such as rides, food or refreshments.~~ See paragraph 1

~~3. Do not discuss anything about this case, or even mention it to anyone whomsoever, including your wife or husband nor permit anyone to mention it in your hearing until you are discharged as jurors or excused from this case. If anyone attempts to discuss this case, report it to me at once.~~ See paragraph 1

2. Do not even discuss the case among yourselves until ~~after~~ you have heard all of the evidence, the court's charge, and the attorneys' arguments, and ~~until~~ I have sent you to the jury room to begin your deliberations ~~consider your verdict~~.

3. You are the judges of the facts of this case. It is your duty to listen to and consider carefully the evidence admitted under my rulings, and to answer the specific questions about the facts that I will submit to you in writing in the court's charge. From second introductory paragraph

4. In arriving at your verdict, you can consider only the evidence admitted during the trial. Do not make any investigation about the facts of this case. ~~Occasionally we have a juror who privately seeks out information about a case on trial. This is improper. All evidence must be presented in open court so that each side may question the witnesses and make proper objection. These rules apply to jurors the same~~

~~as they apply to the parties and to me. If you know of, or learn anything about, this case except from the evidence admitted during the course of thie trial, you should tell me about it at once. You have just taken an oath that you will render a verdict on the evidence submitted to you under my rulings.~~ Do not seek out any information contained in documents, books, or records that are not in evidence. Do not make personal inspections or observations outside the courtroom. Do not let anyone else do any of these things for you. This avoids a trial based upon secret evidence.

~~6. Do not make personal inspections, observations, investigations, or experiments nor personally view premises, things, or articles not produced in court. Do not let anyone else do any of these things for you.~~

See paragraph 4

~~7. Do not tell other jurors your own personal experiences nor those of other persons, nor relate any special information. A juror may have special knowledge of matters such as business, technical or professional matters or he may have expert knowledge or opinions, or he may know what happened in this or some other lawsuit. To tell the other jurors any of this information is a violation of these instructions.~~

Moved to Part 3 - Court's Charge

5. The law is determined by the legislature and courts of this state. You are obligated to follow my instructions about the law, regardless of whether you think the law is right or wrong.

New

6. During the presentation of evidence, the attorneys may make legal objections. If an objection to a question is sustained, disregard the question, and do not speculate as to why it was asked or what the answer would have been. If an objection to a witness's answer is sustained, disregard that answer. It is not in evidence, and should not be considered. Do not speculate about

New

or consider for any reason the objections or my rulings themselves.

~~8. Do not discuss or consider attorneys' fees unless evidence about attorneys' fees is admitted.~~

Moved to Part 3 - Court's Charge

~~9. Do not consider, discuss, nor speculate whether or not any party is or is not protected in whole in part by insurance of any kind.~~

Moved to Part 3 - Court's Charge

~~10. Do not seek information in law books, dictionaries, public or private records or elsewhere, which is not admitted in evidence.~~

~~At the conclusion of all the evidence, I may submit to you a written charge asking you some specific questions. You will not be asked, and you should not consider, whether one party or the other should win. Since you will need to consider all of the evidence admitted by me, it is important that you pay close attention to the evidence as it is presented.~~

~~The Texas law permits proof of any violation of the rules of proper jury conduct. By this I mean that jurors and others may be called upon to testify in open court about acts of jury misconduct. I instruct you, therefore, to follow carefully all instructions which I have given you, as well as others which you later receive while this case is on trial.~~

~~You may keep these instructions and review them as the case proceeds. A violation of these instructions should be reported to me.~~

I stress again that it is imperative that you follow these instructions, as well as any others that I may later give you. If you do not obey these instructions, then it may become necessary for another jury to re-try this case with all of the attendant waste of your time here and the

expense to the litigants and the taxpayers of this county for another trial. Keep your copy of these instructions, and refer to them should any question arise about the rules that govern your conduct during this trial. A violation of any instruction must be reported to me as soon as possible.

Part 3 - Court's Charge

~~That~~ The following written instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jury as part of the charge:

1. This case is submitted to you by asking questions about the facts ~~which you must decide from the evidence you have heard in this trial~~. Your answers must be based only upon the evidence, including exhibits, admitted during the trial.

2. In considering the evidence, you are bound to follow the law set forth in this charge, as well as all instructions concerning jurors' conduct that you have been given.

New emphasis

3. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony ~~but in matters of law, you must be governed by the instructions in this charge~~.

~~In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.~~

See paragraph 2

4. ~~1.~~ Do not let bias, prejudice, or sympathy play any part in your deliberations.

~~2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.~~

See paragraph 1

5. Do not become a secret witness by telling other jurors about other incidents, experiences, or lawsuits. Do not tell other jurors about any special knowledge, information, or expertise you may have. You must confine your deliberations to the evidence presented in open court. This avoids a trial based upon secret evidence.

Moved from Part 2

6. Do not discuss or consider attorneys' fees. [Omit when attorneys' fees are in issue.]

Moved from Part 2

7. Do not discuss or consider whether insurance protects any party. [Omit when coverage is in issue.]

Moved from Part 2

8. This charge includes all legal instructions and definitions that are necessary to assist you in reaching your verdict, so do not seek out any information in law books or dictionaries.

Moved from Part 2

9. ~~3. Since~~ Every answer ~~that is~~ required by the charge is important, ~~no juror should state or consider that any required answer is not important.~~

10. ~~4. You must not~~ Do not decide who you think should win and then try to answer the questions accordingly. Simply answer the questions, and do not ~~discuss or~~ concern yourselves with the effect of your answers.

11. ~~5. You will not~~ Do not decide ~~the answer to~~ a question by ~~lot or by drawing straws or by~~ any ~~other~~ method of chance.

12. ~~5. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by~~ Do not answer a question that calls for a numerical answer by adding together each juror's figure and dividing by the number of jurors to get an average.

13. ~~5.~~ Do not do any trading on your answers. That is, one juror must not agree to answer ~~a certain~~ one question ~~one~~ a certain way if other jurors will agree to answer another question ~~another~~ a certain way.

14. After you retire to the jury room, you will select ~~your own~~ a presiding juror. ~~The first thing the presiding juror will do is to have this complete charge read aloud and then~~ You will then deliberate upon your answers ~~to the questions asked~~.

15. It is the duty of that presiding juror:

a. to preside during the deliberations to provide order and compliance with the charge; New

b. to write, sign, and deliver to the bailiff any communication to me;

c. to conduct the vote; and

d. to write your answers in the spaces provided.

16. ~~6.~~ You may render your verdict on the vote of ten or more members of the jury, but the same ten or more must agree upon each of the answers made. ~~and to the entire verdict. You will not, therefore, enter into an agreement to be~~

~~bound by a majority or any other vote of less that ten jurors.~~

17. If the verdict~~ and all of the answers therein~~ is reached by unanimous agreement, the presiding juror ~~shall~~ will sign the verdict on the certificate page for the entire jury.

18. If the verdict is less than unanimous, the ten or eleven jurors who agree to each and every answer will sign the verdict individually on the certificate page. ~~If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.~~

19. If you observe a violation of my instructions outside the jury room, by either a juror or any other person, you must report that to me. New

20. During your deliberations, ~~the presiding juror or~~ any ~~other~~ juror who observes a violation of my ~~the court's~~ instructions shall ~~immediately warn the one who is violating the same~~ point out the violation and caution the offending juror not to violate the instruction ~~do so~~ again.

~~These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys, and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.~~

21. You must not discuss the case with anyone, not even with other members of the jury, unless all of the jurors are in the jury room. If anyone other than a juror tries to talk to you about the case before you reach a verdict, tell me immediately. New

22. When all required questions have been answered, the presiding juror has written your answers on the charge, and the verdict has been signed, you will summon the bailiff and be returned to court with your verdict. New

[Questions, definitions, and instructions to be placed here.]

Certificate

We, the jury, have answered the ~~above and foregoing~~ questions as shown ~~herein indicated,~~ and ~~herewith~~ return these answers to ~~same into~~ court as our verdict.

Signature of presiding juror, if unanimous. [One signature line here] ~~(To be signed by the presiding juror if unanimous.)~~

Signatures of jurors voting for the verdict, if not unanimous: [11 signature lines here] ~~(To be signed by those rendering the verdict if not unanimous.)~~

Part 4 - Jury Release

The judge shall give the jury the following oral instructions after accepting the verdict and then release them. ~~That the following oral instructions shall be given by the court to the jury after the verdict has been accepted by the court and before the jurors are discharged.~~

I ~~The court has~~ earlier instructed you to ~~that you should~~ observe strict secrecy during the trial, not to ~~and that you should not~~ discuss this case with anyone except other jurors while you

were deliberating. I am ~~now~~ about to discharge you. Once I have done that ~~after your discharge~~, you are released from that and all of the other orders that I gave you ~~from your secrecy~~. You will ~~then~~ be absolutely free to discuss anything about the case ~~and your deliberations~~ with anyone. ~~However,~~ You will be just as ~~are also~~ free to decline to talk about ~~discuss~~ the case ~~and your deliberations~~ if that is your decision ~~you wish~~.

~~After you are discharged, it is lawful for the attorneys or other persons to question you to determine whether any of the standards for jury conduct which I have given you in the course of this trial were violated and to ask you to give an affidavit to that effect. You are free to discuss or not to discuss these matters and to give or not to give an affidavit.~~

[Judge's commendation of jurors and the important service they have performed may be added here.]

Rule 226. Oath to Jury Panel

Before the parties or their attorneys begin the examination of the jury panel ~~jurors whose names have thus been listed~~, the jurors shall be sworn by the court or under its direction as follows: "Do you~~, and each of you, do~~ solemnly swear or affirm that you will give true answers ~~true answers give~~ to all questions asked of ~~propounded to~~ you concerning your qualifications as a juror, so help you God?"

Rule 236. Jurors' Oath

The jury shall be sworn by the court or under its direction as follows: "Do you~~, and each of~~

~~you, do~~ solemnly swear or affirm that ~~in all cases between parties which shall be to you submitted,~~ you will return a true verdict ~~a true verdict render~~ according to the law stated in the court's charge ~~as it may be given you in charge by the court~~ and to the evidence submitted to you under the rulings of this court, so help you God?"

Report of

Texas Supreme Court

Task Force on the

Rules of Civil Procedure

November 8, 1993

To: The Honorable Nathan L. Hecht
Rules Member, Supreme Court of Texas

From: William V. Dorsaneo, III
Chairman, Task Force on Revision of the Texas Rules of Civil Procedure

Re: Recodification of the Texas Rules of Civil Procedure

Status Report

1. The Need for Recodification: Background.

As originally promulgated, the Texas Rules of Civil Procedure consisted of approximately 822 separate rules divided into eight parts:

I.	General Rules.
II.	Rules of Practice in District and County Courts.
III.	Rules of Procedure for the Courts of Civil Appeals.
IV.	Rules of Practice for the Supreme Court.
V.	Rules of Practice in Justice Courts.
VI.	Rules Relating to Ancillary Proceedings.
VII.	Rules Relating to Special Proceedings.
VIII.	Closing Rules.

This original structure has been rendered substantially obsolete by subsequent Texas Supreme Court orders. As a result of the adoption of the Texas Rules of Appellate Procedure, Parts III and IV were completely repealed and the number of civil procedural rules was reduced by approximately 130 rules. In addition to the large gap that was created by the promulgation of the Rules of Appellate Procedure, another consequence of their removal from the Rules of Civil Procedure is that the civil procedural rulebook now begins with two separate sections of "general rules," i.e., the General Rules (Rules 1-14c) contained in Part I and the General Rules (Rules 15-21b) contained in the first section of Part II.

In addition to the major structural change that resulted from the adoption of the appellate rules, other major revisions have been made in Part II of the rulebook. Most notably, the rules concerning pretrial discovery, venue practice, the jury charge, and findings of fact in bench trials and have been rewritten; the rules concerning the need for and the procedural mechanisms for serving papers and notices on other parties or

their counsel have been changed; the rules concerning postjudgment motions and the duration and extent of the trial court's plenary power have been substantially revised; new rules have been adopted recognizing new procedural mechanisms, i.e. special appearances, summary judgments, mental and physical examinations; and a large number of rules have been repealed for a variety of reasons. Nonetheless, despite all of this activity, many of the current rules are substantially verbatim renditions of the parts of the Revised Civil Statutes of 1925 that were deemed procedural and, therefore, appropriate for inclusion in the rules of civil procedure by the Texas Supreme Court and the original rules committee.

Currently, the Texas Rules of Civil Procedure are divided into six parts and numbered 1-14c (general rules), 15-330 (district and county level courts) 523-591 (justice court rules) 572-734 (ancillary proceedings), 737-813 (special proceedings) and 814-822 (closing rules). Parts I and II contain the most important rules and include the following sections and subsections:

I. General Rules (1-14c)
II. Rules of Practice in District and County Courts
- Sec. 1 General Rules (15-21b)
- Sec. 2 Institution of Suit (22-27)
- Sec. 3 Parties to Suits (28-44)
- Sec. 4. Pleading
  - A. General (45-77)
  - B. Pleadings of Plaintiff (78-82)
  - C. Pleadings of Defendant (83-98)
- Sec. 5. Citation (99-124)
- Sec. 6. Costs and Security Therefor (125-149)
- Sec. 7. Abatement and Discontinuance of Suit (150-165a)
- Sec. 8. Pre-Trial Procedure (166-175)
- Sec. 9. Evidence and Depositions
  - A. Evidence (176-105)
  - B. Depositions (187-215)
- Sec. 10. The Jury in Court (216-236)
- Sec. 11. Trial of Causes
  - A. Appearance and Procedure (237-250)
  - B. Continuance and Change of Venue (251-261)
  - C. The Trial (262-270)
  - D. Charge to the Jury (271-279)
  - E. Case to the Jury (280-289)
  - F. Verdict (290-295)
  - G. Findings by Court (296-299a)
  - H. Judgments (300-314)
  - I. Remittitur and Correction (315-316)
  - J. New Trials (320-329b)
  - K. Certain District Courts (330)

2. The Desirability of Reorganization.

The Task Force recommends that Parts I and II of the Texas Rules of Civil Procedure containing Rules 1-330 be substantially reorganized. From an overall standpoint, the members of the Task Force have concluded that it is feasible and desirable to reorganize the Texas Rules of Civil Procedure in the current rulebook in the following manner:

I. General Rules
II. Commencement of Action; Service of Process, Pleadings, Motions and Orders
III. Pleadings and Motions
IV. Parties
V. Discovery and Pretrial Procedure
VI. Trial
VII. Judgments; Motions for Judgment; New Trials
VIII. Provisional and Final Remedies
IX. Special Proceedings
X. Counsel, Courts, Clerks, Court Reporters, Court Records, and Court Costs
XI. Closing Rules.

The method of organization is based on the way that the Federal Rules of Civil Procedure are organized except for the inclusion of a separate subsection for Pretrial Procedure in the structure that we recommend. We believe that this organization is far superior to the current one for two basic reasons. First, the changes made in the original rules have impaired the structural utility of the original rulebook. Second, the proposed general structure is substantially less complicated as well as being more in tune with modern procedural thinking concerning particular procedural subjects and, therefore, more user friendly. In other words, given the procedural developments that have occurred in Texas since the rules were promulgated originally, the federal structure is a better one than the original structure.

A detailed table of contents based on the proposed structure is attached to this memorandum as an appendix.

3. The Need for Revision of Sections and Specific Rules With or Without Substantive Changes.

The Task Force also recommends that the sections and the specific rules of procedure concerning practice in district and county level courts within each part and section be amended by combining discrete rules, by eliminating unnecessary rules and by reordering the remaining rules into a more workable and understandable organization within each section of the new

general structure. Many of the current Texas Rules of Civil Procedure governing the practice in district and county level courts are one paragraph items with relatively uninformative titles that could and should be combined, with or without substantive change. This is especially so in contrast to the current federal rules and the Texas rules that were based on the 1937 draft of the federal rules, which are longer rules having titled subparts.

Probably, the original drafters thought it wise not to change the predecessor rules and statutes too much in 1939-1940, because of a presumed familiarity with them by the bench and bar. However, because of the fractionalization of particular subjects into a large number of short rules it is frequently difficult for lawyers and judges to see and appreciate the relationship between related matters. As a result, this method of organization and drafting is also productive of needless complexity, uncertainty and some procedural stupidity. Of course, this part of the revision process is an especially difficult and time-consuming one for several reasons.

First, because the original rules were copied from the revised civil statutes of 1925, which were themselves copied from earlier codifications, they are poorly worded and poorly ordered. Unlike each of the codes "recodifying" the statutes that have been enacted in the past twenty-five years, the Texas rules of procedure have not been restated in modern language, rearranged into a more logical order, or systematically cleansed of duplicative, expired or other ineffective provisions.

Second, when the original rules were promulgated, although many of them were in fact taken from the then existing federal rules, a number of changes were made in them either organizationally or textually. For the most part, these changes were mistakes that should be reversed.

Third, despite the fact that most of the major efforts at revising specific parts of the rulebook that have been undertaken during the past fifteen years have produced substantial improvements, a number of other piecemeal changes that have been made over time have compromised the overall utility of the rulebook.

A preliminary and working draft of a set of reorganized rules developed by the Task Force as well as a disposition table are also attached to this memorandum as appendices.

4. The Need for More Work on Ancillary and Special Proceedings.

The third recommendation of the Task Force is that the rules governing Ancillary Proceedings and Special Proceedings be

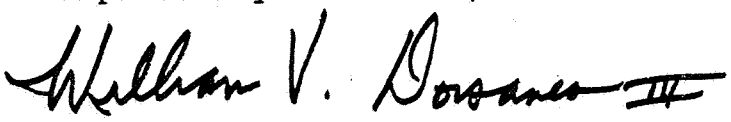
substantially revised in two fundamental ways. First, many of the subjects covered in both the Ancillary Proceedings and Special Proceedings sections of the current rulebook are also covered both procedurally and substantively in either the Civil Practice and Remedies Code, the Property Code or in some other codification. The Task Force believes that this truncation or in some cases duplication of coverage is undesirable. Although we have not completed our analysis of the Ancillary Proceedings and Special Proceedings and are not in a position to make specific recommendations, one major part of the revision process would entail the repeal of procedural rules coupled with statutory amendments.

Conclusion

Since the original promulgation of the Texas Rules of Civil Procedure, amendments have been made or are being made on the most important procedural subjects. Most of these changes have been beneficial and they can be retained in substantial measure. Nonetheless, the sophistication of modern Texas lawyers is not matched by the overall organization of our procedural rules which contain an excessive number of rules, incomplete treatment of important subjects, a separation of pertinent information concerning an individual subject into a number of rules that are not in reasonable proximity to each other, as well as unnecessary redundancy. Despite the fact that current rules are workable and notwithstanding the overall contributions of the fine lawyers and jurists who have worked for the improvement of the rules in the years following their initial promulgation, after more than fifty years of service, the rulebook needs special attention.

It is our privilege to be of service to the Court in pursuit of this worthwhile endeavor.

Respectfully submitted,



William V. Dorsaneo III
Chairperson, Task Force
on Revision of the Texas
Rules of Civil Procedure

APPENDIX "A"

Table of Contents

APPENDIX "B"
DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

CURRENT TRCP	PROPOSED TRCP	COMMENTS
1 Objective of Rules	1 Objective of Rules	No wording change from existing rule. "Liberal construction" is only substantive phrase in the rule.
2 Scope of Rules	2 Scope of Rules	No wording change from existing rule. This rule appears wordy and cumbersome as written. Is it necessary to relate back to the various September 1, 1941 statutes?
3 Construction of Rules	3 Construction of Rules	No wording change from existing rule
3a Local Rules	4 Local Rules	No wording change from existing rule
4 Computation of Time	6 Time (a)Computation	New rule tracks wording of old rule
5 Enlargement of Time	6 Time (b)Enlargement (c)Use of U.S. Postal Service	(b) New rule tracks wording of old rule (c) Note the current and new Texas rule allow for 10 days tardy. The Fed rule adds 3 days
6 Suits Commenced on Sunday	5 Commencement of Suit	The essence of old rule 6 is included; however the reference to injunction, attachment, garnishment, sequestration, or distress proceeding exception has not been included.
7 May Appear by Attorney	110 May Appear by Attorney; Attorney in Charge; Number of Counsel Heard; Attorney to Show Authority (a)May Appear by Attorney	No wording change from existing rule
8 Attorney in Charge	110 May Appear by Attorney; Attorney in Charge; Number of Counsel Heard; Attorney to Show Authority (b)Attorney in Charge	No wording change from existing rule
9 Number of Counsel Heard	110 May Appear by Attorney; Attorney in Charge; Number of Counsel Heard; Attorney to Show Authority (c)Number of Counsel Heard	No wording change from existing rule
10 Withdrawal of Attorney	112 Withdrawal of Attorney	No wording change from existing rule
11 Agreements to Be in Writing	113 Agreements to be in Writing	No wording change from existing rule
12 Attorney to Show Authority	110 May Appear by Attorney; Attorney in Charge; Number of Counsel Heard; Attorney to Show Authority (d)Attorney to Show Authority	No wording change from existing rule
13 Effect of Signing of Pleadings, Motions and other Papers; Sanctions	24 Signing of Pleadings, Motions, and Other Papers; Sanctions (b), (c), (d)	Significant wording change from Rule 13. Also incorporates rule 57. Generally reorganized.
14 Affidavit by Agent	Delete	
14b Return or Other Disposition of Exhibits	120 Duties of Clerk (g)Exhibits	Reworded. Proposed rule incorporates existing rules 23, 24, 25, 26, 27, and 246
14b Return or Other Disposition of Exhibits SUPREME COURT ORDER RELATING TO RETENTION AND DISPOSITION OF EXHIBITS	124 Withdrawal of Exhibits by Parties (a)Disposal of Exhibits	Reworded from existing rule
14c Deposit in Lieu of Surety Bond	133 Security for Costs	No wording change.
15 Writs and Process	9 Process, Service and Filing of Pleadings, Motions and Other Papers (a)Form	No wording change from existing rule

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

16 Shall Endorse All Process	9 Process, Service and Filing of Pleadings, Motions and Other Papers (b)Endorsement	Slight wording change from existing rule
17 Officer to Execute Process	9 Process, Service and Filing of Pleadings, Motions and Other Papers (c)Fees 129 Issuance and Service of Process (b)In-County Process	No wording change from existing rule DUPLICATION.
18 When Judge Dies During Term, Resigns or Is Disabled	114 Effect of Vacant Judgeship on Proceedings	Significantly reworded and shortened
18a Recusal or Disqualification of Judges	115 Recusal or Disqualification of Judges	Significantly reworded
18b Grounds for Disqualification and Recusal of Judges	116 Grounds for Disqualification and Recusal of Judges	Slight wording change from existing rule, plus a "definitions" section added
18c Recording and Broadcasting of Court Proceedings	118 Recording and Broadcasting of Court Proceedings	No wording change from existing rule
19 Non-Adjournment of Term	Not included in draft. Consider Deletion.	Review for obsolescence in light of continuous terms
20 Minutes Read and Signed	119 Minutes Read and Signed. Consider Deletion.	No wording change from existing rule. Review for obsolescence; procedure likely ignored for most part
21 Filing and Serving Pleadings and Motions	9 Process, Service, and Filing of Pleadings, Motions and Other Papers (d)Filing and Serving Pleadings and Motions	No wording change from existing rule
21a Methods of Service	9 Process, Service, and Filing of Pleadings, Motions and Other Papers (e)Methods of Service	Some wording changes from existing rule
21b Sanctions for Failure to Serve or Deliver Copy of Pleadings and Motions	9 Process, Service, and Filing of Pleadings, Motions and Other Papers (f)Sanctions	No wording change from existing rule
22 Commenced by Petition	5 Commencement of Suit	No wording change from existing rule
23 Suits to Be Numbered Consecutively	120 Duties of Clerk (a)Assignment of File Numbers	Reworded. Proposed rule incorporates existing rules 14b, 24, 25, 26, 27, and 246
24 Duty of Clerk	120 Duties of Clerk (b)Endorsement on Petitions	Reworded. Proposed rule incorporates existing rules 14b, 23, 25, 26, 27, and 246
25 Clerk's File Docket	120 Duties of Clerk (c)File Docket	Reworded. Proposed rule incorporates existing rules 14b, 23, 24, 26, 27, and 246
26 Clerk's Court Docket	120 Duties of Clerk (e)Court Docket	Reworded. Proposed rule incorporates existing rules 14b, 23, 24, 25, 27, and 246
27 Order of Cases	120 Duties of Clerk (d)Order of Cases and Denoting File Number on Instruments	Reworded. Proposed rule incorporates existing rules 14b, 23, 24, 25, 26, and 246
28 Suits in Assumed Name	30 Parties Plaintiff and Defendant (b)Capacity to Sue or Be Sued in Assumed Name	No wording change from existing rule. Tracks Fed. rule 17(a).
29 Suit on Claim Against Dissolved Corporation	Delete	This should be covered in the TBCA (Art. 7.12).
30 Parties to Suits	Delete	This should be covered in the CPRC (Sec. 17.001).
31 Surety Not to Be Sued Alone	Delete	This should be covered in the CPRC (Sec. 17.001).
32 May Have Question of Suretyship Tried	Delete	This special rule for sureties is unecessary.
33 Suits by or Against Counties	Transfer to CPRC or Delete	See Ch. 17, CPRC.

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

34 Against Sheriff, Etc.	Transfer to CPRC or Delete	See Ch. 17, CPRC.
35 On Official Bonds	Transfer to CPRC or Delete	See Ch. 17, CPRC.
36 Different Officials and Bondsmen	Transfer to CPRC or Delete	See Ch. 17, CPRC.
37 Additional Parties	Delete	This rule is unnecessary.
38 Third-Party Practice	27 Third-Party Practice	No wording change from existing rule.
39 Joinder of Persons Needed for Just Adjudication	32 Joinder of Persons Needed for Just Adjudication	No wording change from existing rule. Tracks Fed. Rule 19
40 Permissive Joinder of Parties	33 Permissive Joinder of Parties	No wording change from existing rule. Tracks Fed. Rule 20
41 Misjoinder and Nonjoinder of Parties	34 Misjoinder and Nonjoinder of Parties	No wording change from existing rule. Tracks Fed. Rule 21
42 Class Actions	36 Class Actions 37 Derivative Suit	No wording change from existing rule, except all language on derivative suits moved to proposed Rule 37. Tracks Fed. Rules 23 and 23.1
43 Interpleader	35 Interpleader	No wording change from existing rule. Tracks Fed. Rule 22(1)
44 May Appear by Next Friend	30 Parties Plaintiff and Defendant (c)Next Friends and Guardians Ad Litem (1)	Significant wording change. Removed language concerning next friends agreement to judgments and their binding nature. Also incorporates existing Rule 173
45 Definition and System	20 Pleadings Allowed; Form of Motions (a)Pleadings	Slight rewording from existing rule plus elimination of "recycled paper" preference
46 Petition and Answer; Each One Instrument of Writing	Consider Deletion.	This rule is probably unnecessary.
47 Claims for Relief	21 General Rules of Pleading (a)Claims for Relief	Slight rewording from existing rule.
48 Alternative Claims for Relief	21 General Rules of Pleading (b)Alternate Claims for Relief	No wording change from existing rule. Tracks Fed. rule 8(e)
49 Where Several Counts	Delete	This rule is unnecessary.
50 Paragraphs, Separate Statements	23 Form of Pleadings (b)Paragraphs	No wording change from existing rule. Tracks Fed. Rule 10(b)
51 Joinder of Claims and Remedies	31 Joinder of Claims and Remedies	No wording change, except confusing language on multiple party joinder and joinder of cross claims and third-party claims eliminated. Tracks Fed. rule 18
52 Alleging a Corporation	Delete; see Proposed Rule 27(e).	
53 Special Act or Law	22 Pleading Special Matters (a)Special Act or Law	No wording change from existing rule
54 Conditions Precedent	22 Pleading Special Matters (b)Conditions Precedent	No wording change from existing rule. Tracks Fed. rule 9(c)
55 Judgment	22 Pleading Special Matters (c)Judgment	No wording change from existing rule. Tracks Fed. rule 9(e)
56 Special Damage	22 Pleading Special Matters (d)Special Damage	Wording addition to define special damages per Sherrod v. Bailey. Tracks Fed. rule 9(g)
57 Signing of Pleadings	24 Signing of Pleadings, Motions, and Other Papers; Sanctions (a)	No wording change from existing rule, but also incorporates Sanctions Task Force Proposal.
58 Adoption by Reference	23 Forms of Pleadings (c)Adoption by Reference	No wording change from existing rule. Tracks Fed. rule 10 (c), first sentence
59 Exhibits and Pleading	23 Forms of Pleadings (d)Exhibits and Pleading	No wording change from existing rule

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

60 Intervenor's Pleadings	38 Intervention (a)Intervenor's Pleadings	No wording change from existing rule. Also incorporates existing Rule 61
61 Trial: Intervenors: Rules Apply to All Parties	Delete.	This rule is unnecessary.
62 Amendment Defined	28 Amended and Supplemental Pleadings (a)Amendment Defined	No wording change from existing rule. Also incorporates existing rule 65
63 Amendments and Responsive Pleadings	28 Amended and Supplemental Pleadings (b)When to Amend; Amended Instrument	No wording change from existing rule. Also incorporates existing rule 64
64 Amended Instrument	28 Amended and Supplemental Pleadings (b)When to Amend; Amended Instrument	No wording change from existing rule. Also incorporates existing rule 63
65 Substituted Instrument Takes Place of Original	28 Amended and Supplemental Pleadings (a)Amendment Defined	No wording change from existing rule. Also incorporates existing rule 62
66 Trial Amendment	28 Amended and Supplemental Pleadings (c)Trial Amendment	No wording change from existing rule. Also incorporates existing rule 67. Tracks Fed. rule 15(b), last two sentences
67 Amendments to Conform to Issues Tried Without Objection	28 Amended and Supplemental Pleadings (c)Trial Amendment	No wording change from existing rule. Also incorporates existing rule 66. Tracks Fed. rule 15(b)
68 Court May Order Repleader	Delete	Not addressed in draft
69 Supplemental Petition or Answer	21 General Rules of Pleadings (c)Supplemental Petition or Answer	Not addressed in draft.
70 Pleading: Surprise: Cost	Consider adding.	Not addressed in draft.
71 Misnomer of Pleading	Consider adding.	
74 Filing With the Court Defined	Consider adding.	
75 Filed Pleadings; Withdrawals	Consider adding.	Not addressed in draft.
75a Filed Exhibits: Court Reporter to File With Clerk	123 Filing of Exhibits by Reporter or Stenographer for Court	Slight wording change from existing rule
75b Filed Exhibits: Withdrawal	124 Withdrawal, Return, Disposal and Copying of Exhibits (b)Withdrawal of Exhibits by Parties (c)Withdrawal of Exhibits for Appellate Purposes	Includes all of existing rule, plus incorporates existing rule 14b
76 May Inspect Papers	125 Inspection of Court Records and Papers	Slight wording change from existing rule
76a Sealing Court Records	126 Sealing Court Records	No wording change from existing rule
77 Lost Records and Papers	127 Lost Records and Papers	No wording change from existing rule
78 Petition; Original and Supplemental; Indorsement	20 Pleadings Allowed; Form of Motions (b)Petition and Answer; Original and Supplemental 23 Form of Pleadings (a)Indorsement; Identity of the Parties	Wording significantly changed from existing rule. Also incorporates existing rules 79 and 83.
79 The Petition	20 Pleadings Allowed; Form of Motions (b)Petition and Answer; Original and Supplemental 23 Form of Pleadings (a)Indorsement; Identity of the Parties	Wording significantly changed from existing rule. Also incorporates existing rules 78 and 83.
80 Plaintiff's Supplemental Petition	21 General Rules of Pleadings (d)Contents of Supplemental Pleadings (1)Plaintiff	No wording change from existing rule
81 Defensive Matters	21 General Rules of Pleading (e)Denials of Claims and Defenses (2)	No wording change from existing rule

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

82 Special Defenses	21 General Rules of Pleading (e)Denials of Claims and Defenses (3)	Wording significantly changed from existing rule
83 Answer; Original and Supplemental; Indorsement	20 Pleadings Allowed; Form of Motions (b)Petition and Answer; Original and Supplemental 23 Form of Pleadings (a)Indorsement; Identity of the Parties	Wording significantly changed from existing rule. Also incorporates existing rules 78 and 79.
84 Answer May Include Several Matters	25 Presentation of Defenses; Plea or Motion Practice (c)Hearings	No wording change from existing rule
85 Original Answer; Contents	Delete	This rule is unnecessary.
86 Motion to Transfer Venue	64 Venue (a)Change of Venue by Consent (b)Motion to Transfer Venue	Some wording change and reorgainization
87 Determination of Motion to Transfer	64 Venue (b)Motion to Transfer Venue (2)Determination of Motion to Transfer	Slight wording change
88 Discovery and Venue	64 Venue (c)Discovery and Venue	No wording change from existing rule
89 Transferred If Motion is Sustained	64 Venue (b)Motion to Transfer Venue (2)(d)Transferred if Motion Sustained	No wording change from existing rule
90 Waiver of Defects in Pleading [first sentence]	20 Pleadings Allowed; Form of Motions (d)Demurrers Abolished	No wording change from existing rule
90 Waiver of Defects in Pleading [all but first sentence[	21 General Rules of Pleading (h)Waiver	Significant wording change also changes the meaning of the rule. Previously only the loser waived defect on appeal; the new rule indicates the winner does too.
91 Special Exceptions	21 General Rules of Pleading (g)Special Exceptions	No wording change from existing rule
92 General Denial	21 General Rules of Pleading (e)Denials of Claims or Defenses (1)	No wording change from existing rule
93 Certain Pleas to Be Verified	22 Pleading Special Matters (e)Certain Pleas to Be Verified	No wording change from existing rule
94 Affirmative Defenses	21 Pleading Special Matters (f)Affirmative Defenses	Requirements for suit on an insurance contract eliminated. Also incorporates existing rule 95. Tracks Fed. rule 8(c)
95 Pleas of Payment	21 Pleading Special Matters (f)Affirmative Defenses	No wording change from existing rule. Also incorporates existing rule 94.
96 No Discontinuance	Delete	This rule is probably unnecessary.
97 Counterclaim and Cross-Claim	26 Counterclaim and Cross-Claim	No wording change from existing rule. Tracks Fed. rule 13
98 Supplemental Answers	21 General Rules of Pleadings (d)Contents of Supplemental Pleadings (2)Defendant	No wording change from existing rule
99 Issuance and Form of Citation	7 Citation and Service - Non-Publication 25 Presentation of Defenses; Plea or Motion Practice (a)When Presented	Proposed rule 7(a)-(d) tracks existing rule 99(a)-(d) word for word. Proposed rule 7 incorporates existing rules 103, 105, 106, 107, 108, and 108a.

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

103 Who May Serve	7 Citation and Service - Non-Publication (e)Who May Serve	No wording change from existing rule. Note that the title of this section is "...Non-Publication", yet this proposed rule addresses citation by publication
105 Duty of Officer or Person Receiving	7 Citation and Service - Non-Publication (f)Duty of Recipient	No wording change from existing rule
106 Method of Service	7 Citation and Service - Non-Publication (g)Method of Service	No wording change from existing rule
107 Return of Service	7 Citation and Service - Non-Publication (h)Return of Service	No wording change from existing rule
108 Defendant Without State	7 Citation and Service - Non-Publication (i)Defendant Not In State	No wording change from existing rule
108a Service of Process in Foreign Countries	7 Citation and Service - Non-Publication (j)Service in Foreign Country	No wording change from existing rule
109 Citation by Publication	8 Citation by Publication (a)General	Significant wording change in new rule
109a Other Substituted Service	8 Citation by Publication (g)Other Substituted Service	No wording change from existing rule
110 Effect of Rules on Other Statutes	8 Citation by Publication (b)Effect of This Rule on Other Statutes	Significant wording change in new rule. Eliminates reference to companion rules
111 Citation by Publication in Action Against Unknown Heirs or Stockholders of Defunct Corporations	Delete	This should be covered in CPRC, Ch. 17.
112 Parties to Actions Against Unknown Owners or Claimants of Interest in Land	Delete	This should be covered in CPRC, Ch. 17.
113 Citation by Publication in Actions Against Unknown Owners or Claimants of Interest in Land	Delete	This should be covered in CPRC, Ch. 17.
114 Citation by Publication; Requisites	8 Citation by Publication (c)Requisites	Substantial wording change from existing rule. Eliminates details of required form and timing. Also incorporates existing rule 115.
115 Form of Published Citation in Actions Involving Land	8 Citation by Publication (c)Requisites	Slight wording change from existing rule. Also incorporates existing rule 114.
116 Service of Citation by Publication	8 Citation by Publication (d)Service	No wording change from existing rule
117 Return of Citation by Publication	8 Citation by Publication (e)Return	No wording change from existing rule
117a Citation in Suits for Delinquent Ad Valorem Taxes	Delete	This should be covered in CPRC, Ch. 17.
118 Amendment	7 Citation and Service - Non-Publication (l)Amendment 8 Citation by Publication (f)Amendment	No wording change from existing rule. Exact wording in both new rule 7(l) and 8(f). APPEARS REDUNDANT
119 Acceptance of Service	7 Citation and Service - Non-Publication (k)Acceptance of Service	Slight wording change from existing rule
119a Copy of Decree	Delete.	This should be covered in the Family Code.
120 Entering Appearance		This rule is unnecessary.

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

120a Special Appearance	63 Special Appearance	Slight wording change
121 Answer is Appearance	Delete.	This rule is unnecessary.
122 Constructive Appearance	This rule should be added.	
123 Reversal of Judgment	This rule should be added.	
124 No Judgment Without Service	This rule should be added.	
125 Parties Responsible	Delete.	This rule is probably unnecessary.
126 Fee for Execution of Process, Demand	129 Issuance and Service of Process (c)Out-of-County Process (d)Indigent Parties	Slight wording change from existing rule
127 Parties Liable for Other Costs	128 Parties Liable for Costs (b)Other Costs	Slightly reworded
129 How Costs Collected	130 Collection (a)How Costs are Collected	Reworded and shortened
130 Officer to Levy	130 Collection (b)Officer to Levy	Slightly reworded
131 Successful Party to Recover	131 Party's Recovery of Its Costs (a)General	No wording change. Also incorporates existing rule 133 & 141
133 Costs of Motion	Delete.	This rule is probably meaningless.
136 Demand Reduced by Payments	131 Party's Recovery of Its Costs (b)Reduction on Demand	No wording change from existing rule.
137 In Assault and Battery, Etc.	131 Party's Recovery of Its Costs (c)Assault, Battery or Defamation Claims	Slight wording change from existing rule. This rule is probably obsolete.
138 Cost of New Trial	Parties Liable for Costs (c)New Trial	No wording change from existing rule
139 On Appeal and Certiorari	Delete.	This rule should be in the TRAP.
140 No Fee for Copy	Consider adding to Proposed Rule 132.	
141 Courts May Otherwise Adjudge Costs	131 Party's Recovery of Its Costs (a)General	No wording change. Also incorporates existing rule 131 & 133
142 Security for Costs	129 Issuance and Service of Process (a)Collection by Clerk	No wording change from existing rule
143 Rule for Costs	133 Security for Costs (a)Rule for Costs	Slight wording change
143a Costs on Appeal to County Court	Delete.	This rule should be in the Justice Court rules.
144 Judgment on Cost Bond	133 Security for Costs (b)Cost Bonds	Slightly reworded. Also incorporates existing rule 148
145 Affidavit of Inability	134 Inability to Pay Costs	No wording change from existing rule
146 Deposit for Costs	133 Security for Costs (c)Deposit for Costs	Slight wording change
147 Applies to Any Party	128 Parties Liable for Cost (a)In General	Slight wording change
148 Secured by Other Bond	133 Security for Costs (b)Cost Bonds	Slightly reworded. Also incorporates existing rule 144
149 Execution for Costs	130 Collection (c)Execution for Costs	Slightly reworded
150 Death of Party	39 Substitution of Parties (a)Death of a Party	No wording change from existing rule. Also incorporates existing rules 151, 152, and 153
151 Death of Plaintiff	39 Substitution of Parties (a)Death of a Party	Slight wording change from existing rule. Also incorporates existing rules 150, 152, and 153

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

152 Death of Defendant	39 Substitution of Parties (a)Death of a Party	Slight wording change from existing rule. Also incorporates existing rules 150, 151, and 153.
153 When Executor, Etc., Dies	39 Substitution of Parties (a)Death of a Party	Slight wording change from existing rule. Also incorporates existing rules 150, 151, and 152.
154 Requisites of Scire Facias	39 Substitution of Parties (b)Requisites of Scire Facias	No wording change form existing rule
155 Surviving Parties	39 Substitution of Parties (c)Surviving Parties	No wording change from existing rule
156 Death After Verdict or Close of Evidence	39 Substitution of Parties (d)Death After Verdict or Close of Evidence	No wording change from existing rule
158 Suit for the Use of Another	39 Substitution of Parties (e)Suit for the Use of Another	No wording change from existing rule
159 Suit for Injuries Resulting in Death	39 Substitution of Parties (f)Suit for Injuries Resulting in Death	No wording change from existing rule
160 Dissolution of Corporation	Add to Proposed Rule 39.	
161 Where Some Defendants Not Served	Consider adding.	
162 Dismissal or Non-Suit	Add.	
163 Dismissal as to Parties Served, Etc.	Add.	
165 Abandonment	Consider adding.	
165a Dismissal for Want of Prosecution	61 Dismissal for Want of Prosecution	Slight wording change only
166 Pretrial Conference	60 Scheduling nad Pretrial	This proposal is being studied by the CCR.
166a Summary Judgment	102 Summary Judgment	Reworded and reorganized. Same substantive information, in general
166b Forms and Scope of Discovery; Protective Orders, Supplementation of Responses	40 General Provisions Regarding Discovery; Scope	The new rule has been reorganized. New rules 40 - 44 now cover the subject matter of 166b & 166c. Discovery Task Force currently addressing need for substantive changes.
166b Forms and Scope of Discovery; Protective Orders, Supplementation of Responses	41 Exemptions and Privleges from Discovery	The new rule has been abbreviated. Previous items now in subsequent rules.
166b Forms and Scope of Discovery; Protective Orders, Supplementation of Responses	42 Discovery Disputes	The new rule has been reorganized. New rules 40 - 44 now cover the subject matter of 166b & 166c. Discovery Task Force currently addressing need for substantive changes.
166b Forms and Scope of Discovery; Protective Orders, Supplementation of Responses	43 Duty to Supplement	The new rule has been reorganized. New rules 40 - 44 now cover the subject matter of 166b & 166c. Discovery Task Force currently addressing need for substantive changes.
166c Stipulations Regarding Discovery Procedure	44 Stipulations Regarding Discovery Procedures	The new rule has been reorganized. New rules 40 - 44 now cover the subject matter of 166(b) & 166(c). Discovery Task Force currently addressing need for substantive changes. Also incorporates 204 language.
167 Discovery and Production of Documents and Things for Inspection, Copying or Photographing [Also has sections from 166b 2 b, c & h]	45 Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes	Significant wording change and reorganization from existing rule. Some headings added or changed. Generally tracks Fed. rule 34
167a Physical and Mental Examination of Persons	46 Physical and Mental Examination of Persons	No wording change from existing rule. Tracks Fed. rule 35

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

168 Interrogatories to Parties	47 Interrogatories to Parties	Wording has been rearranged, but is essentially the same, except language regarding service has been eliminated (168(1)). Tracks Fed. rule 33
169 Requests for Admission	48 Requests for Admission	No wording change from existing rule. Tracks Fed. rule 36
171 Master in Chancery	62 Masters and Auditors (a)Master in Chancery	No wording change from existing rule. Also incorporates existing rule 172. Tracks Fed. rule 53
172 Audit	62 Masters and Audit (b)Audit	No wording change from existing rule. Also incorporates existing rule 171
173 Guardian Ad Litem	30 Parties Plaintiff and Defendant (c)Next Friends and Guardian Ad Litem (2)	Slight wording change from existing rule. Also incorporates existing rule 44
174 Consolidation; Separate Trials	67 Consolidation; Separate Trials; and Severance	Additional wording from existing rule. Also incorporates part of existing rule 41
175 Issue of Law and Dilatory Pleas	60 Pretrial and Discovery Conferences; Scheduling; Management (i)Issue of Law and Dilatory Pleas	No wording change from existing rule
176 Witnesses Subpoenaed	72 Subpoenas (a)Witnesses Subpoenaed	No wording change from existing rule
177 Form of Subpoena	72 Subpoenas (b)Form of Subpoena	No wording change from existing rule
177a Subpoena for Production of Documentary Evidence	72 Subpoena (c)Subpoena for Production of Documentary Evidence	No wording change from existing rule. Tracks Fed. rule 45(c)?? [The existing rule references 45(b), but this appears to be in error]
178 Service of Subpoenas	72 Subpoena (d)Service of Subpoena	No wording change from existing rule
179 Witness Shall Attend	72 Subpoena (e)Witness Shall Attend	No wording change from existing rule
180 Refusal to Testify	Delete.	This rule is unnecessary.
181 Party as Witness	Delete.	This rule is unnecessary.
183 Interpreters	117 Interpreters	No wording change from existing rule. Tracks Fed. rule 43(f)
185 Suit on Account	Delete.	This rule is unnecessary.
187 Deposition to Perpetuate Testimony	49 Deposition to Perpetuate Testimony	No wording change from existing rule
188 Depositions in Foreign Countries	54 Deposition in Foreign Jurisdiction	No wording change from existing rule
200 Depositions Upon Oral Examinations	50 Deposition Upon Oral Examination	No wording change from existing rule. Also incorporates other existing rules
201 Compelling Appearance; Production of Documents and Things; Deposition of Organization	53 Compelling Appearance at Depositions	Slight wording changes from existing rule
202 Non-Stenographic Recording; Deposition by Telephone	50 Deposition Upon Oral Examination (b)Notice of Examination	Abbreviated form of existing rule included. Seems to require rework as significant provisions are not included.
203 Failure of Party or Witness to Attend or to Serve Subpoena; Expenses	Delete; This should be covered in the general sanction's rules	See p. 115 of the Report of Sanctions' Task Force.
204 Examination, Cross-Examination and Objections	50 Deposition Upon Oral Examination (c)Examination, Cross-Examination and Objections	No wording change from existing rule. Also incorporates other existing rules

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

205 Submission to Witness; Changes; Signing	50 Deposition Upon Oral Examination (d)Record and Transcript of Examination (1)Submission to Witness; Changes; Signing	No wording change from existing rule. Also incorporates other existing rules
206 Certification by Officer; Exhibits; Copies; Notice of Delivery	50 Deposition Upon Oral Examination (d)Record and Transcript of Examination (2)-(5)	No wording change from existing rule. Sections have been combined and rearranged. Also incorporates other existing rules
207 Use of Deposition Transcripts in Court Proceedings	52 Use of Depositions in Court Proceedings	No major wording change from existing rule. Also incorporates other existing rule 209
208 Depositions Upon Written Questions	51 Depositions Upon Written Questions	No wording change from existing rule
209 Retention and Disposition of Deposition Transcripts and Depositions Upon Written Questions	52 Use of Depositions in Court Proceedings	No major wording change from existing rule. Also incorporates other existing rule 207
215 Abuse of Discovery; Sanctions	55 Abuse of Discovery; Sanctions	
216 Request and Fee for Jury Trial	73 Preserving the Right to Jury Trial (a)Request (b)Jury Fee	No wording change form existing rule
217 Oath of Inability	73 Preserving the Right to Jury Trial	No wording change from existing rule
218 Jury Docket	Delete.	This rule is probably unnecessary.
219 Jury Trial Day	Delete.	This rule is probably unnecessary.
220 Withdrawing Cause From Jury Docket	73 Preserving the Right to Jury Trial	No wording change from existing rule
221 Challenge to the Array	74 Challenging the Assembly of the Jury Panel	Reworded. Also incorporates existing rule 222
222 When Challenge is Sustained	74 Challenging the Assembly of the Jury Panel	Reworded. Also incorporates existing rule 221
223 Jury List in Certain Counties	75 Seating the Jury Panel	Major rewrite. Procedures removed from rule
224 Preparing Jury List	75 Seating the Jury Panel	Major rewrite. Procedures removed from rule
225 Summoning Talesman	75 Seating the Jury Panel	Major rewrite. Procedures removed from rule
226 Oath to Jury Panel	76 Swearing in, Instructing, and Examining the Jury Panel	Major rewrite. Removes reference to "God" in oath.
226a Admonitory Instructions to Jury Panel and Jury	79 Oath and Instructions to Jury (b)Instructions	L. Hughes draft intended. Not yet included
227 Challenge to Juror	77 Challenges for Cause	Major rewrite. Also incorporates existing rules 228, 229, & 231
228 "Challenge for Cause" Defined	77 Challenges for Cause	Major rewrite. Also incorporates existing rules 227, 229, & 231
229 Challenge for Cause	77 Challenges for Cause	Major rewrite. Also incorporates existing rule 227, 228, & 231
230 Certain Questions Not to Be Asked	Delete.	This rule is unnecessary.
231 Number Reduced by Challenges	77 Challenges for Cause	Major rewrite. Also incorporates existing rules 227, 228, & 229
232 Making Peremptory Challenges	Delete.	This rule is unnecessary.
233 Number of Peremptory Challenges	78 Peremptory Challenges	Major rewrite. Also incorporates existing rule 234 & adds Batson/Edmundson procedure
234 Lists Returned to the Clerk	78 Peremptory Challenges	Major rewrite. Also incorporates existing rule 233 & adds Batson/Edmundson procedure
235 If Jury is Incomplete	Delete.	This rule is probably unnecessary.
236 Oath to Jury	79 Oath and Instructions to Jury (a)Oath	Rule reworded. Reference to "God" eliminated.

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

237 Appearance Day.	Delete.	This rule is unnecessary.
237a Cases Remanded From Federal Court	103 Default Judgment (a)When Available	Reworded and reorganized. Also incorporates existing rule 239
238 Call of Appearance Docket.	Delete.	This rule is obsolete.
239 Judgment by Default	103 Default (a)When Available	Reworded and reorganized. Also incorporates existing rule 237a
239a Notice of Default Judgment	103 Default (d)Notice of the Judgment	Rule reworded and shortened
240 Where Only Some Answer	103 Default (b)Interlocutory Judgment	Rule reworded
241 Assessing Damages on Liquidated Demands	103 Default (c)Damages (1)Liquidated Demands	Rule reworded
243 Unliquidated Damages	103 Default (c)Damages (2)Unliquidated Demands	Rule reworded
244 On Service by Publication	103 Default (e)After Service by Publication	No wording change from existing rule
245 Assignment of Cases for Trial	70 Assignment of Cases for Trial (a)Assignment for Trial	No wording change from existing rule
246 Clerk to Give Notice of Settings	70 Assignment of Cases for Trial (b)Notice of Setting 120 Duties of Clerk (f)Notice of Trial to Non-Resident Attorney	No wording change form existing rule BUT RULE IS DUPLICATED IN 70(b) & 120(f)
247 Trial When Set	Delete.	This rule is unnecessary.
248 Jury Cases.	Delete.	This rule is unnecessary.
248		
251 Continuance	66 Continuance (a)In General	Slight wording change from existing rule
252 Application for Continuance	66 Continuance (b)Continuance on Motion of Party (1), (2), (3)(A) 72 Subpoenas (f)Application for Continuance	New rule reworded and reorganized
253 Abence of Counsel as Ground for Continuance	66 Continuance (b)Continuance on Motion of Party (3)(B)Absence of Counsel	No wording change from existing rule
254 Attendance on Legislature	66 Continuance (b)Continuance (3)(C)Attendance on Legislature	New rule reworded
255 Change of Venue by Consent	64 Venue (a)Change of Venue by Consent	No wording change from existing rule. Incorporates existing rule 86 also
257 Granted on Motion	64 Venue (b)Motion to Transfer Venue (3)Change of Venue Granted on Motion	No wording change from existing rule
258 Shall be Granted	64 Venue (b)Motion to Transfer Venue (3)(B)Shall Be Granted	No wording change from existing rule
259 To What County	64 Venue (b)Motion to Transfer Venue (3)(C)Transferred to What County	No wording change from existing rule

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

261 Transcript on Change	64 Venue (b)Motion to Transfer Venue (3)(D)Transcript on Change	No wording change from existing rule
262 Trial by the Court	Delete.	This rule is unnecessary.
263 Agreed Case	70 Assignment of Cases for Trial (c)Agreed Method of Trial	Existing rule reworded and modified. Also incorporates existing rule 264, in part.
264 Videotape Trial	70 Assignment of Cases for Trial (c)Agreed Method of Trial	Existing rule reworded and modified. Also incorporates existing rule 263, in part.
265 Order of Proceedings on Trial by Jury	71 Order of Trial (a)Order of Proceedings	Slight wording changes from existing rule to make rule apply to all trials.
266 Open and Close--Admission	71 Order of Trial (b)Open and Close--Admission	No wording change from existing rule
267 Witnesses Placed Under Rule	Delete.	This is covered in Evid. R. 614.
268 Motion for Instructed Verdict	100 Motion for Judgment	Significant wording changes from existing rule
269 Argument	71 Order of Trial (c)Order of Argument 111 Attorney Conduct During Trial	In new rule 71, (1)-(3) track (a)-(c) of old rule. In new rule 111, (a)-(e) track (d)-(h) of existing rule.
270 Additional Testimony	71 Order of Trial (d)Additional Testimony	No wording change from existing rule
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280 Presiding Juror of Jury	85 Deliberations (a)Presiding Juror	Wording changed from existing rule
281 Papers Taken to Jury Room	85 Deliberations (d)Charge and Exhibits	Wording changed from existing rule
282 Jury Kept Together	85 Deliberations (b)Separation	Wording changed from existing rule
283 Duty of Officer Attending Jury	85 Deliberations (c)Bailiff	Wording changed from existing rule.
284 Judge to Caution Jury	Delete.	This rule is probably unnecessary.
285 Jury May Communicate With Court	86 Communication (a)Generally	Wording changed from existing rule
286 Jury May Further Receive Instructions	86 Communication (a)Generally	Wording changed from existing rule
287 Disagreement as to Evidence	86 Communication	Wording changed from existing rule. Reference to obtaining notes on witness testimony eliminated.
288 Court Open for Jury	Delete.	This rule is probably unnecessary.
289 Discharge of Jury	87 Verdict (g)Discharge	Wording changed from existing rule
290 Definition and Substance	87 Verdict (a)Defined	Wording changed. Reference to general and special verdists eliminated.

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

291 Form of Verdict	87 Verdict (b)Form	Wording changed from existing rule. Now require answers to questions submitted by the court rather than "No special form ..."
292 Verdict by Portion of Original Jury	87 Verdict (c)Requirements (1)Signing (2)Number	Wording changed from existing rule
293 When the Jury Agrees	87 Verdict (d)Receipt	Wording changed from existing rule
294 Polling the Jury	87 Verdict (e)Polling	Wording changed from existing rule
295 Correction of Verdict	87 Verdict (f)Defects	Wording changed from existing rule
296 Requests for Findings, etc.	88 Findings by the Court; Judgment on Partial Findings.	This proposed rule changes current practice.
297 Time to File, etc.	88 Findings by the Court; Judgments on Partial Findings.	This proposed rule changes current practice.
298 Additional or Amended Findings of Fact and Conclusions of Law	88 Findings by the Court, Etc. (a)Modification of Findings.	
299 Omitted Findings	88 Findings by the Court, etc. (a)Modification of Findings.	Slight wording change from existing rule.
299a Findings of Fact to be Separately Filed.	101. Judgments, Decrees and Orders; Effective Dates.	This is an entirely new rule.
300 Court to Render Judgment	100 Motion for Judgment as a Matter of Law; Modification of Judgments and Corrections of Clerical Mistakes (a)Motion for Judgment as a Matter of Law	Wording changed from existing rule. Also incorporates existing rules 268 & 301
301 Judgments	100 Motion for Judgment as a Matter of Law; Modifications of Judgments and Corrections of Clerical Mistakes (a)Motion for Judgment as a Matter of Law 101 Judgments, Decrees and Orders; Effective Dates (a)Definition; Form and Substance	Wording changed from existing rule. Also incorporates existing rules 268 & 300
302 On Counterclaims.	Delete.	This rule is unnecessary.
303 On Counterclaims for Costs.	Delete.	This rule is unnecessary.
304 Judgment Upon Record.	Delete.	This rule is unnecessary.
305 Proposed Judgment	101 Judgments, Decrees and Orders; Effective Dates (b)Proposed Judgments	Reworded from existing rule
306 Recitation of Judgment	101 Judgments, Decrees and Orders; Effective Dates (a)Definition; Form and Substance	Slight wording change from existing rule. Also incorporates portion of existing rule 301
306a Periods to Run From Signing of Judgment	101 Judgments, Decrees and Orders; Effective Dates (f)Effective Dates: Periods to Run from Signing of Judgment	No wording change from existing rule
306c Prematurely Filed Documents	104 New Trials (f)Prematurely Filed Motions	No wording change from existing rule
307 Exceptions, Etc., Transcript.	Delete.	This rule is obsolete.

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

308 Court Shall Enforce its Decrees	101 Judgments, Decrees and Orders; Effective Dates (c)Judgments for Personal Property	Slight wording change from existing rule
308a In Suits Affecting the Parent-Child Relationship	Delete.	This should be covered in the Family Code.
309 In Foreclosure Proceedings	101 Judgments, Decrees and Orders; Effective Dates (d)Judgments in Foreclosure Proceedings	No wording change from existing rule. Also incorporates existing rule 310
310 Writ of Possession	101 Judgments, Decrees and Orders; Effective Dates (d)Judgments in Foreclosure Proceedings	Reworded from existing rule. Also incorporates existing rule 309
311 On Appeal from Probate Court.	Delete.	This rule is obsolete.
312 On Appeal from Justice Court.	Delete.	This rule is obsolete.
313 Against Executors, Etc.	101 Judgments, Decrees and Orders; Effective Dates (e)Judgments Against Personal Representatives	No wording change from existing rule
314 Confession of Judgment.	Delete.	This rule is obsolete.
315 Remittitur.	Consider Adding .	
316 Correction of Clerical Mistakes in Judgment Record	100 Motion for Judgment as a Matter of Law; Modication of Judgments or Findings and Correction of Clerical Mistakes	Slight wording change from existing rule
320 Motions and Actions of Court Thereon	104 New Trials (a)Motion for New Trials (e) Partial New Trials; Remittiturs	Rule shortened and reorganized
321 Form	104 New Trials (c)Form of Motion; Need for Affidavits	Reworded and reorganized. Also incorporates existing rule 322
322 Generality to be Avoided	104 New Trials (c)Form of Motion; Need for Affidavits	Reworded and reorganized. Also incorporates existing rule 321
324 Prerequisites of Appeal	104 New Trials (b)Prerequisite on Appeal	No wording change in (a) & (b) of existing rule. Part (c) Judgment Notwithstanding Findings; Cross-Points has been eliminated
326 Not More Than Two.	Consider Adding.	
327 For Jury Misconduct	104 New Trials (d)Special Rules for Complaints of Jury Misconduct	No wording change from existing rule
329 Motion for New Trial on Judgment Following Citation by Publication	106 Motion for New Trial on Judgment Following Citation by Publication	No wording change from existing rule
329a County Court Cases.	Consider Deletion.	This seems obsolete.
329b Time for Filing Motions (g)	100 Motion for Judgment as a Matter of Law; Modication of Judgments and Correction of Clerical Mistakes (b)Motion for Modification of Judgment or Findings 105 Time for Filing Motions	Wording slighty changed from existing rule. Rules generally reorganized
330 Rule of Practice and Procedure in Certain District Courts.	Delete.	Move to Government Code.

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

	30 Parties Plaintiff and Defendant (a)Real Party in Interest	New. Source Fed. R. 17(a).
	20 Pleadings Allowed; Form of Motions (c)Motions and Other Papers	New. Source Fed. R. 7.
	25 Presentation of Defenses; Plea or Motion Practice (b)How Presented	New. Source Fed. R. 12.
	121 Duties (Court Reporters)	New. Source Tex.R.App.P. 11
	122 Work (Court Reporters)	New. Source Tex.R.App.P. 12
	132 Taxable Costs	New.
	65 Pleas in Abatement	New. Case law

APPENDIX "B"
DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES
(Current rules that have been deleted from proposed rules)

CURRENT TRCP	PROPOSED TRCP	COMMENTS
14 Affidavit by Agent	Delete	
19 Non-Adjournment of Term	Not included in draft. Consider Deletion.	Review for obsolescence in light of continuous terms
20 Minutes Read and Signed	119 Minutes Read and Signed. Consider Deletion.	No wording change from existing rule. Review for obsolescence; procedure likely ignored for most part
29 Suit on Claim Against Dissolved Corporation	Delete	This should be covered in the TBCA (Art. 7.12).
30 Parties to Suits	Delete	This should be covered in the CPRC (Sec. 17.001).
31 Surety Not to Be Sued Alone	Delete	This should be covered in the CPRC (Sec. 17.001).
32 May Have Question of Suretyship Tried	Delete	This special rule for sureties is unecessary.
33 Suits by or Against Counties	Transfer to CPRC or Delete	See Ch. 17, CPRC.
34 Against Sheriff, Etc.	Transfer to CPRC or Delete	See Ch. 17, CPRC.
35 On Official Bonds	Transfer to CPRC or Delete	See Ch. 17, CPRC.
36 Different Officials and Bondsmen	Transfer to CPRC or Delete	See Ch. 17, CPRC.
37 Additional Parties	Delete	This rule is unnecessary.
46 Petition and Answer; Each One Instrument of Writing	Consider Deletion.	This rule is probably unnecessary.
49 Where Several Counts	Delete	This rule is unnecessary.
52 Alleging a Corporation	Delete; see Proposed Rule 27(e).	
61 Trial: Intervenors: Rules Apply to All Parties	Delete.	This rule is unnecessary.
68 Court May Order Repleader	Delete	Not addressed in draft
85 Original Answer; Contents	Delete	This rule is unnecessary.
96 No Discontinuance	Delete	This rule is probably unnecessary.
111 Citation by Publication in Action Against Unknown Heirs or Stockholders of Defunct Corporations	Delete	This should be covered in CPRC, Ch. 17.
112 Parties to Actions Against Unknown Owners or Claimants of Interest in Land	Delete	This should be covered in CPRC, Ch. 17.
113 Citation by Publication in Actions Against Unknown Owners or Claimants of Interest in Land	Delete	This should be covered in CPRC, Ch. 17.
117a Citation in Suits for Delinquent Ad Valorem Taxes	Delete	This should be covered in CPRC, Ch. 17.
119a Copy of Decree	Delete.	This should be covered in the Family Code.
121 Answer is Appearance	Delete.	This rule is unnecessary.
125 Parties Responsible	Delete.	This rule is probably unnecessary.

APPENDIX "B"

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

(Current rules that have been deleted from proposed rules)

133 Costs of Motion	Delete.	This rule is probably meaningless.
139 On Appeal and Certiorari	Delete.	This rule should be in the TRAP.
143a Costs on Appeal to County Court	Delete.	This rule should be in the Justice Court rules.
180 Refusal to Testify	Delete.	This rule is unnecessary.
181 Party as Witness	Delete.	This rule is unnecessary.
185 Suit on Account	Delete.	This rule is unnecessary.
218 Jury Docket	Delete.	This rule is probably unnecessary.
219 Jury Trial Day	Delete.	This rule is probably unnecessary.
230 Certain Questions Not to Be Asked	Delete.	This rule is unnecessary.
232 Making Peremptory Challenges	Delete.	This rule is unnecessary.
235 If Jury is Incomplete	Delete.	This rule is probably unnecessary.
237 Appearance Day.	Delete.	This rule is unnecessary.
238 Call of Appearance Docket.	Delete.	This rule is obsolete.
247 Trial When Set	Delete.	This rule is unnecessary.
248 Jury Cases.	Delete.	This rule is unnecessary.
262 Trial by the Court	Delete.	This rule is unnecessary.
267 Witnesses Placed Under Rule	Delete.	This is covered in Evid. R. 614.
284 Judge to Caution Jury	Delete.	This rule is probably unnecessary.
288 Court Open for Jury	Delete.	This rule is probably unnecessary.
302 On Counterclaims.	Delete.	This rule is unnecessary.
303 On Counterclaims for Costs.	Delete.	This rule is unnecessary.
304 Judgment Upon Record.	Delete.	This rule is unnecessary.
307 Exceptions, Etc., Transcript.	Delete.	This rule is obsolete.
308a In Suits Affecting the Parent-Child Relationship	Delete.	This should be covered in the Family Code.
311 On Appeal from Probate Court.	Delete.	This rule is obsolete.
312 On Appeal from Justice Court.	Delete.	This rule is obsolete.
314 Confession of Judgment.	Delete.	This rule is obsolete.
329a County Court Cases.	Consider Deletion.	This seems obsolete.
330 Rule of Practice and Procedure in Certain District Courts.	Delete.	Move to Government Code.

APPENDIX "B"

DISPOSITION TABLE: EXISTING vs PROPOSED CIVIL PROCEDURE RULES

(Current rules to be added to proposed rules)

CURRENT TRCP	PROPOSED TRCP	COMMENTS
70 Pleading: Surprise: Cost	Consider adding.	Not addressed in draft.
71 Misnomer of Pleading	Consider adding.	
74 Filing With the Court Defined	Consider adding.	
75 Filed Pleadings; Withdrawals	Consider adding.	Not addressed in draft.
122 Constructive Appearance	This rule should be added.	
123 Reversal of Judgment	This rule should be added.	
124 No Judgment Without Service	This rule should be added.	
140 No Fee for Copy	Consider adding to Proposed Rule 132.	
160 Dissolution of Corporation	Add to Proposed Rule 39.	
161 Where Some Defendants Not Served	Consider adding.	
162 Dismissal or Non-Suit	Add.	
163 Dismissal as to Parties Served, Etc.	Add.	
165 Abandonment	Consider adding.	
315 Remittitur.	Consider Adding .	
326 Not More Than Two.	Consider Adding.	

APPENDIX "C"

MASTER PROPOSED CIVIL PROCEDURE RULES

SECTION 1
General Rules

Rule 1. Objective of Rules

The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.

[Current Rule: Tex. R. Civ. P. 1].
[Original Source: New Rule 1].

Rule 2. Scope of Rules

These rules shall govern the procedure in the justice, county, and district courts of the State of Texas in all actions of a civil nature, with such exceptions as may be hereinafter stated. Where any statute in effect immediately prior to September 1, 1941, prescribed a rule of procedure in lunacy, guardianship, or estates of decedents, or any other probate proceedings in the county court differing from these Rules, and not included in the "List of Repealed Statutes," such statute shall apply; and where any statute in effect immediately prior to September 1, 1941, and not included in the "List of Repealed Statutes," prescribed a rule of procedure in any special statutory proceeding differing from these rules, such statute shall apply. All statutes in effect immediately prior to September 1, 1941, prescribing rules of procedure in bond or recognizance forfeitures in criminal cases are hereby continued in effect as rules of procedure governing such cases, but where such statutes prescribed no rules of procedure in such cases, these rules shall apply. All statutes in effect immediately prior to September 1, 1941, prescribing rules of procedure in tax suits are hereby continued in effect as rules of procedure governing such cases, but where such statutes prescribed no rules of procedure in such cases, these rules shall apply; provided, however, that Rule ____ (current Rule 117a) shall control with respect to citation in tax suits.

[Current Rule: Tex. R. Civ. P. 2].
[Original Source: Federal Rule 1, adapted to Texas practice].
[Official Comments]:

Change by Amendment effective September 1, 1986. Amended to delete any reference to appellate procedure.

Rule 3. Construction of Rules

Unless otherwise expressly provided, the past, present or future tense shall each include the other; the masculine, feminine, or neuter gender shall each include the other, and the singular and plural number shall each include the other.

[Current Rule: Tex. R. Civ. P. 3].
[Original Source: Art. 10, subdivisions 2, 3 and 4].

Rule 4. Local Rules

Each administrative judicial region, district court, county court, county court at law, and probate court may make and amend local rules governing practice before such courts, provided:

(a) that any proposed rule or amendment shall not be inconsistent with these rules or with any rule of the administrative judicial region in which the court is located;

(b) no time period provided by these rules may be altered by local rules;

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

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

(e) all local rules or amendments adopted and approved in accordance herewith are made available upon request to the members of the bar;

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

[Current Rule: Tex. R. Civ. P. 3a].
[Original Source: New Rule].
[Official Comments]:

Change by Amendment effective April 1, 1984. Moves Rule 817 to Rule 3a to emphasize the superiority of the general rules over local rules of procedure and requires Supreme Court

approval so as to achieve uniformity.

Change by Amendment effective September 1, 1986. Amended to delete any reference to appellate procedure. The words "Court of Appeals, each" have been deleted.

Change by Amendment effective September 1, 1990. To make Texas Rules of Civil Procedure timetables mandatory and to preclude use of unpublished local rules or other "standing" orders or local practices to determine issues of substantive merit.

SECTION 2
Commencement of Action; Service of Process, Pleadings Motions and Orders

Rule 5. Commencement of Suit

A civil suit in the district or county court shall be commenced by a petition filed in the office of the clerk. No civil suit shall be commenced on Sunday.

[Current Rule: Tex. R. Civ. P. 22 and the applicable portion of Rule 6.].
[Original Source: Art. 1974, unchanged and Art. 1971, with minor textural change].
[Task Force Comments: There is an exception in current rule 6 for "cases of injunction, attachment, garnishment, sequestration, or distress proceedings"; it is unclear whether this exception applies to commencement of the suit and/or service of process. If it applies to commencement of the suit, then the exception would be added to the last sentence of the proposed rule].

Rule 6. Time

The following rule applies to any period of time prescribed or allowed by these rules, by order of a court, or by any applicable statute.

(a) **Computation.** The day of the act, event or default which begins the period is not to be included in the computation. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday. Saturdays, Sundays and legal holidays shall not be counted for any purpose in any time period of five days or less in these rules, except for purposes of the three-day periods in Rules ____ (current Rule 21) and _____ (current Rule 21a), which extend other periods by three days when service is made by registered or certified mail or by facsimile, and for purposes of the five-day period provided for under Rule ____ (current Rules 748, 749, 749a, 749b, and 749c).

(b) Enlargement. When by these rules, by a notice given thereunder or by order of a court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if an application is made before the expiration of the period originally prescribed or as extended by a previous order; or (2) upon motion permit the act to be done after the expiration of the specified period where good cause is shown for the failure to act. This section does not apply to any action brought under the rules relating to new trials.

(c) Use of United States Postal Service. If any document is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail on or before the last day for filing the document, it shall be filed by the clerk and be deemed timely filed if it is received by the clerk not more than ten days tardy. A legible post-mark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing.

[Current Rule: Tex. R. Civ. P. 4 and 5].
[Original Source: Federal Rule 6].
[Official Comments]:

Changes to Rule 4:

Change: Omission of the Federal provision excluding intermediate Sundays or holidays when the period of time is less than seven days and the Federal reference is to half-holidays.

Change by amendment effective January 1, 1961. The word ''Saturday'' was added in last sentence.

Change by amendment effective September 1, 1990. Amended to omit counting Saturdays, Sundays and legal holidays in all periods of less than five days with certain exceptions.

Changes to Rule 5:

Change: The second clause in the Federal rule requires a showing that the failure to act ''was the result of excusable neglect.'' Also, specific reference is made in this rule to the time limitations relating to motions for new trial and for rehearings, and to appeals and writs of error, while in the Federal Rule the cross reference to such subjects is by Rule number.

Change by amendment effective March 1, 1950. The first proviso was added at the end of the rule.

Change by amendment effective January 1, 1971. The language of the first proviso has been changed to eliminate the requirement that the date of mailing be shown by a postmark on the envelope and an additional proviso has been added to make a legible postmark conclusive as to the date of mailing.

Change by amendment effective February 1, 1973. The words ''affixed by the United States Postal Service'' have been inserted in the final proviso.

Change by amendment effective January 1, 1976. A legible postmark shall be prima facie, not conclusive, evidence of date of mailing.

Change by amendment effective September 1, 1986. Amended to delete any reference to appellate procedure. The phrase ''or motions for rehearing or the period for taking an appeal or writ of error from the trial court to any higher court or the period of application for writ of error in the Supreme Court'' and the phrase ''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'' have been deleted.

Change by amendment effective September 1, 1990. To make the last date for mailing under Rule 5 coincide with the last date for filing.

Rule 7. Citation and Service - Non-Publication

(a) Issuance. Upon the filing of the petition, the clerk, when requested, shall forthwith issue a citation and deliver the citation as directed by the requesting party. The party requesting citation shall be responsible for obtaining service of the citation and a copy of the petition. Upon request, separate or additional citations shall be issued by the clerk.

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

after the expiration of twenty days after the date of service thereof. The requirement of subsections 10 and 12 of this section shall be in the form set forth in Section c of this rule.

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

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

[Current Rule: Tex.R.Civ.P. 99].
[Original Source: Art. 2021].
[Official Comments]:

Change: The rule authorizes the clerk to issue as many citations for the defendant or defendants as the plaintiff may request, without the delay of securing a return on any prior citation.

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

[Current Rule: Tex.R.Civ.P. 103].
[Original Source: New Rule].
[Official Comments]:

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

Change by amendment effective January 1, 1988. The amendment makes clear that the courts are permitted to authorize persons other than Sheriffs or Constables to serve citation. Further, Sheriffs or Constables are not restricted

to service in their county. The last sentence is added to avoid the necessity of motions and fees.

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

[Current Rule: Tex. R. Civ. P. 105].
[Original Source: Art. 2025, unchanged].
[Official Comments]:

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

(g) Method of Service.

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

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

(B) mailing to the defendant by registered or certified mail, return receipt requested, a true copy of the citation with a copy of the petition attached thereto.

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

(A) by leaving a true copy of the citation, with a copy of the petition attached, with anyone over sixteen years of age at the location specified in such affidavit, or

(B) in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit.

[Current Rule: Tex. R. Civ. P. 106].
[Original Source: Art. 2026].
[Official Comments]:

Change: The officer is directed to note upon the copy of the citation, which he delivers to the defendant, the date of

delivery. He delivers a copy of the petition in all cases.

Change by amendment effective January 1, 1976. Service ''by registered or certified mail'' is authorized in certain instances.

Change by amendment effective January 1, 1978. Subdivisions (b) and (e) are new. The rule is rewritten.

Change by amendment effective January 1, 1981. The rule is reorganized to clarify its meaning. Alternate methods of service are authorized if either (a)(1) or (a)(2) are tried without success. Both methods are not required.

Change by amendment effective January 1, 1988. Conforms to amendment to Rule 103.

(h) Return of Service. The return of the officer or authorized person executing the citation shall be endorsed on or attached to the same; it shall state when the citation was served and the manner of service and be signed by the officer officially or by the authorized person. The return of citation by an authorized person shall be verified. When the citation was served by registered or certified mail as authorized by Rule ____ (current Rule 106), the return by the officer or authorized person must also contain the return receipt with the addressee's signature. When the officer or authorized person has not served the citation, the return shall show the diligence used by the officer or authorized person to execute the same and the cause of failure to execute it, and where the defendant is to be found, if he can ascertain.

Where citation is executed by an alternative method as authorized by Rule ____ (current Rule 106), proof of service shall be made in the manner ordered by the court.

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

[Current Rule: Tex. R. Civ. P. 107].
[Original Source: Arts. 2034 and 2036].
[Official Comments]:

Change: That part of the rule derived from Art. 2034 has been changed only textually. The last sentence of the rule supersedes Art. 2036 in the District and County Courts in harmony with the new rules making the time for answer date from the day of service.

Change by amendment effective January 1, 1978. Provides manner of return when service by mail or by an alternative method.

Change by amendment effective January 1, 1981. The only changes are the references to Rule 106.

Change by amendment effective January 1, 1988. Amendments are made to conform to changes in Rule 103.

Change by amendment effective September 1, 1990. To state more directly that a default judgment can be obtained when the defendant has been served with process in a foreign country pursuant to the provisions of Rules 108 or 108a.

(i) Defendant Not In State. Where the defendant is absent from the State, or is a nonresident of the State, the form of notice to such defendant of the institution of the suit shall be the same as prescribed for citation to a resident defendant; and such notice may be served by any disinterested person competent to make oath of the fact in the same manner as provided in Rule ____ (current Rule 106) hereof. The return of service in such cases shall be endorsed on or attached to the original notice, and shall be in the form provided in Rule ____ (current Rule 107), and be signed and sworn to by the party making such service before some officer authorized by the laws of this State to take affidavits, under the hand and official seal of such officer. A defendant served with such notice shall be required to appear and answer in the same manner and time and under the same penalties as if he had been personally served with a citation within this State to the full extent that he may be required to appear and answer under the Constitution of the United States in an action either in rem or in personam.

[Current Rule: Tex. R. Civ. P. 108].
[Original Source: Arts. 2037 and 2038].
[Official Comments]:

Change: This rule supersedes the former statutes governing non-resident notice. Form of citation and method of service is to be the same as provided for resident defendants.

Change by amendment effective January 1, 1976. The words after ''State'' in the last sentence are new. Its purpose is to permit acquisition of in personam jurisdiction to the constitutional limits.

(j) Service in Foreign Country.

(1) **Manner.** Service of process may be effected upon a party in a foreign country if service of the citation and petition is made: (a) in the manner prescribed by the law of the

foreign country for service in that country in an action in any of its courts of general jurisdiction; or **(b)** as directed by the foreign authority in response to a letter rogatory or a letter of request; or **(c)** in the manner provided by Rule ____ (current Rule 106); or **(d)** pursuant to the terms and provisions of any applicable treaty or convention; or **(e)** by diplomatic or consular officials when authorized by the United States Department of State; or **(f)** by any other means directed by the court that is not prohibited by the law of the country where service is to be made. The method for service of process in a foreign country must be reasonably calculated, under all of the circumstances, to give actual notice of the proceedings to the defendant in time to answer and defend. A defendant served with process under this rule shall be required to appear and answer in the same manner and time and under the same penalties as if he had been personally served with citation within this state to the full extent that he may be required to appear and answer under the Constitution of the United States or under any applicable convention or treaty in an action either in rem or in personam.

(2) Return. Proof of service may be made as prescribed by the law of the foreign country, by order of the court, by Rule ____ (currently, Rule 107), or by a method provided in any applicable treaty or convention.

[Current Rule: Tex. R. Civ. P. 108a].
[Original Source: ?].
[Official Comment: New rule effective April 1, 1984].

(k) Acceptance of Service. The defendant may accept service of process, or waive the issuance or service thereof, by a written memorandum signed by the defendant, his duly authorized agent or attorney, after suit is brought if such memorandum is sworn to before a proper officer, excluding any attorney in the case, and filed with the court. Such acceptance or waiver shall have the same force and effect as if the citation had been issued and served as provided by law. The party signing the memorandum shall be delivered a copy of plaintiff's petition, and the memorandum shall so state that such was received by the party. In every divorce action such memorandum shall also include the defendant's mailing address.

[Current Rule: Tex. R. Civ. P. 119; with only grammatical changes].
[Original Source: Art. 2045].
[Official Comments]:

Change: Addition of requirement that the waiver of service be sworn to before an officer authorized to administer oaths.

Change by amendment effective December 31, 1941. It is provided that the officer shall be ''other than an attorney in the case,'' and the last sentence is added.

Change by amendment effective January 1, 1955. Last sentence added.

Change by amendment effective January 1, 1961. Requirement added that written memorandum constituting acceptance of process or waiver of issuance and service thereof be signed ''after suit is brought.''

(1) **Amendment.** At any time in its discretion and upon such notice and on such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

[Current Rule: Tex. R. Civ. P. 118].
[Original Source: Art. 2044, Federal Rule 4(h)].
[Official Comments]:

Change: The rule authorizes amendment in the process as well as in the proof of its service.

Rule 8. Citation by Publication

(a) General. Upon oath made by a party to a suit, his agent or attorney [hereinafter in this section "party"] that one or more of the following situations exist, the clerk shall issue citation for a defendant for service by publication:

(1) if the residence of any defendant is unknown to the party, or

(2) if the defendant is a transient person whose whereabouts cannot be ascertained through due diligence of the party, or

(3) if the defendant is absent from or is a nonresident of the State and the party has been unable to obtain personal service as provided for in Rule _____ (current Rule 108).

In all such cases it shall be the duty of the court to inquire into the sufficiency of the diligence exercised in attempting to ascertain the residence or whereabouts of the defendant or to obtain service of nonresident notice before granting any judgment on such service.

[Current Rule: Tex. R. Civ. P. 109].
[Original Source: Art. 2039 First sentence, with minor textural change].

[Official Comments]:

Change by amendment effective January 1, 1976. The word ''continental'' before ''United States'' in the last sentence is deleted.

Change by amendment effective April 1, 1984. The last sentence of the former rule is deleted.

(b) Effect of This Rule on Other Statutes. Where a statute authorizing citation by publication provides expressly for requisites of such citation, these rules shall not govern. Otherwise, the provisions of these rules shall govern.

[Current Rule: Tex. R. Civ. P. 110].
[Original Source: New Rule].

(c) Requisites. Where citation by publication is authorized by these rules, the citation shall contain the requisites prescribed by Rule ____ (current Rules 15 and 99), insofar as they are not inconsistent with this section. No copy of the plaintiff's petition shall accompany this citation. The citation shall be directed to the defendant or defendants by name, if known, or to the defendant or defendants as designated in the petition, or such other classification as may be fixed by any statute or by these rules. If there are two or more defendants, separate citation is not required for each; it shall be sufficient for the citation to be directed to all of them by name or classification. The citation shall contain the names of the parties, a brief statement of the nature of the suit (no details or particulars of the claim are required), and a description of any property involved and of the interest of the defendant(s).

If the suit involves land, the brief statement of the claim shall state the kind of suit, the number of acres of land involved, or the lot and block number, or any other plat description that may be of record if the land is situated in a city or town, the survey on which and the county in which the land is situated, and any special pleas which are relied upon in such suit.

[Current Rule: Tex. R. Civ. P. 114 and 115].
[Original Source: Art. 2041, with minor textural change, and Art. 2092(6)].

(d) Service. The citation, when issued, shall be served by the sheriff or any constable of any county of the State of Texas or by the clerk of the court in which the case is pending, by having the same published once each week for four (4) consecutive weeks, the first publication to be at least twenty-eight (28) days before the return day of the citation. In all suits which do not involve the title to land or the partition of real estate,

such publication shall be made in the county where the suit is pending, if there be a newspaper published in said county, but if not, then in an adjoining county where a newspaper is published. In all suits which involve the title to land or partition of real estate, such publication shall be made in the county where the land, or a portion thereof, is situated, if there be a newspaper in such county, but if not, then in an adjoining county to the county where the land or a part thereof is situated, where a newspaper is published.

[Current Rule: Tex.R.Civ.P. 116].
[Original Source: Arts. 2042 and 2092(6)].
[Official Comments]:

Change by amendment effective April 1, 1984. Rule 116 was not amended when Rule 103 was changed, effective January 1, 1981. It was therefore inconsistent with Rule 103.

(e) Return. The return of the officer executing such citation shall be endorsed or attached to the same, and show how and when the citation was executed, specifying the dates of such publication, be signed by him officially and shall be accompanied by a printed copy of such publication.

[Current Rule: Tex. R. Civ. P. 117].
[Original Source: Art. 2043, unchanged].

(f) Amendment. At any time in its discretion and upon such notice and on such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

[Current Rule: Tex. R. Civ. P. 118].
[Original Source: Art. 2044; Federal Rule 4(h)].
[Official Comments: New rule effective December 31, 1947].

Change: The rule authorizes amendment in the process as well as in the proof of its service.

(g) Other Substituted Service. Whenever citation by publication is authorized, the court may, on motion, prescribe a different method of substituted service, if the court finds, and so recites in its order, that the method so prescribed would be as likely as publication to give defendant actual notice. When such method of substituted service is authorized, the return of the officer executing the citation shall state particularly the manner in which service is accomplished, and shall attach any return receipt, returned mail, or other evidence showing the result of such service. Failure of defendant to respond to such citation shall not render the service invalid. When such

substituted service has been obtained and the defendant has not appeared, the provisions of Rules ____ (current Rules 244 and 329) shall apply as if citation had been served by publication.

[Current Rule: Tex. R. Civ. P. 109a].
[Original Source: New rule effective January 1, 1976].

Rule 9. Process, Service and Filing of Pleadings, Motions and Other Papers.

(a) **Form.** The style of all writs and process shall be "The State of Texas;" and unless otherwise specially provided by law or these rules every such writ and process shall be directed to any sheriff or any constable within the State of Texas, shall be made returnable on the Monday next after expiration of twenty days from the date of service thereof, and shall be dated and attested by the clerk with the seal of the court impressed thereon; and the date of issuance shall be noted thereon.

[Current Rule: Tex. R. Civ. P. 15].
[Original Source: Art. 2286].
[Official Comments]:

Change: Elimination of the former requirement that the writ be addressed to the sheriff or any constable of a specific county and that the writ be returnable to a term of court. Compare Rule 101.

(b) **Endorsement.** For all process, every officer or authorized person shall endorse the day and hour on which he received them, the manner in which he executed them, and the time and place the process was served and shall sign the returns officially.

[Current Rule: Tex. R. Civ. P. 16].
[Original Source: Art. 6875, with minor textural changes].
[Official Comments]:

Change by amendment effective January 1, 1988. Article 3926a, effective September 1, 1981, authorizes the commissioner's court of each county to set a ''reasonable'' fee for service of process; mileage is no longer an authorized expense for serving process.

(c) **Fees.** Except where otherwise expressly provided by law or these rules, the officer receiving any process to be executed shall not be entitled in any case to demand his fee for executing the same in advance of such execution, but his fee shall be taxed and collected as other costs in the case.

[Current Rule: Tex. R. Civ. P. 17].
[Original Source: Art. 3911].

[Official Comments]:

Change: Addition of the matter to the first comma.

(d) Filing and Serving Pleadings and Motions. Every pleading, plea, motion or application to the court for an order, whether in the form of a motion, plea or other form of request, unless presented during a hearing or trial, shall be filed with the clerk of the court in writing, shall state the grounds therefor, shall set forth the relief or order sought, and at the same time a true copy shall be served on all other parties, and shall be noted on the docket.

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

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

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

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

[Current Rule: Tex. R. Civ. P. 21].
[Original Source: Art. 2291].
[Official Comments]:

Change by amendment effective January 1, 1978. The phrase, ''if it relates to a pending suit.'' was deleted from the end of the first sentence. The phrase, ''If the motion does not relate to a pending suit,'' was deleted from the beginning of the second sentence.

Change by amendment effective January 1, 1981. The rule is broadened to encompass matters other than motions and to require three-day notice unless the period is shortened.

Change by amendment effective September 1, 1990. To require filing and service of all pleadings and motions on all parties and to consolidate notice and service Rules 21, 72 and 73.

(e) Methods of Service.

(1) General. Except as otherwise provided in these rules or by order of the court, every order required by its terms to be served, every pleading subsequent to the original petition, every paper relating to discovery required to be served upon a

party, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, designation of record on appeal, request for finding of fact and/or law, and similar paper shall be filed with the clerk of the court in writing, may be served by:

(A) delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record as the case may be, either in person or by agent;

(B) by courier receipted delivery;

(C) by certified or registered mail, to the party's last known address;

(D) by facsimile to the recipient's current telecopier number; or

(E) by such other manner as the court in its discretion may direct.

(2) **When Complete.** Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Service by facsimile after 5:00 p.m. local time of the recipient shall be deemed served on the following day. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail or by facsimile, three days shall be added to the prescribed period.

(3) **Who May Serve.** Notice may be served by a party to the suit, an attorney of record, a sheriff or constable, or by any other person competent to testify. The party or attorney of record shall certify to the court compliance with this rule in writing on the filed instrument. A certificate by a party or an attorney of record, or the return of an officer, or the affidavit of any person showing service of a notice shall be prima facie evidence of the fact of service.

(4) **Extension of Time.** Nothing herein shall preclude any party from offering proof that the notice or instrument was not received, or, if service was by mail, that it was not received within three days from the date of deposit in a post office or official depository under the care and custody of the United States Postal Service, and, upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just.

(5) Cumulative. The provisions of this section relating to the method of service of notice are cumulative of all other methods of service prescribed by these rules.

[Current Rule: Tex. R. Civ. P. 21a].
[Original Source: New Rule effective December 31, 1947].
[Official Comments]:

Change by amendment effective January 1, 1971. The second and third sentences have been added to make service by mail complete upon proper deposit in the mail and to enlarge the time for acting after service by mail; the sentence formerly providing for notice of a motion by filing and entry on the motion docket has been eliminated.

Change by amendment effective February 1, 1973. The words ''Postal Service'' have been substituted for ''Post Office Department'' and a sentence has been inserted authorizing the court to grant an extension of time or other relief upon finding that a notice or document was not received or, if service was by mail, was not received within three days from the date of deposit in the mail.

Change by amendment effective January 1, 1978. The phrase ''not relating to a pending suit'' in the next to last sentence, is deleted.

Change by amendment effective January 1, 1981. The next to last sentence from the end of the former rule requiring three-day notice is deleted because Rule 21 is concurrently amended to require that notice.

Change by amendment effective April 1, 1984. This rule consolidates Rules 21a and 21b.

Change by amendment effective September 1, 1990. To allow for service by current delivery means and technologies.

(f) Sanctions. If any party fails to serve on or deliver to the other parties a copy of any pleading, plea, motion, or other application to the court for an order in accordance with Rules _____ (current Rules 21 and 21a), the court may in its discretion, after notice and hearing, impose an appropriate sanction available under Rules ____ (current Rule 215-2b).

[Current Rule: Tex. R. Civ. P. 21b].
[Original Source: New rule effective September 1, 1990].
[Official Comments]:

Repealed provisions of Rule 73-to the extent they are to remain operative-are moved to this new Rule 21b to provide

sanctions for the failure to serve any filed documents on all parties].

SECTION 3
Pleadings and Motions

Rule 20. Pleadings Allowed; Form of Motions

(a) Pleadings. Pleadings in the district and county courts shall be by petition and answer and shall consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's grounds of defense. That an allegation be evidentiary or be of legal conclusion shall not be grounds for objection when fair notice to the opponent is given by the allegations as a whole. Pleadings shall 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 together with any verification or a copy of said original and copy of any such verification shall 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 shall be construed so as to do substantial justice.

Pleadings shall contain any other matter which may be required by any law or rule authorizing or regulating any particular action or defense.

[Current Rule: Tex. R. Civ. P. 45].
[Original Source: Art. 1997 (in part); Texas Rules 1 and 32 (for the District and County Courts) and Federal Rule 8(f)].
[Official Comments]:

Change by amendment effective September 1, 1990. To provide for filing of pleadings having either original or copies of signatures and verifications including documents telephonically transferred.

(b) Petition and Answer; Original and Supplemental. The pleading of the plaintiff shall consist of an original petition, and such supplemental petitions as may be necessary. The answer of the defendant shall consist of an original answer and such supplemental answers as may be necessary.

[Current Rules: Tex. R. Civ. P. 78, 83].
[Original Source: Texas Rules 3 and 60 (for District and County Courts)].

(c) Motions and Other Papers. An application to the court for an order shall be by motion which, unless made during a

hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules. All motions shall be signed in accordance with Rule _____ (currently Rule 13).

[Current Rule: Tex. R. Civ. P. 21].
[Original source: Federal Rule 7(b)].
[Official Comments]:

Change by amendment effective January 1, 1971. The second and third sentences have been added to make service by mail complete upon proper deposit in the mail and to enlarge the time for acting after service by mail; the sentence formerly providing for notice of a motion by filing and entry on the motion docket has been eliminated.

Change by amendment effective February 1, 1973. The words ''Postal Service'' have been substituted for ''Post Office Department'' and a sentence has been inserted authorizing the court to grant an extension of time or other relief upon finding that a notice or document was not received or, if service was by mail, was not received within three days from the date of deposit in the mail.

Change by amendment effective January 1, 1978. The phrase ''not relating to a pending suit'' in the next to last sentence, is deleted.

Change by amendment effective January 1, 1981. The next to last sentence from the end of the former rule requiring three-day notice is deleted because Rule 21 is concurrently amended to require that notice.

Change by amendment effective April 1, 1984. This rule consolidates Rules 21a and 21b.

Change by amendment effective September 1, 1990. To allow for service by current delivery means and technologies.

(d) **Demurrers Abolished.** General demurrers shall not be used.

[Current Rule: Tex. R. Civ. P. 90 (1st sentence of Rule 90)].
[Original Source: New Rule].

Rule 21. General Rules Of Pleading

(a) 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;

(1) a short statement of the cause of action sufficient to give notice of the claim involved, provided that in all claims for unliquidated damages only the statement that the damages sought are within the jurisdictional limits of the court is necessary; provided, further, that upon special exception the court shall require the pleader to amend so as to specify the maximum amount claimed.

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

[Current Rule: Tex. R. Civ. P. 47].
[Original Source: Federal Rule 8(a) and Peek v. Equip. Services Co., 779 S.W.2d 802 (Tex. 1989)].
[Official Comments]:

Change by amendment effective January 1, 1988. The amendment makes it clear that Rule 11 is subject to modification by any other rule of Civil Procedure.

(b) Alternative Claims for Relief. A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based upon legal or equitable grounds or both.

[Current Rule: Tex. R. Civ. P. 48].
[Original Source: Federal Rule 8(e), in part, unchanged].
[Official Comments]:

Change: Omission of the Federal requirement that jurisdictional grounds be stated. The Federal Rule requires ''a short and plain statement of the claim showing that the pleader is entitled to relief,'' for which wording of subdivision (a) above has been substituted.

Change by amendment effective January 1, 1978. Textual changes in first sentence, and first sentence of (c), all of (b), and the proviso in (c) are new.

(c) **Supplemental Petition or Answer.** Each supplemental petition or answer, made by either party, shall be a response to the last preceding pleading by the other party, and shall not repeat allegations formerly pleaded further than is necessary as an introduction to that which is stated in the pleading then being drawn up. These instruments, to wit, the original petition and its several supplements, and the original answer and its several supplements, shall respectively, constitute separate and district parts of the pleadings of each party; and the position and identity, by number and name, with the indorsement of each instrument, shall be preserved throughout the pleadings of either party.

[Current Rule: Tex. R. Civ. P. 69].
[Original Source: Texas Rule 10 (for District and County Courts)].

(d) **Contents of Supplemental Pleadings.**

(1) **Plaintiff.** The plaintiff's supplemental petitions may contain special exceptions, general denials, and the allegations of new matter not before alleged by him, in reply to those which have been alleged by the defendant.

[Current Rule: Tex. R. Civ. P. 80].
[Original Source: Texas Rule 5 (for District and County Courts), unchanged].

(2) **Defendant.** The defendant's supplemental answers may contain special exceptions, general denial, and the allegations of new matter not before alleged by him, in reply to that which has been alleged by the plaintiff.

[Current Rule: Tex. R. Civ. P. 98].
[Original Source: Texas Rule 8 (for District and County Courts)].

(e) **Denials of Claims or Defenses.**

(1) A general denial of matters pleaded by the adverse party which are not required to be denied under oath, shall be sufficient to put the same in issue. When the defendant has pleaded a general denial, and the plaintiff shall afterward amend his pleading, such original denial shall be presumed to extend to all matters subsequently set up by the plaintiff. When a counterclaim or cross-claim is served upon a party who has made an appearance in the action, the party so served, in the absence of a responsive pleading, shall be deemed to have pleaded a general denial of the counterclaim or cross-claim, but the party shall not be deemed to have waived any special appearance or motion to transfer venue. In all other respects the rules

prescribed for pleadings of defensive matter are applicable to answers to counterclaims and cross-claims.

[Current Rule: Tex. R. Civ. P. 92].
[Original Source: Arts. 2006 (part) and 2012, combined without change].
[Official Comment]:

Change by amendment effective April 1, 1985. The second paragraph is new. It clarifies some ambiguity in the law and undertakes to codify the law. The phrase ''plea of privilege'' has been corrected to ''motion to transfer venue.''

(2) When a defendant sets up a counterclaim, the plaintiff may plead thereto under rules prescribed for pleadings of defensive matter by the defendant, so far as applicable. Whenever the defendant is required to plead any matter of defense under oath, the plaintiff shall be required to plead such matters under oath when relied on by him.

[Current Rule: Tex. R. Civ. P. 81].
[Original Source: Art. 2004, unchanged].

(3) When a party pleads an affirmative defense contained in (d) of this rule the adverse party is not required to deny such defense, but the same shall be regarded as denied unless expressly admitted.

[Current Rule: Tex. R. Civ. P. 82].
[Original Source: Art. 2005, unchanged].

(f) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

[Current Rule: Tex. R. Civ. P. 94 (except last sentence)].
[Original Source: Portion of Federal Rule 8(c), unchanged].

When a defendant shall desire to prove payment, he shall file with his plea an account stating distinctly the nature of such payment, and the several items thereof; failing to do so, he shall not be allowed to prove the same, unless it be so plainly and particularly described in the plea as to give the plaintiff full notice of the character thereof.

[Current Rule: Tex. R. Civ. P. 95].

[Original Source: Art. 2014].
[Official Cmments]:

Change: Omission of reference to counterclaim and set off.

(g) Special Exceptions. A special exception shall not only point out the particular pleading excepted to, but it shall also point out intelligibly and with particularity the defect, omission, obscurity, duplicity, generality, or other insufficiency in the allegations in the pleading excepted to.

[Current Rule: Tex. R. Civ. P. 91].
[Original Source: Texas Rule 18 (for District and County Courts)].

(h) Waiver. Every defect, omission, or fault in a pleading either of form or of substance, which is not specifically pointed out by exception in writing and brought to the attention of the judge in the trial court at least ____ days before trial {omit : before the instruction or charge to the jury or, in a non-jury case, before the judgment is signed}, shall be deemed to have been waived by the party failing to except, provided that this rule shall not apply as to any party against whom a default judgment is rendered.

[Current Rule: Tex. R. Civ. P. 90].
[Original Source: New Rule].
[Official Comments]:

Change by amendment effective January 1, 1981. The words ''motion or'' before ''exception'' are deleted, and ''rendition of judgment'' is changed to ''judgment is signed.''

[Task Force Comments: The underlined text indicates a recommendation for substantive changes].

Rule 22. Pleading Special Matters

(a) Special act or law. A pleading founded wholly or in part on any private or special act or law of this State or of the Republic of Texas need only recite the title thereof, the date of its approval, and set out in substance so much of such act or laws as may be pertinent to the cause of action or defense.

[Current Rule: Tex. R. Civ. P. 53].
[Original Source: Art. 2000, unchanged].

(b) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it shall be sufficient to aver generally that all conditions precedent have been performed or have occurred. When such performances or occurrences have

been so plead, the party so pleading same shall be required to prove only such of them as are specifically denied by the opposite party.

[Current Rule: Tex. R. Civ. P. 54].
[Original Source: Federal Rule 9(c)].
[Official Comment]:

Change by amendment of March 31, 1941. The practice on failure of specific denial is made clearer by changes in the wording of the last sentence.

(c) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it shall be sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

[Current Rule: Tex. R. Civ. P. 55].
[Original Source: Federal Rule 9(e)].
[Official Comment: No change except the substitution of ''it shall be'' for ''it is''].

(d) Special Damage. When items of special damage are claimed, they shall be specifically stated. Special damages are those damages that arise naturally but not necessarily from another's wrongful conduct; they vary with the circumstances of each case.

[Current Rule: Tex. R. Civ. P. 56].
[Original Source: Federal Rule 4(g)].
[Task Force Comment: The second sentence is based on Sherrod v. Bailey, 580 S.W.2d 24 (Tex. Civ. App.--Houston [1st Dist.] 1979, writ ref'd n.r.e.)].

(e) Certain Pleas to be Verified. A pleading setting up any of the following matters, unless the truth of such matters appear of record, shall be verified by affidavit.

(1) That the plaintiff has not legal capacity to sue or that the defendant has not legal capacity to be sued.

(2) That the plaintiff is not entitled to recover in the capacity in which he sues, or that the defendant is not liable in the capacity in which he is sued.

(3) That there is another suit pending in this State between the same parties involving the same claim.

(4) That there is a defect of parties, plaintiff or defendant.

(5) A denial of partnership as alleged in any pleading as to any party to the suit.

(6) That any party alleged in any pleading to be a corporation is not incorporated as alleged.

(7) Denial of the execution by himself or by his authority of any instrument in writing, upon which any pleading is founded, in whole or in part and charged to have been executed by him or by his authority, and not alleged to be lost or destroyed. Where such instrument in writing is charged to have been executed by a person then deceased, the affidavit shall be sufficient if it states that the affiant has reason to believe and does believe that such instrument was not executed by the decedent or by his authority. In the absence of such a sworn plea, the instrument shall be received in evidence as fully proved.

(8) A denial of the genuineness of the indorsement or assignment of a written instrument upon which suit is brought by an indorsee or assignee and in the absence of such a sworn plea, the indorsement or assignment thereof shall be held as fully proved. The denial required by this subdivision of the rule may be made upon information and belief.

(9) That a written instrument upon which a pleading is founded is without consideration, or that the consideration of the same has failed in whole or in part.

(10) A denial of an account which is the foundation of the plaintiff's action, and supported by affidavit.

(11) That a contract sued upon is usurious. Unless such plea is filed, no evidence of usurious interest as a defense shall be received.

(12) That notice and proof of loss or claim for damage has not been given as alleged. Unless such plea is filed such notice and proof shall be presumed and no evidence to the contrary shall be admitted. A denial of such notice or such proof shall be made specifically and with particularity.

(13) In the trial of any case appealed to the court from the Industrial Accident Board the following, if pleaded, shall be presumed to be true as pleaded and have been done and filed in legal time and manner, unless denied by verified pleadings:

(A) Notice of injury.

(B) Claim for Compensation

(C) Award of the Board

(D) Notice of intention not to abide by the award of the Board.

(E) Filing of suit to set aside the award.

(F) That the insurance company alleged to have been the carrier of the workers' compensation insurance at the time of the alleged injury was in fact the carrier thereof.

(G) That there was good cause for not filing claim with the Industrial Accident Board within the one year period provided by statute.

(H) Wage rate.

A denial of any of the matters set forth in subdivisions (a) or (g) of paragraph 13 may be made on information and belief.

Any such denial may be made in original or amended pleadings; but if in amended pleadings the same must be filed not less than seven days before the case proceeds to trial. In case of such denial the things so denied shall not be presumed to be true, and if essential to the case of the party alleging them, must be proved.

(14) That a party plaintiff or defendant is not doing business under an assumed name or trade name as alleged.

(15) In the trial of any case brought against an automobile insurance company by an insured under the provisions of an insurance policy in force providing protection against uninsured motorists, an allegation that the insured has complied with all terms of the policy as a condition precedent to bringing the suit shall be presumed to be true unless denied by verified pleadings which may be upon information and belief.

(16) Any other matter required by statute to be pleaded under oath.

[Current Rule: Tex. R. Civ. P. 93].
[Original Source: Arts. 573, 574, 1999, 2010, 3734, and 5074].
[Official Comments]:

Change: The basic statute relating to sworn pleadings was Art. 2010. With it have been combined provisions from a number of other specific statutes requiring sworn pleas. No change of meaning has been intended in so far as the combinations, as such, are concerned. The scope of sworn denials has, however, been broadened. Subdivision (b) will, under this rule, include the plea that ''the defendant has

not legal capacity to be sued.'' Subdivision (c) has been extended to include a denial of defendant's liability in the capacity in which he is sued. In subdivision (d) the term ''cause of action'' has been replaced by the word ''claim.'' Subdivisions (f) and (g) apply to allegations in any pleading, not merely to the petition as formerly stated in Art. 2010.

Change by amendment of March 31, 1941. Subdivisions (m) and (n) (Source: Art. 5546, and Acts 1937, 45th Leg., p. 535, ch. 261, sec. 2) and (o) added.

Change by amendment effective December 31, 1941. Section (6) has been added to subdivision (n).

Change by amendment effective December 31, 1943. Section (7) and the new sentence concerning sections (1) and (7) have been added to subdivision (n), and minor textual changes have been made in the last paragraph of this subdivision.

Change by amendment effective March 1, 1950. A new subdivision, designated (o), has been added, and the subdivision formerly lettered (o) has been designated (p).

Change by amendment effective January 1, 1971. Final clause of subdivision (k) has been changed to harmonize with Rule 185 as amended. Section (8) has been added to subdivision (n).

Change by amendment effective January 1, 1976. Subdivision (p) is new and is adopted for the purpose of simplifying issues in uninsured motorist cases.

Change by amendment effective September 1, 1983. To conform to S.B. 291 and 898, 68th Legislature, 1983.

Change by amendment effective April 1, 1984. Section 10 is changed to conform to amended Rule 185.

Rule 23. Form of Pleadings

(a) Indorsement; Identity of the Parties. The petition and answer and all supplemental petitions and answers shall be indorsed, so as to show their respective positions in the process of pleading, as "original petition/answer," "plaintiff's/defendant's first supplemental petition/answer," and so on, to be successively numbered, named and indorsed. The petition shall state the names of the parties and their residences, if known, together with the contents described in Rule _____ (currently Rule 47) General rules of pleading (__) above.

[Current Rule: Tex. R. Civ. P. 78, 79, 83].
[Original Source: Texas Rules 3 and 6 (for District and County Courts)].

(b) Paragraphs. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings, so long as the pleading containing such paragraph has not been superseded by an amendment as provided in Rule ____ (currently Rule 65) Amended and Supplemental Pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

[Current Rule: Tex. R. Civ. P. 50].
[Original Source: Federal Rule 10(b)].

(c) Adoption by Reference. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion, so long as the pleading containing such statements has not been superseded by an amendment as provided by Rule ____ (currently Rule 65) Amended and Supplemental Pleadings.

[Current Rule: Tex. R. Civ. P. 58].
[Original Source: Federal Rule 10(c), first sentence].

Change: Addition of words after comma.

(d) Exhibits and Pleading. Notes, accounts, bonds, mortgages, records, and all other written instruments, constituting, in whole or in part, the claim sued on, or the matter set up in defense, may be made a part of the pleadings by copies thereof, or the originals, being attached or filed and referred to as such, or by copying the same in the body of the pleading in aid and explanation of the allegations in the petition or answer made in reference to said instruments and shall be deemed a part thereof for all purposes. Such pleadings shall not be deemed defective because of the lack of any allegations which can be supplied from said exhibit. No other instrument of writing shall be made an exhibit in the pleading.

[Current Rule: Tex. R. Civ. P. 59].
[Original Source: Texas Rule 19 (for District and county Courts)].
[Official Comments]:

Change: The rule has been shortened. Provision is made for copying the exhibit into the body of the pleading. Addition of provision making the exhibit a part of the pleading for

all purposes and for supplying allegations from the exhibit.

Rule 24. Signing of Pleadings, Motions, and Other Papers; Sanctions

(a) Every pleading, motion, and other paper 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, telephone number, and, if available, telecopier number. A party not represented by an attorney shall sign his pleadings, state his address, telephone number, and, if available telecopier number.

[Current Rule: Tex. R. Civ. P. 57].
[Original Source: Federal Rule 11, first two sentences, unchanged].
[Official Comments]:

Change by amendment effective January 1, 1981. Rule changed to require statement on pleadings of attorney's State Bar of Texas identification number and telephone number and the telephone number of a party not represented by a lawyer.

Change by amendment effective September 1, 1990. To supply attorney telecopier information with other identifying information on pleadings. Documents telephonically transferred are permitted to be filed under changes in Rule 45.

(b) By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, motion, or other paper, an attorney or unrepresented party is certifying that to the best of the presenter's knowledge, information, and belief, formed after reasonable inquiry, the instrument is not groundless and presented in bad faith or groundless and presented for the purpose of harassment.

(c) Courts shall presume that pleadings, motions, and other papers are presented in good faith. "Groundless" for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law. A general denial does not constitute a violation of this rule. The amount requested for damages does not constitute a violation of this rule.

(d) Any party adversely affected by a violation of this rule may file a motion seeking relief or sanctions. The procedure, compliance, and review provisions of Rule ____ (currently Rule 166d) shall govern motions and proceedings under this rule, except that motions under this rule shall be served at least twenty-one (21) days before being filed or presented to the

court; if the challenged pleading, motion, or other paper is withdrawn or corrected within that twenty-one (21) day period, the motion under this rule shall not be filed or presented to the court.

(e) Upon finding a violation of this rule, the court may award relief and sanctions as provided in Rule ___ and ___ (currently Rule 215).

[Current Rule: Tex. R. Civ. P. 13].
[Original Source: Texas Rule 51 (for District and County Courts)].
[Official Comments]:

Change by amendment effective September 1, 1990. To require notice and hearing before a court determines to impose sanctions, to specify that any sanction imposed be appropriate, and to eliminate the 90-day ''grace'' period provided in the former version of the rule.

[Task Force Comment: This draft rule was taken from the report of the Sanctions' Task Force].

Rule 25. Presentation of Defenses; Plea or Motion Practice

(a) When presented. The citation shall direct the defendant to file a written answer to the plaintiff's petition on or before 10:00 a.m. on the Monday next after the expiration of twenty days after the date of service thereof. An additional 10 days shall be added to this period if the defendant files a dilatory plea in a separate instrument that is overruled.

[Current Rule: Tex. R. Civ. P. 99].
[Original Source: Federal Rule 12b)].
[Official Comments]:

Change: The rule authorizes the clerk to issue as many citations for the defendant or defendants as the plaintiff may request, without the delay of securing a return on any prior citation.

(b) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a petition, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) lack of jurisdiction over the subject matter;

(2) lack of jurisdiction over the person;

(3) improper venue;

(4) insufficiency of process;

(5) insufficiency of service of process;

(6) failure to join a party under Rule ____ (currently Rule 39);

(7) formal or substantive defects in a pleading.

(c) Hearings. The defendant in his answer may plead as many several matters, whether of law or fact, as he may think necessary for his defense, and which may be pertinent to the cause, and such matters shall be heard in such order as may be directed by the court, special appearance and motion to transfer venue, and the practice thereunder being excepted herefrom.

[Current Rule: Tex. R. Civ. P. 84].
[Original Source: Arts. 2006 (part) and 2012 (combined with mionr textural changes)].
[Official Comments]:

Change: These two articles have been combined with minor textual change. See also Rule 92 for balance of Art. 2006.

Change by amendment effective March 1, 1950. The requirement that defensive matters must be filed at the same time and in due order of pleading has been eliminated, and the provisions of the last clause have been changed to allow pleas to be heard in such order as the court may direct, excepting a plea of privilege.

Change by amendment effective September 1, 1962. Words ''special appearance and'' inserted before ''plea of privilege.''

Change by amendment effective September 1, 1983. To conform to S.B. 898, 68th Legislature, 1983.

Rule 26. Counterclaim and Cross-claim

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim within the jurisdiction of the court, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction; provided, however, that a judgment based upon a settlement or compromise of a claim of one party to the transaction or occurrence prior to a disposition on the merits shall not operate as a bar to the transaction or

occurrence unless the latter has consented in writing that said judgment shall operate as a bar.

(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against a opposing party whether or not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount of different in kind from that sought in the pleading of the opposing party, so long as the subject matter is within the jurisdiction of the court.

(d) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after filing his pleading may be presented as a counterclaim by amended pleading.

(e) Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(f) Additional Parties. Persons other than those made parties to the original action may be made parties to a third party action, counterclaim or cross-claim in accordance with the provisions of Rules _____ (currently Rules 38, 39 and 40).

(g) Tort shall not be the subject of set-off or counterclaim against a contractual demand nor a contractual demand against tort unless it arises out of or is incident to or is connected with same.

(h) Separate Trials; Separate Judgments. If the court orders separate trials as provided in Rule ____ (currently Rule 174), judgment on a counterclaim or cross-claim may be rendered when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

[Current Rule: Tex. R. Civ. P. 97].
[Original source: Federal Rule 13].
[Official Comments]:

Change: Subdivisions (d) and (f) of the Federal Rule have been omitted and the subdivisions relettered. Subdivisions (d), (e), (f) in part, and (h) above, correspond to

subdivisions (e), (g), (h), and (i) respectively of the Federal Rule. In (a) above, the compulsory counter-claim has been limited to a claim within the jurisdiction of the court. In (c), a similar limitation has been embodied. Other subdivisions have minor textual changes.

Change by amendment of March 31, 1941. The proviso in subdivision (f) takes the place of the last sentence of subdivision (f) in the original Rule 97, and subdivision (g) has been added. Subdivision (in original Rule 97 has been changed to (h).

Change by amendment effective January 1, 1971. Proviso concerning effect of judgment based upon settlement or compromise of claim of one party to a transaction has been added to subdivision (a).

Change by amendment effective April 1, 1984. Subdivision (f) is rewritten.

Rule 27. Third-Party Practice

(a) **When Defendant May Bring in Third Party.** At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a citation and petition to be served upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party petition not later than thirty (30) days after he serves his original answer. Otherwise, he must obtain leave on motion upon notice to all parties to the action. The person served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim under the rules applicable to the defendant, and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants a provided in Rule ____ (currently Rule 97). The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses and his counterclaims and cross-claims. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or who may be liable to

him or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant.

(b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

(c) This rule shall not be applied, in tort cases, so as to permit the joinder of a liability or indemnity insurance company, unless such company is by statute or contract liable to the person injured or damaged.

(d) This rule shall not be applied so as to violate any venue statute, as venue would exist absent this rule.

[Current Rule: Tex. R. Civ. P. 38].
[Original Source: Federal Rule 14, with minor textural change].
[Official Comments]:

Change by amendment effective April 1, 1984. The rule removes the need to get leave of court to begin third-party action; makes textual changes to clarify terminology.

Rule 28. Amended and Supplemental Pleadings

(a) Amendment Defined. The object of an amendment, as contra-distinguished from a supplemental petition or answer, is to add something to, or withdraw something from, that which has been previously pleaded so as to perfect that which is or may be deficient, or to correct that which has been incorrectly stated by the party making the amendment, or to plead new matter, additional to that formerly pleaded by the amending party, which constitutes an additional claim or defense permissible to the suit.

[Current Rule: Tex. R. Civ. P. 62].
[Original Source: Texas Rules 12 and 15 (for District and County Courts) combined, with minor textural changes].

Unless the substituted instrument shall be set aside on exceptions, the instrument for which it is substituted shall no longer be regarded as a part of the pleading in the record of the cause, unless some error of the court in deciding upon the necessity of the amendment, or otherwise in superseding it, be complained of, and exception be taken to the action of the court, or unless it be necessary to look to the superseded pleading upon a question of limitation.

[Current Rule: Tex. R. Civ. P. 65].

[Original Source: Texas Rule 14 (for District and County Courts) with minor textural changes].

(b) When to Amend; Amended Instrument. Parties may amend their pleadings, respond to pleadings on file of other parties, file suggestions of death and make representative parties, and file such other pleas as they may desire by filing such pleas with the clerk at such time as not to operate as a surprise to opposite party; provided, that any pleadings, responses or pleas offered for filing within seven days of the date of trial or thereafter, or after such time as may be ordered by the judge under Rule _____ (currently Rule 166), shall be filed only after leave of the judge is obtained, which leave shall be granted by the judge unless there is a showing that such filing will operate as a surprise to the opposite party.

[Current Rule: Tex. R. Civ. P. 63].
[Original Source: Arts. 2001, subdivisions 1 and 2].
[Official Comments]:

Change: This rule authorizes amendment without leave of court when filed seven days or more before the date of trial. It requires leave to amend thereafter, which may be granted by the judge instead of by the court. Subdivision 3 of Article 2001 is superseded by Rules 66 and 67.

Change by amendment effective January 1, 1961. Language ''or after such time as may be ordered by the judge under Rule 166'' added.

Change by amendment effective September 1, 1990. To require that all trial pleadings of all parties, except those permitted by Rule 66, be on file at least seven days before trial unless leave of court permits later filing.

The party amending shall point out the instrument amended, as "original petition," or "plaintiff's first supplemental petition," or as "original answer," or "defendant's first supplemental answer" or other instrument filed by the party and shall amend by filing a substitute therefor, entire and complete in itself, indorsed "amended original petition," or amended "first supplemental petition," or "amended original answer," or "amended first supplemental answer," accordingly as said instruments of pleading are designated.

[Current Rule: Tex. R. Civ. P. 64].
[Original Source: Texas Rule 13 (for District and County Courts)].

(c) Trial Amendments. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleading, or if during the trial any defect, fault or omission in

a pleading, either of form or substance, is called to the attention of the court, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the allowance of such amendment would prejudice him in maintaining his action or defense upon the merits. The court may grant a postponement to enable the objecting party to meet such evidence.

[Current Rule: Tex. R. Civ. P. 66].
[Original Source: Federal Rule 15(b) (last two sentences) with minor textural change].

(d) Trial by Consent. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. In such case such amendment of pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made by leave of court upon motion of any party at any time up to the submission of the case to the Court or jury, but failure so to amend shall not affect the result of the trial of these issues; provided that written pleadings, before the time of submission, shall be necessary to the submission of questions, as is provided in Rules ____ and ____ (currently Rules 277 and 279).

[Current Rule: Tex. R. Civ. P. 67].
[Original Source: Federal Rule 15(b)].

SECTION 4
Parties

Rule 30. Parties Plaintiff and Defendant

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest, except as provided by law. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is sought. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) Capacity to Sue or Be Sued in Assumed Name. Any partnership, unincorporated association, private corporation, or

individual doing business under an assumed name may sue or be sued in its partnership, assumed or common name for the purpose of enforcing for or against it a substantive right, but on a motion by any party or on the court's own motion the true name may be substituted.

[Current Rule: Tex. R. Civ. P. 28].
[Original Source: Part of Federal Rule 17(b)].
[Official Comments]:

Change: Addition of ''an individual doing business under an assumed name,'' and partnership or common name.

Change by amendment effective January 1, 1971. Language has been added to make the rule applicable to a private corporation and authorize the true name of the party to be substituted on motion.

(c) Next Friends and Guardians Ad Litem.

(1) A minor or incompetent person who does not have a legal guardian may sue and be represented by "next friend" who shall have the same rights as guardians have, but shall give security for costs, or affidavits in lieu thereof, when required.

(2) The court will appoint a guardian ad litem to represent a minor or incompetent person when such person is a defendant to a suit and has no guardian, or when such person is a party to a suit and is represented by a guardian or next friend who appears to the court to have an interest adverse to such minor or incompetent person. The court shall allow the guardian ad litem a reasonable fee for his services to be taxed as a part of the costs.

[Current Rule: Tex. R. Civ. P. 44, 173].
[Original Source: Art. 2159].
[Official Comments]:

Change: Addition of ''an individual doing business under an assumed name,'' and partnership or common name.

Change by amendment effective January 1, 1971. Language has been added to make the rule applicable to a private corporation and authorize the true name of the party to be substituted on motion.

Rule 31. Joinder of Claims and Remedies

(a) **Joinder of Claims.** A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or alternative claims, as

many claims, legal or equitable, as the party has against an opposing party.

(b) Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. This rule shall not be applied in tort cases so as to permit the joinder of a liability or indemnity insurance company, unless such company is by statute or contract directly liable to the person injured or damaged.

[Current Rule: Tex. R. Civ. P. 51].
[Original Source: Federal Rule 18].
[Oficial Comments].

Change: Reference to the right of plaintiff to join an action upon a claim for money and an action to set aside a fraudulent conveyance is omitted as unnecessary in view of the decisions of this state.

Change by amendment effective December 31, 1941. The last sentence has been added.

Change by amendment effective January 1, 1961. The word ''statute'' substituted for the word ''law'' in last sentence of subdivision (b).

Rule 32. Joinder of Persons Needed for Just Adjudication

(a) **Persons to be Joined if Feasible.** A person who is subject to service of process shall be joined as party in the action if (1) in his absence complete relief cannot be accorded among those already parties; or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.

(b) **Determination by Court Whenever Joinder Not Feasible.** If a person described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the

person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule _____ (currently Rule 42).

[Current Rule: Tex. R. Civ. P. 39].
[Original Source: Federal Rule 19, with textural change].
[Official Comments]:

Change by amendment effective January 1, 1971. The rule has been completely rewritten to adopt, with minor changes, the provisions of Federal Rule 19 as amended.

Rule 33. Permissive Joinder of Parties

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

[Current Rule: Tex. R. Civ. P. 40].

[Original Source: Federal Rule 20, unchanged].

Rule 34. Misjoinder and Nonjoinder of Parties

Misjoinder of parties is not grounds for dismissal of an action. Parties may be dropped and added, or suits filed separately may be consolidated, or actions which have been improperly joined may be severed and each ground of recovery improperly joined may be docketed as a separate suit between the same parties, by order of the court on motion of any party or on its own initiative at any stage of the action, before the time of submission to the jury or to the court if trial is without a jury, on such terms as are just. Any claim against a party may be severed and proceeded with separately.

[Current Rule: Tex. R. Civ. P. 41].
[Original Source: Federal Rule 21].
[Task Force Comments:].

Change: Addition of provision for adding and dropping parties and for consolidation of suits and for severing actions in case of misjoinder of parties or causes.

Rule 35. Interpleader

Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which the claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in any other rules.

[Current Rule: Tex. R. Civ. P. 43].
[Original Source: Federal Rule 22(1), with minor textural change].

Rule 36. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims and defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Action Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of **(A)** inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for the party opposing the class, or **(B)** adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole; or

(3) where the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(4) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: **(A)** the interest of members of the class in individually controlling the prosecution or defense of separate actions; **(B)** the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; **(C)** the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulty likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained: Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall, after hearing, determine by order whether it is to be so maintained. This determination may be altered, amended, or withdrawn at any time before final judgment. The court may order the naming of additional parties in order to insure the adequacy of representation.

(2) After the court has determined that a class action may be maintained it shall order the party claiming the class action to direct to the members of the class the best notice

practicable under the circumstances including individual notice to all members who can be identified through reasonable effort. In all class actions maintained under subdivision (b)(1), (b)(2), and (b)(3), this notice shall advise the members of the class **(A)** the nature of the suit, (B) the binding effect of the judgment, whether favorable or not, and (C) the right of any member to appear before the court and challenge the court's determinations as to the class and its representatives. In all class actions maintained under subdivision (b)(4) this notice shall advise each member of the class (A) the nature of the suit; **(B)** that the court will exclude him from the class if he so requests by a specified date; **(C)** that the judgment, whether favorable or not, will include and bind all members who do not request exclusion by the specified date; and **(D)** that any member who does not request exclusion may if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivisions (b)(1), (b)(2), and (b)(3), whether or not favorable to the class, shall include, describe, and be binding upon all those whom the court finds to be members of the class and who received notice as provided in subdivision (c)(2). The judgment in an action maintained as a class action under subdivision (b)(4), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(d) Actions Conducted Partially as Class Actions. When appropriate **(1)** an action may be brought or maintained as a class action with respect to particular issues, or **(2)** a class be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall be construed and applied accordingly.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice shall be given to all members of the class in such manner as the court directs.

(f) Discovery. Unnamed members of a class action are not to be considered as parties for purposes of discovery.

(g) Effective Date. This rule shall be effective only with respect to actions commenced on or after September 1, 1977.

[Current Rule: Tex. R. Civ. P. 42].
[Original Source: Federal Rule 23].
[Official Comments]:

Change by amendment effective September 1, 1977. Rule 42 is completely rewritten. Subdivision (a) is copied from revised

Federal Rule 23(a). Subdivision (b)(1) is copied from revised Federal Rule 23(b)(2). Subdivision (b)(2) is copied from revised Federal Rule 23(b)(2). Subdivision (b)(3 is taken from present Texas Rule 42(a)(3), omitting the reference to the character of the right as ''several.'' Subdivision (b)(4) is adopted from revised Federal Rule 23(b)(3). Subdivision (c)(1 is adopted from revised Federal Rule (c)(1) with little change except in the choice of words. The second sentence in proposed (c)(1) is not found in the Federal Rule although the idea is implied therein. Subdivision (d) is copied from revised Federal Rule 23(c)(4). Subdivision (e) is copied from revised Federal Rule 23(e).

Change by amendment effective April 1, 1984. The paragraph concerning a derivative suit is added to subdivision (a).

Rule 37. Derivative Suits

In a derivative suit brought pursuant to article 5.14 of the Texas Business Corporation Act, the petition shall contain the allegations (1) that the plaintiff was a record or beneficial owner of shares, or of an interest in a voting trust for shares at the time of the transaction of which he complains, or his shares or interest thereafter devolved upon him by operation of law from a person who was the owner at that time, and (2) with particularity, the efforts of the plaintiff to have suit brought for the corporation by the board of directors, or the reasons for not making any such efforts. The derivative suit may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders similarly situated in enforcing the right of the corporation. The suit shall not be dismissed or compromised without the approval of the court, and notice in the manner directed by the court of the proposed dismissal or compromise shall be given to shareholders.

[Current Rule: Tex. R. Civ. P. 42(a)].
[Original Source: Federal Rule 23(a)].

Rule 38. Intervention

(a) **Intervenor's Pleadings.** Any party may intervene by filing a pleading subject to being stricken out by the court for sufficient cause on the motion of any party.

(b) **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to

protect that interest, unless the applicant's interest is adequately protected by existing parties.

(c) **Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(d) **Procedure.** A person desiring to intervene shall serve a motion to intervene upon the parties as provided by these rules. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

[Current Rule: Tex. R. Civ. P. 60, 61].
[Original Source: Art. 1998 and Texas Rule 30 (for District and County Courts)].
[Official Comments]:

Rule 60, Change: Intervention is authorized without leave of court, regardless of whether the court is in session or in vacation.

Rule 60, Change by amendment effective September 1, 1990. Rules 21 and 21a control notice and service of pleadings of intervenors.

Rule 39. Substitution of Parties

(a) **Death of Party.** Where the cause of action is one which survives, no suit shall abate because of the death of any party thereto, but such suit may continue as hereinafter provided. Upon death of a party, the heirs, administrator or executrix of such decedent may appear and upon suggestion of death in open court may proceed as a party in his own name, Absent a timely appearance and suggestion, upon application by an opposing party, the clerk shall issue a scire facias for the heirs, administrator or executrix of such decedent, requiring him to appear and prosecute such suit. An opposing party may have the suit dismissed upon failure of the heirs, administrator or executrix of such decedent to respond to the scire facias in a timely manner.

[Current Rule: Tex. R. Civ. P. 150-153].
[Original Source: Arts. 2078, 2079, 2080, 2081, with minor textural changes].
[Official Comments]:

Rule 151, Change by amendment effective April 1, 1984. Textual changes.

Rule 153, Change by amendment effective April 1, 1984. Textual changes.

(b) Requisites of Scire Facias. The scire facias and returns thereon, provided for herein, shall conform to the requisites of citations and the returns thereon, under the provisions of these rules.

[Current Rules: Tex. R. Civ. P. 154].
[Original Source: Art. 2091, with minor textural changes].

(c) Surviving Parties. Where there are two or more plaintiffs or defendants, and one or more of them die, upon suggestion of such death being entered upon the record, the suit shall at the instance of either party proceed in the name of the surviving plaintiffs or against the surviving defendants, as the case may be.

[Current Rule: Tex. R. Civ. P. 155].
[Original Source: Art. 2082, unchanged].

(d) Death After Verdict or Close of Evidence. When a party in a jury case dies between verdict and judgment, or a party in a non-jury case dies after the evidence is closed and before judgment is pronounced, judgment shall be rendered and entered as if all parties were living.

[Current Rule: Tex. R. Civ. P. 156].
[Original Source: Art. 2083, unchanged].
Official Comments]:

Change by amendment effective January 1, 1978. The rule is made applicable to non-jury as well as jury cases.

(e) Suit for the Use of Another. When a plaintiff suing for the use of another shall die before verdict, the person for whose use such suit was brought, upon such death being suggested on the record in open court, may prosecute the suit in his own name, and shall be responsible for costs as if he brought the suit.

[Current Rule: Tex. R. Civ. P. 158].
[Original Source: Art. 2085, unchanged].

(f) Suit for Injuries Resulting in Death. In cases arising under the provisions of the title relating to injuries resulting in death, the suit shall not abate by the death of either party pending the suit, but in such case, if the plaintiff dies, where there is only one plaintiff, some one or more of the parties

entitled to the money recovered may be substituted and the suit prosecuted to judgment in the name of such party or parties, for the benefit of the person entitled; if the defendant dies, his executor, administrator or heir may be made a party, and the suit prosecuted to judgment.

[Current Rule: Tex. R. Civ. P. 159].
[Original Source: Art. 2086, unchanged].

SECTION 5
Discovery and Pretrial Procedure

A. DISCOVERY

Rule 40. General Provisions Regarding Discovery; Scope

(a) **Forms of Discovery.** Permissible forms of discovery are (1) oral or written depositions of any party or non-party, (2) written interrogatories to a party, (3) requests of a party for admission of facts and the genuineness or identity of documents or things, (4) requests and motions for production, examination, and copying of documents or other tangible materials, (5) requests and motions for entry upon and examination of real property and (6) motions for a mental or physical examination of a party or person under the legal control of a party.

[Current Rule: Tex. R. Civ. P. 166b(1)].
[Original Source: New Rule, combining provisions of old Rules 167, 186a and 186b].
[Official Comments]:

Rule 166(b), Change: Subdivision 1[(a)] has been added. The court has been given the power to compel the appearance of the parties or their agents as well as the attorneys. Reference to an auditor is also authorized.

Change by amendment effective January 1, 1961. Requirement that court's order at pre-trial conference allowing amendments show ''the time within which same may be filed.''

Change by amendment effective September 1, 1990. To broaden the scope of the rule and to confirm the ability of the trial courts at pretrial hearings to encourage settlement.

(b) **Scope of Discovery.** Except as provided in Rule 41 (currently Paragraph 3 of Rule 166b) or otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows

(1) **In general.** Parties may obtain discovery regarding any matter, not privileged, that is relevant to the

subject matter involved in the pending action whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. It is not ground for objection that the information sought will be inadmissible at the trial if it appears reasonably calculated to lead to the discovery of admissible evidence.

[Current Rule: Tex. R. Civ. P. 166b(2)(a)].
[Original Source: Fed.R.Civ.P. 26(b)].
[Task Force Comments: The references to the scope of discovery for particular discovery devices has been moved to the appropriate rule.]

(2) Potential Parties and Witnesses. A party may obtain discovery of, and nothing in these rules shall render nondiscoverable, the identity and location (name, address and telephone number) of any potential party and of persons having knowledge of relevant facts. A person has knowledge of relevant facts when he or she has or may have knowledge of any discoverable matter. The information need not be admissible in order to satisfy the requirements of this subsection and personal knowledge is not required.

[Current Rule: Tex. R. Civ. P. 166b(2)(d) and last paragraph of Rule 166b(3)(e)].
[Original Source: New Rule].

(3) Insurance and Settlement Agreements. A party may obtain discovery of the following:

(A) The existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment that may be rendered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(B) The existence and contents of any settlement agreement. Information concerning the settlement agreement is not by reason of disclosure admissible in evidence at trial.

[Current Rule: Tex. R. Civ. P. 166b(2)(f)].
[Original Source: New Rule].

Rule 41. Exemptions and Privileges from Discovery

(a) Work Product. A party may not obtain discovery of the work product of an attorney, subject to the exceptions of Civil

Evidence Rule 503(d), which shall govern as to work product as well as to attorney-client privilege.

(b) Experts.

(1) A party may not obtain discovery of the facts known, identity, mental impressions and opinions of experts, acquired or developed in anticipation of litigation, if the expert has been informally consulted or retained or specially employed by another party in anticipation of litigation or preparation for trial or any documents or tangible things containing such information if the expert will not be called as an expert witness and the expert's opinions or impressions have not been reviewed by a testifying expert.

(2) Nothing in these rules shall prevent a party from obtaining discovery of the identity and location (name, address and telephone number) of an expert who may be called as an expert witness, the subject matter on which the witness is expected to testify, the mental impressions and opinions held by the expert and the facts known to the expert (regardless of when the factual information was acquired) which relate to or form the basis of the mental impressions and opinions held by the expert. The disclosure of the same information concerning an expert used for consultation and who is not expected to be called as an expert witness at trial is required if the consulting expert's opinion or impressions have been reviewed by a testifying expert. The trial judge has discretion to compel a party to determine and disclose whether an expert may be called to testify within a reasonable and specific time before the date of trial.

[Current Rule: Tex. R. Civ. P. 166b(3)(b); 166b(2)(3)].
[Original Source: New Rule].

(c) Reports. A party may also obtain discovery of documents and tangible things including all tangible reports, physical models, compilations of data and other material prepared by an expert or for an expert in anticipation of the expert's trial and deposition testimony. The disclosure of material prepared by an expert used for consultation is required even if it was prepared in anticipation of litigation or for trial if the consulting expert's opinions or impressions have been reviewed by a testifying expert. If the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert who will be called as an expert witness have not been recorded and reduced to tangible form, the trial judge may order these matters reduced to tangible form and produced within a reasonable time before the date of trial.

[Current Rule: Tex. R. Civ. P. 166b(2)(e)(2) & (4)].
[Original Source: New Rule].

(d) **Witness Statements.** A party may not discover the written statements of potential witnesses and parties when made subsequent to the occurrence or transaction upon which the suit is based and in connection with the prosecution, investigation, or defense of the particular suit, or in anticipation of the prosecution or defense of the claims made a part of the pending litigation, except that persons, whether parties or not, shall be entitled to obtain, upon request, copies of statements they have previously made concerning the action or its subject matter and which are in the possession, custody, or control of any party. The term "written statements" includes (i) a written statement signed or otherwise adopted or approved by the person making it, and (ii) a stenographic, mechanical, electrical or other type of recording, or any transcription thereof which is a substantially verbatim recital of a statement made by the person and contemporaneously recorded. For purposes of this paragraph a photograph is not a statement. A party may obtain discovery of a communication that is otherwise privileged, however, upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

[Current Rule: Tex. R. Civ. P. 166b(2)(g) and 166b(3)(c)].
[Original Source: New Rule].

(e) **Party Communications.** A party may not discover communications between agents or representatives or the employees of a party to the action or communications between a party and that party's agents, representatives or employees, when made subsequent to the occurrence or transaction upon which the suit is based and in connection with the prosecution, investigation or defense of the particular suit, or in anticipation of the prosecution or defense of the claims made a part of the pending litigation. This exemption does not include communications prepared by or for experts that are otherwise discoverable. For the purpose of this paragraph, a photograph is not a communication. A party may obtain discovery of a communication that is otherwise privileged, however, upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

[Current Rule: Tex. R. Civ. P. 166b(3)(d)].
[Original Source: New Rule].

(f) **Other Privileged Information.** A party may not discover any matter protected from disclosure by any other privilege.

[Current Rule: Tex. R. Civ. P. 166b(3)(a) through (e), 166b(2)(e)].
[Original Source: New Rule].

Rule 42. Discovery Disputes

(a) Grounds for Objection to Requested Discovery. A party may object to discovery propounded to it on the grounds that such discovery requests information beyond the scope of discovery as defined by Rule _____ (current Rule 166b(4)); requests information that is privileged or exempt from discovery as defined by Rule ____ (current Rule 166b(2),(3)); constitutes an undue burden, unnecessary expense, harassment, or annoyance; or invades personal, constitutional or property rights. After the date on which answers are to be served, objections are waived unless an extension of time has been obtained by agreement or order of the court or good cause is shown for the failure to object within such period.

[Current Rule: new provision].
[Original Source: New Rule].

(b) Objection or Motion for Protective Orders. On objection made in a party's response to a discovery request or motion specifying the grounds, the court may make any order in the interest of justice necessary to protect any person against or from whom discovery is sought from discovery. Objections, 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:

(1) ordering that requested discovery not be sought in whole or in part, or that the extent or subject matter of discovery be limited, or that it not be undertaken at the time or place specified.

(2) ordering that the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court.

(3) ordering 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. Any order under this subparagraph shall be made in accordance with the provisions of Rule _____ (current Rule 76a) with respect to all court records subject to that rule.

[Current Rule: Tex. R. Civ. P. 166b(5): Objections to discovery appropriate as alternative method].
[Original Source: New Rule].

(c) Presentation of Objections to Discovery. Either an objection made in a party's response to a discovery request or a

motion for protective order shall preserve that party's objection to requested discovery without further support or action unless the objection or motion is set for hearing and determined by the court. Any party may at any reasonable time request a hearing on any objection or motion for protective order. The failure of a party to obtain a ruling prior to trial on any objection to discovery or motion for protective order does not waive such objection or motion. In objecting to an appropriate discovery request, a party seeking to exclude any matter from discovery on the basis of an exemption or immunity from discovery, must specifically plead the particular exemption or immunity from discovery relied upon and at or prior to any hearing shall produce any evidence necessary to support such claim either in the form of affidavits served at least seven days before the hearing or by testimony. If the trial court determines that an in camera inspection and review by the court of some or all of the requested discovery is necessary, the objecting party must segregate and produce the discovery to the court in a sealed wrapper or by answers made in camera to deposition questions, to be transcribed and sealed in event the objection is sustained. When a party seeks to exclude documents from discovery and the basis for objection is undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights, rather than a specific immunity or exemption, it is not necessary for the court to conduct an inspection and review of the particular discovery before ruling on the objection.

[Current Rule: Tex. R. Civ. P. 166b(4)].
[Original Source: New Rule].
[Task Force Comments: Presumably subject to work of Discovery Task Force].

(d) Certificate of Conference. Before any discovery objections or motion can be set for hearing before the court, the party setting the hearing shall file a certificate that efforts to resolve the discovery dispute without the necessity of court intervention have been attempted and failed.

[Current Rule: Tex. R. Civ. P. 166b(7)].
[Original Source: New Rule].
[Task Force Comments: Certificate now required before motion is set for hearing].

Rule 43. Duty to Supplement

A party who has responded to a request for discovery that was correct and complete when made is under no duty to supplement his response to include information thereafter acquired, except the following shall be supplemented not less than thirty days prior to the beginning of trial unless the court finds that a

good cause exists for permitting or requiring later supplementation.

(a) A party is under a duty to reasonably supplement his response if he obtains information upon the basis of which:

(1) he knows that the response was incorrect or incomplete when made;

(2) he knows that the response though correct and complete when made is no longer true and complete and the circumstances are such that failure to amend the answer is in substance misleading; or

(b) If the party expects to call an expert witness when the identity or the subject matter of such expert witness' testimony has not been previously disclosed in response to an appropriate inquiry directly addressed to these matters, such response must be supplemented to include the name, address and telephone number of the expert witness and the substance of the testimony concerning which the expert witness is expected to testify, as soon as is practical, but in no event less than thirty (30) days prior to the beginning of trial except on leave of court.

(c) In addition, a duty to supplement answers may be imposed by order of the court or agreement of the parties, or at any time prior to trial through new requests for supplementation of prior answers.

[Current Rule: Tex. R. Civ. P. 166b(6)].
[Original Source: New Rule].
[Task Force Comment: Presumably part of Discovery Task Force report].

Rule 44. Stipulations regarding Discovery Procedures

Unless the court orders otherwise, the parties may by written agreement modify the procedures provided by these rules for all methods of discovery. Any such agreement varying the procedures provided by these rules for depositions, however, may be set forth on the record in the text of the deposition transcript, set forth in a separate exhibit to the transcript and signed by all parties, or approved by prior written order of the court.

[Current Rule: Tex. R. Civ. P. 166c].
[Original Source: New Rule].
[Official Comments]:

Change by amendment effective January 1, 1988. This is a new rule which allows the parties to modify the existing procedures concerning depositions to fit the facts and

situations of the individual case.

[Task Force Comments: The redraft of current Rule 166c has been adapted from the current language of Tex. R. Civ. P. 206(4) regarding agreeing to different procedures for submitting depositions to witnesses and delivery].

Rule 45. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(a) Scope.

(1) Documents and Tangible Things. A party may obtain discovery of the existence, description, nature, custody, condition, location and contents of any and all documents, (including papers, books, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, and any other data compilations from which information can be obtained and translated, if necessary, by the person from whom production is sought, into reasonably usable form) and any other tangible things which constitute or contain matters relevant to the subject matter in the action.

[Current Rule: Tex. R. Civ. P. 166b(2)(b)].
[Original Source: New Rule].

(2) Medical Records and Medical Authorization. Any party alleging physical or mental injury and damages arising from the occurrence which is the subject of the case shall be required, upon written request, to produce, or furnish an authorization permitting the full disclosure of, medical records not theretofore furnished to the requesting party which are reasonably related to the injury or damages asserted. Copies of all medical records, reports, x-rays or other documentation obtained by virtue of an authorization furnished in response, shall be furnished by the requesting party, without charge, to the party who furnished the authorization in response to the request and copies of all medical records, reports, x-rays or other documentation obtained by virtue of the written request or by virtue of the authorization shall be made available by the requesting party for inspection and photographing and/or copying to all parties to the action under reasonable terms and conditions. If such information, so obtained, is to be used or offered in evidence upon trial, it shall be furnished by the requesting party to the party who furnished the authorization and made available for inspection by all parties not less than thirty (30) days prior to trial, except as may be excused by a showing of good cause. The mailing of written notice by the requesting party that he has obtained medical records, reports, x-rays or other documentation by virtue of the written request or by virtue of an authorization furnished in response constitutes making them available if the mailing is done thirty (30) days prior to trial

and if it prescribes reasonable terms and conditions for inspection of them.

[Current Rule: Tex. R. Civ. P. 166b(2)(h)]..
[Original Source: New Rule].

(3) **Land.** A party may obtain a right of entry upon designated land or other property when the designated land or other property is relevant to the subject matter in the action.

[Current Rule: Tex. R. Civ. P. 166b(2)(c)].
[Original Source: New Rule].

(4) **Possession, Custody or Control.** Unless otherwise provided in these rules, a person is not required to produce a document or tangible thing or permit entry upon land or other property unless it is within the person's possession, custody or control. Possession, custody or control includes constructive possession such that the person need not have actual physical possession. As long as the person has a superior right to compel the production from a third party (including an agency, authority or representative), the person has possession, custody or control. If a person has a superior right to compel a third person to permit entry upon land or other property, the person with the right has possession or control.

[Current Rule: Tex. R. Civ. P. 166b(2)(b)].
[Original Source: New Rule].

(b) Requests and Responses.

(1) Any party may serve on any other party a request 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 this rule; or 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 this rule.

[Current Rule: Tex. R. Civ. P. 167(a), (b)].
[Original Source: Federal Rule 34].
[Official Comments]:

Change: The provision of the Federal rule regarding land surveying is omitted. The proviso is added to limit the scope of the discovery authorized.

Change by amendment effective September 1, 1957. Provision is added authorizing entry on land of party for inspecting, surveying, etc.

Change by amendment effective January 1, 1971. An exception has been added to the proviso to permit discovery of information relating to the identity and location of any potential party or witness.

Change by amendment effective February 1, 1973. Language has been added and the proviso has been rewritten to permit discovery of certain insurance contracts, papers, and other tangible things calculated to lead to the discovery of material evidence, the identity and location of any potential witness, and the reports of an expert who will be called as a witness. Provision is also made for a person to obtain a copy of any statement he has previously made concerning the action or its subject matter and which is in the possession of a party.

Change by amendment effective January 1, 1981. The rule is entirely rewritten to provide for more precise procedures.

Change by amendment effective April 1, 1984. Portions of the former rule are deleted and have been incorporated into revised Rule 166b, except for the last sentence of subdivision 3 concerning unreasonable requests or responses. Discovery abuse is dealt with in revised Rule 215. The addition to the rule in subdivision 1(c) provides that a request may identify the items requested by ''category'' but with ''reasonable particularity.'' This language is adapted from current Federal Rule 34, upon which the 1981 revisions to Texas Rule 167 were largely modeled. The other changes in Rule 167 serve to conform it to revised Rule 166b.

Change by amendment effective January 1, 1988. Paragraph 3 is new; paragraph 4 is former paragraph 3; and paragraph 5 is former paragraph 4.

Change by amendment effective September 1, 1990. To require that requests and responses be filed and served on all parties, but that documents produced should not be filed without leave of court. Former subdivision 3 is deleted and the succeeding subdivisions 4 and 5 are renumbered as subdivisions 3 and 4.

(2) 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.

(3) 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.

(4) A true copy of the request and response, together with proof of the service thereof on all parties as provided in Rule 21a, shall be filed promptly in the clerk's office by the party making it, except that any documents produced in response to a request need not be filed.

(5) 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.

(6) Testing or examination shall not extend to destruction or material alteration of an article without notice, hearing, and prior approval by the court.

(c) **Time.** The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the citation and petition upon that party. The request shall be then served upon every party to the action. The party upon whom the request is served shall serve a written response and objections, if any, within 30 days after the service of the request, except that if the request accompanies citation, a defendant may serve a written response and objections, if any, within 50 days after service of the citation and petition upon that defendant. The time for making a response may be shortened or lengthened by the court upon a showing of good cause.

[Current Rule: Tex. R. Civ. P. 167(2)].
[Original Source: Federal Rule 34].
[Official Comments]:

Change by amendment effective January 1, 1988.] Paragraph 4, Presentation of Objections, is new. Paragraph 5, Protective Orders, is former paragraph 4. Subparagraphs 5(a) is former paragraph 4(a) with no change. Subparagraph 5(b) is former paragraph 4(b) with no change. Subparagraph 5(c) is former paragraph 4(c) with changes. Paragraph 6, Duty to Supplement, is former paragraph 5 with no changes. Subparagraphs 6(a)-(c) are former subparagraphs 5(a)-(c) with no changes.

Change by amendment effective September 1, 1990. To eliminate the contradiction between Rule 166b.2(e)(1) and (2) and corresponding Rule 166b.3(e), Rule 166b.2(e)(1) and (2) have been modified to make discoverable the impressions and opinions of a consulting expert if a testifying expert has reviewed those opinions and material, regardless of whether the opinions and material form a basis for the opinion of the testifying expert. The amendments to subdivision 3 standardize language and provide that matters exempt under subdivision 3(c) are not made discoverable solely because the consultant may or is to be a fact witness only. The amendments to subdivision 4 expressly dispense with the necessity of doing anything more than serving objections to preserve discovery complaints in order to avoid unnecessary time and expense to parties and time of the courts, particularly where no party ever requests a hearing on the objection. The failure of any party to do more than merely object fully shall never constitute a waiver of any objection, but information withheld may not be used in evidence at trial by the withholding party absent supplementation. The last sentence added to subdivision 4 was previously the second sentence of Rule 168(6) and was moved because it applies to all discovery objections. Subdivision 5(c) is amended to reference the requirements of new Rule 76a. New subdivision 7 was added to ensure that court time will not be taken to resolve discovery disputes unless the parties cannot resolve them without court intervention.

[Task Force Comments: Tex. R. Civ. P. 167(3) deleted].

(d) Nonparties. Upon the filing of a motion setting forth with specific particularity the request and necessity therefor, and after and hearing, a court may order a person, organizational entity, governmental agency or corporation not a party to this suit to produce in accordance with this rule. All parties and the nonparty shall have the opportunity to assert objections at the hearing.

[Current Rule: Tex. R. Civ. P. 167(4)].
[Original Source: Federal Rule 34].
[Task Force Comments: This may be deleted since the deposition and subpoena duces tecum from non-parties is a much better alternative].

Rule 46. Physical and Mental Examinations of Persons

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody, conservatorship or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental

examination by a physician or psychologist or to produce for examination the person in his custody, conservatorship or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. Except as provided in subparagraph (d) of this rule, an examination by a psychologist may be ordered only when the party responding to the motion has identified a psychologist as an expert who will testify. For the purpose of this rule, a psychologist is a person licensed or certified by a State or the District of Columbia as a psychologist.

(b) Report of Examining Physician or Psychologist.

(1) If requested by the party against whom an order is made under this rule or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician or psychologist setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician or psychologist fails or refuses to make a report the court may exclude his testimony if offered at the trial.

(2) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or psychologist or the taking of a deposition of the physician or psychologist in accordance with the provisions of any other rule.

(c) Effect of No Examination. If no examination is sought either by agreement or under the provisions of this rule, the party whose mental or physical condition is in controversy shall not comment to the court or jury on his willingness to submit to an examination, on the right of any other party to request an examination or move for an order, or on the failure of such other party to do so.

(d) Cases Arising Under Title II, Family Code. In cases arising under Title II, Family Code, on the court's own motion or on the motion of a party, the court may appoint:

(1) one or more psychologists to make any and all appropriate mental examinations of the children who are the subject of the suit or any other parties irrespective of whether a psychologist has been listed by any party as an expert who will testify.

(2) non-physician experts who are qualified in paternity testing to take blood, body fluid or tissue samples and to conduct such tests as ordered by the court.

[Current Rule: Tex. R. Civ. P. 167a].
[Original Source: Federal Rule 35].
[Official Comments]:

Change by amendment effective September 1, 1990. To provide for court-ordered examination by certain psychologists.

[Task Force Comments: 167a(e) has been moved to Rule 42(1).]

Rule 47. Interrogatories to Parties

(a) Scope, Use at Trial.

Interrogatories may relate to any matters which can be inquired into under Rule _____ (current Rule 166b), but the answers, subject to any objections as to admissibility, may be used only against the party answering the interrogatories. It is also not ground for objection that an interrogatory propounded pursuant to Rule ____ (current Rule 43) involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

[Current Rule: Tex. R. Civ. P. 168(2)].
[Original Source: Federal Rule 33, with changes].
[Official Comments]:

Change by amendment effective January 1, 1967. Provisions have been added to permit, when there are more than four adverse parties, the filing of four copies of interrogatories or answers with the clerk in lieu of service on ''all other parties.'' The third and fourth paragraphs have also been added.

Change by amendment effective February 1, 1973. Language authorizing answers to be signed by attorney has been eliminated. The sentence concerning identification of expert witnesses and the subject matter of their testimony, and the paragraph concerning answers that may be ascertained from

business records, have been added.

Change by amendment effective January 1, 1978. Time to answer enlarged to 30 days; time to object to interrogatories enlarged to 15 days; answers should follow each question.

Change by amendment effective January 1, 1981. The rule is wholly rewritten to provide for procedures and scope. It limits the number of interrogatories to thirty questions, except on court order.

Change by amendment effective April 1, 1984. Subdivision 7 of former Rule 168, concerning duty to supplement interrogatories, has been moved to Rule 166b and revised to apply generally to the discovery process. Sanctions imposable for violating the duty to supplement are stated in new Rule 215(4).

Subdivision 2b, regarding the identification of individual documents contained in former Rule 168(2), was proposed at the federal level in 1978 by the Advisory Committee on Civil Rules of the Judicial Conference of the United States but was withdrawn after it received criticism. SEE Schroeder & Frank, THE PROPOSED CHANGES IN THE DISCOVERY RULES, 1978 Arizona St. L. Rev. 475, 491 (1978). The revision to Rule 168 corresponds with the language of the current federal rule "... to locate and to identify as readily as can the party served the records ...." The provisions in this rule concerning sanctions have been deleted, because the subject is covered by Rule 215.

Change by amendment effective September 1, 1990. The previous second sentence in subdivision 6 was, and is, applicable to all discovery objections and therefore has been moved to Rule 166b.4, last sentence.

[Task Force Comments: The language concerning contention interrogatories is taken from current Rule 166b(2)(a)].

(b) Interrogatories and Responses.

(1) Serving Interrogatories. 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. A true copy of the interrogatories and the written answers or objections, together

with proof of service thereof as provided in Rule ____ (current Rule 21a), shall be filed promptly in the clerk's office by the party making them, except that when an interrogatory is answered by reference to records as permitted by paragraph ___, the records so referenced need not be filed. 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.

[Current Rule: Tex. R. Civ. P. 168].
[Original Source: Federal Rule 33, with changes].

(2) Option to Produce Records. Where the answer to an interrogatory may be derived or ascertained from public records or 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.

[Current Rule: Tex. R. Civ. P. 168(2)(a),(b)].
[Original Source: Federal Rule 33, with changes].
[Official Comments]:

Change by amendment effective January 1, 1967. Provisions have been added to permit, when there are more than four adverse parties, the filing of four copies of interrogatories or answers with the clerk in lieu of service on ''all other parties.'' The third and fourth paragraphs have also been added.

Change by amendment effective February 1, 1973. Language authorizing answers to be signed by attorney has been eliminated. The sentence concerning identification of expert witnesses and the subject matter of their testimony, and the paragraph concerning answers that may be ascertained from business records, have been added.

Change by amendment effective January 1, 1978. Time to answer enlarged to 30 days; time to object to interrogatories enlarged to 15 days; answers should follow

each question.

Change by amendment effective January 1, 1981. The rule is wholly rewritten to provide for procedures and scope. It limits the number of interrogatories to thirty questions, except on court order.

Change by amendment effective April 1, 1984. Subdivision 7 of former Rule 168, concerning duty to supplement interrogatories, has been moved to Rule 166b and revised to apply generally to the discovery process. Sanctions imposable for violating the duty to supplement are stated in new Rule 215(4).

Subdivision 2b, regarding the identification of individual documents contained in former Rule 168(2), was proposed at the federal level in 1978 by the Advisory Committee on Civil Rules of the Judicial Conference of the United States but was withdrawn after it received criticism. SEE Schroeder & Frank, THE PROPOSED CHANGES IN THE DISCOVERY RULES, 1978 Arizona St. L. Rev. 475, 491 (1978). The revision to Rule 168 corresponds with the language of the current federal rule "... to locate and to identify as readily as can the party served the records ...." The provisions in this rule concerning sanctions have been deleted, because the subject is covered by Rule 215.

Change by amendment effective September 1, 1990. The previous second sentence in subdivision 6 was, and is, applicable to all discovery objections and therefore has been moved to Rule 166b.4, last sentence.

(3) Time. 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.

[Current Rule: Tex. R. Civ. P. 168(4)].
[Original Source: Federal Rule 33, with changes].

(4) 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 ____ (currently Rule 166b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

(5) Responding to Interrogatories. 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 ____ (currently Rule 14) shall not apply.

[Current Rule: Tex. R. Civ. P. 168(5)].
[Original Source: Rule 33, with changes].

(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. Answers only to those interrogatories or portions thereof, to which objection is made, shall be deferred until the objections are ruled upon and for such additional time thereafter as the court may direct. Either party may request a hearing as to such objections at the earliest possible time.

[Current Rule: Tex. R. Civ. P. 168(6)].
[Original Source: Federal Rule 33, with changes].

Rule 48. Requests for Admission

(a) Scope. At any time after commencement of the action, 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 _____ (currently 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. It is not ground for objection that a request for admission relates to mixed questions of law and fact or that the documents referred to in a request may not be admissible at trial. 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. 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 ____ (currently Rule 21a), shall be filed promptly in the clerk's office by the party making it.

[Current Rule: Tex. R. Civ. P. 169(1), first paragraph].

[Original Source: Federal Rule 36, with minor textural changes].
[Official Comments]:

Change by amendment effective December 31, 1941. The method of service is explained to be delivery, etc.

Change by amendment effective March 1, 1950. The third sentence, requiring delivery of the request for admissions to the adverse party's attorney, where he is represented by an attorney of record; the fourth sentence, requiring that the request state that it is made under this rule and the effect of failure to answer; and the last sentence, requiring the filing of copies in the clerk's office, have been added.

Change by amendment effective February 1, 1973. Sentence concerning effect of admission and provisions authorizing court to determine sufficiency of answers or reasons and permit withdrawal or amendment of admission have been added.

Change by amendment effective April 1, 1984. This rule has been revised to conform it to new Rule 166b. Under the amendment to Rule 169, a party may be required to admit or deny the truth of any matters within the scope of discovery. This change follows the pattern established by the 1970 amendment to Federal Rule 36. The time for making a response has been extended to thirty days. This modification is consistent with the objective of making discovery responses generally due within thirty days. Consistent with the view that all ''sanction'' information be set forth in one rule, noncompliance information has been moved to Rule 215(3). If requests go unanswered for thirty (30) days, no court order is required to deem such requests admitted unless otherwise ordered by the court.

Change by amendment effective September 1, 1990. The rule is amended to provide that the parties may agree to extend or shorten the time to respond to a request. The rule is also amended to permit service of a request at any time after commencement of the action but extending the time to respond in such case to no less than fifty days after service of the citation and petition on the responsive party.

(b) Requests and Responses. 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 days after service of the request, or within such time as the court may allow, or as otherwise agreed by the parties, the party to whom the request is directed serves upon the party

requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of fifty days after service of the citation and petition upon that defendant. If objection is made, the reason therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons that the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or easily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission is requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Paragraph 3 of Rule ____ (currently Rule 215), deny the matter or set forth reasons why he cannot admit or deny it.

[Current Rule: Tex. R. Civ. P. 169(1), second paragraph]. [Original Source: Federal Rule 36, with minor textural changes].

(c) 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 _____ (currently Rule 166) governing amendment of a pre-trial order, and Rule _____ (currently Rule 166b-6) governing duty to supplement discovery responses, the court may permit withdrawal or amendment of responses and deemed admissions upon a showing of good cause for such withdrawal or amendment if the court finds that the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the action will be subserved thereby. Any admission made by a party under this rule is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

[Current Rule: Tex. R. Civ. P. 169(2)]. [Original Source: Federal Rule 36, with minor textural changes].

Rule 49. Deposition to Perpetuate Testimony

(a) Petition. When any person may anticipate the institution of an action in which he may be a party, and may desire to perpetuate his own testimony or that of any other person to be used in such suit, he, his agent or attorney, may file a verified petition in the proper court of any county where venue of the anticipated action may lie. The petition shall be in the name of the petitioner and shall show: (1) that petitioner anticipates the institution of an action in which he may be a party; (2) the subject matter of the anticipated action and his interest therein; (3) the names and residences, if known, or a description of the persons expected to be interested adversely to petitioner; (4) the names and addresses of the persons to be examined, the substance of the testimony which he expects to elicit from each, and petitioner's reasons for desiring to perpetuate such testimony; and (5) a request for an order of the court authorizing such petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(b) Notice and Service. The petitioner shall thereafter serve or cause to be served at least fifteen days before the date of hearing, a notice upon the witness, or witnesses, and upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court at a time and place named in such notice for the order requested in the petition, and which notice may be served as provided in Rule ____ (currently Rule 21a). If the verified petition states that the name or the residence of any expected adverse party is unknown to petitioner and his agent or attorney and cannot be ascertained after diligent inquiry, the clerk of the court or justice of the peace shall, on petitioner's request, cause the notice to any such party or parties to be published in some newspaper in the county where the petition is filed if there be a newspaper published in such county, but if no newspaper be published in such county, then in a newspaper in the nearest county where a newspaper is published, once each week for two consecutive weeks, stating the substance of the petition, the court in which it is filed and the number thereof, the name of petitioner and each of the witnesses and their addresses, the names and addresses of the expected adverse parties, if known, or a description of such parties, and that a hearing will be had on such petition at a designated time and place on or after the 14th day following the first publication of such notice. Provided, however, that in any case where justice or necessity so requires the judge or justice may permit the taking of such depositions upon shorter notice than herein prescribed, or may extend such time in order to permit service on any adverse party.

(c) Application to Probate Will. An application or petition, or an anticipated application or petition, for the

probate of a will shall be considered as a suit within the meaning and purport of this rule; and, whenever any person in this State shall desire to perpetuate testimony for use in an anticipated application for the probate of a will, the notice, accompanied by a copy of the aforesaid petition may be served by posting as prescribed by Section 33(f)(2) of the Texas Probate Code, such notice to be directed to all parties interested in the estate of the testator and to comply with the requirements of Section 33(c) of said Code insofar as they may be applicable.

(d) Order and Manner of Taking, Etc. If satisfied that the perpetuation of testimony may prevent a failure or delay of justice, the court or justice shall make an order authorizing the taking of such depositions and state whether such depositions shall be taken upon oral examination or written questions. The time and place at which such depositions shall be taken may be stated in such order or by means of notice as provided for depositions generally. The deposition rules not inconsistent with this rule shall apply to the taking, signing, returning, objections to, and use of such depositions. Any interested party may, after the filing in the court of any deposition taken under notice by publication under this rule, move to suppress said deposition, in whole or in part, by bill of review, such right to move to suppress to be cumulative of all other rights to attack or oppose said deposition.

[Current Rule: Tex. R. Civ. P. 187].
[Original Source: Art. 3742, unchanged].

Rule 50. Deposition upon Oral Examination

(a) When Depositions May Be Taken. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if a party seeks to take a deposition prior to the appearance day of any defendant.

[Current Rule: Tex. R. Civ. P. 200(1)].
[Original Source: Art. 3753, unchanged].
[Official Comments]:

Change by amendment effective September 1, 1962. Provision regarding subpoena duces tecum inserted.

Change by amendment effective January 1, 1971. Reference to Rule 202 has been changed to Rule 201.

Change by amendment effective February 1, 1973. Sentence providing that a corporation, partnership, association, or governmental agency may be named as the witness has been

added.

Change by amendment effective April 1, 1984. The rule is rewritten. The first sentence of subdivision 1 is taken from former Rule 186a and Fed. R. Civ. P. 30(a). The second sentence is based upon former Rule 186b and Fed. R. Civ. P. 30(a) and (b)(2). Subdivision 2 has been redrafted to provide that all parties are entitled to notice of a deposition and to conform it to the provisions of Rule 201 dealing with the subpoena duces tecum and designation of a witness by corporate deponents. The new language in subdivision 2b is a verbatim adoption of the first sentence of Federal Rule 30(b)(6).

Change by amendment effective September 1, 1990. To provide for persons who may attend deposition without notification, and to provide for reasonable notice of any party's intent to have any other persons attend.

(b) Notice of Examination.

(1) Reasonable notice must be served in writing by the party, or his attorney, proposing to take a deposition upon oral examination, to every other party or his attorney of record. The notice shall state the name of the deponent, the time and the place of the taking of his deposition, and if the production of documents or tangible things is desired, a designation of the items to be produced by the deponent in compliance with Rule _____ (currently Rule 201) [production of documents and things]. The notice shall also state the identity of persons who will attend other than the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the deposition. If any party intends to have any other persons attend, that party must give reasonable notice to all parties of the identity of such other persons.

(2) A party may in his notice name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested.

(3) Any party intending to make a non-stenographic recording shall give five days' notice to all other parties by certified mail, return receipt requested, and shall specify in said notice the type of non-stenographic recording which will be used. After the notice is given, any party may make a motion for relief under Rule _____ (currently Rule 166b). If a hearing is not held prior to the taking of the deposition, the non-stenographic recording shall be made subject to the court's ruling at a later time.

[Current Rule: Tex. R. Civ. P. 200(2), 202(1)].
[Original Source: Art. 3753 and New Rule].
[Task Force Comments: Combines notice provisions from rules 200(2), and 202(1)].

(c) Examination, Cross-Examination and Objections.

(1) Written Cross-Questions on Oral Examination. At any time before the expiration of ten days from the date of the service of the notice, any party, in lieu of participating in the oral examination may serve written questions on the party proposing to take the deposition who shall cause them to be transmitted to the officer authorized to take the deposition who shall propound them to the witness and record the answers verbatim.

(2) Oath. Every person whose deposition is taken upon oral examination shall be first cautioned and sworn to testify the truth, the whole truth and nothing but the truth.

(3) Examination. The witness shall be carefully examined, his testimony shall be recorded at the time it is given and thereafter transcribed by the officer taking the deposition, or by some person under his personal supervision.

(4) Objections to Testimony. The officer taking an oral deposition shall not sustain objections made to any of the testimony or fail to record the testimony of the witness because an objection is made by any of the parties or attorneys engaged in taking the testimony. Any objections made when the deposition is taken shall be recorded with the testimony and reserved for the action of the court in which the cause is pending. Absent express agreement recorded in the deposition to the contrary:

(A) objections to the form of questions or the nonresponsiveness of answers are waived if not made at the taking of an oral deposition and;

(B) except as provided in (1) above, or unless otherwise provided by agreement of the parties recorded by the officer in the deposition transcript, the court shall not be confined to objections made at the taking of the testimony.

[Current Rule: Tex. R. Civ. P. 204].
[Original Source: Art. 3758, unchanged].
[Official Comments]:

Change by amendment effective December 31, 1947. The previous rule has been almost completely redrafted and the procedure, as to cross-interrogatories, has been materially altered.

Change by amendment effective January 1, 1971. The requirement that written interrogatories be filed with the clerk and the reference to the commission have been eliminated; the word ''questions'' has been substituted for ''interrogatories''; and a provision has been added requiring the party proposing to take the deposition to cause written questions to be presented to the officer.

Change by amendment effective April 1, 1984. Subdivision 1 is former Rule 204 revised; subdivision 2 comes from former Rule 205; subdivision 3 from former Rule 206; subdivision 4 from former Rule 207. A major change is the waiver of objections to form of questions and responsiveness of answers if not made at taking of oral deposition.

(d) Record and Transcript of Examination.

(1) Submission to Witness, Changes, Signing. When the testimony is fully transcribed the deposition officer shall transmit or provide the original deposition transcript to the witness or if the witness is a party with an attorney of record, to the attorney of record, for examination and signature, by the witness before any officer authorized to administer an oath, unless such examination and signature are waived by the witness and by the parties. No erasures or obliterations of any kind are to be made to the original testimony as transcribed by the deposition officer. Any changes in form or substance which the witness desires to make shall be furnished to the deposition officer by the witness, together with a statement of the reasons given by the witness for making such changes. The changes and the statement of the reasons for the changes shall be 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 ____ (currently Rule 207), the Court determines that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

[Current Rule: Tex. R. Civ. P. 205].
[Original Source: New Rule].
[Official Comments]:

Change by amendment effective January 1, 1988. The amendments to this rule are to update the rule to conform to the usual practices used in finalizing the deposition.

(2) Certification. The officer shall attach as part of the deposition transcript a certificate duly sworn by such officer which shall state the following:

(A) that the witness was duly sworn by the officer;

(B) that the transcript is a true record of the testimony given by the witness;

(C) the amount of charges for the officer's preparation of the completed deposition transcript and any copies of exhibits;

(D) 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;

(E) that changes, if any made by the witness, in the transcript and otherwise are attached thereto or incorporated therein;

(F) that the witness returned or did not return the transcript;

(G) 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, is in the possession and custody of the attorney or party who asked the first question appearing in the transcript for safekeeping and use at trial;

(H) that a copy of the certificate was served on all parties pursuant to Rule ____ (currently Rule 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.

[Current Rule: Tex. R. Civ. P. 206(1), (4)].
[Original Source: New Rule].
[Official Comments]:

New rule effective April 1, 1984. The former Rule 206 is incorporated into Rule 204. This rule revises and

incorporates former Rules 208, 208a, and 210.

(3) **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.

The deposition officer shall give notice to all parties of delivery of the deposition transcript and copies of exhibits. It shall be sufficient notice of delivery for the officer to serve on each party a copy of the officer's certification pursuant to Tex.R.Civ.P. ____ (currently Rule 21a).

[Current Rule: Tex. R. Civ. P. 206(2) and (6)].
[Original Source: New Rule].

(4) **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 party producing them, and such witness or party shall thereafter maintain and preserve the original exhibits and shall produce any such original exhibits for hearing or trial upon seven (7) days notice from any party. Copies annexed to the original deposition transcript may be used for all purposes.

[Current Rule: Tex. R. Civ. P. 206(3)].
[Original Source: New Rule].

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

[Current Rule: Tex. R. Civ. P. 206(5)].
[Original Source: New Rule].

Rule 51. Deposition Upon Written Questions

(a) Serving Questions; Notice. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. Leave of court, granted with or without notice, must be obtained only if a party seeks to take a deposition prior to the appearance day of any defendant. Attendance of witnesses and the production of designated items may be compelled as provided in Rule ___ (currently Rule 201).

A party proposing to take a deposition upon written questions shall serve them upon every other party with a written notice in compliance with Rule ____ (currently Rule 201 a reasonable time before the deposition is to be taken.

(b) Cross-Questions, Redirect Questions, Re-Cross Questions and Formal Objections. Any party may serve cross-questions upon all other parties within ten days after the notice and direct questions are served. Within five days after being served with cross-questions a party may serve redirect questions upon all other parties. Within three days after being served with redirect questions a party may serve recross questions upon all other parties. Objections to the form of written questions are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within five days after service of the last questions authorized. The court may for cause shown enlarge or shorten the time.

(c) Deposition Officer; Interpreter. Any person authorized to administer oaths including notaries public (whether or not the person is a certified shorthand reporter), is an officer who is authorized to issue a subpoena or subpoena duces tecum for a written deposition as provided in Rule ____ (currently Rule 201) and is an officer before whom a written deposition may be taken. An officer who is authorized to take a written deposition shall have authority, when he deems it expedient, to summon and swear an interpreter to facilitate the taking of the deposition.

(d) Officer to take Responses and Prepare Record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly to administer an oath to the witness, to take the testimony of the

witness in response to the questions and to prepare, certify and deliver the deposition, in the manner provided by Rule _____ (currently Rule 204), attaching thereto the copy of the notice and questions.

[Current Rule: Tex. R. Civ. P. 208].
[Original Source: New Rule].
[Official Comments: New rule effective April 1, 1984. Former rule 208 is incorporated into Rule 206. This new rule revises and consolidates the written deposition practice as formerly stated in Rules 189, 190, 191, 192, 196, 197, and 198 except that the use of written depositions in court proceedings is covered by new Rule 207.

Section 4 states that a person authorized to administer oaths, such as a notary public, may take written depositions, even though that person is not a certified shorthand reporter.

Subdivision 5, by reference to new Rules 205 and 206, conforms the taking of the written deposition, its filing and other procedures to the oral deposition practice.

Change by amendment effective September 1, 1990. Rule 208 is modified to conform to Rule 200 and permit the deposition on written questions of a defendant prior to appearance date with permission of the court. Rule 208 is also amended to provide for persons who may attend deposition without notification, and to provide for reasonable notice of any party's intent to have any other persons attend].

[Task Force Comments: Requirements of notice (Rule 201(1)) deleted, with reference to Rule 46(2) substituted therefor. Rule 201(2), "Notice by Publication," deleted].

Rule 52. Use of Depositions in Court Proceedings

(a) Use of Deposition Transcripts in Same Proceeding.

(1) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition taken in the same proceeding, insofar as admissible under the Texas Rules of Civil Evidence, may be used by any person for any purpose against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof. Further, the Texas Rules of Civil Evidence shall be applied to each question and answer as though the witness were then present and testifying. Depositions shall include the original transcripts or any certified copies thereof. Unavailability of the deponent is not a requirement for admissibility.

(2) Included Within Meaning of "Same Proceeding." Substitution of parties pursuant to these rules does not affect the right to use depositions previously taken; and, when a suit has been brought in a court of the United States or of this or any other state and another suit involving the same subject matter is brought between the same parties or their representatives or successors in interest, all depositions lawfully taken in each suit may be used in the other suit(s) as if originally taken therefor.

(3) Parties Joined After Deposition Taken. If one becomes a party after the deposition is taken and has an interest similar to that of any party described in a. or b. above, the deposition is admissible against him only if he has had a reasonable opportunity, after becoming a party, to redepose the deponent, and has failed to exercise that opportunity.

(b) Use of Deposition Transcripts Taken in Different Proceeding. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition taken in a different proceeding may be used subject to the provisions and requirements of the Texas Rules of Civil Evidence. Further, the Texas Rules of Civil Evidence shall be applied to each question and answer as though the witness were then present and testifying.

(c) Motions to Suppress. When a deposition transcript has been delivered by the deposition officer pursuant to Rule _____ (currently Rule 206) and notice of delivery given at least one entire day before the day on which the case is called for trial, errors and irregularities in the notice of delivery, and errors in the manner in which the testimony is transcribed or the deposition transcript is prepared, signed, certified, sealed, endorsed, delivered, or otherwise dealt with by the deposition officer under Rules _____ and _____ (currently Rules 205 and 206) are waived, unless a motion to suppress the deposition transcript or some part thereof is made and notice of the written objections made in the motion is given to every other party before the trial commences.

(d) Retention and Disposition of Deposition Transcripts and Depositions upon Written Questions.

In the event deposition transcripts and depositions upon written questions are filed with the court, the clerk shall retain and dispose of same as directed by the Supreme Court.

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

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

This order shall apply only to: (1) those cases in which judgment has been rendered on service of process by publication and in which no motion for new trial was filed within two years after judgment was signed; and, (2) all other cases in which judgment has been signed for one year and in which no appeal was perfected or in which a perfected appeal was dismissed or concluded by a final judgment as to all parties and the issuance of the appellate court's mandate such that the case is no longer pending on appeal or in the trial court.

After first giving all the attorneys of record written notice that they have an opportunity to claim and withdraw the same, the clerk, unless otherwise directed by the court, may dispose of them thirty days after giving such notice. If any such document is desired by more than one attorney, the clerk shall make the necessary copies and prorate the cost among all the attorneys desiring the document.

[Current Rule: Tex. R. Civ. P. 207 and 209].
[Original Source: See Tex. Civ. P. Rem. C. §20.001].
[Official Comments]:

Rule 207, New rule effective April 1, 1984. Former Rule 207 is incorporated into Rule 204. This rule replaces former Rules 211, 212, and 213.

Rule 53. Compelling Appearance at Depositions

(a) Subpoena. Any person may be compelled to appear and give testimony by deposition in a civil action. Upon proof of service of a notice to take a deposition, written or oral, the clerk or any officer authorized to take depositions and any certified shorthand reporter shall immediately issue and cause to be served upon the witness a subpoena directing him to appear before the officer at the time and place stated in the notice for the purpose of giving his deposition.

(b) Party. When the deponent is a party, service of the notice upon the party or his attorney shall have the same effect as a subpoena served on the party. If the deponent is an agent or employee who is subject to the control of a party, notice to take the deposition which is served upon the party or the party's attorney of record shall have the same effect as a subpoena served on the deponent.

(c) Organizations. When the deponent named in the subpoena or notice is a public or private corporation, a partnership, association or governmental entity, the subpoena or notice shall direct the deponent named to designate the person or persons to testify in the deponent's behalf, and, if the deponent so desires, the matters on which each person designated will testify, and shall further direct that the person or persons designated by the deponent will testify and the notice shall further direct that the person or person designated by the deponent appear before the officer at the time and place stated in the subpoena or notice for the purpose of giving their testimony.

(d) Production. Any deponent may be compelled by subpoena duces tecum or notice to produce items or things within his care, custody or control. The subpoena duces tecum or notice shall be in compliance with Rule ____ (currently Rule _____) [production of documents and things].

(e) Time and Place. The time and place designated shall be reasonable. The place of taking a deposition shall be in the county of the witness' residence, or where he is employed or regularly transacts business in person or at such other convenient place as may be directed by the court in which the cause is pending; provided, however, the deposition of a party or the person or person designated by a party under paragraph 3 above may be taken in the county of suit. A nonresident or transient person may be required to attend in the county where he is served with a subpoena, or within one hundred miles from the place of service, or at such other convenient place as the court may direct. The witness shall remain in attendance from day to day until such deposition is begun and completed.

[Current Rule: Tex.R.Civ.P. 201].
[Original Source: Arts. 3754, 3755, and 3756].
[Official Comments]:

Change by amendment effective February 1, 1973. Sentence concerning subpoena where witness is a corporation, partnership, association, or governmental agency and not a party to the suit has been added.

Change by amendment effective January 1, 1981. The rule is completely rewritten.

Change by amendment effective April 1, 1984. Statutory references concerning persons authorized to take depositions have been deleted from subdivision 1. A change has been made to limit the coverage of current Rule 201(5) so that the county of suit principle applies only to persons designated by organizations, etc., who are parties.

Rule 54. Depositions in Foreign Jurisdictions

(a) 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.

(b) Upon the granting of a commission to take the oral deposition of a person under paragraph (a) 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.

(c) 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.

(d) 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.

(e) Evidence obtained in response to a letter rogatory or a letter of request need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements of depositions taken within the State of Texas under these rules.

[Current Rule: Tex. R. Civ. P. 188].
[Original Source: New Rule, effective April 1, 1984].

Rule 55. Abuse of Discovery; Sanctions

(a) Motion for Sanctions or Order Compelling Discovery. A party, upon reasonable notice to other parties and all other persons affected thereby, may apply for sanctions or an order compelling discovery as follows:

(1) Appropriate Court. On matters relating to a deposition, an application for an order to a party may be made to the court in which the action is pending, or to any district court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken. As to all other discovery matters, an application for an order will be made to the court in which the action is pending.

(2) Motion.

(A) If a party or other deponent which is a corporation or other entity fails to make a designation under Rules _____, _____, or ____ (currently Rules 200-2b, 201-4 or 208); or

(B) if a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails:

(i) to appear before the officer who is to take his deposition, after being served with a proper notice; or

(ii) to answer a question propounded or submitted upon oral examination or upon written questions; or

(C) if a party fails:

(i) to serve answers or objections to interrogatories submitted under Rule ____ (currently Rule 168), after proper service of the interrogatories; or

(ii) to answer an interrogatory submitted under Rule 168; or

(iii) to serve a written response to a request for inspection submitted under Rule ____ (currently Rule 167), after proper service of the request; or

(iv) to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection submitted under Rule ____ (currently Rule 167); the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or

inspection or production in accordance with the request, or apply to the court in which the action is pending for the imposition of any sanction authorized by Paragraph (b)(2)(currently subparagraph (2)(b) herein without the necessity of first having obtained a court order compelling such discovery.

When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion pursuant to Rule ____ (currently Rule 166b).

(3) Evasive or Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) Disposition of Motion to Compel: Award of Expenses. If the motion is granted, the court shall, after opportunity for hearing, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay, at such time as ordered by the court, the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or attorney advising such motion to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

In determining the amount of reasonable expenses, including attorney fees, to be awarded in connection with a motion, the trial court shall award expenses which are reasonable in relation to the amount of work reasonably expended in obtaining an order compelling compliance or in opposing a motion which is denied.

(5) Providing Person's Own Statement. If a party fails to comply with any person's written request for the person's own statement as provided in Paragraph ____ of Rule _____ (currently Rule 166b), the person who made the request may move for an order compelling compliance with Paragraph ___ of Rule ____ (currently Rule 166b). If the motion is granted, the movant may recover the expenses incurred in obtaining the order, including attorney fees, which are reasonable in relation to the amount of work reasonably expended in obtaining the order.

(b) Failure to Comply with Order or with Discovery Request.

(1) Sanctions by Court in District Where Deposition is Taken. If a deponent fails to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rules ____, ____, or ____ (currently Rules 200-2b, 201-4 or 208) to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under paragraph 1 of this rule or Rule ____ (currently Rule 167a), the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:

(A) An order disallowing any further discovery of any kind or of a particular kind by the disobedient party;

(B) An order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;

(C) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(D) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(E) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(F) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(G) When a party has failed to comply with an order under Rule ____ (currently Rule 167a(a)) requiring him to appear or produce another for examination, such orders as are listed in Paragraphs ___, ____, ____, ____ or ____ (currently Paragraphs (1), (2), (3), (4) or (5)) of this subdivision, unless

the person failing to comply shows that he is unable to appear or to produce such person for examination.

(H) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

(3) Sanction Against Nonparty for Violation of Rule ____ (currently Rule 167). If a nonparty fails to comply with an order under Rule ____ (currently Rule 167), the court which made the order may treat the failure to obey as contempt of court.

(c) Abuse of Discovery Process in Seeking, Making, or Resisting Discovery. If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may, after notice and hearing, impose any appropriate sanction authorized by Paragraphs (1), (2), (3), (4), (5), and (8) of paragraph (b)(2) of this rule. Such order of sanction shall be subject to review on appeal from the final judgment.

(d) Failure to Comply with Rule ____ (currently Rule 169).

(1) Deemed Admission. Each matter of which an admission is requested shall be deemed admitted unless, within the time provided by Rule ____ (currently Rule 169), the party to whom the request is directed serves upon the party requesting the admissions a sufficient written answer or objection in compliance with the requirements of Rule ____ (currently Rule 169), addressed to each matter of which an admission is requested. For purposes of this subdivision an evasive or incomplete answer may be treated as a failure to answer.

(2) Motion. The party who has requested the admission may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of Rule ____ (currently Rule 169), it may order either that the matter is admitted or that an amended answer be served. The provisions of paragraph d of subdivision 1 of this rule apply to the award of expenses incurred in relation to the motion.

(3) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule ____ (currently Rule 169) and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule ____ (currently Rule 169(1), or (2)) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(e) Failure to Respond to or Supplement Discovery. A party who fails to respond to or supplement his response to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in a response or supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter, unless the trial court finds that good cause sufficient to require admission exists. The burden of establishing good cause is upon the party offering the evidence and good cause must be shown in the record.

(f) Exhibits to Motions and Responses. Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents.

[Current Rule: Tex. R. Civ. P. 215].
[Original Source: Art. 3768, unchanged].
[Task Force Comment: But see Report of Texas Supreme Court Task Force on Sanctions].
[Official Comments]:

New rule effective April 1, 1984. Rule 170 is deleted because this rule covers conduct in violation of Rule 167. The revisions to Rule 168, the deletion of Rule 170, and the provisions of new Rule 215 are intended to clarify under what circumstances the most severe sanctions authorized under the rules are imposable. New Rule 215 retains the conclusion reached in LEWIS V. ILLINOIS EMPLOYERS INS. CO. OF WAUSAU, 590 S.W.2d 119 (Tex. 1979), and extends such rule to cover all discovery requests, except requests for admissions. New Rule 215 leaves to the discretion of the court whether to impose sanctions with or without an order compelling discovery, so that the court will be free to apply the proper sanction or order based upon the degree of the discovery abuse involved.

This rule is rewritten to gather all discovery sanctions into a single rule. It includes specific provisions concerning the consequences of failing to comply with Rule 169, and spells out penalties imposable upon a party who fails to supplement discovery responses. It provides for sanctions for those who seek to make discovery in an abusive manner.

Change by amendment effective January 1, 1988. This amendment states that the party offering the evidence has the burden of establishing good cause for any failure to supplement discovery before trial and provides a manner for making a record for discovery hearings.

Change by amendment effective September 1, 1990. To require notice and hearing before an imposition of sanctions under subdivision 3, and to specify that such sanctions be appropriate.

B. PRETRIAL PROCEDURE

Rule 60. Scheduling and Pretrial Conferences

(a) As soon as practicable but in no event more than one hundred and twenty (120) days after the filing of a petition, the court, after a hearing with the attorneys for the parties and any unrepresented parties at an attended conference or by telephone conference, shall enter a scheduling order that establishes the times for

(1) Joinder of additional parties;

(2) Amending or supplementing pleadings;

(3) Filing and hearing motions and special exceptions;

(4) Designating testifying experts;

(5) Taking of experts' depositions;

(6) Completion of discovery;

(7) Discovery problems conference;

(8) Initial and final pretrial hearings;

(9) Trial on the merits; and

(10) Such other matters which the Court determines should be scheduled.

(b) The initial pretrial conference is to assist in the preparation and disposition of the case without undue expense or burden to the parties and for the purpose of establishing early and continuing control so that the case will not be protracted for lack of management, expediting the disposition of the action, discouraging wasteful pretrial activities, improving the quality of the trial through more thorough preparation and facilitating the settlement of the case.

(c) Matters to Be Considered at the Conference. The participants at any conference under this rule shall consider and may take action with respect to

(1) All pending dilatory pleas, motions and exceptions;

(2) The necessity of desirability of amendments to the pleadings;

(3) A discovery schedule and consideration of discovery problems;

(4) Requiring written statements of the parties' contentions;

(5) Identification of fact and simplification of the issues;

(6) The possibility of obtaining stipulations of fact;

(7) The identification of legal matters to be ruled on or decided by the court;

(8) The exchange of a list of direct fact witnesses, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before the time of trial, who will be called to testify at trial, stating their addressees and telephone number, and the subject of the testimony of each such witness;

(9) The exchange of a list of expert witnesses who will be called to testify at trial, stating their address and telephone number, and the subject of the testimony and opinions that will be proffered by each expert witnesses;

(10) Agreed applicable propositions of law and contested issues of law;

(11) Proposed jury charge questions, instructions, and definitions for a jury case or proposed findings of fact and conclusions of law for a non-jury case;

(12) The marking and exchanging of all exhibits that any party may use at trial and stipulation to the authenticity and admissibility of exhibits to be used at trial;

(13) Written trial objections to the opposite party's exhibits, stating the basis for each objection;

(14) The advisability of a preliminary reference of issues to a master or auditor for findings to be used as evidence when the trial is to be by jury;

(15) The settlement of the case, and to aid such consideration, the court may encourage settlement.

(16) Such other matters as may aid in the disposition of the action.

(d) At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so on motion by the attorney for any party and following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

(e) Final Pretrial Conference. Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(f) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent courts of the action unless modified by the court.

(g) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule _____ (currently Rule 215(2)(B), (C), (D)). In lieu of or in addition to any other sanction, the judge shall require the party

or the attorney representing any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expense unjust.

[Current Rule: Tex. R. Civ. P. 166].
[Original Source: New Rule effective Mar. 1, 1950].
Official Comments]:

Change by amendment effective March 1, 1952. The last sentence is added to subdivision (a).

Change by amendment effective January 1, 1967. Fourth sentence of subdivision (c) was added.

Change by amendment effective January 1, 1971. The first sentence of subdivision (c) has been added, and the words "answers to interrogatories" have been inserted in the fifth sentence of subdivision (c).

Change by amendment effective January 1, 1978. The time requirements in subdivision (c) are changed. The third, fourth, and fifth sentences of subdivision (c) are new. The last sentence of subdivision (c) is new.

Change by amendment effective January 1, 1981. The second sentence adds the words "with notice to opposing counsel," and "and any supporting affidavits," and "filed and." Third sentence adds the words, "file and."

Change by amendment effective April 1, 1984. Subdivision (c) is changed to include stipulations and authenticated and certified public records as matters in support of a summary judgment.

Change by amendment effective September 1, 1990. This amendment provides a mechanism for using previously non-filed discovery in summary judgment practice. Such proofs must all be filed in advance of the bearing in accordance with Rule 166a. Subdivisions (d) through (g) are renumbered as subdivisions (e) through (h).

[Proposed Official Comment: This proposed rule is an amalgamation of Tex. R. Civ. P. 166 as amended in 1988 and Fed. R. Civ. P. 16 as amended in 1982. It also includes a portion of Federal Rule 26. The most significant change is the requirement for a mandatory scheduling order to be made "as soon as practicable but in no event more than 120 days after filing the petition" and mandatory pretrial. Other changes include the addition of language embracing the Texas

Supreme Court's decision in Koslow's v. Mackie, 796 S.W.2d 700, 705 (Tex. 1990)].

[Task Force Comment: This draft rule is being considered by the Committee on Court Rules].

(h) Issue of Law and Dilatory Pleas. When a case is called for trial in which there has been no pretrial hearing as provided by Rule ____ (currently Rule 166), the issue of law arising on the pleadings, all pleas in abatement and other dilatory pleas remaining undisposed of shall be determined; and it shall be no cause for postponement of a trial of the issues of law that a party is not prepared to try the issues of fact.

[Current Rule: Tex. R. Civ. P. 175].
[Original Source: Art. 2166, with minor textural changes].

Rule 61. Dismissal for Want of Prosection

(a) Failure to Appear. A case may be dismissed for want of prosecution on failure of any party seeking affirmative relief to appear for any hearing or trial of which the party had notice. Notice of the court's intention to dismiss and the date and place of the dismissal hearing shall be sent by the clerk to each attorney of record, and to each party not represented by an attorney and whose address is shown on the docket or in the papers on file, by posting same in the United States Postal Service. The clerk shall note affirmatively on the docket sheet the fact of mailing the notice of dismissal. At the dismissal hearing, the court shall dismiss for want of prosecution unless there is good cause for the case to be maintained on the docket. If the court maintains the case on the docket, it shall render a pretrial order assigning a trial date and setting deadlines for joinder, discovery, pleading, and all other pretrial matters. The case may be continued thereafter only for valid and compelling reasons specifically determined by court order. Notice of the signing of the order of dismissal shall be given as provided in Rule ____ (currently Rule 306a). Failure to mail notices as required by this rule shall not affect any of the periods mentioned in Rule ____ (currently Rule 306a) except as provided in that rule.

(b) Non-Compliance with Time Standards. Any case not disposed of within time standards promulgated by the Supreme Court under its Administrative Rules may be placed on a dismissal docket.

(c) Reinstatement. A reinstatement motion shall set forth the grounds and be verified by the movant or his attorney. It shall be filed with the clerk within 30 days after the signing of the dismissal order or within the period provided by Rule ____ (currently Rule 306a). A copy of the motion shall be served on

each attorney of record and each party not represented by an attorney whose address is shown on the docket or in the papers on file. The clerk shall deliver a copy of the motion to the judge, who shall set a hearing on the motion as soon as is practicable. The court shall notify all parties or their attorneys of record of the date, time, and place of the hearing.

After the hearing and upon finding that the prior failure to appear was not intentional or the result of conscious indifference but was due to accident or mistake or that the failure has been otherwise reasonably explained, the court shall reinstate the case.

If for any reason the reinstatement motion is not decided by a signed written order within seventy-five days after the judgment is signed, or within such other time as may be allowed by Rule ____ (currently Rule 306a), the motion shall be deemed overruled by operation of law. If a timely reinstatement motion is filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to reinstate the case until 30 days after all such timely filed motions are overruled, either by written and signed order or by operation of law, whichever occurs first.

(d) Cumulative Remedies. This dismissal and reinstatement procedure shall be cumulative of the rules and laws governing any other procedures available to the parties in such cases. The same reinstatement procedures and timetable are applicable to all dismissals for want of prosecution including cases which are dismissed pursuant to the court's inherent power, whether or not a motion to dismiss has been filed.

[Current Rule: Tex. R. Civ. P. 165a].
[Original Source: New Rule effective February 1, 1973].
[Official Comments]:

Change by amendment effective January 1, 1976. The words ''or docket call'' are deleted after the word ''trial'' in the first sentence.

Change by amendment effective January 1, 1984. The rule is rewritten to provide a statewide rule for dismissal and reinstatement of cases.

Rule 62. Masters and Auditors

(a) Masters in Chancery. The court may, in exceptional cases, for good cause appoint a master in chancery, who shall be a citizen of this State, and not an attorney for either party to the action, nor related to either party, who shall perform all of the duties required of him by the court, and shall be under orders of the court, and have such power as the master of chancery has in a court of equity.

The order of reference to the master may specify or limit his powers, and may direct him to report only upon particular issues, or to do or perform particular acts, or to receive and report evidence only and may fix the time and place for beginning and closing the hearings, and for the filing of the master's report. Subject to the limitations and specifications stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient production before him of evidence upon all matters embraced in the reference, including the production of books, papers, vouchers, documents and other writings applicable thereto. He may rule upon the admissibility of evidence, unless otherwise directed by the order of reference and has the authority to put witnesses on oath, and may, himself, examine them, and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner as provided for a court sitting in the trial of a case.

The clerk of the court shall forthwith furnish the master with a copy of the order of reference.

The parties may procure the attendance of witnesses before the master by the issuance and service of process as provided by law and these rules.

The court may confirm, modify, correct, reject, reverse or recommit the report, after it is filed, as the court may deem proper and necessary in the particular circumstances of the case. The court shall award reasonable compensation to such master to be taxed as costs of suit.

[Current Rule: Tex. R. Civ. P. 171].
[Original Source: Art. 2320 and Federal Rule 53 (part)].

(b) Audit. When an investigation of accounts or examination of vouchers appears necessary for the purpose of justice between the parties to any suit, the court shall appoint an auditor or auditors to state the accounts between the parties and to make report thereof to the court as soon as possible. The auditor shall verify his report by his affidavit stating that he has carefully examined the state of the account between the parties, and that his report contains a true statement thereof, so far as the same has come within his knowledge. Exceptions to such report or of any item thereof must be filed within 30 days of the filing of such report. The court shall award reasonable compensation to such auditor to be taxed as costs of suit.

[Current Rule: Tex. R. Civ. P. 172].
[Original Source: Art. 2292, unchanged].

Rule 63. Special Appearance

(a) In General. A special appearance may be made by any party either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that such party or property is not amenable to process issued by the courts of this State. A special appearance may be made as to an entire proceeding or as to any severable claim involved therein. Such special appearance shall be made by sworn motion filed prior to motion to transfer venue or any other plea, pleading or motion; provided however, that a motion to transfer venue and any other plea, pleading, or motion may be contained in the same instrument or filed subsequent thereto without waiver of such special appearance; and may be amended to cure defects. The issuance of process for witnesses, the taking of depositions, the serving of requests for admissions, and the use of discovery processes, shall not constitute a waiver of such special appearance. Every appearance, prior to judgment, not in compliance with this rule is a general appearance.

(b) Motions to Challenge Jurisdiction Shall be Heard Before Other Motions. Any motion to challenge the jurisdiction provided for herein shall be heard and determined before a motion to transfer venue or any other plea or pleading may be heard. No determination of any issue of fact in connection with the objection to jurisdiction is a determination of the merits of the case or any aspect thereof.

(c) Determination of Special Appearance. The court shall determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony. The affidavits, if any, shall be served at least seven days before the hearing, shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.

Should it appear from the affidavits of a party opposing the motion that he or she cannot for reasons stated present by affidavit facts essential to justify his or her opposition, the court may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Should it appear to the satisfaction of the court at any time that any of such affidavits are presented in violation of Rule _____ (currently Rule 13), the court shall impose sanctions in accordance with that rule.

(d) Objection to Jurisdiction Sustained. If the court sustains the objection to jurisdiction, an appropriate order shall be entered. If the objection to jurisdiction is overruled, the objecting party may thereafter appear generally for any purpose. Any such special appearance or such general appearance

shall not be deemed a waiver of the objection to jurisdiction when the objecting party or subject matter is not amenable to process issued by the courts of this State.

[Current Rule: Tex. R. Civ. P. 120a].
[Original Source: New Rule effective September 1, 1962].
[Official Comments]:

Change by amendment effective January 1, 1976. Words are added in the third sentence which permit amendments to the special appearance motion.

Change by amendment effective September 1, 1983. To conform to S.B. 898, 68th Legislature, 1983.

Change by amendment effective September 1, 1990. To provide for proof by affidavit at special appearance hearings, with safeguards to responding parties. These amendments preserve Texas prior practice to place the burden of proof on the party contesting jurisdiction.

Rule 64. Venue

(a) Change of Venue by Consent. Upon the written consent of the parties filed with the papers of the cause, the court, by an order entered on the minutes, may transfer the same for trial to the court of any other county having jurisdiction of the subject matter of such suit. A written consent of the parties to transfer the case to another county may be filed with the clerk of the court at any time.

(b) Motion to Transfer Venue.

(1) Filing.

(A) Time to File. An objection to improper venue is waived if not made by written motion filed prior to or concurrently with any other plea, pleading or motion except a special appearance motion provided for in Rule ____ (currently Rule 53).

(B) How to File. The motion objecting to improper venue may be contained in a separate instrument filed concurrently with or prior to the filing of the movant's first responsive pleading or the motion may be combined with other objections and defenses and included in the movant's first responsive pleading.

(C) Requisites. The motion, and any amendments to it, shall state that the action should be transferred to another specified county of proper venue because:

(i) The county where the action is pending is not a proper county; or

(ii Mandatory venue of the action in another county is prescribed by one or more specific statutory provisions which shall be clearly designated or indicated.

The motion shall state the legal and factual basis for the transfer of the action and request transfer of the action to a specific county of mandatory or proper venue. Verification of the motion is not required. The motion may be accompanied by supporting affidavits as provided in section (2)(C)(1) of this rule.

(D) Service. A copy of any instrument filed pursuant to this rule shall be served in accordance with Rule ____ (currently Rule 21a).

(E) Response. A response to the motion to transfer is not required, except as provided in section (2)(c)(1) of this rule.

(2) Determination of Motion to Transfer.

(A) Consideration of Motion. The determination of a motion to transfer venue shall be made promptly by the court and such determination must be made in a reasonable time prior to commencement of the trial on the merits. The movant has the duty to request a setting on the motion to transfer. Except on leave of court each party is entitled to at least 45 days notice of a hearing on the motion to transfer.

Except on leave of court, any response or opposing affidavits shall be filed at least 30 days prior to the hearing of the motion to transfer. The movant is not required to file a reply to the response but any reply and any additional affidavits supporting the motion to transfer must, except on leave of court, be filed not later than 7 days prior to the hearing date.

(B) Burden of Establishing Venue.

(i) Maintenance of Action in a Particular County. A party who seeks to maintain venue of the action in a particular county in reliance upon Section 15.001 (General Rule), Sections 15.011-15.017 (Mandatory Venue), Sections 15.031-15.040 (Permissive Venue), or Sections 15.061 and 15.062 (Multiple Claims), Civil Practice and Remedies Code, has the burden to make proof, as provided in section _(2)(C) of this rule, that venue is maintainable in the county of suit.

(ii) Transfer of Action to Another County. A party who seeks to transfer venue of the action to another specified county under Section 15.001 (General Rule), Sections 15.011-15.017 (Mandatory Venue), Sections 15.031-15.040

(Permissive Venue), or Sections 15.061 and 15.062 (Multiple Claims), Civil Practice and Remedies Code, has the burden to make proof, as provided in section (2)(C) of this rule, that venue is maintainable in the county to which transfer is sought.

A party who seeks to transfer venue of the action to another specified county under Sections 15.011-15.017, Civil Practice and Remedies Code on the basis that a mandatory venue provision is applicable and controlling has the burden to make proof, as provided in section (2)(C) of this rule, that venue is maintainable in the county to which transfer is sought by virtue of one or more mandatory venue exceptions.

(iii) Cause of Action. It shall not be necessary for a claimant to prove the merits of a cause of action, but the existence of a cause of action, when pleaded properly, shall be taken as established as alleged by the pleadings. When the defendant specifically denies the venue allegations, the claimant is required, by prima facie proof as provided in section (2)(C) of this rule, to support such pleading that the cause of action taken as established by the pleadings, or a part of such cause of action, accrued in the county of suit. If a defendant seeks transfer to a county where the cause of action or a part thereof accrued, it shall be sufficient for the defendant to plead that if a cause of action exists, then the cause of action or part thereof accrued in the specific county to which transfer is sought, and such allegation shall not constitute an admission that a cause of action in fact exists. But the defendant shall be required to support his pleading by prima facie proof as provided in section (2)(C) of this rule, that, if a cause of action exists, it or a part thereof accrued in the county to which transfer is sought.

(C) <u>Proof.</u>

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

(ii) The Hearing. The court shall determine the motion to transfer venue on the basis of the pleadings, any stipulations made by and between the parties and such affidavits and attachments as may be filed by the parties in accordance with section (b)(2)(C)(1) of this rule or section (c) of this rule.

All venue challenges shall be determined by the court without the aid of a jury.

(iii) Prima Facie Proof Provided. If a claimant has adequately pleaded and made prima facie proof that venue if proper in the county of suit as provided in section (b)(2)(C)(1) of this rule, then the cause of action shall not be transferred but shall be retained in the county of suit, unless the motion to transfer is based on the grounds that an impartial trial cannot be had in the county where the action is pending or on an established ground of mandatory venue. A ground of mandatory venue is established when the party relying upon a mandatory exception to the general rule makes prima facie proof as provided in section (b)(2)(C)(1) of this rule.

(iv) Failure to Provide Prima Facie Proof. In the event that the parties shall fail to make prima facie proof that the county of suit or the specific county to which transfer is sought is a county of proper venue, then the court may direct the parties to make further proof.

(D) Transferred if Motion Sustained. If a motion to transfer venue is sustained, the cause shall not be dismissed, but the court shall transfer said cause to the proper court; and the costs incurred prior to the time such suit is filed in the court to which said cause is transferred shall be taxed against the plaintiff. The clerk shall make up a transcript of all the orders made in said cause, certifying thereto officially under the seal of the court, and send it with the original papers in the cause to the clerk of the court to which the venue has been changed.

Provided, however, if the cause be severable as to defendant parties, and shall be ordered transferred as to one or more defendants but not as to all, the clerk, instead of sending the original papers, shall make certified copies of such filed papers as directed by the court and forward the same to the clerk of the court to which the venue has been changed. After the cause has been transferred, the clerk of the court to which the cause has been transferred shall mail notification to the plaintiff or his attorney that transfer of the cause has been completed, that the filing fee in the proper court is due and payable within thirty days from the mailing of such notification, and that the case may be dismissed if the filing fee is not timely paid; and if such filing fee is timely paid, the cause will be subject to trial at the expiration of thirty days after the mailing of notification to the parties or their attorneys by the clerk that the papers have been filed in the court to which the cause has been

transferred; and if the filing fee is not timely paid, any court of the transferee county to which the case might have been assigned, upon its own motion or the motion of a party, may dismiss the cause without prejudice to the refiling of same.

(E) Motion for Rehearing. If venue has been sustained as against a motion to transfer, or if an action has been transferred to a proper county in response to a motion to transfer, then no further motions to transfer shall be considered regardless of whether the movant was a party to the prior proceedings or was added as a party subsequent to the venue proceedings, unless the motion to transfer is based on the grounds that an impartial trial cannot be had or on the ground of mandatory venue, provided that such claim was not available to the other movant or movants.

(F) Appeals. There shall be no interlocutory appeals from such determination.

(3) Change of Venue Granted on Motion.

(A) Requisites. A change of venue may be granted in civil causes upon motion of either party, supported by his own affidavit and the affidavit of at least three credible persons, residents of the county in which the suit is pending, for any following cause:

(i) That there exists in the county where the suit is pending so great a prejudice against him that he cannot obtain a fair and impartial trial.

(ii) That there is a combination against him instigated by influential persons, by reason of which he cannot expect a fair and impartial trial.

(iii) That an impartial trial cannot be had in the county where the action is pending.

(iv) For other sufficient cause to be determined by the court.

(B) Shall be Granted. Where such motion to transfer venue is duly made, it shall be granted, unless the credibility of those making such application, or their means of knowledge or the truth of the facts set out in said application are attacked by the affidavit of a credible person; when thus attacked, the issue thus formed shall be tried by the judge; and the application either granted or refused. Reasonable discovery in support of, or in opposition to, the application shall be permitted, and such discovery as is relevant, including deposition testimony on file, may be attached to, or incorporated

by reference in, the affidavit of a party, a witness, or an attorney who has knowledge of such discovery.

(C) Transferred To What County. If the motion to transfer is granted, the cause shall be removed:

(i) If from a district court, to any county of proper venue in the same or an adjoining district;

(ii) If from a county court, to any adjoining county of proper venue;

(iii) If (i) or (ii) are not applicable, to any county of proper venue;

(iv) If a county of proper venue (other than the county of suit) cannot be found, then if from

(1) A district court, to any county in the same or an adjoining district or to any district where an impartial trial can be had;

(2) A county court, to any adjoining county or to any district where an impartial trial can be had; but the parties may agree that venue shall be changed to some other county, and the order of the court shall conform to such agreement.

(D) Transcript on Change. When a change of venue has been granted, the clerk shall immediately make out a correct transcript of all the orders made in said cause, certifying thereto officially under the seal of the court, and send the same, with the original papers in the cause, to the clerk of the court to which the venue has been changed.

(c) Discovery and Venue. Discovery shall not be abated or otherwise affected by pendency of a motion to transfer venue. Issuing process for witnesses and taking depositions shall not constitute a waiver of a motion to transfer venue, but depositions taken in such case may be read into evidence in any subsequent suit between the same parties concerning the same subject matter in like manner as if taken in such subsequent suit. Deposition transcripts, responses to requests for admission, answers to interrogatories and other discovery products containing information relevant to a determination of proper venue may be considered by the court in making the venue determination when they are attached to, or incorporated by reference in, an affidavit of a party, a witness, or an attorney who has knowledge of such discovery.

[Current Rule: Tex. R. Civ. P. 86-89, 255, 257-259, 261].

[Original Source: Arts. 2007 (as amended), 2164, 2170, 2171, 2172, 2174, and modified to conform to S.B. 898, 68th Legislature, 1983].
[Official Comments]:

Rule 86, Change: The plea of privilege is required to state the post office address of the defendant or his attorney. The time allowed for filing a controverting affidavit has been increased to ten days.

Rule 86, Change by amendment of March 31, 1941. The word ''or'' changed to read ''of'' between ''service'' and ''process.''

Rule 86, Change by amendment effective December 31, 1943. Controverting affidavit required to be filed within ten days after appearance day if plea of privilege is filed in vacation, otherwise within ten days after appearance day or after the filing of the plea of privilege, whichever is the later date.

Rule 86, Change by amendment effective January 1, 1955. Copy of plea of privilege required to be served on the adverse party or his attorney by delivery to him in person or by registered mail, and requiring filing of controverting affidavit within ten days after receipt thereof.

Rule 86, Change by amendment effective September 1, 1962. Requisites of plea of privilege to be sued in county other than the county of one's residence prescribed, and note regarding 1943 amendment rewritten.

Rule 86, Change by amendment effective September 1, 1983. To conform to S.B. 898, 68th Legislature, 1983.

Rule 87, Change by amendment effective September 1, 1983. This rule is completely rewritten to conform to S.B. 898, 68th Legislature, 1983.

Rule 87, Change by amendment effective September 1, 1990. To clarify that no proof of any kind is required of any party to establish any element of a cause of action or part thereof; proof is restricted to place, if any, and the pleadings establish all other elements and may not be controverted for venue purposes as to the existence of a cause of action or part thereof.

Rule 88, Change by amendment effective September 1, 1983. To conform to S.B. 898, 68th Legislature, 1983.

Rule 89, Change by amendment effective September 1, 1983.

To conform to S.B. 898, 68th Legislature, 1983.

Rule 257, Change by amendment effective September 1, 1983.
To conform to S.B. 898, 68th Legislature, 1983.

Rule 258, Change by amendment effective September 1, 1983.
To conform to S.B. 898, 68th Legislature, 1983.

Rule 259, Change: The venue is not required to be changed to the adjoining county with the courthouse nearest to the courthouse in the county where the suit is pending.

Rule 259, Change by amendment effective September 1, 1983.
To conform to S.B. 898, 68th Legislature, 1983.

Rule 65. Plea in Abatement

(a) In General. A plea in abatement is used to allege facts arising outside of the petition that set forth reasons, other than venue or jurisdiction, why the case should be suspended or dismissed.

(b) Elements. A plea in abatement must:

(1) State the grounds demonstrating both why the suit was improperly brought and how the suit should have been brought; and

(2) State facts rather than conclusions of law.

(3) Be specific enough to give fair notice of the defendant's claim; and

(4) Be verified.

(c) Procedure. A plea in abatement may be contained in a separate instrument or included in the answer. The plea may be filed before answering or may be included in the answer.

(d) Waiver of Objection. The plea must be brought to the court's attention so that it may be heard prior to commencement of the trial. An objection that should be raised by a plea in abatement will be waived if the plea is not made or if there is an undue delay in making it, at least when the party who failed to assert the plea actively engaged in pursuing the case on the merits before asserting the dilatory plea. However, if the court is made aware of circumstances justifying abatement, it may order abatement on its own motion.

(e) Determination of Plea in Abatement.

(1) Hearing. Either party may request a jury to hear and decide disputed issues of fact.

(2) Burden. When determining the plea, the trial court must accept the facts alleged in the plaintiff's petition as true unless they are disproved.

The moving party has the burden to prove the relevant facts by a preponderance of the evidence. The moving party must be prepared to introduce evidence at the hearing to support his or her contentions.

If the moving party fails to submit evidence in support of the plea, or fails to prove the relevant facts by a preponderance of the evidence, the court should not sustain the plea.

(f) Effect of Sustained Plea.

(1) Abatement. If a plea in abatement is sustained, the court will abate the cause of action until the obstacle to its prosecution is removed. When a case is abated, the parties are prohibited from taking any further action until the matter is revived. If a suit is only partially abated, some procedures, such as discovery, may continue.

(2) Dismissal. The court will not dismiss a suit that has been abated until the plaintiff has been given a reasonable opportunity to remove the obstacle that prevented the proper prosecution of the action. Even if the case is dismissed, the claimant may revive the action or may bring another action on the same cause.

[Task Force Comments: This is an entirely new rule].

Rule 66. Continuance

(a) In General. A continuance is a postponement or delay of the trial of a case that has been set for trial. A continuance shall be granted only for sufficient cause supported by affidavit, or by consent of the parties, or by operation of law. An application for a continuance shall not be heard before the defendant files his defense.

(b) Continuance on Motion of Party.

(1) Discretionary or Mandatory. Ordinarily, the ruling on a motion for continuance is within the sound discretion of the trial court. However, a continuance may be mandatory if sought because a party, or an attorney is a member of the Legislature and must be in attendance during a legislative session.

(2) Requisites. A party must show both that the reason a continuance is necessary is not due to fault or lack of diligence on his or her part or that of his or her counsel, and

that failure to grant a continuance will result in substantial harm or prejudice to him or her in the presentation of his or her case or defense.

(3) Grounds for Continuance.

(A) Want of Testimony. A motion for continuance based on want of testimony must include an affidavit that such testimony is material, stating the materiality thereof. The affidavit must also state the diligence used to procure the testimony; the cause of failure, if known; the reason the testimony cannot be procured from any other source; and, if it be for the absence of a witness, the name and residence of the witness, and what is expected to be proven by him or her.

(B) Absence of Counsel. Except as provided elsewhere in these rules, absence of counsel will not be good cause for a continuance or postponement of the cause when called for trial, except it may be allowed in the discretion of the court, upon cause shown or upon matters within the knowledge or information of the judge to be stated on the record.

(C) Attendance on Legislature. A motion for continuance on the basis of absence of a party or attorney who is a member of the Legislature is mandatory if sought during, or within 30 days before, a legislative session, provided no harm is done to the rights of the opposing party. However, the continuance is within the court's discretion when the attorney for whom continuance is sought was employed in the case within 10 days of the trial date. The affidavit accompanying the motion for continuance must show that either the party or the party's attorney is a member of the Legislature and that he or she will be or is in actual attendance on a session or constitutional convention. The affidavit should also include a declaration by the attorney, a member for whom continuance is sought, that the attorney intends to participate actively in the preparation or presentation of the case. Where a party to any cause, or an attorney for any party to a cause, is a member of the legislature, his affidavit need not be corroborated.

If the motion for continuance is granted, the cause will be continued until 30 days after adjournment of the legislative session, and the continuance not charged against the moving party.

[Current Rule: Tex. R. Civ. P. 251-254].
[Original Source: Arts. 2167 and 2168 (unchanged), Texas Rule 49 (for District and County Courts), and Art. 2168a, with minor textural changes].
[Official Comments]:

Rule 252, Change by amendment effective April 1, 1984. The second paragraph is added to the former rule.

Rule 253, Change: Addition of the wording to the first comma.

Rule 254, Change by amendment effective January 1, 1981. The rule was amended to conform with Article 2168a.

Rule 67. Consolidation; Separate Trials; Severance

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counter-claim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues.

(c) Severance.

(1) In General. Severance may be ordered at the discretion of the trial court in order to avoid prejudice to a party on such terms as are just, such as prevention of confusion, prevention of delay, improper venue, or misjoinder of parties.

(2) Motion to Transfer Venue. When one or more defendant files a motion to transfer venue in an action and the motion is sustained, if the cause of action against the several defendants is joint and several the court should sever and retain jurisdiction over the action insofar as it concerns the defendants whose motions have not been sustained, and should transfer the suit insofar as it concerns the defendant whose motion is sustained. However, if the cause of action is a joint action growing out of joint liability, there can be no severance and the suit must be transferred as an entirety to the county of the residence of the defendant whose motion is sustained.

(3) Misjoinder of Parties. Actions which have been improperly joined may be severed and each ground of recovery improperly joined may be docketed as a separate suit between the same parties, by order of the court on motion of any party or on its own initiative at any stage of the action, before the time of submission to the jury or to the court if trial is without a jury, on such terms as are just. Any claim against a party may be severed and proceeded with separately.

[Current Rule: Tex. R. Civ. P. 41, 174].
[Original Source: Federal Rule 21, and Federal Rule 42 (unchanged)].
[Official Comments]:

Rule 41, Change: Addition of provision for adding and dropping parties and for consolidation of suits and for severing actions in case of misjoinder of parties or causes.

SECTION 6
Trial

A. SCHEDULING CASES FOR TRIAL; GENERAL RULES

Rule 70. Assignment of Cases for Trial

(a) **Assignment for Trial.** The court may set contested cases on written request of any party, or on the court's own motion, with reasonable notice of not less than forty-five days to the parties of a first setting for trial, or by agreement of the parties; provided, however, that when a case previously has been set for trial, the Court may reset said contested case to a later date on any reasonable notice to the parties or by agreement of the parties. Noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time.

A request for trial setting constitutes a representation that the requesting party reasonably and in good faith expects to be ready for trial by the date requested, but no additional representation concerning the completion of pretrial proceedings or of current readiness for trial shall be required in order to obtain a trial setting in a contested case.

[Current Rule: Tex. R. Civ. P. 245].
[Original Source: Federal Rule 40, with minor textural change].
[Official Comments]:

Change by amendment effective January 1, 1976. The rule is rewritten to require notice of settings in county and district courts.

Change by amendment effective April 1, 1984. The last sentence of former Rule 245 is deleted and is included in Rule _____ (currently Rule 306a).

Change by Amendment effective September 1, 1990. First paragraph, to harmonize a first time nonjury setting with the time for jury demand, and to set a more realistic notice

for trial. Second paragraph, to standardize the readiness requirement to obtain a trial setting.

(b) Notice of Settings. The clerk shall keep a record in his office of all cases set for trial, and it shall be his duty to inform any non-resident attorney of the date of setting of any case upon request by mail from such attorney, accompanied by a return envelope properly addressed and stamped. Failure of the clerk to furnish such information on proper request shall be sufficient ground for continuance or for a new trial when it appears to the court that such failure has prevented the attorney from preparing or presenting his claim or defense.

[Current Rule: Tex. R. Civ. P. 246].
[Original Source: New Rule].

(c) Agreed Method of Trial. The parties may agree to submit the case upon an agreed statement of facts filed of record. With leave of court, the parties may agree to present all evidence by videotape recording. The manner of taking and preserving the testimony and paying for the costs shall be set forth in a written agreement approved by the court. A party may withdraw from the agreement only upon leave of court and on such conditions for payment of costs as the court may impose.

[Current Rule: Tex. R. Civ. P. 263-264].
[Original Source: Art. 2177, unchanged, and New Rule].

Rule 71. Order of Trial

(a) Order of Proceedings. The trial of cases shall proceed in the following order unless the court should, for good cause stated in the record, otherwise direct:

(1) The party upon whom rests the burden of proof on the whole case shall state briefly the nature of his claim or defense and what said party expects to prove and the relief sought. Immediately thereafter, the adverse party may make a similar statement, and intervenors and other parties will be accorded similar rights in the order determined by the court.

(2) The party upon whom rests the burden of proof on the whole case shall then introduce his evidence.

(3) The adverse party shall briefly state the nature of his claim or defense and what said party expects to prove and the relief sought unless he has already done so.

(4) He shall then introduce his evidence.

(5) The intervenor and other parties shall make their statement, unless they have already done so, and shall introduce their evidence.

(6) The parties shall then be confined to rebutting testimony on each side.

(7) But one counsel on each side shall examine and cross-examine the same witness, except on leave granted.

[Current Rule: Tex. R. Civ. P. 265].
[Original Source: Art. 2180].
[Official Comments]:

Change by amendment of March 31, 1941. The above Article is unchanged except that the last subdivision above has been added. Its source is Texas Rule 43 (for District and County courts), unchanged.

Change by amendment effective January 1, 1967. The Rule has been rewritten to permit each party, at his option, either to read his pleading or state the nature of his claim or defense to the jury, but not do both.

Change by amendment effective January 1, 1978. The rule is amended by eliminating the provisions in (a), (c), and (e) concerning the reading of pleadings.

(b) Open and Close -- Admission. Except as provided in Rule ___ (currently Rule 269) the plaintiff shall have the right to open and conclude both in adducing his evidence and in the argument, unless the burden of proof on the whole case under the pleadings rests upon the defendant, or unless the defendant or all of the defendants, if there should be more than one, shall, after the issues of fact are settled and before the trial commences, admit that the plaintiff is entitled to recover as set forth in the petition, except so far as he may be defeated, in whole or in part, by the allegations of the answer constituting a good defense, which may be established on the trial; which admission shall be entered of record, whereupon the defendant, or the defendants, if more than one, shall have the right to open and conclude in adducing the evidence and in the argument of the cause. The admission shall not serve to admit any allegation which is inconsistent with such defense, which defense shall be one that defendant has the burden of establishing, as for example, and without excluding other defenses: accord and satisfaction, adverse possession, arbitration and award, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, release, res judicata, statute of frauds, statute of limitations, waiver, and the like.

[Current Rule: Tex. R. Civ. P. 266].

[Original Source: Texas Rule 31 (for District and County Courts].
[Official Comments]:

Change by amendment of March 31, 1941. The above article is unchanged except that the last subdivision above has been added. Its source is Texas Rule 43 (for District and County courts), unchanged.

Change by amendment effective January 1, 1967. The rule has been rewritten to permit each party, at his option, either to read his pleading or state the nature of his claim or defense to the jury, but not do both.

Change by amendment effective January 1, 1978. The rule is amended by eliminating the provisions in subdivisions (a), (c), and (e) concerning the reading of pleadings.

(c) Order of Argument.

(1) After the evidence is concluded and the charge is read, the parties may argue the case. The party having the burden of proof on the whole case, or on all matters which are submitted by the charge, shall be entitled to open and conclude the argument; where there are several parties having separate claims or defenses, the court shall prescribe the order of argument between them.

(2) In all arguments, and especially in arguments on the trial of the case, the counsel opening shall present his whole case as he relies on it, both of law and facts, and shall be heard in the concluding argument only in reply to the counsel on the other side.

(3) Counsel for an intervenor shall occupy the position in the argument assigned by the court according to the nature of the claim.

[Current Rule: Tex. R. Civ. P. 269].
[Original Source: Subdivision (a): Art. 2183; Subdivisions (b) through (h), see below].
[Official Comments]:

Change: Addition, in second sentence, of words "or on all matters which are submitted by the charge, whether upon special issues or otherwise."

Change by amendment of March 31, 1941. Source of Subdivisions (b) through (h); Texas Rules 36 through 42 (for District and County Courts).

(d) **Additional Testimony.** When it clearly appears to be necessary to the due administration of justice, the court may permit additional evidence to be offered at any time; provided that in a jury case no evidence on a controversial matter shall be received after the verdict of the jury.

[Current Rule: Tex.R.Civ.P. 270].
[Original Source: Art. 2181].
[Official Comments]:

Change by amendment effective April 1, 1984. Textual changes.

Rule 72. Subpoenas

(a) **Witnesses Subpoenaed.** The clerk of the district or county court, or justice of the peace, as the case may be, at the request of any party to a suit pending in his court, or of any agent or attorney, shall issue a subpoena for any witness or witnesses who may be represented to reside within one hundred miles of the courthouse of the county in which the suit is pending or who may be found within such distance at the time of trial; provided that any clerk, justice of the peace or other officer issuing a subpoena pursuant to the provisions of this rule, or of any other rule or statute, shall issue a separate subpoena, together with a copy thereof, for each witness subpoenaed.

[Current Rule: Tex. R. Civ. P. 176].
[Original Source: Acts 1939, 46th Leg., p. 323, Sec. 1, amending Art. 3704].
[Official Comments]:

Change by amendment effective September 1, 1957. Witnesses residing within one hundred miles of courthouse made subject to subpoena; officer required to issue separate subpoena for each witness.

Change by amendment effective February 1, 1973. Words "male or female" have been deleted.

(b) **Form of Subpoena.** The style of the subpoena shall be "The State of Texas." It shall state the style of the suit, the court in which the same is pending, the time and place at which the witness is required to appear, and the party at whose instance the witness is summoned. It shall be dated and attested by the clerk or justice, but need not be under the seal of the court, and the date of its issuance shall be noted thereon. It may be made returnable forthwith, or on any date for which trial of the cause may be set. It shall be addressed to any sheriff or constable of the State of Texas or other person authorized to serve and execute subpoenas as provided in Rule 178.

[Current Rule: Tex. R. Civ. P. 177].
[Original Source: Acts 1939, 46th Leg., p. 323, Sec. 2, amending Art. 3705].
[Official Comments]:

Change by amendment effective December 31, 1941. Instead of the words "names of the parties to" the words "style of" have been supplied; and the last sentence has been added.

Change by amendment effective September 1, 1957. Subpoena directed to any sheriff or constable of the State of Texas instead of to sheriff or any constable of county in which suit is pending.

Change by amendment effective January 1, 1978. Last sentence is changed to conform to the change in Rule 178].

(c) Subpoena for Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or tangible things designated therein; but the court, on motion made seasonably and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion to quash or modify upon the advancement by the person in whose behalf the subpoena is issued, of the reasonable costs of producing the books, papers, documents or tangible things.

[Current Rule: Tex. R. Civ. P. 177a].
[Original Source: Federal Rule 45(b)].
[Task Force Comments: Note: New Rule].

(d) Service of Subpoenas. Subpoenas may be executed and returned at any time by the sheriff or constable, or by any other person who is not a party and is not less than eighteen years of age, and shall be served by delivering a copy of such subpoena to the witness; and service thereof may be accepted by any witness by a written memorandum, signed by such witness, attached to the subpoena.

[Current Rule: Tex. R. Civ. P. 178].
[Original Source: Acts 1939, 46th Leg., p. 323, Sec. 3, amending Art. 3706].
[Official Comments]:

Change by amendment effective September 1, 1957. Subpoena served by delivering copy instead of reading to witness.

Change by amendment effective January 1, 1978. States who may serve a subpoena.

(e) Witness Shall Attend. Every witness summoned in any suit shall attend the court from day to day, and from term to term, until discharged by the court or party summoning such witness. If any witness, after being duly summoned, shall fail to attend, such witness may be fined by the court as for contempt of court, and an attachment may issue against the body of such witness to compel the attendance of such witness; but no such fine shall be imposed, nor shall such attachment issue in a civil suit until it shall be shown to the court, by affidavit of the party, his agent or attorney, that all lawful fees have been paid or tendered to such witness.

[Current Rule: Tex. R. Civ. P. 179].
[Original Source: Acts 1939, 46th Leg., p. 323, Sec. 4, amending R.C.S. Art. 3707, unchanged].
[Official Comment: Note: This act took effect prior to the Rule Making Act].
[Task Force Comments: Tex. R. Civ. P. 180 and 181 have been omitted; see Tex. R. Civ. Evid.].

(f) Application for Continuance. The failure to obtain the deposition of any witness residing within 100 miles of the courthouse of the county in which the suit is pending shall not be regarded as want of diligence when diligence has been used to secure the personal attendance of such witness under the rules of law, unless by reason of age, infirmity or sickness, or official duty, the witness will be unable to attend the court, or unless such witness is about to leave, or has left, the State or county in which the suit is pending and will not probably be present at the trial.

[Current Rule: Tex. R. Civ. P. 252 (2nd paragraph)].
[Original Source: Art. 2168, unchanged].
[Official Comments]:

Change by amendment effective April 1, 1984. The second paragraph is added to the former rule.

B. JURY TRIAL; JURY SELECTION

Rule 73. Preserving Right to Jury Trial

(a) Request. 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.

(b) Jury Fee. Unless otherwise provided by law, 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.

[Current Rule: Tex. R. Civ. P. 216].
[Original Source: Arts. 2124 and 2125].
[Official Comments]:

Change: The fee must be paid ten days or more before the case is set upon the non-jury docket.

Change by Amendment effective September 1, 1990. Additional fees for jury trials may be required by other law, e.g., Texas Government Code § 51.604.

(c) Oath of Inability. The deposit for a jury fee shall not be required when the party shall within the time for making such deposit, file with the clerk his affidavit to the effect that he is unable to make such deposit, and that he can not, by the pledge of property or otherwise, obtain the money necessary for that purpose; and the court shall then order the clerk to enter the suit on the jury docket.

[Current Rule: Tex. R. Civ. P. 217].
[Original Source: Art. 2127, unchanged].

(d) Withdrawing Cause from Jury Docket. When any party has paid the fee for a jury trial, he shall not be permitted to withdraw the cause from the jury docket over the objection of the parties adversely interested. If so permitted, the court in its discretion may by an order permit him to withdraw also his jury fee deposit. Failure of a party to appear for trial shall be deemed a waiver by him of the right to trial by jury.

[Current Rule: Tex. R. Civ. P. 220].
[Original Source: Art. 2130, with minor textual change].
[Official Comments]:

Change by amendment effective December 31, 1947. The words "any party" have been substituted for "one party"; "the cause" for "such cause"; and "over the objection" for "without the consent."

Change by amendment effective January 1, 1971. Sentence has been added providing that failure of a party to appear for trial shall be deemed a waiver of jury trial.

Rule 74. Challenging the Assembly of the Jury Panel

Any party that will be tried to a jury may challenge the jury panel on the ground that the jurors summoned were not selected randomly or according to law. This challenge must be made either in writing or orally on the record before peremptory

challenges are exercised, setting forth distinctly the grounds for the challenge. When such a challenge is made, the court shall hear evidence and make a decision without delay. If the challenge is sustained, the challenged jury panel shall be discharged, and other jurors shall be summoned according to law.

[Task Force Comments: The source of this proposed rule is current Rules 221 and 222. As written, these rules provide a procedure allowing parties to challenge the method by which persons were chosen for jury lists and summoned to be on the panel for the week "upon the ground that the officer summoning the jury has acted corruptly, and has willfully summoned jurors known to be prejudiced . . . or biased." The Government Code (§ 62.001-014) provide the methods for making up the jury pool and assembling jury lists from that pool. It makes sense to allow a challenge to the method by which the jury list is assembled, but it does not make sense to limit the challenge to the grounds set forth in the current rule].

Rule 75. Seating the Jury Panel

The jury panel for a particular case shall be listed and be seated in the order in which the names are chosen from the jury list. Upon demand by any party prior to examination of the jury panel, the judge of the court to which the panel is assigned may have the names of the members of the jury panel redrawn at random, and the jury panel shall be relisted and reseated in the order in which the names are redrawn. This can be done only once in each case [for each jury chosen???].

[Task Force Comments: Current Rules 223, 224, and 225 are concerned with assembling the jury panel (although the titles of Rules 223 and 224 mistakenly indicate that they concern assembling the "jury list"). Gov't Code §§ 62.015, .016, and .017 actually cover the method whereby jury panels are chosen. Therefore, the references in the Rules to these procedures are deleted here. The statutes do not deal with the "jury shuffle, however." Interestingly, the rules allow a shuffle only in counties governed by the laws providing for interchangable juries. The proposed rule allows a jury shuffle in all counties. Rule 225 concerning summoning talesman should be deleted because it is covered in the statutes].

Rule 76. Swearing In, Instructing, and Examining the Jury Panel

(a) Oath. Before examination of the jury panel, the jurors shall be administered this oath: "Do you solemnly swear or affirm that you will give true answers to all questions asked you about your qualifications as a juror?"

(b) Instructions. After the members of the panel have been sworn and before they are examined, the judge shall instruct them, with the modifications that the circumstances of the case may require, as follows:

[insert instructions from L. Hughes draft]

(c) Examination. The court shall permit the parties to examine and may itself examine the members of the jury panel to elicit facts that will enable the parties to challenge jurors in accordance with these rules and applicable law.

[Task Force Comments: Current rule 226, with minor changes. Part 3 is a new rule. There is currently no Texas rule describing the voir dire examination. Current Rule 230 concerns voir dire examination, but seems unnecessary].

Rule 77. Challenges for Cause

Any party may orally challenge a panel member for cause alleging some fact that by law disqualifies that juror to serve as a juror, or that in the opinion of the court renders that juror unfit to sit on the jury. In deciding the challenge, the court shall consider the juror's answers to questions asked as well as other evidence. If the challenge is sustained, the juror shall be discharged from the case. If successful challenges reduce the number of prospective jurors to less than twenty-four in the district court or twelve in the county court, additional jurors shall be summoned.

[Task Force Comments: This proposed rule combines current Rules 227, 228, 229, and 231].

Rule 78. Peremptory Challenges

(a) Grounds. Upon completion of the court's determination of challenges for cause, any party may make peremptory challenges to a juror by striking that juror's name from a list furnished by the clerk. A peremptory challenge is made to a juror without assigning any reason therefor. After the exercise of peremptory challenges, the parties shall deliver their completed lists to the clerk. The clerk shall identify the first twelve names on the panel in the district court, or six in the county court, that have not been struck by any party, who shall constitute the jury.

(b) Number and Apportionment. Each side (plaintiff and defendant) to a civil case shall be entitled to six peremptory challenges in a case tried in the district court, and to three in the county court. If there are multiple parties on any one side, the trial court shall determine before the exercise of peremptory challenges whether the parties on the same side are antagonistic with respect to any issue to be submitted to the jury. Each

antagonistic party is entitled to its own peremptory challenges. Upon the motion of any party made prior to the exercise of peremptory challenges, the trial judge shall use its discretion to apportion the number of peremptory challenges so that no party or side is given unfair advantage as a result of the the alignment of the litigants, the determination of antagonism, and the award of peremptory challenges.

(c) **Challenges based on race prohibited.** After the clerk has announced to the parties the composition of the jury, but before the remainder of the jury panel has been dismissed and the jury is sworn, any party may object to any other party's peremptory challenges on the ground that they were made on the basis of race. The party making the objection must present prima facie evidence of facts tending to show that the challenges were made on the basis of race. If the objecting party satisfies its burden of prima facie proof, the party that excercised the challenges may present evidence of a racially neutral explanation for the challenges. The party objecting to the peremptory challenges has the burden of proving by a preponderance of the evidence that the challenges were made on the basis of race. The court shall use its discretion in sustaining or overruling the challenge. Upon sustaining the challenge, the court within its discretion may reinstate the juror stricken on the basis of race or call a new jury panel.

[Task Force Comments: Parts 1 and 2 of this rule are simplified versions of current Rules 233 and 234. Part 3 is new, and codifies the Batson procedure. There are two issues addressed in the proposed rule: (1) when error must be preserved; and (2) the standard of review on appeal. The proposal requires the objection be made before the panel is dismissed, so that it gives the trial judge the choice of reinstating the stricken juror or calling a new panel. See Henry v. State, 729 S.W.2d 732 (Tex.Cr.App. 1987) (coming to the opposite decision before the Code was amended). The Code of Criminal Procedure requires the judge to call a new panel, and thus allows the objection to be made anytime before the jury is sworn. The proposal contains an abuse of discretion standard of review. The cases use the federal "clearly erroneous" standard, which really has no place in Texas civil procedure. See Lott v. City of Fort Worth, 840 S.W.2d 146 (Tex. App. -- Ft. Worth 1992)].

Rule 79. Oath and Instructions to Jury

(a) **Oath.** The jury shall be administered this oath: "Do you solemnly swear or affirm that you will return a verdict according to the law in the court's instructions and to the evidence admitted before you?"

(b) **Instructions.** After the jury has been sworn, the judge shall instruct them, with the modifications that the circumstances of the case may require, as follows:
[Insert admonitory instructions from L. Hughes draft here]

[Task Force Comments: Current Rule 236 and 226a have been combined with minor changes].

C. THE JURY CHARGE

[INSERT JURY CHARGE RULES BASED ON THE REPORT OF JURY CHARGE TASK FORCE].

D. JURY DELIBERATIONS AND VERDICTS

Rule 85. Deliberations

(a) **Presiding Juror.** The jury shall select one juror as the presiding juror.

[Current Rule: Texas Rule 280].
[Original Source: Art. 2192, unchanged].
[Official Comments]:

Change by amendment effective April 1, 1984. The word ''foreman'' is changed to ''presiding juror.''

(b) **Separation.** When the jury retires for deliberation, the jury shall be kept together under the supervision of a bailiff, except as the court may permit them to separate in its discretion.

[Current Rule: Texas Rule 282].
[Original Source: Art. 2194, unchanged].

(c) **Bailiff.** The court will appoint a bailiff to supervise the jury during its deliberation. The bailiff may only make or permit communications to the jury as ordered by the court, except to inquire whether they have reached a verdict. The bailiff shall not disclose the state of the deliberations except to report to the court that a verdict has been reached.

[Current Rule: Texas Rule 283].
[Original Source: Art. 2195, unchanged].

(d) **Charge and Exhibits.** The jury must take with them on retiring for deliberation, without request from a juror or counsel, the court's charge and all of the exhibits admitted into evidence, except where physically impractical.

[Current Rule: Texas Rule 281].
[Original Source: Art. 2193, unchanged].

Rule 86. Communication

(a) Generally. The court may on its own motion communicate with the jury. The jury may communicate with the court by the presiding juror telling the bailiff that the jury has a message to the court. The presiding juror shall communicate on behalf of the jury. All communications with the jury must be either written and filed or oral in open court.

[Current Rule: Texas Rules 285, 286].
[Original Source: Arts. 2197 and 2198].
[Official Comments]:

Rule 285, Changed by amendment effective April 1, 1984. The word ''foreman'' is changed to ''presiding juror.''

Rule 286, Change: Authorizing court to give additional instructions on his own motion where deemed proper, and requiring the jury to make its request in writing.

Rule 286, Change by amendment effective April 1, 1984. The word ''foreman'' is changed to ''presiding juror.''

(b) Disagreements.

(1) Testimony. When the jury disagree about a specific point of testimony of a witness, the jury will notify the court of the dispute. The court will have that part of the witness's testimony read to the jury. If the reporter's notes cannot be read, the court may recall the witness and direct the witness to repeat the testimony as nearly as possible.

(2) Deposition. If the jury disagree about part of a deposition, the court may permit the disputed portion to be read to the jury again.

[Current Rule: Tex. R. Civ. P. 287].
[Original Source: Arts. 1939, 46th Legislature, p. 213, Sec. 1, being Art. 2198, as amended, with minor textural change].

Rule 87. Verdict

(a) Defined. A verdict is a written declaration by a jury of its decision under the charge submitted by the court.

[Current Rule: Tex. R. Civ. P. 290].
[Original Source: Art. 2202, reworded].
[Official Comments:].

Change by amendment effective April 1, 1984. The word ''foreman'' is changed to ''presiding juror.''

(b) Form. A verdict will be in the form of written responses to the general or special questions submitted by the

court in the charge. A judgment is sustainable if there has been substantial compliance with this rule.

[Current Rule: Tex. R. Civ. 291].
[Original Source: Art. 2203, unchanged].
[Official Comments]:

Change by amendment effective February 1, 1973. Sentence requiring concurrence of all members of the jury in the verdict has been deleted.

(c) Requirements.

(1) Signing. A verdict must be signed by the presiding juror for a unanimous jury or by every concurring juror for a non-unanimous jury or for a jury reduced from its original size.

(2) Number. A verdict may be returned by the agreement of ten of a twelve-member jury or by the agreement of five of a six-member jury. A twelve-member jury reduced in size may return a unanimous verdict as long as at least nine jurors remain.

(d) Receipt. When the jury agrees on a verdict, they notify the bailiff. The court will then order the jury to the courtroom and ask whether the jury has agreed on a verdict. If the presiding juror answers yes, the court will read the verdict. If the verdict is in proper form and no party requests a poll, the court receives the verdict by ordering that the verdict be filed.

[Current Rule: Tex. R. Civ. P. 293].
[Original Source: Art. 2205, modified by eliminating the requirement that the jurors' names be called by the clerk].
[Official Comments]:

Change by amendment effective February 1, 1973. The words ''objects to its accuracy, no juror represented as agreeing thereto'' have been inserted, and other minor textual changes have been made in the second sentence.

(e) Polling.

(1) Polling. On the request of a party, the court will poll the jury, by its asking each juror whether the verdict as read by the court is his verdict in every particular.

(2) Effect. Where the verdict rendered was unanimous and a juror dissents from it or where the verdict has been rendered by a partial jury and a concurring juror dissents, the court will either retire the jury for further deliberation or discharge the jury.

[Current Rule: Tex. R. Civ. P. 294].

[Original Source: Art. 2206, modified by eliminating the words "which is done by" and adding the language of the second sentence through "And then"].
[Official Comments]:

Change by amendment effective February 1, 1973. The last sentence has been rewritten to provide that the jury shall be retired for further deliberation if any juror answers in the negative where the verdict is returned as a unanimous verdict or if any juror shown by his signature to agree to the verdict answers in the negative.

Change by amendment effective April 1, 1984. The word ''foreman'' is changed to ''presiding juror.''

(f) Defects.

(1) A verdict is defective if material questions are unanswered, answers do not respond to the questions, or answers conflict. The court may reform a defective verdict by further written instructions in open court explaining to the jury how to cure the defect and sending them to deliberate further.

(2) A question is material if its answer cannot be found elsewhere in the charge and if the answer can alter the effect of the verdict on the judgment.

[Current Rule: 295].
[Original Source: Art. 2207].
[Official Comments]:

Change: Addition of words, ''in writing.''

Change by amendment effective January 1, 1988. The amendment makes it clear that the court may direct a complete yet defective verdict to be reformed. The amendment also makes it clear that in the event the verdict is incomplete or otherwise improper, the court is limited to giving the jury additional instructions in writing.

(g) Discharge.

(1) Verdict. On ordering the verdict filed, the court will discharge the jury.

(2) Failure to Agree. If the jury cannot agree, it may be discharged by the court when they have deliberated long enough that, in the court's discretion, renders reaching an agreement improbable.

(3) Shortage. The court will discharge the jury when the number of jurors is reduced below the minimum number required for a verdict.

(4) **Effect.** If the jury is discharged before rendering a verdict, the case will be set for another trial.

[Current Rule: 289].
[Original Source: Art. 2200, reworded with minor textural changes].
[Official Comments]:

Change by amendment effective April 1, 1984. Textual changes.

PART D. Nonjury Trials

Rule 88. Findings by the Court; Judgment on Partial Findings

(a) Findings of Fact. In all cases tried without a jury, the court has the mandatory duty to find the facts specially and state separately its conclusions of law. Requests for findings of fact are not necessary for purposes of review. It is sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision signed and filed by the court. If written, the court shall cause a copy of its findings and conclusions to be mailed to each party to the action.

When findings of fact are made in actions tried by the court without a jury, they shall form the basis of the judgment upon all grounds of recovery and of defense embraced therein. The judgment may not be supported upon appeal by a presumed finding upon any ground of recovery or defense, no element of which has been included in the findings of fact; but when one or more elements thereof have been found by the trial court, omitted unrequested elements, when supported by evidence, will be supplied by presumption in support of the judgment. Refusal of the court to make a finding requested shall be reviewable on appeal.

[Current Rule: Tex. R. Civ. P. 298, 299].
[Original Source: Federal Rule 52(a), (b)].

(b) Judgment on Partial Findings. If during a trial without a jury a party has been fully heard with respect to an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party on any claim, counterclaim, cross-claim or third-party claim that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

[Current Rule: New Rule].

[Original Source: Federal Rule 52(c)].
[Official Comments]:

Change by amendment effective September 1, 1957. Provision added requiring that notice of request be given to opposite party.

Change by amendment effective September 1, 1990. To revise the practice and times for findings of fact and conclusions of law. SEE ALSO Rules 296 and 297.

[Task Force Comments: Adoption of the current federasl practice is recommended].

SECTION 7
Judgments; Motions for Judgment; New Trials

Rule 100. Motion for Judgment as a Matter of Law; Modification of Judgments or Findings and Correction of Clerical Mistakes.

(a) Motion for Judgment As a Matter of Law. A party may move for judgment in its favor at the close of the adverse party's evidence and at the close of all the evidence on any or all issues. If there is no legally sufficient basis for a reasonable jury to have found for the nonmovant with respect to an issue, the court may grant a motion for judgment as a matter of law against the nonmovant on any claim, counterclaim, cross-claim or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue. A motion for judgment as a matter of law may also be made for the first time after verdict or judgment and if made after the judgment has been rendered may include a motion for new trial in the alternative.

[Current Rules: Tex. R. Civ. P. 268, 300, 301].
[Original Source: Arts. 2209, with minor textural change, and 2211; Federal Rules 50(a)(last sentence) and 51].
[Task Force Comments: This proposal is adapted from federal Rule 50].

(b) Motion for Modification of Judgment or Findings. A motion to modify may include any basis for modifying, correcting, or reforming the judgment in any respect, for disregarding a jury finding on an issue or issues, or for adding findings of fact or for disregarding or amending findings of fact in a nonjury case. or a motion to modify, correct, or reform a judgment or finding (as distinguished from a motion to correct the record of a judgment under paragraph (c) of this rule), if filed, shall be filed within the time prescribed by Rule ____ (currently Rule 329b). Each such motion shall be in writing and signed by the party or his attorney and shall specify the relief or order that is sought. The overruling of a motion to modify shall not preclude the filing of a motion for new trial, nor shall the

overruling of a motion for new trial preclude the filing of a motion to modify.

[Current Rule: Tex. R. Civ. P. 329b(g)].
[Original Source: New Rule effective January 1, 1955, derived from Art. 2092].

(c) Motion to Correct Judgment Record. Clerical mistakes in the record of any judgment may be corrected by the judge in open court according to the truth or justice of the case after notice of the motion has been given to the parties interested in such judgment, as provided in Rule ___ (currently Rule 21a), and thereafter the execution shall conform to the judgment as amended.

[Current Rule: Rule 316].
[Original Source: Art. 2228, including 1943 Amendment adding last sentence].

Rule 101. Judgments, Decrees and Orders; Effective Dates

(a) Definition; Form and Substance. "Judgment" as used in these rules includes a decree and any order that disposes of a claim. A judgment shall contain the full names of the parties, for and against whom the judgment is rendered and for what recovery. A judgment shall not contain a recital of the pleadings, the record of prior proceedings, findings of fact or jury findings or a recitation of any other matter that is otherwise shown of record. Only one final judgment shall be rendered in any cause except where it is otherwise specially provided by law.

[Current Rule: Tex. R. Civ. P. 306, 301].
[Original Source: s 63 and 64 (for District and County Courts)(combined); Art. 2211; and Federal Rule 54].
[Official Comments]:

Rule 306, Change by amendment effective January 1, 1971. Language requiring judgment to recite findings of the jury on which it is based has been eliminated.

(b) Proposed Judgments. Any party may prepare and submit a proposed judgment to the court for signature.

[Current Rule: Tex. R. Civ. P. 305].
[Original Source: Arts. 2218, 2219, unchanged].
[Official Comments]:

Change by amendment effective September 1, 1990. To clarify the practice for proposed judgments and notice to other parties.

(c) Judgment for Personal Property. Where the judgment is for personal property, and it is shown by the pleadings and evidence and the verdict, if any, that such property has an especial value to the plaintiff, the court may award a special

writ for the seizure and delivery of such property to the plaintiff; and in such case may enforce its judgment by attachment, fine and imprisonment.

[Current Rule: Tex. R. Civ. P. 308, 309].
[Original Source: Arts. 2217, 2218, unchanged].

(d) Judgments in Foreclosure Proceedings. Judgments for the foreclosure of mortgages and other liens shall provide: that the plaintiff recover his debt, damages, and costs, with a foreclosure of the plaintiff's lien on the property subject to the lien; except in judgments against personal representatives, that an order of sale shall issue for the property as under execution; and, that if the property cannot be found or if the proceeds of the sale are insufficient to satisfy the judgment, then the balance remaining unpaid shall be taken out of other property of the defendant, as in case of ordinary executions. An order foreclosing a lien on real estate has the force and effect of a writ of possession and the order shall so provide and direct the sheriff or other officer to place the purchaser of the property in possession within thirty days after the date of the foreclosure sale.

[Current Rule: Tex. R. Civ. P. 309, 310].
[Original Source: Arts. 2218, 2219, unchanged].
[Official Comments]:

Rule 309, Change: The order of sale is to be directed to the sheriff or constable of any county of the State, in harmony with the rules relating to executions.

Rule 309, Change by amendment effective January 1, 1967. The order of sale is to be directed to any sheriff or any constable within the State of Texas, in harmony with the rules relating to executions.

(e) Judgments Against Personal Representatives. A judgment for the recovery of money against an executor, administrator, or guardian, shall state that it is to be paid in the due course of administration. No execution shall issue, but it shall be certified to the county court, sitting in probate, to be enforced under the law, but a judgment against an executor under a will dispensing with the action of the county court shall be enforced against the property of the testator in the hands of the executor, by execution, as in other cases.

[Current Rule: Tex. R. Civ. P. 313].
[Original Source: Art. 2222, unchanged].

(f) Effective Dates: Periods to Run from Signing of Judgment.

(1) Beginning of Periods. The date an order is signed as shown of record determines the beginning of the periods for the court's plenary power to grant a new trial or to vacate,

modify, correct or reform an order and for filing in the trial court documents that a party may file within those periods, including motions for new trial, motions to modify, motions to reinstate a case dismissed for want of prosecution, motions to vacate a judgment.

(2) Date to be Shown. All judgments, decisions, and orders of any kind shall be reduced to writing and signed by the trial judge with the date of signing stated expressly in it. If the date of signing is not recited in the order, it may be shown in the record by a certificate of the judge or otherwise; the absence of a showing of the date in the record shall not invalidate an order.

(3) Notice of Judgment. When an appealable order is signed, the clerk of the court shall immediately give notice to the parties by first-class mail advising them that the order was signed. Failure to comply with this rule shall not affect the periods mentioned in paragraph (1), except under paragraph (4).

(4) No Notice of Judgment. If within twenty days after the judgment or other appealable order is signed, a party adversely affected by it has neither received the notice required by paragraph (3) nor acquired actual knowledge of the order, then for that party the periods in paragraph (1) shall begin on the date that party received notice or acquired actual knowledge of the signing, whichever occurred first, but in no event shall those periods begin more than ninety days after the original appealable order was signed.

(5) Motion, Notice, and Hearing. To establish the application of paragraph (4), the party adversely affected is required to prove in the trial court, on sworn motion and notice, elements of paragraph (4) the date on which the party or his attorney first either received a notice of the judgment or acquired actual knowledge of the signing and that this date was more than twenty days after the judgment was signed. The trial court shall find the date on which the party or his attorney first either received or acquired actual knowledge of the signing of the judgment at the conclusion of the hearing and include this finding in the court's order.

(6) Nunc Pro Tunc Order. When a corrected judgment has been signed after expiration of the court's plenary power, the periods in subparagraph (1) of this paragraph shall run from the date of signing the corrected judgment for complaints that would not apply to the original document.

(7) Process by Publication. For a motion for new trial filed more than thirty days after the judgment was signed when process has been served by publication, the periods in subparagraph (1) shall be computed as if the judgment were signed on the date of filing the motion.

[Current Rule: Rule 306a].

[Original Source: New Rule].
[Official Comments]:

Change by amendment effective January 1, 1981. The rule is rewritten to eliminate the use of the term, ''rendition of judgment,'' and to make period begin with the date the judgment is signed. A certificate by the judge is permitted to establish the date of signing. Reference to the notice of appeal and filing the statement of facts in the trial court has been deleted in view of amendments which omit these requirements.

Change by amendment effective April 1, 1984. The rule collects all provisions concerning the beginning of post-judgment periods that ordinarily run from the date the judgment is signed.

Paragraph 1 is the second paragraph of former Rule 306a, with the addition of the period of the court's plenary power as defined by paragraphs (d) and (e) of Rule 329b.

Paragraph 2 is the first paragraph of former Rule 306a.

Paragraph 3 changes former Rule 307d by requiring notice by mail and incorporates that rule into this rule.

Paragraphs 4 and 5 are new and apply when actual notice of the signing of the judgment is not received within twenty days after the judgment was signed.

Paragraph 6, with respect to nunc pro tunc orders, comes from former Rule 306b and makes clear that paragraphs 1 and 4 of this Rule 306a do not revive the court's expired plenary power with respect to complaints that could have been made to the original judgment.

Paragraph 7 conforms Rule 329 to the 1981 amendments to the appellate rules and eliminates the discrepancy created by those amendments in apparently providing for appeal that may expire before the time for filing a motion for new trial in cases of citation by publication.

Change by amendment effective September 1, 1986. Amended to delete any reference to appellate procedure.

The phrase ''in connection with an appeal, including but not limited to an original or amended motion for new trial, an appeal bond, certificate of cash deposit, or notice or affidavit in lieu thereof, and bills of exception, and for filing of the petition for writ of error if review is sought by writ of error, and for filing in the appellate court of the transcript and statement of facts'' is deleted from subdivision 1; the phrase, ''except the period for filing a petition for writ of error'' is deleted from subdivision 4; and the words ''thirty days before'' are deleted from

subdivision 7.

Change by amendment effective January 1, 1988. Amended to reflect repeal of Rule 317.

Rule 102. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaims, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motions and Proceedings Thereon. The motion for summary judgment shall state the specific grounds therefore. [Each party shall, in the motion for summary judgment or in the response thereto, specifically refer to any portions of depositions relied upon; copies of said deposition excerpts shall be attached to the motion for summary judgment or response.] Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one [forty-five] days before the time specified for hearing. Except on leave of court [for good cause shown], the adverse party, not later than seven days prior to the day of hearing [shall] file and serve [a] written response. No oral testimony shall be received at the hearing. The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. [Amendment to pleadings at any time subsequent to a motion for summary judgment may be made only with leave of court and for good cause shown.] Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered an appeal as grounds for reversal. A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the matter of tact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

(d) Burdens of Movant and Non-Movant. A party moving for summary judgment, on an issue upon which the movant would have the burden of proof at trial, shall have the burden to present evidence sufficient to establish facts which, if proved at trial, would entitle the movant to an instructed verdict. If the motion is based upon the absence of proof of an issue upon which the non-movant has the burden to proof, the non-movant must respond with evidence sufficient to entitle the non-movant to submission of the issue to a jury.

(e) Appendices, References and Other Use of Discover Not Otherwise on File. Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence or a notice containing specific references to the discovery or specific references to other instruments are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: **(i)** at least twenty-one [forty-five] days before the hearing if such proofs are to be used to support the summary judgment; or **(ii)** at least seven days before the hearing if such proofs are to be used to oppose the summary judgment.

(f) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings on that action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be deemed established, and the trial shall be conducted accordingly.

(g) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached hereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(h) What Affidavits Are Unavailable. Should it appear from the [by] affidavits of [that] a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his [that party's] opposition, [and if the affidavit sufficiently describes the expected proof], the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions be taken or discovery to be had or may make such other order as is just.

(i) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him [such other party] to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

[Current Rule: Tex. R. Civ. P. 166a].
[Original Source: Federal Rule 56, as originally promulgated, except that the following wording in subdivision (a) has been eliminated: "pleading in answer thereto has been served"; and in its place the following language has been submitted: "Adverse party has appeared or answered."].
[Official Comments]:

Change by amendment effective March 1, 1952. The last sentence is added to subdivision (a).

Change by amendment effective January 1, 1967. Fourth sentence of subdivision (c) was added.

Change by amendment effective January 1, 1971. The first sentence of subdivision (c) has been added, and the words ''answers to interrogatories'' have been inserted in the fifth sentence of subdivision (c).

Change by amendment effective January 1, 1978. The time requirements in subdivision (c) are changed. The third, fourth, and fifth sentences of subdivision (c) are new. The last sentence of subdivision (e) is new.

Change by amendment effective January 1, 1981. The second sentence adds the words ''with notice to opposing counsel,'' ''and any supporting affidavits,'' and ''filed and.'' Third sentence adds the words,''file and.''

Change by amendment effective April 1, 1984. Subdivision (c) is changed to include stipulations and authenticated and certified public records as matters in support of a summary judgment.

Change by amendment effective September 1, 1990. This amendment provides a mechanism for using previously non-filed discovery in summary judgment practice. Such proofs must all be filed in advance of the hearing in accordance with Rule 166a. Subdivisions (d) through (g) are renumbered as subdivisions (e) through (h).

[Task Force Comments: This proposal is based on the Proposed Summary Judgment Rule recommended to the Supreme Court by the Committee on Court Rules].

Rule 103. Default Judgment

(a) When Available. At any time after a defendant is required to answer, appear, or otherwise defend as provided by these rules, the plaintiff may take judgment by default; provided that the citation with the officer's return thereon shall have been on file with the clerk for the length of time required by Rule ____ (currently Rule 107). No default judgment shall be rendered against a defendant in a removed action remanded from federal court if the defendant filed an answer in federal court during removal.

[Current Rule: Tex. R. Civ. P. 237a, 239].
[Original Source: Art. 2154, with minor textural changes; Federal Rule 55].
[Oficial Comments]:

Rule 237a, Change by amendment effective April 1, 1984. Minor change.

Rule 237a, Change by amendment effective September 1, 1990. To expressly provide, consistent with existing law, that a default judgment cannot be taken in a case remanded from federal court if an answer was filed in federal court during removal.

Rule 239, Change: ''In term time'' added.

Rule 239, Change by amendment effective September 1, 1962. Final clause beginning with the words ''and provided that'' added.

(b) Interlocutory Judgment. An interlocutory judgment by default may be rendered as follows:

(1) As to a defendant's liability pending a determination of unliquidated damages; or,

(2) As to a certain defendant in an action who is in default under subsection (a) of this Rule where there are several defendants in the action, some of whom are not in default.

[Current Rule: Tex. R. Civ. P. 240.
[Original Source: Art. 2155, with textural change].

(c) Damages.

(1) Liquidated Demands. Damages shall be assessed by the court against a defendant if the claim is liquidated and proved by a written instrument unless the defendant demands and is entitled to a trial by jury.

(2) Unliquidated Demands. The court shall hear evidence as to damages and shall render judgment therefor if the claim is unliquidated or not proved by written instrument unless the defendant demands and is entitled to a trial by jury. Notice of a hearing as to damages shall be given to a defendant who has either answered or appeared as provided for in these rules.

[Current Rule: Tex. R. Civ. P. 241, 243].
[Original Source: Art. 2157, unchanged].
[Official Comments]:

Change by amendment of March 31, 1941. The original rule has been amended by striking out the word ''claim'' and substituting in lieu thereof the words ''cause of action.''

(d) Notice of the Judgment. At or immediately prior to the time an interlocutory or final default judgment is rendered, the plaintiff shall certify to the clerk in writing the last known mailing address of the defendant, which shall be filed among the papers in the action. The clerk shall use this address to comply with the notice requirement of Rule _____ (currently Rule 306a(3)).

[Current Rule: Tex. R. Civ. P. 239a].
[Original Source: New Rule effective January 1, 1967].

(e) After Service by Publication. Where service has been made by publication, and no answer has been filed nor appearance entered within the prescribed time, the court shall appoint an attorney to defend the suit in behalf of the defendant, and judgment shall be rendered as in other cases; but, in every such case a statement of the evidence, approved and signed by the judge, shall be filed with the papers of the cause as a part of the record thereof. The court shall allow such attorney a reasonable fee for his services, to be taxed as part of the costs.

[Current Rule: Tex. R. Civ. P. 244].
[Original Source: Art. 2158, with minor textual change.

(f) Setting Aside Default Judgment. The court may set aside an interlocutory or final default judgment for good cause at any time before the court's plenary power expires under Rule _____ (currently Rule 329b (d) and (e)). A final default judgment also may be set aside in accordance with Rule ___ (currently Rule 320).

[Current Rule: Tex. R. Civ. P. 330].
[Original Source: Federal Rule 55(c)].

Rule 104. New Trials

(a) **Motion for New Trials.** New trials may be granted and judgment set aside for good cause, on motion or on the court's own motion on such terms as the court shall direct. New trials may be granted when the damages are manifestly too small or too large. Each motion for new trial shall be in writing and signed by the party or his attorney.

[Current Rule: Tex. R. Civ. P. 320].
[Original Source: Texas Rule 67 (for District and County Courts), unchanged].
[Official Comments]:

Change by amendment effective January 1, 1955. Subdivisions (a) and (d) of original rule eliminated as these requirements are covered in Rules 329-a and 329-b.

Changes by amendment effective January 1, 1976. The rule permits partial retrials in certain cases.

Change by amendment effective January 1, 1978. The last sentence is changed by deleting the part requiring a specification of each ground.

Change by amendment effective January 1, 1981. ''Point or points'' used in place of ''ground or grounds.'' SEE Rules 321, 418(d), 458, 469(e), and 515.

Change by amendment effective April 1, 1984. The rule is rewritten to be consistent with Rule 329b(d).

(b) **Prerequisite for Complaint on Appeal.**

(1) **Motion for New Trial Not Required.** A point in a motion for new trial is not a prerequisite to a complaint on appeal in either a jury or a nonjury case, except as provided in subdivision (2).

(2) **Motion for New Trial Required.** A point in a motion for new trial is a prerequisite to the following complaints on appeal:

(A) A complaint on which evidence must be heard such as one of jury misconduct or newly discovered evidence or failure to set aside a judgment by default;

(B) A complaint of factual insufficiency of the evidence to support a jury finding;

(C) A complaint that a jury finding is against the overwhelming weight of the evidence;

(D) A complaint of inadequacy or excessiveness of the damages found by the jury; or

(E) Incurable jury argument if not otherwise ruled on by the trial court.

[Current Rule: Tex. R. Civ. P. 324].
[Original Source: 71a (for District and County Courts)].
[Official Comments]:

Change: Reference to fundamental error as an exceptional situation not requiring motion for new trial eliminated. Proviso added authorizing appellee, when judgment is rendered non obstante veredicto or notwithstanding the jury finding on one or more special issues, to complain of any prejudicial error committed against him over his objection on the trial by cross-assignments of error filed in the Court of Civil Appeals without having first presented such complaint in a motion for new trial.

Change by amendment of March 31, 1941. Paragraph added providing that an assignment in a motion for new trial shall not be a prerequisite to the right to complain on appeal of the action of the court in giving an instructed verdict, rendering or refusing to render judgment non obstante veredicto, or overruling appellant's motion for judgment on the verdict.

Change by amendment effective December 31, 1941. Reference to cross-assignments of error and to motion for new trial deleted from sentence dealing with appellee's right to complain of errors committed against him on the trial. Sentence added providing that a motion for new trial shall not be necessary in behalf of appellee, except where he complains of the judgment or a part thereof. Provisions of paragraph dealing with right to complain on appeal without an assignment in a motion for new trial expanded to include action of court ''in withdrawing the case from the jury and rendering judgment.''

Change by amendment effective January 1, 1955. The rule has been largely re-written and re-arranged.

Change by amendment effective September 1, 1957. Provisions of rule dealing with cross-points of error of appellee when judgment has been rendered non obstante veredicto have been expanded to require cross-points, as to any matter, not requiring the taking of evidence, which would vitiate the verdict. The amendment is intended to modify the holding in DE WINNE V. ALLEN, 154 Tex. 316, 277 S.W.2d 95, 99.

Change by amendment effective September 1, 1962. The proviso in the first sentence has been rewritten to express more clearly its effect as declared in WAGNER V. FOSTER, 161

Tex. 333, 341 S.W.2d 887. The words ''in a case coming within the proviso of Rule 329-a,'' which formerly appeared after''''non-jury case'' in the first sentence, have been deleted. Notes regarding original change and 1941 amendments have been rewritten.

Change by amendment effective January 1, 1978. Eliminates requirement for a motion for new trial in jury cases in most (though not all) instances.

Change by amendment effective January 1, 1981. The third sentence of the rule is rewritten, and the fourth sentence is deleted.

Change by amendment effective April 1, 1984. The requirement for a motion for new trial concerning factual complaints of jury findings, excessive and inadequacy of damages, and incurable jury argument have been added.

(c) Form of Motion; Need for Affidavits. Affidavits are required when a ground of objection is predicated on facts that are outside of the facts that appear in the record. Affidavits are required for:

(1) allegations of jury misconduct;

(2) newly discovered evidence;

(3) when a defendant seeks to set aside a default judgment by excusing the default; and,

(4) when a defendant seeks to set aside a judgment following citation by publication.

When a motion for new trial is based upon affidavits, the affidavits shall be served with the motion.

[Current Rule: Tex. R. Civ. P. 321, 322].
[Original Source: 67 and 68 (for District and County Courts), unchanged].
[Official Comments]:

Rule 321, Change by amendment effective January 1, 1981. ''Point'' is substituted for ''ground.'' SEE Rules 320, 418(d), 458, 469(e),and 515.

(d) Special Rules for Complaints of Jury Misconduct.

(1) When the ground of a motion for new trial, supported by affidavit, is misconduct of the jury or of the officer in charge of them, or because of any communication made to the jury, or that a juror gave an erroneous or incorrect answer on voir dire examination, the court shall hear evidence thereof from the jury or others in open court, and may grant a new trial if such misconduct proved, or the communication made,

or the erroneous or incorrect answer on voir dire examination, be material, and if it reasonably appears from the evidence both on the hearing of the motion and the trial of the case and from the record as a whole that injury probably resulted to the complaining party.

(2) A juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict concerning his mental processes in connection therewith, except that a juror may testify whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

[Current Rule: Tex. R. Civ. P. 327].
[Original Source: Art. 2234].
[Official Comments]:

Change: Imposing burden on complaining party to show probability of injury.

Change by amendment effective January 1, 1955. Phrase ''or that a juror gave an erroneous or incorrect answer on voir dire examination'' inserted.

Change by amendment effective April 1, 1984. This codifies existing law that there must be affidavits before the trial judge need have a hearing. It incorporates the provisions of Rule 606(b), Texas Rules of Evidence.

(e) Partial New Trials; Remittiturs. If the court is of the opinion that the damages awarded to a party by the jury are excessive, the court shall indicate to such party within what time the party may file a remittitur of the excess.

[Current Rule: Tex. R. Civ. P. 320, third sentence].
[Original Source: 67 (for District and County Courts), unchanged].
[Task Force Comments: See T.R.A.P. 85(c) and Rule 320 (second sentence) concerning the subject of suggestion of remittituras].

(f) Prematurely Filed Motions. No motion for new trial or motion to modify shall be held ineffective because prematurely filed; but every such motion shall be deemed to have been filed on the date of but subsequent to the time of signing of the judgment.

[Current Rule: Tex. R. Civ. P. 306c].
[Original Source: New Rule].
[Official Comments]:

Change by amendment effective January 1, 1971. Language requiring judgment to recite findings of the jury on which it is based has been eliminated.

Rule 105. Time for Filing Motions

The following rules shall be applicable to motions for new trial and motions to modify judgments or findings (other than motions to correct the record under Rule ___ (currently Rule 316) in all district and county courts:

(a) A motion for new trial, if filed, shall be filed prior to or within thirty days after the judgment or other order complained of is signed.

(b) One or more amended motions for new trial may be filed without leave of court before any preceding motion for new trial filed by the movant is overruled and within thirty days after the judgment or other order complained of is signed.

(c) In the event an original or amended motion for new trial or a motion to modify, correct or reform a judgment is not determined by written order signed within seventy-five days after the judgment was signed, it shall be considered overruled by operation of law on expiration of that period.

(d) The trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed.

(e) If a motion for new trial is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.

(f) On expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law; provided that the court may at any time correct a clerical error in the record of a judgment and render judgment nunc pro tunc under Rule ___ (currently Rule 316), and may also sign an order declaring a previous judgment or order to be void because signed after the court's plenary power had expired.

(g) A motion to modify a judgment or findings (as distinguished from motion to correct the record of a judgment under Rule ____ (currently Rule 316), if filed, shall be filed and determined within the time prescribed by this rule for a motion for new trial and shall extend the trial court's plenary power and the time for perfecting an appeal in the same manner as a motion for new trial.

(h) If a judgment is modified, corrected or reformed in any respect, the time for appeal shall run from the time the modified, corrected, or reformed judgment is signed, but if a correction is made pursuant to Rule after expiration of the period of plenary power provided by this rule, no complaint shall be heard on appeal that could have been presented in an appeal from the original judgment.

[Current Rule: Tex.R. Civ. P. 329b].
[Original Source: New Rule effective January 1, 1955].
[Official Comments]:

Change: In subdivision (b), the amount of the bond is to be fixed in accordance with the rules relating to supersedeas bonds.

Change by amendment effective January 1, 1981. The word ''rendered'' in the first sentence of subdivision (a) is changed to ''signed.''

Change by amendment effective April 1, 1984. This change conforms to the 1981 amendments to Rules 329b, 356, 386, and other rules that make the periods for appeal begin to run from the signing of the judgment rather than from overruling the motion for new trial.

(i) If a judgment is modified, corrected or reformed in any respect, the time for appeal shall run from the time the modified, corrected, or reformed judgement is signed, but if a correction is made pursuant to Rule ____ (currently Rule 316) after expiration of the period of plenary power provided by this rule, no complaint shall be heard on appeal that could have been presented in an appeal from the original judgment.

[Current Rule: Tex. R. Civ. P. 329b].
[Original Source: New Rule].

Rule 106. Motion for New Trial on Judgment Following Citation by Publication

In cases in which judgment has been rendered on service of process by publication, when the defendant has not appeared in person or by attorney of his own selection:

(a) The court may grant a new trial upon petition of the defendant showing good cause, supported by affidavit, filed within two years after such judgment was signed. The parties adversely interested in such judgment shall be cited as in other cases.

(b) Execution of such judgment shall not be suspended unless the party applying therefor shall give a good and sufficient bond payable to the plaintiff in the judgment, in an amount fixed in accordance with Appellate Rule 47 relating to supersedeas bonds, to be approved by the clerk, and conditioned

that the party will prosecute his petition for new trial to effect and will perform such judgment as may be rendered by the court should its decision be against him.

(c) If property has been sold under the judgment and execution before the process was suspended, the defendant shall not recover the property so sold, but shall have judgment against the plaintiff in the judgment for the proceeds of such sale.

(d) If the motion is filed more than thirty days after the judgment was signed, the time period shall be computed pursuant to Rule ____ (currently Rule 306a(7).

[Current Rule: Tex. R. Civ. P. 329].
[Original Source: Art. 2236].
[Official Comments]:

Change: In Subdivision (b), the amount of the bond is to be fixed in accordance with the rules relating to supersedeas bonds.

Change by amendment effective January 1, 1981: The word rendered" in the first sentence of subdivision (a) is changed to "signed."

Change by amendment effective April 1, 1984. This change conforms to the 1981 amendments to Rules 329 b, 356, 386, and other rules that make the periods for appeal begin to run from the signing of the judgment rather than from overruling the motion for new trial.

SECTION ___
Counsel, Courts, Clerks, Court Reporters, Court Records & Court Costs

A. COUNSEL

Rule 110. May Appear by Attorney; Attorney in Charge; Number of Counsel Heard; Attorney to Show Authority

(a) **May Appear by Attorney.** Any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court.

[Current Rule: Tex. R. Civ. P. 7].
[Original Source: Art. 1993, unchanged].

(b) **Attorney in Charge.** On the occasion of a party's first appearance through counsel, the attorney whose signature first appears on the initial pleadings for any party shall be the attorney in charge, unless another attorney is specifically designated therein. Thereafter, until such designation is changed by written notice to the court and all other parties in

accordance with Rule ___ (currently Rule 21a), said attorney in charge shall be responsible for the suit as to such party.

All communications from the court or other counsel with respect to a suit shall be sent to the attorney in charge.

[Source: Tex. R. Civ. P. 8].
[Original Source: 45 (for District and County Courts), unchanged].

(c) Number of Counsel Heard. Not more than two counsel on each side shall be heard on any question or on the trial, except in important cases, and upon special leave of the court.

[Source: Tex. R. Civ. P. 9].
[Original Source: 44 (for District and County Court), unchanged].

(d) Attorney to Show Authority. A party in a suit or proceeding pending in a court of this state may, by sworn written motion stating that he believes the suit or proceeding is being prosecuted or defended without authority, cause the attorney to be cited to appear before the court and show his authority to act. The notice of the motion shall be served upon the challenged attorney at least ten days before the hearing on the motion. At the hearing on the motion, the burden of proof shall be upon the challenged attorney to show sufficient authority to prosecute or defend the suit on behalf of the other party. Upon his failure to show such authority, the court shall refuse to permit the attorney to appear in the cause, and shall strike the pleadings if no person who is authorized to prosecute or defend appears. The motion may be heard and determined at any time before the parties have announced ready for trial, but the trial shall not be unnecessarily continued or delayed for the hearing.

[Current Rule: Tex. R. Civ. P. 12].
[Original Source: Art. 320].
[Official Comments]:

Change: Minor textual change and the addition of the requirement that notice be served at least ten days before trial of the motion.

Change by amendment effective January 1, 1981. The existing rule is changed to permit a challenge to a plaintiff's attorney, so that all attorneys are subject to a challenge that they are in court without authority.

Rule 111. Attorney Conduct During Argument

(a) Questions of Law; Questions on Motions; Exceptions to Evidence. Arguments on questions of law shall be addressed to the court, and counsel should state the substance of the authorities referred to without reading more from books than is necessary to verify the statement. On a question on motions, exceptions to the evidence, and other incidental matters, the

counsel will be allowed only such argument as is necessary to present clearly the question raised, and refer to authorities on it, unless further discussion is invited by the court.

(b) Arguments on the Facts. Arguments on the facts should be addressed to the jury, when one is impaneled in a case that is being tried, under the supervision of the court. Counsel shall be required to confine the argument strictly to the evidence and to the arguments of opposing counsel.

(c) Side-Bar Remarks; Personal Attacks on Opposing Counsel. Side-bar remarks, and remarks by counsel of one side, not addressed to the court, while the counsel on the other side is examining a witness or arguing any question to the court, or addressing the jury, will be rigidly repressed by the court.

Mere personal criticism by counsel upon each other shall be avoided, and when indulged in shall be promptly corrected as a contempt of court.

(d) Objections. The court will not be required to wait for objections to be made when the rules as to arguments are violated, but should such violations not be noticed and corrected by the court, opposing counsel may ask leave of the court to rise and present his point of objection. However the court shall protect counsel from any unnecessary interruption made on frivolous and unimportant grounds.

(e) Addressing the Court. It shall be the duty of every counsel to address the court from his or her place at the bar, to rise to his or her feet when addressing the court, and to remain at his or her place at the bar while engaged in the trial of a case.

[Current Rule: Tex. R. Civ. P. 269].
[Original Source: Art. 2183].
[Official Comments]:

Change: Addition, in second sentence, of words ''or on all matters which are submitted by the charge, whether upon special issues or otherwise.''

Change by amendment of March 31, 1941. Source of subdivisions (b) through (h); s 36 through 42 (for District and County Courts).

Rule 112. Withdrawal of Attorney

An attorney may withdraw from representing a party only upon written motion for good cause shown. If another attorney is to be substituted as attorney for the party, the motion shall state: the name, address, telephone number, telecopier number, if any, and State Bar of Texas identification number of the substitute attorney; that the party approves the substitution; and that the withdrawal is not sought for delay only. If another attorney is not to be substituted as attorney for the party, the motion shall state: that a copy of the motion has been delivered to the

party; that the party has been notified in writing of his right to object to the motion; whether the party consents to the motion; the party's last known address; and all pending settings and deadlines. If the motion is granted, the withdrawing attorney shall immediately notify the party in writing of any additional settings or deadlines of which the attorney has knowledge at the time of the withdrawal and has not already notified the party. The Court may impose further conditions upon granting leave to withdraw. Notice or delivery to a party shall be either made to the party in person or mailed to the party's last known address by both certified and regular first class mail. If the attorney in charge withdraws and another attorney remains or becomes substituted, another attorney in charge must be designated of record with notice to all other parties in accordance with Rule ___.

[Current Rule: Tex. R. Civ. P. 10].
[Original Source: 46 (for District and County Courts), unchanged].
[Official Comments]:

Change by amendment effective January 1, 1988. The amendment repeals the present rule and makes provision for withdrawal of counsel, setting forth the requirements for withdrawal and withdrawal with substitution of counsel. The amendment also carries forward the requirements of amended Rule 8 regarding designation of attorney in charge.

Change by amendment effective September 1, 1990. The amendment repeals the present rule and clarifies the requirements for withdrawal.

Rule 113. Agreements to be in Writing

Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it is in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.

[Current Rule: Tex. R. Civ. P. 11].
[Original Source: 47 (for District and County Courts), unchanged].
[Official Comments]:

Change by amendment effective January 1, 1988. The amendment makes it clear that Rule 11 is subject to modification by any other rule of Civil Procedure.

B. COURTS

Rule 114. Effect of Vacant Judgship on Proceedings

If the office of a judge should become vacant, all pleadings, motions and proceedings shall be continued by the clerk until a judge is appointed or transferred to hold such court.

[Current Rule: Tex. R. Civ. P. 18].
[Original Source: Art. 2288].
[Task Force Comments: The substantive meaning of the former rule has not been changed. The only changes are in the phraseology.]

Rule 115. Recusal or Disqualification of Judges

(a) Filing of Motion. At least ten days before the date set for trial or other hearing in any court other than the Supreme Court, the Court of Criminal Appeals or the Court of Appeals, any party may file a motion to recuse or disqualify the judge before whom the case is pending on the grounds that such judge has either bias or prejudice either against the party or in favor of any adverse party.

If a judge is assigned to a case within ten days of the date set for trial or other hearing, the motion shall be filed at the earliest practicable time prior to the commencement of the trial or other hearing.

The motion shall be verified and must state with particularity the grounds why the judge before whom the case is pending should not sit. The motion shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence provided that facts may be stated upon information and belief if the grounds of such belief are specifically stated.

[Original Source: Art. 2288 and 28 U.S.C. § 143].

(b) Effect of Motion. Prior to any further proceedings in the case, the judge shall either recuse himself or request the presiding judge of the administrative judicial district to assign a judge to hear such motion. If the judge recuses himself, he shall enter an order of recusal and request the presiding judge of the administrative judicial district to assign another judge to sit, and shall make no further orders and shall take no further action in the case except for good cause stated in the order in which such action is taken.

If the judge declines to recuse himself, he shall forward to the presiding judge of the administrative judicial district, in either original form or certified copy, an order of referral, the motion, and all opposing and concurring statements. Except for good cause stated in the order in which further action is taken, the judge shall make no further orders and shall take no further action in the case after filing of the motion and prior to hearing on the motion. The presiding judge of the administrative judicial district shall immediately set a hearing before himself or some other judge designated by him, shall cause notice of such hearing to be given to all parties or their counsel, and shall make such other orders including orders on interim or ancillary relief in the pending cause as justice may require.

(c) **Review of Judgment on Motion.** If the motion is denied, it may be reviewed for abuse of discretion on appeal from the final judgment. If the motion is granted, the order shall not be reviewable, and the presiding judge shall assign another judge to sit in the case.

(d) **Appointment and Assignment of Judges.** The Chief Justice of the Supreme Court may also appoint and assign judges in conformity with this rule and pursuant to statute.

[Current Rule: Tex. R. Civ. P. 18a].
[Original Source: New Rule].
[Official Comments]:

Change by amendment effective April 1, 1984. Subdivision (a) is changed textually.

Change by amendment effective September 1, 1986. The words ''the Court of Criminal Appeals'' have been added in (a); and subsection ''1'' has been added to (g).

Rule 116. Grounds For Disqualification and Recusal of Judges

(a) **Definitions.** In this rule:

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

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

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

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

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

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

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

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

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

(b) Disqualification. Judges shall disqualify themselves in all proceedings in which:

(1) they or lawyers they have practiced law with have served as a lawyer in the matter in controversy; or

(2) they have an interest in the subject matter in controversy either individually or as a fiduciary; or

(3) either of the parties is related to them by affinity or consanguinity within the third degree.

(c) Recusal. A judge shall recuse himself in any proceeding in which:

(1) the judge's impartially might reasonably be questioned;

(2) the judge has a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(3) the judge or a lawyer with whom he or she previously practiced law has been a material witness concerning it;

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

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

(6) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

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

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

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

(7) he or his spouse, or a person within the first degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding.

(d) Judge's Responsibility to Remain Apprised of His or Her Personal Affairs. A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(e) Waiver of Ground for Recusal. The parties to a proceeding may waive any ground for recusal after it is fully disclosed on the record.

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

[Current Rule: Tex. R. Civ. P. 18b].
[Original Source; New Rule].
[Official Comments]:

Change by amendment effective September 1, 1990. The grounds for a judge's mandatory recusal have been expanded from those in prior Rule 18b(2).

Rule 117. Interpreters

The court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

[Current Rule: Tex. R. Civ. P. 183].
[Original Source: Art. 3712, unchanged, Federal Rule 43(f)].
[Official Comments]:

Change by amendment effective September 1, 1990. To adopt procedures for the appointment and compensation of interpreters.

[Task Force Comments: Comment to 1990 change: To adopt procedures for the appointment and compensation of

interpreters. The provision regarding summoning interpreters and their conduct is deleted because it is covered by Rule 604, s of Civil Evidence].

Rule 118. Recording and Broadcasting of Court Proceedings

A trial court may permit broadcasting, televising, recording, or photographing of proceedings in the courtroom only in the following circumstances:

(a) in accordance with guidelines promulgated by the Supreme Court for civil cases, or

(b) when broadcasting, televising, recording, or photographing will not unduly distract participants or impair the dignity of the proceedings and the parties have consented, and consent to being depicted or recorded is obtained from each witness whose testimony will be broadcast, televised, or photographed, or

(c) the broadcasting, televising, recording, or photographing of investiture, or ceremonial proceedings.

[Current Rule: Tex. R. Civ. P. 18c].
[Original Source: New Rule, effective September 1, 1990].

Rule 119. 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.

[Current Rule: Tex. R. Civ. P. 20].
[Original Source: Art. 1918].
[Official Comments]:

Change: Elimination of former requirement that minutes be signed daily. Extension of the rule to judges of both district and county courts.

C. CLERKS

Rule 120. Duties of Clerk

(a) Assignment of File Numbers. The clerk shall assign suits consecutive file numbers.

[Current Rule: Tex. R. Civ. P. 23]
[Original Source: 82 (for District and County Courts)].

(b) Endorsement on Petitions. The clerk shall endorse the file number, the date and time of filing, and sign his or her name officially on each petition filed.

[Current Rule: Tex. R. Civ. P. 24].
[Original Source: Art. 1972].

(c) File Docket. The clerk shall keep a "file docket" and note thereon the file number of each suit, the names of the attorneys and the parties to the suit, and the nature of the suit.

[Current Rule: Tex. R. Civ. P. 25].
[Original Source: Art. 1973, with minor textual change].

(d) Order of Cases and Denoting File Number on Instruments. The clerk shall enter chronologically in the file docket and mark with the file number on all papers filed with the clerk, all process issued and return made thereon, all appearances, orders verdicts and judgments. The entries shall state the nature of each paper filed or writ issued and the substance of each order and judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall state the date the entry is made.

[Current Rule: Tex.R.Civ.P. 25].
[Original Source: Art. 1973, with minor textual change].

(e) Court Docket. The clerk shall keep a book known as a "court docket" that shall include in chronological order the file number of the cases, the names of the attorneys, the names of the parties to the suit, the nature of the suit, the pleas, the motions and the rulings of the court as made.

[Current Rule: Tex. R. Civ. P. 26].
[Original Source: Art. 1973, with minor textual change].

(f) Notice of Trial to Non-Resident Attorney. The clerk shall keep a record in his office of all cases set for trial, and it shall be his duty to inform any non-resident attorney of the date of setting of any case upon request by mail from such attorney, accompanied by a return envelope properly addressed and stamped. Failure of the clerk to furnish such information on proper request shall be sufficient ground for continuance or for a new trial when it appears to the court that such failure has prevented the attorney from preparing or presenting his claim or defense.

[Current Rule: Tex. R. Civ. P. 246].
[Original Source: New Rule].

(g) Exhibits. The clerk of the court in which the exhibits are filed shall retain and dispose of the exhibits as directed by the Supreme Court.

[Current Rule: Tex. R. Civ. P. 14b].
[Original Source: New Rule effective January 1, 1967].

D. COURT REPORTERS

Rule 121. Duties.

(a) General Duties. The duties of official court reporters shall be performed under supervision of the presiding judge of the court and shall include, but not be limited to:

(1) attending all sessions of court and making a full record of the evidence when requested by the judge or any party to a case, together with all objections to the admissibility of the evidence, the rulings and remarks of the court theron;

(2) making a full record of jury arguments and voir dire examinations when requested by the judge or any party to a case, together with all objections to the admissibility of the evidence, the rulings and remarks of the court thereon;

(3) filing all exhibits with the clerk;

(4) preparing official transcripts of all such evidence or other proceedings, or any portion thereof, subject to the laws of this state, these rules and the instructions of the presiding judge of the court; and

(5) performing such other duties relating to the reporter's official duties as may be directed by the judge presiding.

(b) Exhibits and Materials. Exhibits and materials used in the trial of a case and all of the records in a case are subject to such orders as the court may enter thereon.

(c) Inability to Fulfill Duties. In case of illness, press of official work, or unavoidable absence or disability of the official court reporter to perform the duties in (a) above, the presiding judge of the court may, in his discretion, authorize a deputy reporter to act in place of and perform the duties of the official reporter.

(d) Retention of Notes. When a defendant is convicted and sentenced to a term of more than two years and no appeal is taken, the court reporter shall file the nontranscribed notes of the proceeding with the district clerk within 20 days following the expiration of the time for perfecting appeal. The district clerk shall not be required to retain the notes beyond 15 years from the date of their filing.

[Current Rule: Tex. R. App. P. 11].
[Original Source: Tex. R. Civ. P. 376b and 376c].

Rule 122. Work

(a) Timeliness. It shall be the joint responsibility of the trial and appellate courts to insure that the work of the court reporter is accomplished timely.

(b) Setting Priorities. The presiding judge of the trial court shall insure that the work of the court reporter is timely accomplished by setting priorities on the various elements of the reporter's workload to be observed by the reporter in the conduct of business of the court reporter's office. Duties relating to proceedings before the court shall take preference over other work.

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 district in which the court sits.

[Current Rule: Tex. R. App. P. 12].
[Original Source: Tex. R. Civ. P. 376b and 376c; See also Chapter 52 of the Government Code]

Rule 123. Filing of Exhibits by Reporter or Stenographer for Court

The reporter or stenographer for the court shall file with the clerk of the court all exhibits which were admitted in evidence or tendered on bill of exception during the course of any hearing, proceeding or trial.

[Current Rule: Tex. R. Civ. P. 75a].
[Original Source: New Rule effective January 1, 1967].

E. COURT RECORDS

Rule 124. Withdrawal, Return, Disposal and Copying of Exhibits

(a) Disposal of Exhibits. In (1) those cases in which judgment has been rendered on service of process by publication and in which no motion for new trial was filed within two years after judgment was signed, and (2) all other cases in which judgment has been signed for one year and in which no appeal was perfected or in which a perfected appeal was dismissed or concluded by a final judgment as to all parties and the issuance of the appellate court's mandate such that the case is no longer pending on appeal or in the trial court, the clerk, unless otherwise directed by the court, after first giving thirty day notice to the attorneys of record so that they have an opportunity to claim or withdraw the trial exhibits, may dispose of the exhibits.

If any exhibit is desired by more than one attorney, the clerk shall make the necessary copies and prorate the cost among all the attorneys desiring the exhibit.

If the exhibit is not a document or otherwise capable of reproduction, the party who offered the exhibit shall be entitled

to claim same; provided, however, that the party claiming the exhibit shall provide a photograph of said exhibit to any other party upon request and payment of the reasonable cost thereof by the other party.

[Current Rule: Tex. R. Civ. P. 14b, Supreme Court Order Relating to Retention and Disposition of Exhibits]

(b) Withdrawal of Exhibits by Parties. The court may by order entered on the minutes allow a filed exhibit to be withdrawn by any party only upon such party's leaving on file a certified photo, or other reproduced copy of such exhibit. The party withdrawing such exhibit shall pay the costs of such order and copy.

[Current Rule: Tex. R. Civ. P. 75b(a)].
[Original Source: New Rule effective January 1, 1967].

(c) Withdrawal of Exhibits for Appellate Purposes. The court reporter or stenographer of the court conducting the hearing, proceedings, or trial in which exhibits are admitted or offered in evidence, shall have the right to withdraw filed exhibits, upon giving the clerk proper receipt therefor, whenever necessary for the court reporter or stenographer to transmit such original exhibits to an appellate court or to otherwise discharge the duties imposed by law upon said court reporter or stenographer.

[Current Rule: Tex. R. Civ. P. 75b(b)].
[Original Source: New Rule effective January 1, 1967].

Rule 125. Inspection of Court Records and Papers

An attorney of record shall be allowed at all reasonable times to inspect the papers and records relating to any suit or other matter in which he is the attorney of record.

[Current Rule: Tex. R. Civ. P. 76].
[Original Source: Art. 318].

Rule 126. Sealing Court Records

(a) Standard for Sealing Court Records. Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed. Other court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of all the following:

(1) a specific, serious and substantial interest which clearly outweighs:

(A) this presumption of openness;

(B) any probable adverse effect that sealing will have upon the general public health or safety;

(2) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

(b) Court Records. For purposes of this rule, court records means:

(1) all documents of any nature filed in connection with any matter before any civil court, except:

(A) documents of any nature filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents;

(B) documents in court files to which access is otherwise restricted by law;

(C) documents filed in an action originally arising under the Family Code.

(2) settlement agreements not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government.

(3) discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.

(c) Notice. Court records may be sealed only upon a party's written motion, which shall be open to public inspection. The movant shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, stating: that a hearing will be held in open court on a motion to seal court records in the specific case; that any person may intervene and be heard concerning the sealing of court records; the specific time and place of the hearing; the style and number of the case; a brief but specific description of both the nature of the case and the records which are sought to be sealed; and the identity of the movant. Immediately after posting such notice, the movant shall file a verified copy of the posted notice with the clerk of the court in which the case in pending and with the Clerk of the Supreme Court of Texas.

(d) Hearing. A hearing, open to the public, on a motion to seal court records shall be held in open court as soon as is practicable, but not less than fourteen days after the motion is

filed and notice is posted. Any party may participate in the hearing. Non-parties may intervene as a matter of right for the limited purpose of participating in the proceedings, upon payment of the fee required for filing a plea in intervention. The court may inspect records in camera when necessary. The court may determine a motion relating to sealing or unsealing court records in accordance with the procedures prescribed for special appearances.

(e) Temporary Sealing Order. A temporary sealing order may be issued upon motion and notice to any parties who have answered in the case, upon a showing of compelling need from specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant before notice can be posted and a hearing held as otherwise provided herein. The temporary order shall set the time for the hearing required by section (d) of this rule and shall direct that the movant immediately give the public notice required in section (c) of this rule. The court may modify or withdraw any temporary order upon motion by any party or intervenor, notice to the parties, and hearing conducted as soon as is practicable. Issuance of a temporary order shall not reduce in any way the burden of proof of a party requesting sealing at the hearing.

(f) Order on Motion to Seal Court Records. A motion relating to sealing or unsealing court records shall be decided by written order, open to the public, which shall state: the style and number of the case; the specific reasons for finding whether the showing required by section (a) of this rule has been made; the specific portions of court records which are to be sealed; and the time period for which the sealed portions of the court records are to be sealed. The order shall not be included in any judgment or other order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.

(g) Continuing Jurisdiction. Any person may intervene as a matter of right at any time before or after judgment to seal or unseal court records. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order. An order sealing or unsealing court records shall not be reconsidered on motion of any party or intervenor who had actual notice of the hearing preceding issuance of the order, without first showing changed circumstances materially affecting the order. Such circumstances need not be related to the case in which the order was issued. However, the burden of making the showing required by section (a) shall always be on the party seeking to seal records.

(h) Appeal. Any order (or portion of an order of judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party or intervenor who participated in the hearing preceding issuance of such order. The appellate court

may abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings.

(i) **Application.** Access to documents in court files not defined as court records by this rule remains governed by existing law. This rule does not apply to any court records sealed in an action in which a final judgment has been entered before its effective date. This rule applies to cases already pending on its effective date only with regard to:

(1) all court records filed or exchanged after the effective date;

(2) any motion to alter or vacate an order restricting access to court records, issued before the effective date.

[Current Rule: Tex. R. Civ. P. 76a].
[Original Source: New Rule effective September 1, 1990: New rule to establish guidelines for sealing certain court records in compliance with Government Code § 22.010].

Rule 127. Lost Records and Papers

When any papers or records are lost or destroyed during the pendency of a suit, the parties may, with the approval of the judge, agree in writing on a brief statement of the matters contained therein; or either party may supply such lost records or papers as follows:

(a) After three days' notice to the adverse party or his attorney, make written sworn motion before the court stating the loss or destruction of such record or papers, accompanied by certified copies of the originals if obtainable, or by substantial copies thereof.

(b) If, upon hearing, the court is satisfied that there are substantial copies of the original, an order shall be made substituting such copies or brief statement for the originals.

(c) Such substituted copies or brief statement shall be filed with the clerk, constitute a part of the cause, and have the force and effect of the originals.

[Current Rule: Tex. R. Civ. P. 77].
[Original Source: Art. 2289, unchanged, except that by Amendment effective December 31, 1943, subdivision b. has been reworded].

F. COURT COSTS

Rule 128. Parties Liable for Costs.

(a) In General. The rules of this section shall apply to any party who seeks a judgment against any other party.

[Current Rule: Tex. R. Civ. P. 147].
[Original Source: Art. 2073].
[Official Comments]:

Change by amendment effective April 1, 1984. The rules for security and rule for costs are made applicable to any party.

(b) Other Costs. Each party shall be liable for all of its costs. If costs cannot be collected from the party against whom they have been judged, execution may be issued against any other party for the uncollected amount.

[Current Rule: Tex. R. Civ. P. 127].
[Original Source: Art. 2052, unchanged].

(c) New Trial. the costs of new trial may either abide the result of the suit or may be taxed against the party to whom the new trial is granted, as the Court may adjudge when it grants a new trial.

[Current Rule: Tex. R. Civ. P. 138].
[Original Source: Art. 2063, unchanged].

Rule 129. Issuance and Service of Process

(a) Collection by Clerk. The clerk shall collect from the plaintiff a fee for services before issuing any process unless process is pursuant to section (d) of this rule.

[Current Rule: Tex. R. Civ. P. 142].
[Original Source: Art. 2067, unchanged].

(b) In-County Process. An officer receiving process to be executed shall not be entitled to demand, in advance, a fee for execution; instead, the fee shall be taxed and collected as other costs in the case.

[Current Rule: Tex. R. Civ. P. 17].
[Original Source: Art. 3911].
[Official Comment]:

Change: Addition of the matter to the first comma.

[Task Force Comment: Note that this rule is also included in the new rules as 9(c)].

(c) Out-of-County Process. No officer shall be compelled to execute any process coming from another county unless the fee for execution is paid in advance, except if process is pursuant to section (d) of this rule.

[Current Rule: Tex. R. Civ. P. 126].

[Original Source: Art. 2051 (second sentence), with minor textural change].

(d) Indigent Parties. If indigent filing is requested and the clerk officially endorses the process as "pauper oath filed," the officer receiving the process for service shall serve it.

[Current Rule: Tex. R. Civ. P. 126].
[Original Source: Art. 2051].

Rule 130. Collection

(a) How Costs are Collected. After judgment, if a responsible party fails or refuses to pay costs within ten days after demand, the clerk may certify a copy of the bill of costs, and provide the same to an officer for collection. The certified bill has the force and effect of an execution. Removal by appeal has no effect on this rule.

[Current Rule: Tex. R. Civ. P. 129].
[Original Source: Art. 2054, unchanged].
[Official Comments]:

Change by amendment effective April 1, 1984. The words ''at the end of the term'' are dropped from the last sentence.

(b) Officer to Levy. The officer may levy upon a party's property to satisfy the costs due; the officer may sell such property as under execution. When the party is a nonresident of the county in which the suit is pending, payment of costs maybe demanded of the party's attorney of record. Unless compelled to levy, the clerk shall not be allowed to charge a fee for certifying a copy of the bill of costs.

[Current Rule: Tex. R. Civ. P. 130].
[Original Source; Art. 2055, with minor textual changes].

(c) Execution for Costs. On demand of any party to whom costs are due, the officer shall issue an execution for costs at once. This rule does not apply to executors, administrators, or guardians in cases in which costs are adjudged against the estate of a deceased person or ward.

[Current Rule: Tex. R. Civ. P. 149].
[Original Source: Art. 2077, with minor textual changes].

Rule 131. Party's Recovery of Its Costs

(a) General. The successful party shall recover from its adversaries, jointly and severally, all costs incurred. The court may, for good cause, stated on the record, adjudge the costs otherwise than as provided by law or in these rules. This rule includes costs of motions and costs of new trials.

[Current Rule: Tex. R. Civ. P. 131 and 141].

[Original Source: Art. 2056 and 2066].

(b) Reduction on Demand. When the plaintiff's demand is reduced by payment to an amount not within the Court's jurisdiction, the defendant shall recover its costs.

[Current Rule: Tex. R. Civ. P. 136].
[Original Source: Art. 2061, unchanged].

(c) Assault, Battery or Defamation Claims. In suits for assault, battery, or defamation, if the verdict awards the plaintiff less than twenty dollars, each party shall pay its own costs.

[Current Rule: Tex. R. Civ. P. 137].
[Original Source: Art. 2062, unchanged].

Rule 132. Taxable Costs

(a) Taxable costs include, but are not limited to:

(1) Filing fees;

(2) Expenses for blood tests required by statute;

(3) Guardian ad litem fees;

(4) Receiver fees.

(b) Costs not taxable include:

(1) Photocopies not required by law;

(2) Attorney fees;

(3) Expert fees;

(4) Inspection and medical examination expenses;

(5) Deposition expenses

[Task Force Comment: This is a new rule and needs to be expanded].

Rule 133. Security for Costs

(a) Rule for Costs. Upon motion of a party, interested court officer, or the Court itself, a party seeking affirmative relief may be ordered to give security for costs at any time before final judgment. If so ordered, the party has twenty days after receiving notice of the order's entry to comply, or its claim shall be dismissed.

[Current Rule: Tex. R. Civ. P. 143].
[Original Source: Art. 2068].

[Official Comments]:

Change: Substitution of twenty day period for reference to next term of court.

Change by amendment effective January 1, 1971. Language has been changed to provide that any party seeking affirmative relief may be ruled for costs upon motion of any party or by the court on its own motion, and the words ''knowledge or'' formerly appearing before ''notice'' in last sentence have been deleted.

(b) Cost Bonds. All cost bonds shall authorize judgment against all obligors for the costs entered in the final judgment. No further security shall be required if the costs are secured by a bond filed by the party required to give security for costs.

[Current Rule: Tex. R. Civ. P. 144 and 148].
[Original Source: Art. 2069 and 2074, unchanged].

(c) Deposit for Costs. In lieu of a cost bond, a party may deposit with the clerk a sum as the Court from time to time may designate as sufficient to pay accrued costs.

[Current Rule: Tex. R. Civ. P. 146].
[Original Source: Art. 2071, with minor textual change].
[Official Comments: Art. 2072 and (Vernon's) Art. 2072a were not deemed procedural. These statutes deal with special provisions exempting certain parties from giving security for costs. Related articles on the same general subject will be found in Vernon's Statutes as Articles 279a, 1174, 2072a, 2276, 2276a, 3700, and 7880-126a].

(d) Deposit in Lieu of Surety Bond.

Wherever these rules provide for the filing of a surety bond, the party may in lieu of filing the bond deposit cash or other negotiable obligation of the government of the United States of America or any agency thereof, or with leave of court, 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 that is insured by the government of the United States of America or any agency thereof, in the amount fixed for the surety bond, conditioned in the same manner as would be a surety bond for the protection of other parties. Any interest thereon shall constitute a part of the deposit.

Rule 134. Inability to Pay Costs

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

action, shall be processed by the clerk in the manner prescribed by this rule.

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

If the party's action results in monetary award, and the court finds sufficient monetary award to reimburse costs, the party shall pay the costs of the action. If the court finds that another party to the suit can pay the costs of the action, the other party shall pay the costs of the action.

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

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

[Current Rule: Tex. R. Civ. P. 145].
[Original Source: Art. 2070].
[Official Comments]:

Change by amendment effective April 1, 1984. The requirement that the contest be tried at the term of court at which the affidavit is filed is deleted.

Change by amendment effective January 1, 1988. The purpose of this rule is to allow indigents to file suit and have citation issued based solely on an affidavit of indigency filed with the suit.