AGENDA
MAY 20-21, 1994
SCAC MEETING

INDEX

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5/20/94

REPORT TO SUPREME COURT ADVISORY COMMITTEE FROM JURY CHARGE SUBCOMMITTEE

Dear Committee Members:

Attached are the proposed revisions to Rules 226, 226a, 236, 271, 272, 273, 274, 275, 276, 277, 278 and 279.

Our subcommittee has essentially concluded its work on those Rules. The changes are typed in bold type, and each change from existing language is marked with one or more asterisks. The asterisks are keyed under the Rules to denote the source of the change or in some case to explain the change.

Most of the changes have been unanimously approved by the subcommittee, and are submitted with the recommendation that they be approved by the full committee. Each of the changes that is not identified specifically below is essentially, "ministerial" or "grammatical". Many of the changes simply have to do with clarifying language or removing archaic terminology.

The changes that the subcommittee believes merit full committee discussion are identified below, as are the issues which the subcommittee felt should be brought to the full committee's attention.

1. Rule 226. The language at the end of Rule 226 "so help you God" (which is also found at the end of the oath in Rule 236), has been identified as objectionable by the ACLU in correspondence to Justice Hecht. That correspondence is attached for your reference. The subcommittee agrees that this manner should be debated by the full committee.

2. Rule 226a(1)(4). The "meddling" language was reinserted based on discussion at the last meeting has been placed in Rule 226a(1)(4). However, we have altered it, to delete the language and about selecting "fair and impartial jurors who are free from any bias or prejudice". Whether or not the "fair and impartial" language should stay in is a matter about which the subcommittee is not unanimous and which should therefore be resolved by the full committee.

3. In Rule 226a(2)(6), there is great discussion in the subcommittee about the impact of the Rule as it is now written. The second sentence of paragraph 6 provides that "if an objection to an witness's answer is sustained, disregard that answer. It is not evidence and should not be considered." Judge Brister has pointed out, and several of us on the

subcommittee agree, that this language is significant. Does it absolve a party who has objected from the requirement that that party seek an instruction for the jury to disregard? What does it do for purposes of determining whether or not there is evidence in the record referable to an appellate point? What does the language in this Rule do to a party's desire from time to time during the trial to have the judge instruct the jury to disregard a particular answer which is exceptionally offensive? Will the parties lose the right to make such a request?

4. Rule 272(2)(d), dealing with disjunctive submission, has also been flagged for discussion by the full committee. As now phrased, the Rule says "the court may submit a question disjunctively when the evidence shows as a matter of law that one or the other conditions or facts inquired about necessarily exists". The subcommittee is unanimous that the term "conditions or facts" should be replaced by the term "matters". The subcommittee does not agree about the necessity or impact of the phrase "as a matter of law". Do we want this phrase included? Is our intent actually to require that a court decide that "as a matter of law" one of the matters necessarily exists? Is this an excessive burden? Is the language necessary or appropriate?

5. Rule 274(2). Luke Soules suggested adding a sentence at the end of this Rule which reads "A party objecting to the charge must point out distinctly the matter complained of and the grounds of the complaint by an objection that identifies the portion of the charge to which complaint is made and is specific enough to inform the trial court to make a correct ruling on the objection or to support a presumption on appeal that the trial court was informed and chose to overrule the objection". The subcommittee has voted not to include this language, feeling that it is duplicative and problematic.

6. Rule 274, Comment. The comment at the end of Rule 274 is new, and has not yet been seen by the committee as a whole. It was requested at the time of the last full committee meeting, and has been drafted by the subcommittee. It is submitted for discussion.

7. Rule 274. Judge McCown discussed and has drafted a comment for possible inclusion at the end of Rule 274. The subcommittee has decided that the comment should not be added. The proposed language from Judge McCown is as follows: Comment under Tex. R. Civ. P. 301, a Motion for Directed Verdict is not a prerequisite to a Motion fo Judgment notwithstanding a verdict. 4 R. McDonald, Texas Civil Practice Sec. 26.9 (1992 ed.). Under Fed. R. Civ. P. 50(b), a Motion for Directed Verdict is a prerequisite to a Motion for Judgement notwithstanding the verdict. The changes proposed here do not change Texas practice. The Federal rule is not adopted. [Comment recommended at last committee meeting, and drafted by Judge Scott McCown.]

The subcommittee has essentially concluded its work on the listed Rules. Our next order of business will be to undertake what we consider to be "part 2" of our task, which is to address Rules 216, 217, 218, 219, 220, 221, 222, 223, 224 and 225, as well as 227, 228, 229, 230, 231, 232, 233, 234 and 235.

The only decision with regard to those Rules which have been made so far is that, with regard

to the conduct of voir dire, the subcommittee has decided not to attempt to draft Rules which address the proper procedures for Batson challenges. The Batson law is evolving too fast, and anything we drafted would potentially be obsolete before a new rule book could even be printed. The subcommittee requests that committee members look at these "part 2" rules, and make any suggestions to us on or before April 1st. This will allow us to discuss those changes and to meet a few times before the May 20-21 full committee meeting.

Thank you for your attention to these matters.

Best regards,

Paula Sweeney

PS/dsa
Enclosure

RULE 216. REQUEST AND FEE FOR 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 nonjury 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.

* **Note to Subcommittee: The suggestion for deletion of this language came from Luke Soules. Please see his attached suggestion, which I do not completely understand.**

RULE 217. 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.

RULE 218. JURY DOCKET

The clerks of the district and county courts, shall each keep a docket, styled, "The Jury Docket," in which shall be entered in their order the cases in which jury fees have been paid or affidavit in lieu thereof has been filed as provided in the two preceding rules.

RULE 219. JURY TRIAL DAY

The court shall designate the days for taking up the jury docket and the trial of jury cases. Such order may be revoked or changed in the court's discretion.

RULE 220. 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.

RULE 221. CHALLENGE TO THE ARRAY

When the jurors summoned have not been selected by jury commissioners or by drawing the names from a jury wheel, any party to a suit which is to be tried by a jury may, before the

jury is drawn challenge the array upon the ground that the officer summoning the jury has acted corruptly, and has wilfully summoned jurors known to be prejudiced against the party challenging or biased in favor of the adverse party. All such challenges must be in writing setting forth distinctly the grounds of such challenge and supported by the affidavit of the party or some other credible person. When such challenge is made, the court shall hear evidence and decide without delay whether or not the challenge shall be sustained.

RULE 222. WHEN CHALLENGE IS SUSTAINED

If the challenge be sustained, the array of jurors summoned shall be discharged, and the court shall order other jurors summoned in their stead, and shall direct that the officer who summoned the persons so discharged, and on account of whose misconduct the challenge has been sustained, shall not summon any other jurors in the case.

RULE 223. JURY LIST IN CERTAIN COUNTIES

In counties governed as to juries by the laws providing for interchangeable juries, the names of the jurors shall be placed upon the general panel in the order in which they are randomly selected, and jurors shall be assigned for service from the top thereof, in the order in which they shall be needed, and jurors returned to the general panel after service in any of such courts shall be enrolled at the bottom of the list in the order of their respective return; provided, however, after such assignment to a particular court, the trial judge of such court, upon the demand prior to voir dire examination by any party or attorney in the case reached for trial in such court, shall cause the names of all members of such assigned jury panel in such case to be placed in a receptacle, shuffled,and drawn, and such names shall be transcribed in the order drawn on the jury list from which the jury is to be selected to try such case. There shall be only one shuffle and drawing by the trial judge in each case.

RULE 224. PREPARING JURY LIST

In counties not governed as to juries by the laws providing for interchangeable juries, when the parties have announced ready for trial the clerk shall write the name of each regular juror entered of record for that week on separate slips of paper, as near the same size and appearance as may be, and shall place the slips in a box and mix them well. The clerk shall draw from the box, in the presence of the court, the names of twenty-four jurors, if in the district court, or so many as there may be, if there be a less number in the box; and the names of twelve jurors if in the county court, or so many as there may be, and write the names as drawn upon two slips of paper and deliver one slip to each party to the suit or his attorney.

RULE 225. SUMMONING TALESMAN

When there are not as many as twenty-four names drawn from the box, if in the district court,or as many as twelve, if in the county court, the court shall direct the sheriff to summon such number of qualified persons as the court deems necessary to complete the panel. The

names of those thus summoned shall be placed in the box and drawn and entered upon the slips as provided in the preceding rules.

Note to Subcommittee: No proposed changes have been made, to my knowledge, to Rule 217 through 225.

RULE 226. OATH TO JURY PANEL

Before the parties or their attorneys begin the examination of the jury panel, the jurors shall be sworn by the court or under its direction as follows: "Do you solemnly swear or affirm that you will give true answer to all questions ***asked you** concerning your qualifications as a juror,, ****so help you God?"**

*** It is suggested that these words be deleted.**
**** See attached correspondence from the ACLU. The issue about whether or not this language should be deleted needs to be debated at the full committee.**

RULE 226a. INSTRUCTIONS TO JURY PANEL AND JURY

The judge shall give the following instructions to the jury panel and to the jury. If the case is tried to a six-person jury, the references to ten or eleven jurors in these instructions should be changed to read "five."

PART 1 - JURY PANEL

After the members of the panel have been sworn as provided in Rule 226 and before the voir dire examination, the judge shall read ***to the jury panel** the following instructions, with such modifications as the circumstances of the particular case may require, to the jury panel:

****Members of the Jury Panel:** The case that is now on trial is _____ v. _____. This is a civil lawsuit that will be tried before a jury. Your duty as jurors will be to decide the disputed facts. It is my ~~*the~~ duty ~~of the~~ ***as** judge to see that the case is tried in accordance with the rules of law. It is very important that you follow carefully all instructions that I give you now and later during the trial. If you do not obey these instructions, it may become necessary for another jury to retry this case with all of the ~~attendant~~ ***resulting** waste of your time here and the expense to the litigants and the taxpayers of this county for another trial. ***Your initial instructions are as follows:***

*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~~ ***these** people.*

2. Do not accept any favors 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 this case with anyone, including your spouse. Do not let anyone discuss the case in your ~~presence~~ *hearing. If anyone tries to talk about the case with you or in your hearing, tell me *or the bailiff immediately.*

*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. ***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 and complete answers. Do not conceal information. If you cannot hear or understand the questions, please let me know.*

*5. If a questions is asked of the whole panel **or part of the 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~~ *those who responded. *Counsel you may proceed.*

PART 2 - JURY

Immediately 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:

By your oath, you are now officials of this court, and active participants in the administration of justice. 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.

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

*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.~~*

*4. In ~~arriving at your verdict~~ *answering these questions, you can consider only the evidence admitted during the trial. Do not make any investigation about the facts of this case. 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.

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.

*6. During the presentation of evidence, the attorneys may make legal objections. If an objection to a questions is sustained, disregard the question, and do not speculate ~~as to~~ ***about** why it was asked or what the answer ~~would~~ ***might** 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 or consider for any reason the objections or my rulings ~~themselves~~ ***on them.***

*I stress again that it is imperative that you follow these instructions, as well as any others that I may ~~later~~ give you ***later.** If you do not obey these instructions, then it may become necessary for another jury to retry this case with all of the ~~attendant~~ ***resulting** 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 questions arise about the rules that govern your conduct during the trial. A violation of any instruction must be reported to me ***or the bailiff** as soon as possible.*

PART 3 - COURT'S CHARGE

*The ***judge shall give the** following written instructions ***to the jury,** 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. Your answers must be based only upon the evidence, including exhibits, admitted during the trial.

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

3. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony.

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

*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~~ ***the courtroom.** This avoids a trial based upon secret evidence.*

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

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

*8. This charge includes ~~all~~ *the legal instructions and definitions that ~~are~~ *you should use ~~necessary to assist you~~ in reaching your verdict. *If no definition is given, the normal meaning of words applies. *Do not look up ~~so do not seek out~~ any information in law books or dictionaries.*

9. Every answer required by the charge is important.

10. Do not decide who think should win and then try to answer the questions accordingly. Simply answer the questions; and do not concern yourselves with the effect of your answers.

11. Do not decide a question by any method of chance.

*12. ~~Do not answer a question that calls for a numerical answer by adding together each juror's figure and then dividing by the number of jurors to get an average.~~ *If a question calls for a numerical answer, the figure should be one agreed to by the jurors, not one reached by adding together each juror's figure and then dividing by the number of jurors to get an average.*

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

14. After you retire to the jury room, you will select a presiding juror. You will then deliberate upon your answers.

15. It is the duty of that presiding juror:

*a. to preside during the deliberations to ~~provide~~ *maintain order and compliance with ~~the charge~~ *all instructions given you;*

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. 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~~ *and every answer~~s~~ made.*

17. If the verdict is reached by unanimous agreement, the presiding juror 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.

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 ****or the bailiff.***

20. During your deliberations, any juror who observes a violation of my instructions shall point out the violation ****to the offending juror*** *and caution ~~the offending~~* ****that*** *juror not to violate the instruction again.*

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 ****or the bailiff*** *immediately.*

22. When ****you have answered*** *all ~~required~~* ****applicable*** *questions ~~have been answered, the presiding juror has written your answers on the charge, and the~~* ****and signed the*** *verdict ~~has been signed~~, you* ****should inform*** *~~will summon~~ the bailiff ~~and be returned to court~~* ****before returning to the courtroom*** *with your verdict.*

[Instructions, definitions and questions to be placed here.]

Certificate

We , the jury have answered the questions as shown and return these answers to court as our verdict.

Signature of presiding juror, if unanimous. [One signature line here.]

Signatures of jurors voting for the verdict, if not unanimous. [Eleven signatures lines here.]

PART 4 - JURY RELEASE

The judge shall give the jury the following oral instructions after accepting the verdict and then release them:

I earlier instructed you to observe strict secrecy during the trial, ****and not to discuss this case with anyone except other jurors while you were deliberating. I am *now about to discharge you. Once I have*** *~~done that~~* ****discharged you,*** *you are released from ~~that~~* ****secrecy and *from all*** *~~of~~ the other orders that I gave you. You will be ~~absolutely~~* ****completely free to discuss***

anything about this case with anyone. You will be just as free to decline to talk about the case if that is your decision.

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

* **Change suggested by the subcommittee**
** **Change suggested at full committee meeting**
*** **Change of concern to subcommittee which requires committees input.**

RULE 227 - 270 have not yet been addressed by this subcommittee except for rule 236 which follows.

RULE 236. JUROR'S OATH

*The jury shall be sworn by the court or under its direction as follows: "Do you solemnly swear or affirm that you will return a true verdict, according to the law stated in the court's charge and ~~to~~ the evidence submitted to you under the rulings of this court, **so help you God?"*

** **See attached correspondence from the ACLU. The issue about whether or not this language should be deleted needs to be debated at the full committee.**

RULE 271. CHARGE TO THE JURY

The trial court shall prepare a written charge to the jury. The court shall provide counsel with written copies of the proposed charge, and shall provide a reasonable opportunity for the parties to prepare their requests and objections and to present them on the record outside the presence of the jury after the conclusion of the evidence and before the charge is read to the jury. After the requests and objections are made and ruled upon and any modifications to the charge are made, the court shall read the charge to the jury in open court in the precise words in which it is written. The court shall deliver one or more copies of the written charge to the jury. The charge shall be signed by the court and filed with the clerk.

RULE 272. STANDARDS FOR THE JURY CHARGE

1. General Standards

a. Pleading Required. A party who has the burden of pleading a matter shall not be entitled to the submission of a question, instruction, or definition regarding that matter unless if the matter is affirmatively raised by the party's pleading.

b. Comment on the Evidence. The court shall not directly comment on the weight of the evidence or advise the jury of the effect of their answers, but an otherwise proper

question, instruction, or definition shall not be objectionable on the ground that it incidentally ~~constitutes a~~ comments* on the weight of the evidence or advises the jury of the effect of their answers.

2. Questions

a. In General. The court shall submit questions ~~on~~ *about the disputed material factual issues ~~which~~ **~~are~~ raised by the pleadings and the evidence.

b. Broad Form Submission. The court shall, whenever feasible, submit the case ~~upon~~ *by broad form questions.

c. Conditional Submission. The court may predicate the jury's consideration of one or more questions upon specified answers to another question or questions on which the materiality of the predicated question or questions depends.

d. Disjunctive Submission. The court may submit a question disjunctively when the evidence shows ***~~as a matter of law~~ that one or the other of the *~~conditions or facts~~ *matters inquired about necessarily exists.

e. Inferential Rebuttal. Inferential rebuttal questions shall not be submitted.

3. Instructions and Definitions

a. In General. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict.

b. Burden of Proof. The placing of the burden of proof may be accomplished by instructions or by inclusion in the questions.

RULE 273. REPEALED.

RULE 274. PRESERVATION OF APPELLATE COMPLAINTS

1. Requests. A party may not assign as error the failure to give ***~~submit~~ a question, definition, or instruction on a contention which that party was required to plead unless the record reflects that, after the conclusion ~~on~~ *of the evidence and before or at the time of objecting, the party tendered such question, definition, or instruction to the judge ***~~court~~ in writing. Defects in a requested question, definition, or instruction shall not constitute a waiver of error if the request provides the trial court reasonable guidance in fashioning a correct question, definition, or instruction. If a request has been filed and bears the judge's ***~~court's~~ signature, if shall be presumed, unless otherwise noted in the record, that the request was tendered at the proper time.

2. Objections. ~~No~~ **A party may **not assign as error the giving or the failure to give a question, definition, or instruction unless that party objects thereto before the charge is read to the jury, stating distinctly the matter objected to and the grounds of the objection. An objection is required even if the objecting party is required to tender a request under paragraph 1 of this rule. Objections shall be in writing or shall be made orally in the presence of the court, the court reporter, and opposing counsel. It shall be presumed, unless otherwise noted in the record, that a party making objections did so at the proper time. ~~***A party objecting to the charge must point out distinctly the matter complained of and the grounds of the complaint by an objection that identifies the portion of the charge to which complaint is made and is specific enough to inform the trial court to make a correct ruling on the objection or to support a presumption on appeal that the trial court was informed and chose to overrule the objection.~~

****Comment: The change in the second sentence, requiring an objection by a party required to tender is intended to modify the rule enunciated in State v. Payne.*

* **Language changes suggested by the subcommittee.**
** **Changes suggested at last full committee meeting.**
*** **Changes suggested at last full committee meeting but questioned by subcommittee and reurged for committee discussion.**
**** **Full committee agreed that a comment was needed but no drafting was done.**

3. Obscured or Concealed Objections or Requests. When an objection or request is obscured or concealed by voluminous unfounded objections or requests, minute differentiations or numerous unnecessary objections or requests, such objection or request shall not preserve appellate complaint. No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only. A judgment shall not be reversed because of the failure of the court to submit different shades of the same question, definition, or instruction.

4. Rulings. The court shall announce its rulings on objections ~~in open court~~ **on the record** before reading the charge to the jury. In the absence of an express ruling, any objection not cured by the charge is deemed overruled.

5. Evidentiary Sufficiency Complaints. A claim that there ~~was~~ *is no evidence to support the submission of a question, or that the answer to the question ~~was~~ *is established as a matter of law, may be made for the first time ** after the verdict. A claim that there ~~was~~ *is factually insufficient evidence to support the jury's answer to a question, or that the answer to a question ~~was~~ *is against the great weight and preponderance of the evidence, ~~must~~ *may be made *only after the verdict. ~~Any of~~ *Such claims may be made regardless of whether the submission of the question was requested by the complainant.

* **Change suggested by subcommittee.**
** **Comment under Tex. R. Civ. P. 301, a Motion for Directed Verdict is not a prerequisite to a Motion for Judgment notwithstanding a verdict. 4 R. McDonald,**

Texas Civil Practice Sec. 26.9 (1992 ed.). Under Fed. R. Civ. P. 50(b), a Motion for Directed Verdict is a prerequisite to a Motion for Judgment notwithstanding the verdict. The changes proposed here do not change Texas practice. The Federal rule is not adopted. [Comment recommended at last committee meeting, and drafted by Judge Scott McCown.]

RULE 275. REPEALED.

RULE 276. REPEALED.

RULE 277. REPEALED.

RULE 278. REPEALED.

RULE 279. OMISSIONS FROM THE CHARGE

1. Omission of Entire Ground. Any independent grounds* of recovery or ~~of~~* defense which is not conclusively established under the evidence and all elements of which are omitted from the charge without preservation of appellate complaint by the party relying thereon is waived.

2. Omission of One or More Elements. When an independent ground of recovery or defense consists of more than one element, and one or more of the elements necessary to sustain such ground of recovery or defense, and necessarily referable thereto, is submitted to and found by the jury, and one or more of such elements is omitted from the charge, the 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, 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, 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 and 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.

* **Change suggested by subcommittee**

5-20-94

RULE 166d. FAILURE TO MAKE OR COOPERATE IN DISCOVERY: REMEDIES

1. Procedure. If a person or entity fails in whole or in part to respond to or supplement discovery, or abuses the discovery process in seeking or resisting discovery, the court may grant relief as set forth below.

(a) Motion. Any person or entity affected by such failure or abuse may file a motion specifically describing the violation. The motion shall be filed in the court in which the action is pending, except that a motion involving a person or entity who is not a party shall be filed in any district court in the district where the discovery is to take place. ~~Motions or responses made under this rule shall be filed and served in accordance with Rule 21 and 21.~~ Nonparties affected by the motion shall be served as if parties. The motion shall contain a certificate that the movant (or the movant's counsel) has spoken with the opposing party (or the opposing party's counsel if represented by counsel) in person or by telephone to try to resolve the discovery dispute ~~without the necessity of court intervention~~, or has made diligent attempts to do so, and that such efforts have failed.

Deleted by vote; Tr. 801, 803.

Deleted by subcommittee; approved Tr. 798-803.

(b) Hearing. Oral hearing is required for motions requesting sanctions under paragraph 3, unless waived by those involved. No oral hearing is required for motions requesting relief provided by paragraph 2. ~~The court shall base its decision upon (1) pleadings, affidavits, stipulations, and discovery results submitted with the motion, (ii) judicial notice taken of the usual and customary expenses including attorney's fees and the contents of the case file, and (iii) testimony if the hearing is oral.~~

Deleted by vote; Tr. 886, 888. Subcommittee encouraged to address by comment.

(c) Order. An order under this rule shall be in writing. An order granting relief or imposing sanctions shall be against, the party, attorney, law firm, or other person or entity whose actions necessitated the motion. An order imposing sanctions under paragraph 3 of this rule shall contain written findings, or be supported by oral findings on the record, stating specifically (1) the conduct meriting sanctions, (ii) the reasons for the court's decision, (iii) why a lesser sanction would be ineffective, and (iv) if the sanctions would preclude a decision on the merits of a party's claim, counterclaim, or defense, the conduct demonstrating that the party, a person under the control of the party, or the party's counsel has acted in flagrant bad faith or with callous disregard for the rules.

2. Motion to Compel or Quash Discovery.

~~The court may compel or quash discovery as provided by Rule 166b. In addition, so long as the amount involved is not substantial, the court may award the prevailing person or entity reasonable expenses necessary in connection with the motion, including attorney's fees. The court may presume the usual and customary fee in connection with the motion is not substantial, unless circumstances or an objection suggests such award may preclude access to the courts. An award of expenses that is substantial is governed by paragraph 3(c). If a motion is granted in part and denied in part, the court may apportion expenses in a just manner. The court may enter these orders without any finding of bad faith or negligence, but shall not award expenses if the unsuccessful motion or opposition was reasonably justified, in fact or law, or any other circumstances make an award of expenses unjust.~~

Subcommittee version deleted by vote; Tr. 898, 901.

(a) The court may compel, limit or deny ~~or quash~~ discovery as provided by Rule 166b.

Substituted version adopted by vote; Tr. 898, 901.

(b) Except in cases involving special circumstances, as set forth in subparagraphs 2(c) and 2(d), a party may not seek, and the court shall not award, expenses, including attorney's fees, or any sanction under paragraph 3, in connection with a motion to compel or quash discovery.

(c) A party may seek, and the court may make, an award of expenses, including attorney's fees, in connection with a motion to compel or quash discovery or a written response to such a motion, ~~supported by affidavit, where~~ if the court finds that the following special circumstances exist: (1) the amount of expenses, including attorney's fees, incurred in connection with the motion or opposition by the party seeking such relief is unreasonably burdensome ~~in relation to the resources of the party~~; and (2) the position of the party against whom such relief is sought was not reasonably justified in seeking or resisting the discovery at issue.

Deleted from proposal; Tr. 894.

(d) A party may seek, and the court may make, an award of sanctions under paragraph 3 ~~expenses, including attorney's fees~~, in connection with a motion to compel or quash discovery or a written response to such a motion, ~~supported by affidavit where~~ if the court finds that one or more of the following special circumstances exists: (1) a person subject to an order previously entered under this paragraph has failed to comply with such an order; (2) a party, ~~a person under the control of a party, or an~~ attorney, law firm, or other person or entity ~~for a party~~, not acting in good faith, has destroyed evidence or engaged in other conduct that cannot effectively be remedied by an order compelling or quashing discovery; (3) a party, attorney, ~~or~~ law firm, or other person or entity has repeatedly or on a continuing basis: ~~(i) failed to file timely discovery responses, (ii)~~ (i) filed untimely or clearly inadequate ~~or incomplete~~ discovery responses; ~~(iii)~~ (ii) failed to comply with specific requirements of a discovery rule, subpoena or order; or ~~(iv) propounded~~ (iii) made discovery requests~~,~~ or ~~raised~~ objections ~~to discovery which~~ that are not reasonably justified.

(e) A motion to compel or quash discovery, or a written opposition to such a motion, that also seeks either recovery of expenses, including attorney's fees, or imposition of sanctions shall so state and shall ~~be supported by affidavit evidence describing~~ describe specifically the acts or omissions constituting special circumstances under paragraphs 2(c) or (d).

Deleted from proposal; Tr. 894.

3. Sanctions. ~~In addition to or in lieu of the relief provided above~~ If one of the special circumstances described in subparagraph 2(d) exists, or if a party, a person under the control of a party, attorney, law firm, or other person or entity acts in flagrant bad faith or with callous disregard of a rule, subpoena, or order, the court may ~~enter~~ make an order imposing one or more of the sanctions set forth below. Any sanction imposed must be just and must be directed to remedying the particular violations involved. A sanction should be no more severe than necessary to satisfy its legitimate purposes.

(a) Reprimanding the offender ~~in writing, either publicly or privately~~;

Deleted by vote; Tr. 902-03.

(b) Disallowing further discovery in whole or in part;

(c) Assessing a substantial amount in discovery or trial expenses, including attorney's fees, ~~of discovery or trial~~;

Subcommittee edits approved by vote; Tr. 902-03.

(d) Deeming certain facts or matters to be established for the purposes of the action;

(e) Barring introduction of evidence supporting or opposing designated claims or defenses;

(f) Striking pleadings or portions thereof, staying further proceedings until an order is obeyed, dismissing with or without prejudice the action or any part thereof, or rendering a default judgment;

(g) Granting the movant a monetary award in addition to or in lieu of actual expenses; or~~;~~

(h) ~~Entering~~ Making such other orders as are just.

Approved by vote; Tr. 902-03.

4. Time for Compliance. ~~Monetary awards pursuant to paragraphs 3(e) or 3(g) shall not be payable prior to final judgment, unless the court makes written findings or oral findings on the record stating why an earlier assessment of the award will not preclude access to the court. Otherwise, orders~~ Orders under this rule shall be operative at such time as directed by the court. ~~If a party contends that a monetary award precludes access to the court, the district judge must either (i) provide that the award is payable only at a date that coincides with or follows entry of a final order terminating the litigation or (ii) makes written findings or oral findings on the record after a hearing that the award does not preclude access to the court.~~

Subcommittee title edit approved by vote; Tr. 902-903.

Remainder of paragraph modified to track *Braden v. Downey*; subcommittee directed to draft language by vote; Tr. 924, 927.

5. Review. An order under this rule shall be ~~deemed to be part of the final judgment, and shall be~~ subject to review on appeal ~~from the final judgment by any therefrom. Any~~ person or entity affected by the order ~~may appeal in the same manner as a party to the underlying judgment~~.

Modified by vote; Tr. 997-98.

~~[1] Parties and counsel should exercise caution before filing motions for sanctions, which may have serious, unintended consequences. Thus, a litigant should file a motion for sanctions only after exhausting other reasonable measures to resolve pretrial disputes.~~

Deleted by vote; Tr. 1042.

[2] This paragraph does not change or address the availability of mandamus relief in sanctions proceedings. *See, e.g., Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992).

Subcommittee modification of task force report; no action taken.

~~[3] Although subparagraph 1(a) deleted reference to the types of exhibits that may be filed with a motion, subparagraph 1(b) makes clear that the parties may file, and the court may consider, such materials.~~

Subcommittee directed to rewrite; Tr. 1043-54. See [4], below.

[4] *Nature of Hearing and Evidence.* Due process requires that, before sanctions are imposed, the alleged offender be afforded fair notice and an opportunity to be heard. The procedure employed may vary with the circumstances, provided that due process requirements are satisfied. The court, in its discretion, shall determine whether to hold a hearing on sanctions under consideration, as well as the type of evidence to be considered. See [Rule on Hearings, Task Force on Revision of the Texas Rules of Civil Procedure]. A hearing is ordinarily required prior to the issuance of any sanction that is based upon a finding of bad faith on the part of the alleged offender. A hearing is appropriate whenever it would assist the court in its consideration of the sanctions issue or would significantly assist the alleged offended in the presentation of his or her defense.

Subcommittee proposal presented March 18-19, 1994. No action taken.

REPORT TO THE SUPREME COURT ADVISORY COMMITTEE OF THE COMMITTEE ON STATE APPELLATE RULES OF THE JUDICIAL PRACTICE AND ADVOCACY SECTION OF THE STATE BAR OF TEXAS

MAY 20, 1994

SUPPLEMENTAL REPORT NUMBER ONE
(Supplements Cumulative Report of March 4, 1994)

Rule 1(b) **Local Rules.** Approved by SCAC as presented on 3-18-94.

Rule 2(b) **Suspension of Rules in Civil and Criminal Matters.** Amended by SCAC to capitalize "Nothing" in the last sentence and approved as amended by SCAC on 3-18-94.

Rule 4 New proposal to change title of rule as follows: Filed Papers--General Rules ~~Signing, Filing and Service~~

Rule 4(a) **Signing.** Approved by SCAC as presented on 3-18-94.

Rule 4(b) SCAC on 3/18/94 referred the rule to subcommittee to conform rule to TEX. R. CIV. P. 8. The following is the new proposal:

~~**Designation of Lead Counsel.** Each motion, petition, application, brief, or other paper shall designate the lead appellate counsel for the party or parties on whose behalf the paper is filed. In the absence of such a designation, the first attorney whose personal signature appears on the paper shall be considered lead counsel for the purpose of receiving notices and other papers. Lead counsel may designate one other attorney to receive notices and copies also.~~ **Designation of Attorney in Charge.** The attorney in charge in the trial court shall be deemed to be the attorney in charge in the appellate court until a written designation specifying otherwise is filed with the appellate court and served on all other parties.

Rule 4(c) SCAC on 3/18/94 referred the rule to subcommittee for further consideration and revision. SCAC specifically requested a version of the rule allowing documents to be delivered by private carrier. The following are alternative proposals:

Alternative 1 (contains no provision for private carrier):

(c) **Filing of Papers.** The filing of records, motions, petitions, applications, briefs and other papers in the appellate court as required by these rules shall be made by delivering ~~filing~~ them ~~with~~ to the clerk, except that any justice or judge of the court may permit the papers to be filed with ~~him~~ the justice or judge, in which event ~~he~~ the justice or judge shall

note thereon the filing date and time and forthwith transmit them to the office of the clerk. If a motion for rehearing, any matter relating to taking an appeal ~~or writ of error~~ from the trial court to any higher court, or application for writ of error or petition for discretionary review is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail on or before the last day for filing same, the same, if received by the clerk not more than ~~ten~~ fifteen days ~~tardily~~ after the last day for filing, shall be filed by the clerk and be deemed as filed in time~~; provided, however, that a certificate of mailing by the United States Postal Service or a legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing~~. A legible postmark, a receipt for registered or certified mail, or a certificate of mailing by the United States Postal Service shall be accepted as conclusive proof of mailing, but other proof may be considered.

Alternative 2 (contains a provision for private carrier):

(c) **Filing** of Papers. The filing of records, motions, petitions, applications, briefs and other papers in the appellate court as required by these rules shall be made by delivering ~~filing~~ them ~~with~~ to the clerk, except that any justice or judge of the court may permit the papers to be filed with ~~him~~ the justice or judge, in which event ~~he~~ the justice or judge shall note thereon the filing date and time and forthwith transmit them to the office of the clerk. If a motion for rehearing, any matter relating to taking an appeal ~~or writ of error~~ from the trial court to any higher court, or application for writ of error or petition for discretionary review is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail on or before the last day for filing same, the same, if received by the clerk not more than ~~ten~~ fifteen days ~~tardily~~ after the last day for filing, shall be filed by the clerk and be deemed as filed in time~~; provided, however, that a certificate of mailing by the United States Postal Service or a legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing~~. A legible postmark, a receipt for registered or certified mail, or a certificate of mailing by the United States Postal Service shall be accepted as conclusive proof of mailing, but other proof may be considered. If the document is transmitted by private delivery service and received by the clerk on the next business day after the last day for filing, or is received by the clerk within fifteen days of the last day for filing and credible proof is presented of receipt of the document by the private delivery service on or before the last day for filing, the document shall be deemed filed in time.

Rule 4(d) **Number of Copies.** Approved by SCAC as presented on 3-18-94.

Rule 4(e) The SCAC referred this subdivision to subcommittee. The following is the new proposal:

(~~ed~~) ~~**Papers Typewritten or Printed**~~ **Form.** ~~All applications, briefs, petitions, motions and other papers shall be printed or typewritten. The use of recycled paper is strongly encouraged. Typewritten papers must be with a double space between the lines and on heavy white paper in clear type.~~

(1) *Paper.* All documents shall be typewritten or printed on opaque white or near-white paper, size 8 1/2 inches by 11 inches, unless commercially printed. The use of recycled paper is strongly encouraged.

(2) *Binding-Copying.* Briefs and applications shall be bound so as to ensure that the bound copy will not lose its cover or fall apart in regular use. It is preferred that briefs be bound to permit them to lie flat when open, and they must do so if the cover is plastic or any material not easily folded. Every brief must have front and back covers of durable quality. The front cover must clearly indicate the name of the party on whose behalf the brief is being filed. Briefs may be produced by any duplicating process in 8⅓ x 11 inch size and shall use only one side of each sheet.

(3) *Length of Briefs and Applications.* Appellate briefs and applications in civil cases (including amicus briefs) shall not exceed fifty pages of Courier type with one-inch margins, or the equivalent, exclusive of pages containing the list of names and addresses of parties, the table of contents, index of authorities, issues or points of error, and any addendum or appendix containing statutes, rules, regulations, and the like, and excerpts from the record crucial to the issues presented. The court may, upon motion or by local rule, permit a longer brief. The court may direct that a party file a brief, or another brief, in a particular case. If any brief is unnecessarily lengthy or not prepared in conformity with these rules, the court may require it to be redrawn.

(4) *Rejection of Briefs.* Unless every copy of a brief conforms to this rule, the clerk is authorized to return unfiled all nonconforming copies. An extension of ten days is allowed for the re-submission in a conforming format of a rejected brief.

(5) *Amendment.* An application, brief, petition, motion, or other paper may be amended at any time when justice requires upon such reasonable terms as the court may prescribe.

Rule 4(f) This subdivision has been revised as part of the conforming amendments necessary to effectuate the SCAC decision to not require that all parties to the appeal be named in the notice of appeal. (*See* Rule 40).

(fe) **Service of All Papers Required.** Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served by a party or person acting for him on all other parties to the ~~appeal or review~~ trial court's judgment. ~~Service on a party represented by counsel shall be made on counsel.~~ Except as provided in the rules governing original proceedings (Rules 120 and 121), a copy of the record is not required to be served on all other parties. When a court of appeals has been presented with a petition and a record in an original proceeding and a subsequent proceeding is commenced in the Supreme Court concerning the matter, the record in the Supreme Court may consist of an index of those papers previously made part of the record and served in the court of appeals proceeding, together with any additional papers material

to the relator's claim for relief in the Supreme Court.

Rule 4(g) Proposed Rule 4(g), entitled "Request for Copies," is deleted as part of the conforming amendments necessary to effectuate the SCAC decision to not require that all parties to the appeal be named in the notice of appeal. (*See* Rule 40).

Rule 4(h) **Manner of service.** Now renumbered as 4(g) because of the deletion of proposed Rule 4(g). Otherwise, there are no changes to the subdivision as presented in the cumulative report.

Rule 4(i) **Proof of service.** Now renumbered as 4(h) because of the deletion of proposed Rule 4(g). Otherwise, there are no changes to the subdivision as presented in the cumulative report.

Rule 5 **Computation of Time.** Proposed amendments have not been considered by the SCAC. Cumulative report page 29.

Rule 7 **Appearance, Withdrawal and Substitution of Counsel.** Proposed amendments have not been considered by the SCAC. Cumulative report page 31.

Rule 11(a)(3) **Duties of Court Reporters.** SCAC rejected the proposed amendment to Rule 11(a)(3) at the 3-18-94 meeting. This subdivision has now been changed to reflect action by the SCAC on 3-18-94.

filing all exhibits with the clerk, and making copies of the exhibits for inclusion in the statement of facts when a statement of facts is prepared.

Rule 12(a) **Work of Court Reporters.** Proposed amendments were discussed by the SCAC on 3-18-94. There is, however, an additional change from the cumulative report, as follows:

(a) It shall be the joint responsibility of the trial and appellate courts to ensure that the work of the court reporter is accomplished timely. When a notice of appeal has been filed and the appellant has made a proper and timely request for a statement of facts and has paid the reporter's fee or made satisfactory arrangements for payment, the appellate court and the official court reporter, rather than the parties, have responsibility to see that the statement of facts is filed. If a substitute or predecessor reporter has recorded any part of the trial or other proceeding, the official reporter has responsibility to obtain from the substitute reporter a transcription of such proceedings.

Rule 13(a) & (k) **On Filing Notice of Appeal and Inability to Pay.** Proposed amendments have not been considered by the SCAC. Cumulative report page 32.

Rule 18(a) **Docketing the Case and Monitoring the Record.** Proposed amendments were approved by SCAC on 3-18-94.

Rule 19(d) & (g) **Evidence on Motions and Particular Motions.** Proposed amendments have not been considered by the SCAC. Cumulative report page 33.

Rule 20 **Amicus Curiae Briefs.** Proposed amendments have not been considered by the SCAC. Cumulative report page 34.

Rule 40(a)(1) **Notice of Appeal.** Approved by the SCAC as presented on 3-18-94.

Rule 40(a)(2) At the 3-18-94 meeting, the SCAC voted to not require the appellant list all appellees. The proposed rule has been changed in accordance with that decision, as follows:

Contents of Notice. The notice of appeal shall state: (1) the number and style of the case in the trial court and the court in which it is pending, (2) the date of the judgment or order appealed from and that appellant desires to appeal from the judgment or some designated portion thereof, (3) the date on which the notice is filed, (4) the names of all appellants filing the notice and the names, addresses, and telephone numbers of their attorneys, and the address and telephone number of any appellant not represented by an attorney. (5) If the appeal may be filed in one of several appellate courts, the notice shall specify the court to which the appeal is taken. (6) If the appellant is not represented by an attorney, the notice shall be under oath.

Rule 40(a)(3) This subdivision has been expanded since the 3-18-94 SCAC meeting.

Service of Notice. The notice of appeal shall be served on all parties to the trial court's final judgment other than the appellants filing the notice. Failure to so serve any other party is ground for dismissal of the appellant's appeal or other appropriate action with respect to any party prejudiced by such failure. The certificate of service shall state the names of all parties served and the names, addresses, and telephone numbers of their attorneys. If any party to the trial court's judgment other than appellants was not represented by an attorney in the trial court, the certificate shall state that party's address and telephone number, if known, and, if either is not known, the certificate shall state that appellant or appellant's counsel has made a diligent inquiry but has been unable to discover the address and telephone number and shall give any available information, such as the last known address or the probable city and county of residence, that might help to identify and locate the unrepresented party. If appellant has been unable to serve any party, the certificate shall state the name and the last known address of the party not served and what diligence has been used to serve that party. If the certificate is not made by an attorney, it shall be under oath.

Rule 40(a)(4) Changed as part of the conforming amendments necessary to effectuate the SCAC decision to not require that all parties to the appeal be named in the notice of appeal.

Amendment of Notice. The notice may be amended at any time until after filing of appellant's brief by filing an amended notice in the appellate court, subject to being stricken on motion of any party affected by the amended notice on showing of cause. The amendment may ~~add or omit parties or~~ correct defects or omissions in the notice. The notice may be amended after filing of the appellant's brief only on leave of the appellate court and on such terms as the court may prescribe.

Rule 40(a)(5) **Notice of Limitation of Appeal.** Proposed amendments have not been considered by the SCAC.

Rule 40(a)(6) **Judgment Not Suspended.** Proposed amendments have not been considered by the SCAC.

Rule 40a **Cross-Appeal.** Delete proposed rule. Some proposed revisions have now been transferred to Rule 74. *See* proposed 74(f).

Rule 41 **Ordinary Appeal -- When Perfected.** Proposed amendments have not been considered by the SCAC.

Rule 42 **Accelerated Appeals in Civil Cases.** Proposed amendments have not been considered by the SCAC. Cumulative report page 38.

Rule 45 **Party Unable to Pay.** The SCAC referred this rule to subcommittee to redraft to conform to Tex. R. Civ. P. 145. The Section Committee has not yet approved a new draft of this rule.

Rule 46 No rule. Reserved for future use. The proposed rule which appears in the cumulative report was not approved by the Section Committee and should be deleted.

Rule 47 **Suspension of Enforcement of Judgment Pending Appeal in Civil Cases.** Proposed amendments have not been considered by the SCAC. Subdivision (b) was incorrectly reported in the cumulative report and should appear as follows:

(b) **Money Judgment.** When the judgment awards recovery of a sum of money, the amount of the bond or deposit shall be at least the amount of judgment, interest, and costs. The trial court may make an order ~~to provide security in an amount or type~~ deviating from this general rule if after notice to all parties and a hearing the trial court finds:

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

~~loss or damage occasioned by the appeal;~~

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

Rule 49 **Appellate Review of Security in Civil Cases.** The phrase "Rule 46 or" in subdivision (a) should be deleted. Otherwise, rule is correct as it appears in the cumulative report. These proposed amendments have not been considered by the SCAC. Cumulative report page 49.

Rule 50 **Record on Appeal.** Proposed revisions have not been considered by the SCAC. Cumulative report page 43. The only change from that contained in the cumulative report is for electronic recording. *See* page 19 of this report.

Rule 51 **The Transcript on Appeal.**

Rule 51(a) The Section Committee has made additional technical corrections to the proposal contained in the cumulative report.

Contents. Unless otherwise designated by the parties in accordance with Rule 50, the transcript on appeal shall include ~~copies of~~ the following: in civil cases, the ~~live pleadings upon which the trial was held~~ last petition and answer and any supplements thereto filed by each party; in criminal cases, copies of the indictment or information, any special pleas and motions of the defendant which were presented to the court and overruled, and any written waivers; the court's docket sheet; the charge of the court and the verdict of the jury, or the court's findings of fact and conclusions of law; the court's judgment or other order appealed from; any motions for new trial or to correct, modify, or reform the judgment and the order of the court thereon; any notice of appeal; ~~any appeal bond, affidavit in lieu of bond or clerk's certificate of a deposit in lieu of bond;~~ any notice of limitation of appeal in civil cases made pursuant to Rule 40; any formal bills of exception provided for in Rule 52; in civil cases, a certified bill of costs, including the cost of the transcript and the statement of facts (if any), showing any credits for payments made; any designation of matters to be included in the transcript pursuant to paragraph (b) of this rule and any filed paper listed in such a designation. ~~and, subject to the provisions of paragraph (b) of this rule, any filed paper any party may designate as material.~~ The clerk may consult with the attorneys for the parties concerning the pleadings to be included.

Rule 51(c) **Duty of Clerk.** Proposed amendments have not been considered by the SCAC.

Rule 51(d) **Copies of Papers.** Proposal should be deleted from the cumulative report.

Rule 51(d) **Original Exhibits.** Although the SCAC decided that the clerk rather than the reporter should have custody of the exhibits, this subdivision should be moved to Rule 53 because it concerns the statement of facts rather than the transcript. Therefore, it is deleted from Rule 51 in the cumulative report.

Rule 52 **Preservation of Appellate Complaints.** The following should replace what currently appears in the cumulative report. This rule has not been previously considered by the SCAC.

In order to present a complaint for appellate review, the record must show that the complaint has been preserved as required by the Texas Rules of Civil Procedure. In criminal cases this rule is subject to any conflicting provisions of the Code of Criminal Procedure.

Other provisions of this rule would be moved to TRCP 324 since they pertain to action to be taken in the trial court. The last sentence is added in view of the limitation of the rule-making power of the Court of Criminal Appeals to post-judgment and appellate rules.

Rule 53 **The Statement of Facts on Appeal.** In addition to the following, there are proposed revisions to Rule 53 to accommodate electronic recording of court proceedings. Those revisions start on page 20 of this report.

Rule 53(d) **Partial Statement.** Approved by SCAC as presented on 3-18-94.

Rule 53(g) **Reporter's Fees.** No changes have been made from the cumulative report. Since subdivision (b) does not require the appellee to pay for additional portions of the record requested, those portions requested by the appellee would be part of the statement of facts for which the appellant is required to pay according to the proposed 53(g). (*See* current 46(e).

The SCAC voted on March 18 that the court of appeals should be able to adjust the fees if the initial designation is too restrictive or if the appellee requests evidence not pertinent to the points specified in 53(d). To meet this problem, the following is suggested: "If the request of either party is improper, the appellate court may adjust the costs accordingly." Probably this would be no change from current law.

Rule 53(j) **Statement of Facts Without Prepayment.** There are no further changes than those contained in the cumulative report. The SCAC has not considered the proposed changes.

Rule 53(k) **Duty of Reporter to File.** There are no further changes than those contained in the cumulative report. This proposal was impliedly approved by the SCAC's approval of the proposed Rule 12.

Rule 53(*l*) **Original Exhibits.** There are no further changes than those contained in the cumulative report. The SCAC has not considered the proposed changes.

Rule 54 **Time to File Record.** The Section Committee has not yet approved amendments to this rule. There are, however, amendments for electronic recording starting on page 21 of this report.

Rule 55 **Amendment of the Record.** Cumulative report recommends deletion of this rule. That recommendation has not been considered by the SCAC.

Rule 56 **Duties of the Appellate Clerk on Receipt of the Notice of Appeal and Record.** The Section Committee recommends the deletion of previous rule 56 and has proposed a new rule. The SCAC approved proposed Rule 18(a) at the 3-18-94 meeting. Proposed Rule 56 provides details corresponding to Rule 18(a). These recommendations have not been considered by the SCAC.

Rule 57 **Docketing the Appeal.** The Section Committee recommends the deletion of this rule. This recommendation has not been considered by the SCAC.

Rule 59 **Voluntary Dismissal.** Proposed amendments have not been considered by the SCAC.

Rule 60 **Involuntary Dismissal.** Proposed amendments have not been considered by the SCAC. Cumulative report page 50.

Rule 61 **Disposition of Record on Final Disposition of Appeal in Civil Cases.** In view of provisions of Government Code § 51.204 that ten years from final disposition the clerk of the court of appeals shall destroy all case records except "records that in the opinion of the clerk or other person designated by the court, contain highly concentrated, unique and valuable information unlikely to be found in any other source available to researchers," what guidance can be given the clerks concerning selection of the records to be retained?

Rule 70 **Motions to Postpone Argument.** No change from cumulative report. SCAC has not considered proposed changes.

Rule 71 **Motions Relating to Informalities in the Record.** No change from cumulative report. SCAC has not considered proposed changes.

Rule 72 **Motions to Dismiss for Want of Jurisdiction.** No change from cumulative report. SCAC has not considered proposed changes.

Rule 73 **Form and Content of Motions for Extension of Time.** No change from cumulative report. SCAC has not considered proposed changes.

Rule 74 **Requisites of Briefs.** There are additional revisions starting on page 21 of this report. Those revisions are part of the incorporation of electronic reporting, it that is adopted by the SCAC.

Rule 74(a) The SCAC approved the rule as proposed on 3-18-94, with a change in the title from "Names of All Parties to the Trial Court's Final Judgment" to "Identity of Parties and Counsel." However, additional changes are necessary because of the SCAC's decision not to require notice of appeal to identify appellees: First sentence should read "notify the parties or their counsel, if any, . . ." Last sentence was deleted.

~~Names of All Parties to the Trial Court's Final Judgment~~ **Identity of Parties and Counsel.** A complete list of the names and addresses of all parties to the trial court's final judgment and the names and addresses of their counsel in the trial court, if any, shall be listed at the beginning of the appellant's brief, so that the members of the court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case and so that the clerk of the court of appeals may properly notify the parties ~~to the trial court's final judgment~~ or their counsel, if any, of the judgment and all orders of the court of appeals. The brief shall include also the address of any party not represented by an attorney, but if the address is not known, shall certify that appellant's attorney has made a diligent inquiry but has been unable to discover it, and the certificate shall give any available information, such as the probable county of residence, that might serve to identify and locate the unrepresented party. If the appellant is not represented by an attorney, the notice shall be under oath.

Rule 74(d) **Issues Presented.** Section Committee proposal was approved by the SCAC on 3-18-94.

Rule 74(e),(f),(k) **Brief of Appellee, Argument, and Appellant's Brief in Reply** were all approved by the SCAC as proposed by the Section Committee on 3-18-94.

Rule 74(f) This is a new proposal which relocates some information from proposed Rule 40a which was deleted after the action of the SCAC on 3-18-94. Current paragraphs (f) and (g) would need to be renumbered.

Cross-Appeal. Unless the appeal is limited in accordance with Rule 40(a)(5), an appellee's brief may include cross-points complaining of any ruling or action of the trial court without filing a separate appeal.

Rule 74(g) **Prayer for Relief.** Proposed amendment should be deleted and rule returned to original.

Rule 74(i),(j) Old subdivisions (i) and (j) are deleted as the information is contained in Rule 4. New (i) and (j) are not changed from the previous rule where they appeared as (*l*) and (m).

Rule 74(*l*) **Modification of Filing Time.** This subdivision was approved on 3-18-94 by the SCAC as proposed by the Section Committee.

Rule 74(m) **Amendment or Supplementation.** This subdivision was approved on 3-18-94 by the SCAC as proposed by the Section Committee.

Rule 75(f) **Request the Waiver.** Rule was approved by the SCAC on 3-18-94 as proposed by the Section Committee.

Rule 80(d) **Rights of Absent Parties.** The proposal contained in the cumulative report should be deleted.

Rule 84 **Damages for Delay in Civil Cases.** Proposed amendments have not been considered by the SCAC.

Rule 91 **Copy of Opinion and Judgment to Interested Parties and Other Courts.** Proposed amendments have not been considered by the SCAC. The cumulative report has been changed, as follows:

On the date an opinion of an appellate court is handed down, the clerk of the appellate court shall mail or deliver to the clerk of the trial court, to the trial judge who tried the case, and to the State and each of the defendants in a criminal case, and in a civil case to each of the parties to the trial court's final judgment in a civil case, a copy of the opinion handed down by the appellate court and a copy of the judgment rendered by the appellate court as entered in the minutes. Delivery to a party having counsel indicated of record shall be made to counsel. The clerk of the trial court shall file a copy of the opinion among the papers of the cause in such court. When there is more than one attorney for a party, the attorneys may designate in advance the attorney in charge on ~~one to~~ whom the copies of the opinion and judgment shall be mailed, as provided by Rule 4(b). In criminal cases, copies shall also be provided to the State Prosecuting Attorney, P. O. Box 12405, Austin, Texas 78711 and to the Clerk of the Court of Criminal Appeals.

Rule 101 **Reconsideration by Court of Appeals.** The Section Committee recommends that Rule 101 be repealed, that an assignment in the motion for rehearing be a prerequisite to Supreme Court review, as currently provided in Rule 131(e), and not for review by the Court of Criminal Appeals, as currently provided by Rule 200(d). However, the Section Committee suggests that the SCAC consider eliminating an assignment in the motion for new trial as a prerequisite of Supreme Court review.

Rules 120-122 **Original Proceedings.** The Section Committee recommends the repeal of Rules 120-122 and the substitution of the following:

Rule 120 **Original Proceedings in Civil Cases.**

(a) **Commencement.** An original proceeding seeking extraordinary relief in an appellate court in a civil case, including a writ of habeas corpus, mandamus, prohibition, or injunction, shall be commenced by filing with the clerk documents containing the following requisites:

(1) *Petition.* The petition shall be in the following form and shall contain the

following information:

(A) *Parties.*

(i) The party seeking relief shall be named relator.

(ii) Any judge, court, tribunal, officer, or other person against whom relief is sought for an act or omission in his or her official capacity shall be named a respondent, but his or her name shall not be included in the title of the proceeding.

(iii) Any person whose interest would be affected by the relief sought shall be named a respondent.

(iv) The names, addresses, and telephone numbers of all relators and respondents and of all attorneys representing those parties in any underlying cause referred to in the petition shall be stated. The address and telephone number of a party represented by counsel in the underlying cause need not be stated.

(B) *Jurisdiction.*

(i) *Authority.* The petition shall cite the particular statute or other authority giving the court jurisdiction to grant original relief.

(ii) *Habeas Corpus.* If a writ of habeas corpus is sought, the petition shall show that relator is restrained of his or her liberty.

(iii) *Inadequacy of Appeal.* In other original proceedings relating to an underlying cause, the petition shall state the facts showing that relator has no adequate remedy by appeal or other legal remedy.

(iv) *Concurrent Jurisdiction.* If the Supreme Court and the court of appeals have concurrent jurisdiction, the petition shall be presented first to the court of appeals unless there is a compelling reason not to do so. A petition filed in the Supreme Court shall state the date of presentation to the court of appeals and that court's action on the petition or the compelling reason that the petition was not first presented to the court of appeals.

(C) *Facts.* The petition shall state concisely and without argument the facts necessary to establish a compelling necessity for and relator's right to the relief sought, including a summary of the relevant proceedings in any underlying cause. All factual statements shall be verified by affidavit made on personal knowledge showing that the affiant is competent to testify to the matters stated.

(D) *Argument and Authorities.* The petition shall contain a brief of the

argument and authorities supporting relator's right to the relief sought. The brief shall conform to the requirements of Rule 74 if in the court of appeals and Rule 131 if in the Supreme Court, so far as applicable.

(E) *Prayer.* The petition shall state the particular relief sought and the names of the parties against whom relief is sought.

(F) *Certificate of Service.* The petition shall contain a certificate of service on all respondents or a certificate explaining the absence of service.

(2) *Deposit.* A deposit for costs shall be made as provided in Rule 13.

(3) *Record.* The relator shall prepare and file with the petition one copy of a record consisting of a certified or sworn copy of the order complained of and also, if in the Supreme Court, the order or opinion of the court of appeals, if any. The record shall also contain any filed paper material to the relator's claim for relief, together with that portion of the evidence presented in any underlying proceeding, in a properly authenticated form, necessary to demonstrate the relator's right to the relief sought. If a writ of habeas corpus is sought, the record shall contain proof of restraint of the relator. The record shall not include more of the proceedings than is necessary, and no presumption shall be applied that anything omitted from the record is relevant.

(b) **Service.** Relator shall promptly serve upon each respondent a copy of the petition and record. If the relator seeks temporary or emergency relief other than a writ of habeas corpus, the relator shall immediately notify or make a diligent effort to notify each respondent of the filing of the petition. Service on a party represented by counsel in the underlying cause, if an underlying cause is referred to in the petition, shall be made on counsel.

(c) Action on Petition.

(1) *Habeas Corpus.* If the court is of the tentative opinion that a writ of habeas corpus should be issued, the court will set the amount of a bond to be executed by relator as a condition of release, order relator released on execution and filing of the bond, and schedule oral argument on the petition. Otherwise, the court shall deny the relief sought without further hearing.

(2) *Other Original Proceedings.* In any other original proceeding the court may request that respondents submit a reply to the petition, and in that event, the clerk will so notify all identified parties. If the court is of the tentative opinion that relator is entitled to the relief sought, or that a serious question concerning such relief requires further consideration, the court will schedule oral argument on the petition. Otherwise, the petition will be denied. Before setting oral argument, and without the notice provided by paragraph (c), the court may hold an informal conference, in person or by telephone, at which the

respondents or their counsel are invited by telephone or other expedited communication to state orally any objection to further consideration of the petition and any information that may help the court make an expeditious disposition of the petition, including a convenient time for oral argument.

(3) *In the Supreme Court.* In cases over which the Supreme Court has original jurisdiction to issue writs of mandamus, prohibition, or injunction, and in which the order of a lower court complained of is in conflict with an opinion of the Supreme Court or is contrary to the Constitution, a statute, or a rule of civil or appellate procedure, the Supreme Court may, after respondents have had an opportunity to file an answer as provided by subparagraph (f), grant the relief sought without hearing argument.

(d) **Temporary Relief.** If the facts stated in the petition show that relator will be prejudiced unless immediate temporary relief is granted, the court may grant temporary relief without notice to respondents, as the exigencies of the case require. The court may require a bond for the protection of the adverse parties as a condition of temporary relief. Whenever practicable, before granting the any immediate relief without the notice provided by subparagraph (e), the court shall hold an informal conference, in person or by telephone, at which the respondents or their counsel are invited by telephone or other expedited communication to state orally any objection to the immediate relief sought and any suggestions concerning the amount of the bond and the time for oral argument. An order granting temporary relief shall be effective until the final decision of the case, unless vacated or modified.

(e) **Notification.** The clerk shall notify by mail all identified parties and their attorneys, if represented by counsel, of the filing of the petition and the date set for oral argument.

(f) **Answer.** At least five days before the date set for oral argument, respondents may file with the clerk and serve upon the relator an answer containing a verified statement of any facts material to the proceeding and a brief of authorities, and may also file an additional record containing exhibits relied on by respondents. The court in its discretion may shorten or extend the time. The answer and additional record shall comply with the requirements set forth in this rule for the relator's petition and record, so far as applicable.

(g) **Misleading Statement or Record.** If any party makes a factual statement in the petition or answer or files a record that is misleading, either by way of a gross affirmative misstatement or omission of obviously important and material facts, the court may, on motion and notice, hold the offending party or attorney in contempt or impose such other penalty as the court deems appropriate.

(h) **Order of the Court.** If, after hearing argument, the court determines that all or part of the relief sought by relator should be granted, it shall issue an order to that effect. Otherwise, the court shall deny relief. If the court denies a writ of habeas corpus, the court shall remand the relator to custody and order the clerk to issue an order of commitment;

if relator is not available for return to custody pursuant to the order of commitment, the court may order the bond forfeited and render judgment accordingly against the surety.

(l) Notice of Order. When the appellate court grants or denies the relief sought in the petition, or dismisses the petition, or grants or overrules a motion for rehearing, the clerk of the court shall notify counsel for the parties and any unrepresented parties by sending them a letter by first-class mail.

Notes and Comments

Change by 1994 amendments: Rules 120, 121, and 122 have been consolidated and condensed into this rule. The procedure in all original proceedings has been made more nearly uniform. The principal substantive changes are: (1) The motion for leave to file and the court's granting of leave before filing of the petition have been abolished; (2) the documents to be filed by the relator have been reduced to a petition and a record containing proceedings in the underlying cause; (3) the petition is required to contain a statement of jurisdiction, a statement of facts, a brief of argument and authorities, and a prayer for relief; (4) any real party in interest is required to be made a respondent; (5) no judge or officer against whom relief is sought is permitted to be named in the title of the proceeding; (6) the provisions for filing, service, copies, and some of the provisions for service have been incorporated into Rule 4; (7) service on any party represented by counsel in an underlying cause is authorized to be made on counsel; (8) the court is authorized to hold an informal conference with the parties before setting argument on the petition and is required to do so, if practicable, before granting temporary relief.

Rule 130 **Filing of Application in Court of Appeals.** The SCAC has not considered the proposed amendments contained in the cumulative report. Cumulative report page 59.

Rule 131 **Requisites of Applications.** The SCAC has not considered the proposed amendments contained in the cumulative report. Subdivision (a) is further revised as follows:

(a) Identity ~~Names~~ of All Parties to the Trial Court's Final Judgment. A complete list of the names and addresses of all parties to the trial court's final judgment and the names and addresses of their counsel in the trial court, if any, shall be listed on the first page of the application, so that the members of the court may at once determine whether they are disqualified to serve or should recuse themselves from participation in the decision of the case and so that the clerk of the court may properly notify the parties to the trial court's final judgment ~~and~~ or their counsel, if any, of the judgment and all orders of the Supreme Court. The application shall include also the address of any party not represented by an attorney, but if the address is not known, shall certify that petitioner's attorney has made a diligent inquiry but has been unable to discover it, and the certificate shall give any available information, such as the probable city or county of residence, that might serve to identify and locate the unrepresented party. If the petitioner is not represented by an attorney, the certificate shall be under oath.

(b) - (d) are not changed from the current rule. Subdivision (e) is recommended to be deleted and a new subdivision (e) substituted therefor. It has not been considered by the SCAC. The last sentence should be struck if the Committee decides that an assignment in the motion for rehearing should not be a prerequisite to appellate review.

(e) Issues Presented. A statement of the issues or points presented for review, expressed in the terms and circumstances of the case but without unnecessary detail, shall be stated in short and concise form and without argument or repetition. The statement of an issue or point presented will be deemed to comprise every subsidiary question fairly included therein. Each issue or point should be supported by reference to the page(s) of the record where the ruling or other matter complained of is shown. Whether the matter complained of originated in the trial court or in the court of appeals, it shall be assigned as error in the motion for rehearing in the court of appeals.

Subdivision (f) as proposed by the Section Committee has not been considered by the SCAC.

Paragraph (2) of the EXPLANATION should be deleted.

Rule 132 **Filing and Docketing Application in Supreme Court.** The SCAC has not considered the proposed amendments contained in the cumulative report. Subdivision (c) is replaced by the following:

(c) **Duty of the Clerk of the Supreme Court.** The Clerk of the Supreme Court shall receive the application for writ of error, shall file it and the accompanying record from the court of appeals, and shall enter the filing upon the docket, but he shall not be required to receive the application and record from the post office or express office unless the postage or express charges shall have been paid. The clerk shall notify each party to the trial court's final judgment, as listed on the first page of the application, by letter of the filing trial court's of the application in the Supreme Court. Notification to parties having counsel indicated of record shall be made to the attorney in charge ~~counsel~~, as defined by Rule 4(b).

Rule 136 **Briefs of Respondents and Others.** The SCAC has not considered the proposed amendments contained in the cumulative report. Cumulative report page 61.

Rule 137 **Petitioner's Brief in Reply.** The SCAC has not considered the proposed amendments contained in the cumulative report. Cumulative report page 63.

Rule 160 **Form and Content of Motions for Extension of Time.** The Section Committee is recommending the deletion of this rule. The SCAC has not considered that recommendation.

Rule 182 **Judgment on Affirmance or Rendition.** The SCAC has not considered the proposed amendments contained in the cumulative report. Cumulative report page 64.

Rule 184 **Reversal and Remand.** The SCAC has not considered the proposed amendments contained in the cumulative report.

Rule 190 **Motion for Rehearing.** The SCAC has not considered the proposed amendments contained in the cumulative report. Cumulative report page 65.

Rule 202 **Discretionary Review with Petition.** This is a change to a criminal rule. The proposed amendment to subdivision (b) should be deleted if Rule 101 is repealed.

Reorganization The Section Committee is recommending that certain organizational headings in the rules be deleted or amended to effect a slight organizational change in the rules. These recommendations are contained in the cumulative report and have not been considered by the SCAC.

Order of Supreme Court Directing Form of Record on Appeal in Civil Cases.

In (A) strike out "separating each proceeding, instrument, or other paper from one another in such a manner that each is readily distinguishable." Insert instead: "with each proceeding, instrument, or other paper beginning at the top of a page."

Electronic Recording.

NOTE TO ADVISORY COMMITTEE: The Section Committee makes no recommendation as to whether electronic recording without an official court reporter should be permitted, but does recommend that if the Supreme Court decides to allow such recording in view of anticipated technical improvements, the court's temporary orders should be replaced by the following amendments.

Following are proposed TEX. R. CIV. P. 264(b) and TEX. R. APP. P. 53, 54, and 74, revised to allow electronic recording. In addition, the words "or recorder" should be added after "reporter" throughout the rules if the SCAC adopts rules relating to electronic recording.

TRCP RULE 264 **Record of ~~Videotape~~ Trial**

(a) Official Reporter. The duties of official court reporter 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 evidence, and the rulings and remarks of the judge ~~court~~ thereon;

(2) making a full record of jury arguments and voir dire examinations when requested to do so by the attorney for any party to a case, together with all objections to such arguments, and the

rulings and remarks of the judge ~~court~~ thereon;

(3) taking, marking, and filing with the clerk after close of the evidence all exhibits admitted or offered in evidence;

(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.

EXPLANATION: The above provisions, taken from TEX. R. APP. P. 11 with minor changes, are more appropriate here.

(b) Electronic Recording.

(1) *Election.* Any court may elect to make an electronic recording in lieu of a stenographic record of the court's proceeding. The electronic recording shall be the official record of that proceeding and no stenographic record shall be required of any proceeding recorded electronically in accordance with this rule.

(2) *Recorder.* If an election to use electronic recording is made, the judge shall designate one or more persons as court recorders. If the court sits in more than one county, the recorder shall be a deputy clerk of the court.

(3) *Duties of Court Recorder.* The court recorder's duties shall be:

(A) Assuring that the recording system is functioning properly and that a complete, distinct, clear, and transcribable recording is made;

(B) Making a detailed, legible log of all proceedings while recording, showing the number and style of the proceeding before the court, the correct name of each person speaking, the event being recorded (e.g., voir dire, opening, direct examination, cross-examination, argument, bench conferences, etc.), and all offers, admissions, and exclusions of exhibits. The log shall state the time of day of each event and the counter number or other indication on the recording device showing the location on the recording where each event is recorded;

(C) Filing with the clerk the original log and a typewritten copy of the original;

(D) taking, marking, and filing with the clerk after close of the evidence all exhibits admitted or offered in evidence;

(E) Storing or providing for storage of the original recording to assure its preservation

and accessibility;

(F) Prohibiting or providing for denial of access to the original recording by any person without written order of the judge of the court;

(G) Preparing or obtaining a certified duplicate of the original recording of any proceeding, upon full payment of any reasonable charge imposed therefor, at the request of any party to the proceeding, or at the direction of the judge of the court, or of any appellate judge before whom the proceeding is pending subject to the instructions of the judge of the court;

(H) Performing such other duties as may be directed by the judge presiding.

EXPLANATION: This subdivision is adapted from the Supreme Court's model order for electronically recorded statements of facts. Requiring the recorder to be a deputy clerk will give the recorder a defined official status and make the clerk responsible for the record.

(c) Videotape Trial. By agreement of the parties, the trial court may allow that all testimony and such other evidence as may be appropriate be presented at trial by videotape. The expenses of such videotape recordings shall be taxed as costs. If any party withdraws agreement to a videotape trial, the videotape costs that have accrued will be taxed against the party withdrawing from the agreement.

Notes and Comments

Change by 1994 amendments: Subdivisions (a) and (b) have been added. Subdivision (c) is the original text of the rule.

Rule 50(e) **Lost or Destroyed Record.** When the record or any portion thereof is lost or destroyed, copies ~~it~~ may be substituted in the trial court and when so substituted the record may be prepared and transmitted to the appellate court as in other cases. If the appellant has made a timely request for a statement of facts, but the court reporter's notes and records have been lost or destroyed without the appellant's fault or if the proceedings were electronically recorded and the recording, or a significant portion thereof have been lost or destroyed, or a significant portion of the proceedings are inaudible without appellant's fault, and the parties cannot agree on a statement of facts, the appellant is entitled to a new trial ~~unless the parties agree on a statement of facts~~.

Rule 53 **The Statement of Facts on Appeal** No changes from the cumulative report to (a)-(f).

(g) **Reporter's Fees.** The appellant shall either pay or make arrangements to pay the official court reporter or recorder his or her fee on completion of the statement of facts. The official court

reporter or recorder shall include in his or her certification the amount of the ~~his~~ charges for preparation of the statement of facts. The Supreme Court and the Court of Criminal Appeals may from time to time make an order providing the fees which court reporters and recorders may charge.

No change from the cumulative report to (h) or (i). (j) is new; the remainder is renumbered.

(j) Electronic Recording. The statement of facts on appeal from any proceeding that has been recorded electronically in accordance with Rule 264(b) of the Texas Rules of Civil Procedure shall be:

(1) A standard recording, labeled to reflect clearly the contents, and numbered if more than one recording unit is required, certified by the court recorder to be a clear and accurate duplicate of the original recording of the entire proceeding;

(2) A copy of the typewritten and original logs filed in the case certified by the court recorder; and

(3) All exhibits, arranged in numerical order and a brief description of each.

(k) ~~Free~~ Statement of Facts Without Prepayment.

(1) *Civil Cases.* In any case where the appellant has filed the affidavit required by Rule 45 to appeal his case without paying the fees of the clerk and official court reporter or recorder ~~bond~~, and no contest is filed, or any contest is overruled, the court or judge upon application of appellant shall order the official reporter or recorder to prepare a statement of facts, and to deliver it to the appellate court ~~appellant~~, but the court reporter or recorder shall receive no pay for same.

(2) *Criminal Cases.* Within the time prescribed for perfecting the appeal an appellant unable to pay for the statement of facts may, by motion and affidavit, move the trial court to have the statement of facts furnished without charge. After hearing the motion, if the court finds the appellant is unable to pay for or give security for the statement of facts, the court shall order the reporter to furnish the statement of facts, and when the court certifies that the statement of facts has been furnished to the appellant, the court reporter shall be paid from the general funds of the county, by the county in which the offense was committed the sum set by the trial judge.

(l) **Duty of ~~Appellant~~ Reporter or Recorder to File.** It is the official court reporter's or recorder's ~~appellant's~~ duty, on payment or arrangement to pay the fee, to cause the statement of facts to be filed with the ~~C~~clerk of the ~~C~~court of ~~A~~appeals.

Rule 54 Time to File Record

(a) **In Civil Cases—Ordinary Timetable.** When a notice of appeal has been filed, the trial court clerk, the reporter or recorder that recorded the proceedings, and the appellate court rather than the parties have responsibility to see that the transcript and statement of facts, if requested, are filed. The clerk and the official reporter or recorder shall file the transcript and statement of facts, if any, ~~shall be filed~~ in the appellate court within sixty days after the judgment is signed, or, if a timely motion for new trial or to modify the judgment has been filed by any party, or if any party has ~~timely~~ filed a timely request for findings of fact and conclusions of law in a case tried without a jury, within one hundred twenty days after the judgment is signed. If an appeal is filed by a party who has not participated in person or by counsel in the actual trial of the case, ~~a writ of error has been perfected to the court of appeals~~ the record shall be filed within sixty days after the notice of appeal is filed ~~perfection of the writ of error~~. Failure to file either the transcript or the statement of facts within such time shall not affect the jurisdiction of the court or the court's authority to consider materials filed late., ~~but shall be ground for dismissing the appeal, affirming the judgment appealed from, disregarding materials filed, or applying presumptions against the appellant, either on appeal or on the court's own motion, as the court shall determine. The court has authority to consider all timely filed transcripts and statements of facts, but shall have no authority to consider a late filed transcript or statement of facts, except as permitted by this rule.~~

(b) In Civil Cases–Electronic Statement of Facts. If the statement of facts has been electronically recorded in accordance with Rule 264(b) of the Texas Rules of Civil Procedure, the duties of the official reporter as provided in subdivision (a) shall be performed by the court recorder, and all other provisions of subdivision (a) shall apply, except that, in such a case the trial court clerk and court recorder shall file the transcript and the electronic statement of facts in the appellate court within forty-five days after the judgment is signed, or, if a timely motion for new trial or to modify the judgment has been filed by any party, or if any party has timely filed a request for findings of fact and conclusions of law, within ninety days after the judgment is signed.

Current Rule 54(b) "In Criminal Cases--Ordinary Timetable" would renumber as (c).

Rule 74 Requisites of Briefs

(h) Electronic Statement of Facts. When an electronic statement of facts has been filed, the following rules shall apply:

(1) Appendix. Each party shall file with the brief one copy of an appendix containing a typewritten or printed transcription of all portions of the recorded statement of facts and one copy of all exhibits relevant to the issues raised on appeal. The appellee's appendix need not repeat any of the evidence included in the appellant's appendix. Transcriptions shall be presumed to be accurate unless objection is made. The form of the appendix and transcription shall conform to any specifications of the Supreme Court concerning the form of the statement of facts.

(2) Presumption. The appellate court shall presume that nothing omitted from the appendices filed by the parties is relevant to any of the issues raised or to disposition of the appeal. The appellate court has no duty to review any part of the electronic recording.

(3) Supplemental Appendix. The appellate court may direct a party to file a supplemental appendix containing additional portions of the recorded statement of facts and may grant a party leave to do so.

(4) Inability to Pay. If any party is unable to pay the cost of an appendix and files the affidavit provided by Rule 45, and any contest to the affidavit is overruled, the recorder shall transcribe or have transcribed such portions of the recorded statement of facts as the party designates and shall file it as that party's appendix.

NOTE TO ADVISORY COMMITTEE; When a party is unable to pay, should the entire statement of facts be transcribed?

(5) Inaccuracies. Any inaccuracies in transcriptions of the recorded statement of facts may be corrected by agreement of the parties. Should any dispute arise after the statement of facts or any appendices are filed as to whether any electronic recording or transcription of it accurately discloses what occurred in the trial court, the appellate court may resolve the dispute by reviewing the recording or the court may submit the matter to the trial court, which, after notice to the parties and hearing, shall settle the dispute and make the statement of facts or transcription conform to what occurred in the trial court.

(6) Costs. The actual expense of appendices, but not more than the amount prescribed for official reporters, shall be taxed as costs. The appellate court may disallow the cost of portions of appendices that it considers surplusage or that do not conform to any specifications prescribed by the Supreme Court.

NOTE TO ADVISORY COMMITTEE: The following questions should be resolved before recommending adoption of any rules concerning electronic statement of facts: (1) Is electronic recording without transcription by an official reporter feasible? Full information should be obtained from courts that have used such recordings, both within Texas and without. (2) Should the recorder be a deputy clerk? This would give him or her a defined official status and make the clerk responsible for the recording, the exhibits, etc. (3) Should one rule concerning electronic recording be adopted, or should various rules be amended, as in the above draft?

PROPOSED AMENDMENTS

TO

TEXAS RULES OF CIVIL PROCEDURE

NOTE TO ADVISORY COMMITTEE: The following proposals for amendment of the Rules of Civil Procedure may not be strictly within the scope of the State Appellate Rules Committee of the Appellate Practice and Advocacy Section. but, in the opinion of this Section Committee, they are related to appellate practice and are of particular interest to appellate lawyers. They are included in this report

for referral to whatever subcommittee or task force of the Advisory Committee may be appropriate to consider them.

RULE 297. ~~TIME TO FILE~~ FILING FINDINGS OF FACT AND CONCLUSIONS OF LAW

(a) Time to File. The court shall file its findings of fact and conclusions of law within twenty days after a timely request is filed. The court shall cause a copy of its findings and conclusions to be mailed to each party in the suit.

(b) Late Filing. If the court fails to file timely findings of fact and conclusions of law, the party making the request shall, within thirty days after filing the original request, file with the clerk and serve on all other parties in accordance with Rule a "Notice of Past Due Findings of Fact and Conclusions of Law" which shall be immediately called to the attention of the court by the clerk. Such notice shall state the date the original request was filed and the date the findings and conclusions were due. Upon filing this notice, the time for the court to file findings of fact and conclusions of law is extended to forty days from the date the original request was filed. The court's authority and duty to file findings and conclusions are not affected by expiration of the court's plenary power over the judgment.

EXPLANATION: Questions have been raised as to whether a court has power to file findings and conclusions after expiration of the court's plenary power. This question may arise when additional or amended findings and conclusions are filed, as provided by Rule 298, particularly if the original findings were filed late under Rule 297. The Section Committee is of the opinion that findings and conclusions, whether filed before or after expiration of the court's plenary power, do not in themselves change the judgment, although they may support a timely motion to modify, correct, or reform or a ground for reversal. Consequently, counsel filing a request for additional findings would be well advised to file a motion to modify, correct, or reform if he believes that additional or amended findings would support a change in the judgment.

Notes and Comments

Change by 1994 amendments: The last sentence has been added. Findings and conclusions do not in themselves change the judgment, but may provide grounds for a timely motion to modify, correct, or reform the judgment or for reversal on appeal.

NOTE TO ADVISORY COMMITTEE; The Section Committee considers the findings-and-conclusions practice unsatisfactory and has studied various proposals to correct it, but has not been able to develop a satisfactory solution. One proposal is to make the findings part of the decision process, analogous to jury findings, and to incorporate the request for additional findings into the motion to modify, correct, or reform the judgment. Another is to adopt something like the federal practice.

RULE 298. ADDITIONAL OR AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

After the court files original findings of fact and conclusions of law, any party may file with the clerk of the court a request for specified additional or amended findings or conclusions. The request for these findings shall be made within ~~ten~~ twenty days after the filing of the original findings and conclusions by the court. Each request made pursuant to this rule shall be served on each party to the suit in accordance with Rule a.

The court shall file any additional or amended findings and conclusions that are appropriate within ten days after such request is filed, and cause a copy to be mailed to each party to the suit. No findings or conclusions shall be deemed or presumed by any failure of the court to make any additional findings or conclusions.

EXPLANATION: The Committee is of the opinion that counsel needs more than ten days after the filing of original findings and conclusions to prepare and file a request for additional or amended findings.

Notes and Comments

Change by 1994 amendments: The time for requesting additional findings is extended from ten to twenty days.

RULE 306a. PERIODS TO RUN FROM SIGNING OF JUDGMENT.

1, 2, 3, 4. [No change.]

5. Motion, Notice, and Hearing. In order to establish the application of paragraph (4) of this rule, the party adversely affected is required to prove in the trial court, on sworn motion and notice, 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 he date upon which the party or his attorney first either received or acquired a notice of the judgment 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, 7. [No change.]

EXPLANATION: Failure to add this sentence to this rule when the corresponding language was added to Rule 5(b)(5) of the appellate rules was apparently an oversight, since it is more pertinent to proceedings in the trial court.

Notes and Comments

Change by 1994 amendments: The last sentence has been added to Subdivision (5) in order to conform this rule to Rule 5(b)(5) of the Texas Rules of Appellate Procedure.

RULE 329b. TIME FOR FILING MOTIONS

The following rules shall be applicable to motions for new trial and motions to modify, correct, or reform judgments (other than motions to correct the record under Rule 316) in all district and county courts:

(a)-(e) [No change.]

(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 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, and may also file findings of fact and conclusions of law if within the time allowed by Rule 297.

(g), (h) [No change.]

Notes and Comments

Change by 1993 amendments: Subdivision (f) has been amended to clarify the court's authority to file findings and conclusions after expiration of the period of plenary power, in conformity with Rule 297(b) as amended.

EXPLANATION: See the explanation under Rule 297.

Rule 627. Time for Issuance

If no supersedeas bond or notice of appeal, as required of agencies exempt from filing bonds, has been filed and approved, the clerk of the court or justice of the peace shall issue the execution upon such judgment upon application of the successful party or his attorney after the expiration of thirty days from the time a final judgment is signed. If a timely motion for new trial or in arrest of judgment or motion to vacate, or to modify, correct, or reform the judgment is filed, the clerk shall issue the execution upon the judgment on application of the party or his attorney after the expiration of thirty days from the time the order overruling the motion is signed or from the time the motion is overruled by operation of law.

Notes and Comments

Change by 1994 amendment: The motion to modify, correct, or reform is added to conform to Tex. R. Civ. P. 329b(g) and the motion to vacate is also added.

RULE 634. EXECUTION SUPERSEDED

~~The clerk or justice of the peace shall immediately issue a writ of supersedeas suspending all further proceedings under any execution previously issued when a supersedeas bond is afterward filed and approved within the time prescribed by law or these rules.~~

If a supersedeas bond is filed and approved at any time during the appellate process, the clerk or justice of the peace shall immediately issue a writ of supersedeas, which shall suspend all further proceedings under any previously-issued writ of execution or other enforcement process.

EXPLANATION: Rule 634 would be amended to reverse the decision in Texas Emp. Ins. Ass'n v. Engelke, 790 S.W.2d 93 (Tex. App. - Houston [1st Dist.] 1990, orig. proc.), in which the court of appeals held that a supersedeas bond filed after a levy on a writ of execution, but before the funds were turned over to the judgment creditor, does not prevent the officer from turning the funds over to the judgment creditor. As amended, Rule 634 makes clear that the filing and approval of a supersedeas bond prevents any further attempts to enforce the judgment by means of a writ of execution or garnishment or a turnover order.

Notes and Comments

Change by 1994 amendments: The rule has been rewritten to give immediate effect to a supersedeas bond, though an execution may have already been levied.

RULE 657. JUDGMENT FINAL FOR POSTJUDGMENT GARNISHMENT

In the case mentioned in subsection 3, section 63.001, Civil Practice and Remedies Code, the judgment in the underlying proceeding, whether based upon a liquidated demand or an unliquidated demand, shall be deemed final and subsisting for the purpose of postjudgment garnishment from and after the date it is signed, unless either a supersedeas bond or deposit shall have been approved and filed in accordance with Texas Rule of Appellate Procedure 47 or the judgment debtor has complied with an order of alternate security under Texas Rule of Appellate Procedure 47 or section 52.002 of the Texas Property Code. A writ of garnishment may issue, upon application and order, no earlier than the date upon which a writ of execution might issue under Rules 627 and 628 of the Texas Rules of Civil Procedure.

Notes and Comments

Change by 1994 amendments: The rule has been clarified and the last sentence has been added.

NOTE TO ADVISORY COMMITTEE: The following conforming amendments to the remaining garnishment rules have been approved by the Section Committee.

Rule 658. Application for Writ of Garnishment and Order

Either at the commencement of a suit, ~~or~~ at any time during its progress, or following the rendition of a final judgment, the ~~plaintiff~~ garnishor may file an application for a writ of garnishment. Such application shall be supported by affidavits of the ~~plaintiff~~ garnishor, his agent, his attorney, or other person having knowledge of relevant facts. The application shall comply with all statutory requirements and shall state the grounds for issuing the writ and the specific facts relied upon by the ~~plaintiff~~ garnishor to warrant the required findings of the court. The writ shall not be quashed because two or more grounds are stated conjunctively or disjunctively. The application and any affidavits shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence; provided that facts may be stated based upon information and belief if the grounds of such belief are specifically stated.

a. Postjudgment Garnishment. A postjudgment writ of garnishment may issue upon written order granting the application, which may be ex parte and in the absence of a hearing. The court in its order granting the application shall make specific findings of facts to support the statutory grounds found to exist and shall specify the maximum value of property or indebtedness that may be garnished. No bond shall be required for a postjudgment writ of garnishment.

b. Prejudgment Garnishment. No writ shall issue before final judgment except upon written order of the court after a hearing, which may be ex parte. The court in its order granting the application shall make specific findings of facts to support the statutory grounds found to exist, and shall specify the maximum value of property or indebtedness that may be garnished and the amount of bond required of ~~plaintiff~~ the garnishor. Such bond shall be in an amount which, in the opinion of the court, shall adequately compensate the defendant in the underlying proceeding in the event ~~plaintiff~~ the garnishor fails to prosecute his suit to effect, and pay all damages and costs as shall be adjudged against him for ~~wrongfully~~ suing out the writ of garnishment. The court shall further find in its order the amount of bond required of the defendant in the underlying proceeding to replevy, which, unless the defendant exercises his option as provided under Rule 664, shall be the amount of ~~plaintiff's~~ the garnishor's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court. The order may direct the issuance of several writs at the same time, or in succession, to be sent to different counties.

Rule 658a. Bond for Prejudgment Garnishment

No writ of garnishment shall issue before final judgment until the ~~party applying therefor~~ garnishor has filed with the officer authorized to issue such writ a bond payable to the defendant in the underlying proceeding in the amount fixed by the court's order, with sufficient surety or sureties as provided by statute, conditioned that the ~~plaintiff~~ garnishor will prosecute his suit to effect and pay to the extent of the penal amount of the bond all damages and costs as may be adjudged against him for ~~wrongfully~~ suing out such writ of garnishment.

After notice to the opposite party, either before or after the issuance of the writ, the defendant or plaintiff in the underlying proceeding may file a motion to increase or reduce the amount of such bond, or to question the sufficiency of the sureties. Upon hearing, the court shall enter its order with respect to such bond and the sufficiency of the sureties.

Should it be determined from the garnishee's answer, if such is not controverted, that the garnishee is indebted to the defendant in the underlying proceeding, or has in his hands effects belonging to the defendant, in an amount or value less than the amount of the debt claimed by the ~~plaintiff~~ garnishor, then after notice to the defendant the court in which such garnishment is pending upon hearing may reduce the required amount of such bond to double the sum of the garnishee's indebtedness to the defendant plus the value of the effects in his hands belonging to the defendant.

Rule 659. Case Docketed

When the foregoing requirements of these rules have been complied with, the judge, or clerk, or justice of the peace, as the case may be, shall docket the case in the name of the ~~plaintiff~~ garnishor as plaintiff and of the garnishee as defendant; and shall immediately issue a writ of garnishment directed to the garnishee, commanding him to appear before the court out of which the same is issued at or before 10 o'clock a.m. of the Monday next following the expiration of twenty days from the date the writ was served, if the writ is issued out of the district or county court; or the Monday next after the expiration of ten days from the date the writ was served, if the writ is issued out of the justice court. The writ shall command the garnishee to answer under oath upon such return date what, if anything, he is indebted to the defendant in the underlying proceeding, and was when the writ was served, and what effects, if any, of the defendant in the underling proceeding ~~he~~ has in his possession, and had when such writ was served, and what other persons, if any, within his knowledge, are indebted to the defendant in the underlying proceeding or have effects belonging to him in their possession.

Rule 661. Form of Writ

The following form of writ may be used:

"The State of Texas.

To E.F., Garnishee, greeting:

Whereas, in the _____ Court of _____ County (if a justice court, state also the number of the precinct), in a certain cause wherein A.B. is plaintiff and C.D. is defendant, the plaintiff, (having recovered a final judgment against C.D. or claiming an indebtedness against the said C.D.) of _____ dollars, besides interest and costs of suit, has applied for a writ of garnishment against you, E.F.; therefore you are hereby commanded to be and appear before said court at _____ in said county (if the writ is issued from the county or district court, here proceed: 'at 10 o'clock a.m. on

the Monday next following the expiration of twenty days from the date of service hereof.' If the writ is issued from a justice of the peace court, here proceed: 'at or before 10 o'clock a.m. on the Monday next after the expiration of ten day from the date of service hereof.' In either event, proceed as follows:) then and there to answer upon oath what, if anything, you are indebted to the said C.D., and were when this writ was served upon you, and what effects, if any, of the said C.D. you have in your possession, and had when this writ was served, and what other persons, if any, within your knowledge, are indebted to the said C.D. or have effects belonging to him in their possession. You are further commanded NOT to pay to defendant any debt or to deliver to him any effects, pending further order of this court. Herein fail not, but make due answer as the law directs."

Rule 663a. Service of Writ on Defendant in the Underlying Proceeding

The defendant in the underlying proceeding shall be served in any manner prescribed for service of citation or as provided in Rule 21a with a copy of the writ of garnishment, the application, accompanying affidavits and orders of the court as soon as practicable following the service of the writ. There shall be prominently displayed on the face of the copy of the writ served on the defendant, in ten-point type and in a manner calculated to advise a reasonably attentive person of its contents, the following:

"To _____, Defendant:

You are hereby notified that certain properties alleged to be owned by you have been garnished. If you claim any rights in such property, you are advised:

"YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT."

Rule 664. Defendant in Underlying Proceeding May Replevy

At any time before judgment is rendered in the underlying proceeding, should the garnished property not have been previously claimed or sold, the defendant in the underlying proceeding may replevy the same, or any part thereof, or the proceeds from the sale of the property if it has been sold under order of the court, by giving bond with sufficient surety or sureties as provided by statute, to be approved by the officer who levied the writ, payable to ~~plaintiff~~ the garnishor, in the amount fixed by the court's order, or, at the defendant's option, for the value of the property or indebtedness sought to be replevied (to be estimated by the officer), plus one year's interest thereon at the legal rate from the date of the bond, conditioned that the defendant~~, garnishee,~~ in the underlying proceeding shall satisfy, to the extent of the penal amount of the bond, any judgment which may be rendered against him in ~~such action~~ the underlying proceeding.

On reasonable notice to the opposing party (which may be less than three days) either party shall have the right to prompt judicial review of the amount of bond required, denial of bond, sufficiency of sureties, and estimated value of the property, by the court which authorized issuance of the writ. The court's determination may be made upon the basis of affidavits, if uncontroverted, setting forth such facts as would be admissible in evidence; otherwise, the parties shall submit evidence. The court shall forthwith enter its order either approving or modifying the requirements of the officer or of the court's prior order, and such order of the court shall supersede and control with respect to such matters.

On reasonable notice to the opposing party (which may be less than three days) the defendant shall have the right to move the court for a substitution of property, of equal value as that garnished, for the property garnished. Provided that there has been located sufficient property of the defendant's to satisfy the order of garnishment, the court may authorize substitution of one or more items of ~~defendant's~~ property of the defendant in the underlying proceeding for all or for part of the property garnished. The court shall first make findings as to the value of the property to be substituted. If property is substituted, the property released from garnishment shall be delivered to defendant, if such property is personal property, and all liens upon such property from the original order of garnishment or modification thereof shall be terminated. Garnishment of substituted property shall be deemed to have existed from date of garnishment on the original property garnished, and no property on which liens have become affixed since the date of garnishment of the original property may be substituted.

Rule 664a. Dissolution or Modification of Writ of Garnishment

A defendant whose property or account has been garnished or any intervening party who claims an interest in such property or account, may by sworn written motion, seek to vacate, dissolve or modify the writ of garnishment, and the order directing its issuance, for any grounds or cause, extrinsic or intrinsic. Such motion shall admit or deny each finding of the order directing the issuance of the writ except where the movant is unable to admit or deny the finding, in which case movant shall set forth the reasons why he cannot admit or deny. Unless the parties agree to an extension of time, the motion shall be heard promptly, after reasonable notice to the ~~plaintiff~~ the garnishor (which may be less than three days), and the issue shall be determined not later than ten days after the motion is filed. The filing of the motion shall stay any further proceedings under the writ, except for any orders concerning the care, preservation or sale of any perishable property, until a hearing is had, and the issue is determined. The writ shall be dissolved unless, at such hearing, the plaintiff the garnishor shall prove the grounds relied upon for its issuance, but the court may modify its previous order granting the writ and the writ issued pursuant thereto. The movant shall, however, have the burden to prove that the reasonable value of the property garnished exceeds the amount necessary to secure the debt, interest for one year, and probable costs. He shall also have the burden to prove facts to justify substitution of property.

The court's determination may be made upon the basis of affidavits, if uncontroverted, setting forth such facts as would be admissible in evidence; otherwise, the parties shall submit evidence. The court may make all such orders including orders concerning the care, preservation or disposition of the property (or the proceeds therefrom if the same has been sold), as justice may require. If the movant has given a replevy bond, an order to vacate or dissolve the writ shall vacate the replevy bond and discharge the

sureties thereon, and if the court modifies its orders or the writ issued pursuant thereto, it shall make such further orders with respect to the bond as may be consistent with its modification.

Rule 667. Judgment by Default

If the garnishee fails to file an answer to the writ of garnishment at or before the time directed in the writ, it shall be lawful for the court, at any time after judgment shall have been rendered against the defendant in the underlying proceeding, and on or after appearance day, to render judgment by default, as in other civil cases, against such garnishee for the full amount of such judgment against the defendant together with all interest and costs that may have accrued in the main case and also in the garnishment proceedings. The answer of the garnishee may be filed as in any other civil case at any time before such default judgment is rendered.

Rule 668. Judgment When Garnishee Is Indebted

Should it appear from the answer of the garnishee or should it be otherwise made to appear and be found by the court that the garnishee is indebted to the defendant in the underlying proceeding in any amount, or was so indebted when the writ of garnishment was served, the court shall render judgment for the ~~plaintiff~~ garnishor against the garnishee for the amount so admitted or found to be due to the defendant from the garnishee, unless such amount is in excess of the amount of the ~~plaintiff's~~ garnishor's judgment against the defendant with interest and costs, in which case, judgment shall be rendered against the garnishee for the full amount of the judgment already rendered against the defendant, together with interest and costs of the suit in the original case and also in the garnishment proceedings. If the garnishee fail or refuse to pay such judgment rendered against him, execution shall issue thereon in the same manner and under the same conditions as is or may be provided for the issuance of execution in other cases.

Rule 669. Judgment for Effects

Should it appear from the garnishee's answer, or otherwise, that the garnishee has in his possession, or had when the writ was served, any effects of the defendant liable to execution, including any certificates of stock in any corporation or joint stock company, the court shall render a decree ordering sale of such effects under execution in satisfaction of ~~plaintiff's~~ garnishor's judgment and directing the garnishee to deliver them, or so much thereof as shall be necessary to satisfy plaintiff's judgment, to the proper officer for that purpose.

Rule 673. May Traverse Answer

If the ~~plaintiff~~ garnishor should not be satisfied with the answer of any garnishee, he may controvert the same by his affidavit stating that he has good reason to believe, and does believe, that the answer of

the garnishee is incorrect, stating in what particular he believes the same to be incorrect. The defendant in the underlying proceeding may also, in like manner, controvert the answer of the garnishee.

Rule 675. Docket and Notice

The clerk of the court or the justice of the peace, on receiving certified copies filed in the county of the garnishee's residence under the provisions of the statutes, shall docket the case in the name of the ~~plaintiff~~ garnishor as plaintiff, and of the garnishee as defendant, and issue a notice to the garnishee, stating that his answer has been so controverted, and that such issue will stand for trial on the docket of such court. Such notice shall be directed to the garnishee, be dated and tested as other process from such court, and served by delivering a copy thereof to the garnishee. It shall be returnable, if issued from the district or county court, at ten o'clock a.m. of the Monday next after the expiration of twenty days from the date of its service; and if issued from the justice court, to the next term of such court convening after the expiration of twenty days after the service of such notice.

Rule 677. Costs

Where the garnishee is discharged upon his answer, the costs of the proceeding, including a reasonable compensation to the garnishee, shall be taxed against the ~~plaintiff~~ garnishor; where the answer of the garnishee has not been controverted and the garnishee is held thereon, such costs shall be taxed against the defendant in the underlying proceeding and included in the execution provided for in this section; where the answer is contested, the costs shall abide the issue of such contest.

4543.001

Recv'd 5-17-94

MEMORANDUM

TO: Supreme Court Advisory Committee

FROM: Discovery Subcommittee (by Alex Wilson Albright)

DATE: May 16, 1994

RE: Proposed Changes to Discovery Rules

Enclosed you will find drafts of the rules that the Discovery Subcommittee proposes for discussion at the meeting this weekend, May 20-21. There are two versions of the draft: one is a clean copy, the other is a red-lined draft showing changes from the current rules. Please note that some proposed rules are new rules and therefore have no corresponding red-lined draft.

A summary of the changes:

1. Rules 37, 38, and 63: Adding parties and amending pleadings. Here we seek to limit pleading amendments, including adding parties, to the first 3 months of the discovery period without leave of court. Any party added during this first 3 months has a full 6 month period to conduct discovery. Ordinary pleading amendments made during this time do not affect the discovery window. The intervenor rule, Rule 60, is not changed because intervenors take the case as they find it. After the deadline, the court may allow amendments and additional parties, and should give additional discovery time where appropriate.

2. Rule 166: Pretrial Conference. This revision is intended only to simplify the existing rule. It is not intended to diminish the present authority of the court. Anything that could be done under the old rule can be done under this rule.

3. New rules: Modification by agreement and court order, 6 month discovery period. These were discussed at the last meeting. Some minor changes have been made from previous drafts, but the basic idea remains the same.

4. New rule: Response, supplementation, amendment. Parties have a duty to make a complete initial response to discovery requests. Amendment is required as soon as it is determined that the initial response was incorrect when made. Supplementation is required 60 days before trial if new information makes the response incorrect now. No supplementation or amendment is required if the new information has been disclosed to the opponent in other discovery or in writing. The rule also allows for limited additional discovery after supplementation or amendment. If a party fails to provide discovery, exclusion is the remedy only if the failure was deliberate or the result of conscious indifference to the obligations under the rules. Otherwise, the court should grant a

continuance to remedy the failure to disclose if needed to prevent an erroneous fact finding.

5. New rule: Standard requests. A party can use interrogatories or requests to obtain standard information specified in the rule.

6. Rule 167: Request for Production. Now applies to electronic data information. The rule specifies how copies may be produced and who pays for production and copying expenses. Parties who object to the time, place or manner of production must nevertheless file a response to the request indicating what will be produced when the objection is resolved.

7. Rule 168: Interrogatories. Unlimited interrogatories that require a yes or no answer or seek only to authenticate or identify documents. Open-ended contention interrogatories can only be used to expand pleadings.

8. Rule 170 (new rule): Experts. Designated at the end of the discovery period, and certain mandatory disclosure required upon designation. Further discovery through depositions, and for each expert designated over 2, the opposing side gets an additional 6 hours to depose.

9. Rules 200, 201, 202, 204, 208: Depositions. General cleaning up of the rules. Important changes are as follows:

a. Parties seeking to take a deposition by non-stenographic means must give notice of the non-stenographic recording, and tell whether a court reporter will be present as well. Whoever wants a specific type of recording has to pay for it themselves. Telephone depositions can be taken on notice. Court reporter can be at either place, subject to some restrictions.

b. 50 hours per side for deposition questioning. Plaintiffs get 50 hours, defendants get 50 hours, and third party defendants get an additional 10 hours to explore issues between them and defendants. Lawyers may instruct witnesses not to answer or terminate deposition if questions are abusive, but there will be no objections at the deposition. A deposition master may be appointed if there is a serious pattern of abuse.

Rule 37: Additional Parties

~~Before a case is called for trial,~~ Aadditional parties~~, necessary or proper parties to the suit,~~ may be brought in~~, either by the plaintiff or the defendant, upon such terms as the court may prescribe; but not at a time nor in a manner to unreasonably delay the trial of the case.~~ without leave of court before the commencement of the discovery period provided for in Rule ___ and during the first three (3) months of the discovery period. Thereafter, parties may be brought in only with leave of court or upon the agreement of the parties. Leave shall be granted unless there is insufficient time to complete discovery that would be made necessary by adding the party, in which case leave shall be denied or the discovery period extended. Leave shall not be granted if it would unreasonably delay the trial.

Rule 38: Third Party Practice

(a) When Defendant May Bring in Third Party. Subject to Rule 37, ~~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 as provided in 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 same 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 the 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.

Rule 63: Amendments and Responsive Pleadings

Parties may amend and supplement their pleadings~~;~~ and respond to other parties' pleadings without leave of court ~~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~~ before the commencement of the discovery period provided for in Rule ____ and during the first three (3) months of the discovery period. Thereafter, parties may file pleadings that amend, supplement, or respond only with leave of court or upon the agreement of the parties.~~at such time as not to operate as a surprise to the 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 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.~~ Leave shall be granted unless there is insufficient time to complete discovery that would be made necessary by the amendment, supplement, or response, in which case leave shall be denied or the discovery period extended. Leave shall not be granted if it would unreasonably delay the trial.

Rule 166: Pretrial Conference

When~~In an~~ appropriate ~~action, to assist in the disposition of the case without undue expense or burden to the parties,~~ the court may order~~in its discretion direct~~ the attorneys for the parties and the parties or their duly authorized agents to appear before it for a pretrial conference. ~~to consider:~~ There may be more than one pretrial conference. The court may consider any matter than may aid in the disposition of the action, including:

(a) ~~All pending dilatory pleas, motions and exceptions;~~The settlement of the case;

(b) ~~The necessity or desirability of amendments to the pleadings;~~Referral of the case to alternate dispute resolution;

(c) Development of a scheduling order, including ~~A~~ discovery ~~schedule~~;

(d) ~~Requiring written statements of the parties' contentions;~~ Determination of uncontested and contested issues of law and fact; and

~~**(e)** Contested issues of fact and the simplification of the issues;~~

~~**(f)** The possibility of obtaining stipulations of fact;~~

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

(e~~h~~) Trial procedure, including ~~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 address and telephone number, and the subject of the testimony of each such witness;~~

~~**(i)** 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 witness;~~

~~**(j)** Agreed applicable propositions of law and contested issues of law;~~

~~**(k)**~~ exchange of p~~P~~roposed jury charges ~~questions, instruction, and definitions for a jury case~~ or ~~proposed~~ findings of fact and conclusions of law, and ~~for a nonjury case;~~

~~**(l)** The marking and exchanging~~ exchange of ~~all~~ exhibits, ~~that any party may use at trial and stipulation to the authenticity and admissibility of exhibits to be used at trial;~~

~~**(m)** Written trial objections to the opposite party's exhibits, stating the basis for each objection;~~

~~(n) 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;~~

~~(o) The settlement of the case, and to aid such consideration, the court may encourage settlement;~~

~~(p) Such other matters as may aid in the disposition of the action.~~

The court shall make an order that~~which~~ recites the action taken at the pretrial conference. This order shall control the subsequent course of action, unless modified to prevent manifest injustice. ~~, the amendments allowed to the pleadings, the time within which same may be filed, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions, agreements of counsel, or rulings of the court, and such order when issued shall control the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or extend it to all actions.~~

Rule 167. Requests for ~~Discovery and~~ Production ~~of Documents and Things for Inspection, Copying or Photographing.~~

~~—~~1. **Requests. ~~Procedure~~**. At any time prior to thirty (30) days before the end of the discovery period, a~~A~~ny party may serve upon any other party a Request for Production and/or for Inspection ~~REQUEST:~~

~~a. to produce and permit the party making the REQUEST, or someone acting on his behalf,~~ to inspect, sample, test, photograph and/or copy, any designated documents, electronic data information or tangible things which constitute or contain matters within the scope of Rule 166b that~~which~~ are in the possession, custody or control of the party upon whom the R~~r~~equest is served. The term "electronic data inforamtion" includes, but is not limited to, all computerized systems, including floppy disks, hard drives, all back up systems and archived tapes. ~~; or~~

~~b. to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon within the scope of rule 166b.~~

2. Contents of Request for Production. ~~—c.~~ The Request~~EQUEST~~ shall set forth the items to be produced or ~~-~~inspected either by individual item or by category, and describe each item and category with reasonable particularity. A party seeking production of electronic data information must specifically set forth the type of electronic data information the producing party is to produce. The Request~~EQUEST~~ shall specify a reasonable time (not less than 30 days after service of the written Request), and place ~~and manner~~ for production~~making the inspection and performing the related acts~~. The Request shall also state the manner of inspection or copying of the requested items. If the requesting party intends to sample or test the requested items, the desired testing and sampling shall be described with sufficient specificity to inform the producing party of the means, manner, and procedure for testing or sampling.

3. Production of Documents or Things. The producing party shall produce the documents or tangible things at the time and place requested, as follows:

a. Documents. The responding party may, at its option, produce copies of original documents only if the party has no originals or the originals remain available for inspection at the requesting party's request on no less than 10 days' written notice.

If the original documents are produced, the producing party is entitled to retain the originals of the documents while the requesting party inspects and copies them.

The producing party shall produce documents as they are kept in the usual course of business, or shall organize and label them to correspond with the categories in the Request.

b. Electronic Data Information and Tangible Things. The responding party shall produce electronic data information and tangible things at the time and place requested.

4. Objections and Responses.

a. Objections to manner of production. The responding party may make objections to the time, place, or manner of production, testing, inspection, or sampling. Such an objection must be made within ten (10) days after service of the request and shall state when, where, and how the responding party proposes to comply with the request. A party who makes an objection to the time, place, or manner of production, testing, inspection, or sampling nonetheless must file within thirty (30) days of service of the request a response which describes any documents, electronic data information, or tangible things responsive to the request. The response also shall give notice of the number of such documents, electronic data information, or tangible things and where they are located.

b. Objections to substance of request. The responding party also may object to the substance of the request in whole or in part and shall specifically state the reasons why such request should not be allowed. Objections to the substance of a request must be made within thirty (30) days after service of the request. A party who makes an objection to the substance of a request nonetheless must within thirty (30) days after service of the request produce any documents, electronic data information, or tangible things responsive to any portion of the request for which no objection has been filed.

~~d. The party upon whom the REQUEST is served shall serve a written RESPONSE which shall state, with respect to each item or category of items, that inspection or other requested action will be permitted as requested, and he shall thereafter comply with the REQUEST, except only to the extent that he makes objections in writing to particular items, or categories of items, stating specific reasons why such discovery should not be allowed.~~

~~e. 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.~~

~~f. A party who produces documents for inspection shall produce them as they are kept in the usual course of business, or shall organize and label them to correspond with the categories in the request.~~

5. Destruction or Alteration. ~~g.~~ Testing, sampling or examination shall not extend to destruction or material alteration of an article without notice, hearing, and prior order of ~~approval by~~ the court.

~~2. Time. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the citation and petition upon that party. The request shall be then served upon every party to the action. The~~

~~party upon whom the request is served shall serve a written response and objections, if any, within 30 days after the service of the request, except that if the request accompanies citation, a defendant may serve a written response and objections, if any, within 50 days after service of the citation and petition upon that defendant. The time for making a response may be shortened or lengthened by the court upon a showing of good cause.~~

~~3. Order. If objection is made to a request or to a response, either party may file a motion and seek relief pursuant to Rules 166b or 215.~~

~~4. Nonparties. The court may order a person, organizational entity, governmental agency or corporation not a party to the suit to produce in accordance with this rule. However, such order shall be made only after the filing of a motion setting forth with specific particularity the request, necessity therefor and after notice and hearing. All parties and the nonparty shall have the opportunity to assert objections at the hearing.~~

6. **Expenses of Production.** Unless otherwise ordered by the court, the expense of producing a documents, electronic data information, or tangible things will be borne by the producing party. The expense of inspecting, sampling, testing, photograghing, and/or copying the documents, electronic data information, or tangible things produced will be borne by the requesting party.

Rule 168. Interrogatories to Parties.

(a) Availability. Any party may file with the court and 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 that ask another party only to identify or authenticate specific documents as contemplated by Article IX of the Texas Rules of Civil Evidence or that require no more than a yes or no answer shall be unlimited in number. Other interrogatories shall not exceed 30 in number, including discrete subparts. 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 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 2, the records so referenced need not be filed.~~

~~1. Service. When a party is represented by an attorney, service of interrogatories and answers to interrogatories shall be made on the attorney unless service upon the party himself is ordered by the court.~~

(b) Answers and Objections.

(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for the objection and shall answer to the extent the interrogatory is not objectionable. Answers and objections shall be preceded by the interrogatory to which they respond.

(2) The answers shall be signed and verified by the party making them, and the objections shall be signed by the attorney making them. The provisions of Rule 14 shall not apply.

(3) The party upon whom the interrogatories have been served shall file with the court and serve a copy of the answers, and objections, if any, not less than 30 days after the service of the interrogatories, except that, if the interrogatories accompany citation, a defendant may serve answers within 50 days after service of the citation and petition upon that defendant.

(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

2. Scope, Use at Trial. Interrogatories may relate to any matters that~~which~~ can be inquired into under Rule 166b, but the answers, subject to any objections as to admissibility,

may be used only against the party answering the interrogatories. It is not ground for objection that an interrogatory involves an opinion or contention that relates to fact or the application of law to fact.

(d) Contention interrogatories. A party can use contention interrogatories that require more than a yes or no answer only to request another party to state the factual and legal theories upon which that party bases particular allegations. The answer to such an interrogatory shall provide information sufficient to apprise the requesting party of the positions the answering party will take at trial. A party need not marshall its proof to answer the interrogatory, but need only disclose more precisely the basis of its pleadings.

(e) Option to Produce Records. Where the answer to an interrogatory may be derived or ascertained from:

~~a.~~ public records~~;~~ or

~~b.~~ from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served;

it is sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and, if applicable, to provide~~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, and shall specify a reasonable time and place at which the documents can be examined not to exceed 10 days after the date the interrogatory answer is filed.

~~3. Procedure. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice requires.~~

~~4. Time to Answer. The party upon whom the interrogatories have been served shall serve answers on the party submitting the interrogatories within the time specified by the party serving the interrogatories, which specified time shall not be less than thirty days after the service of the interrogatories, except that, if the request accompanies citation, a defendant may serve answers within 50 days after service of the citation and petition upon that defendant. The court, on motion and notice for good cause shown, may enlarge or shorten the time for serving answers or objections.~~

~~5. Number of Interrogatories. The number of questions including subsections in a set of interrogatories shall be limited so as not to require more than thirty answers. No more than two sets of interrogatories may be served by a party to any other party, except by agreement~~

~~or as may be permitted by the court after hearing upon a showing of good cause. The court may, after hearing, reduce or enlarge the number of interrogatories or sets of interrogatories if justice so requires. The provisions of rule 166b are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.~~

~~The interrogatories shall be answered separately and fully in writing under oath. Answers to interrogatories shall be preceded by the question or interrogatory to which the answer pertains. True copies of the interrogatories, and answers and objections thereto, shall be served on all parties or their attorneys, and copies thereof shall be provided to any additional parties upon request. The answers shall be signed and verified by the person making them and the provisions of Rule 14 shall not apply.~~

~~6. Objections. On or prior to the date on which answers are to be served, a party may serve written objections to specific interrogatories or portions thereof. 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.~~

Note: Open-ended contention interrogatories may be used only to secure information that would be provided if the other party were required to plead more particularly. Parties seeking to obtain disclosure of facts supporting or rebutting particular allegations should use other discovery devices.

RULE 200. DEPOSITIONS UPON ORAL EXAMINATION

1. When Depositions May Be Taken. During the discovery period provided for in Rule ___ ~~After commencement of the action~~, any party may take the testimony of any person, including a party, by deposition upon oral examination, which will be recorded stenographically by any officer authorized to take depositions.[1] ~~.~~

~~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.~~

2. Notice ~~of Examination: General Requirements; Notice of Deposition of Organization.~~

a. A party proposing to take a deposition upon oral examination must give rReasonable 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 the~~his~~ deposition, and if the production of documents or tangible things ~~in accordance with Rule 201~~ is desired, a designation of the items to be produced by the deponent that complies with Rule 167. If the deponent is a party, or a party's agents, employees, or persons subject to a party's control, the procedure of Rule 167 shall apply. ~~either by individual item or by category and which describes each item and category with reasonable particularity.~~ The notice shall also state the identity of persons who will attend the deposition 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 identify of such other persons.

b. A party may in the ~~his~~ notice name as the deponent a public or private corporation, ~~or a~~ partnership, ~~or~~ association, ~~or~~ governmental agency, or other organization ~~and describe with reasonable particularity the matters on which examination is requested~~. and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. The subdivision does not preclude taking a deposition by any other procedure authorized by these rules.[2]

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1 This requires a CSR certified under Gov't Code 52.021, unless Rule 202 is followed.

2 The present Texas rule regarding depositions of organizations has been replaced with the Federal Rule, which is clearer and has developed a body of interpretative cases that can be referred to for guidance. The provisions of the Federal Rule can be found in this rule and Rule 204 concerning subpoenas.

RULE 201. COMPELLING APPEARANCE; PRODUCTION OF DOCUMENTS AND THINGS; DEPOSITION OF ORGANIZATION

Any person may be compelled to appear and give testimony by deposition in a civil action.

1. **Subpoena.** 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 an ~~the~~ officer at the time and place stated in the notice for the purpose of giving his deposition.

2. **Production.** A witness may be compelled by subpoena duces tecum to produce items or things designated in the notice according to Rule 200(2)(a) and within his care, custody or control. ~~The subpoena duces tecum shall direct with particularity the witness to produce, at such time and place designated, documents or tangible things which constitute or contain evidence or information relating to any of the matters within the scope of the examination permitted by Rule 166b; but in that event t~~ The subpoena will be subject to the provisions of Rules 177a and 166b.

3. **Party.** When the deponent is a party, service of the notice upon ~~the party or~~ the party's ~~his~~ attorney shall have the same effect as a subpoena served on the party. If the deponent is an agent, ~~or~~ employee, or persons ~~who is~~ subject to the control of a party, notice to take the deposition ~~which is s~~served upon the ~~party or the~~ party's attorney ~~of record~~ shall have the same effect as a subpoena served on the deponent. ~~A party or party's agents or employees or persons subject to that party's control, may be compelled to produce designated documents or tangible things, as in paragraph 2 hereof, if the notice sets for the individual items or categories of items to be produced with reasonable particularity.~~

4. **Organizations.** When the deponent named in the subpoena or notice is a public or private corporation, ~~a~~ partnership, association, ~~or~~ governmental entity, or other organization, and the notice describes the matters on which examination is requested in accordance with Rule 200(2)(b), the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The person so designated shall testify as to matters known or reasonably available to the organization. ~~the subpoena or notice shall direct the deponent so 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 dponent will testify and the notice shall further direct that the person or persons designated by the deponent appear before the officer at the time and place stated in the subpoena or notice for the purpose of giving their testimony.~~

5. Time and Place. The time and place designated for the deposition shall be reasonable. The place ~~of taking a deposition~~ shall be in the county of the witness' residence or, where he is employed or regularly transacts business in person or at such other convenient place as may be directed by the court in which the cause is pending; provided, however, the deposition of a party or the person or persons designated by a party under paragraph 4 above may be taken in the county of suit subject to the provisions of ~~paragraph 5 of~~ Rule 166b(5). A nonresident or transient person may be required to attend in the county where he is served with a subpoena, or within one hundred fifty 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.

RULE 202. NON-STENOGRAPHIC RECORDING; DEPOSITION BY TELEPHONE

1. Non-stenographic Recording. Any party may cause the testimony and other available evidence at a deposition upon oral examination to be recorded by other than stenographic means, including videotape recordings, without leave of court, and the non-stenographic recording may be presented at trial in lieu of reading from a stenographic transcription of the deposition, subject to the following rules:

a. Any party intending to make a non-stenographic recording shall ~~give five days' notice of all other parties by certified mail, return receipt requested, and shall specify~~ give reasonable prior ~~in said~~ notice to the deponent and other parties, either in the deposition notice or in writing, ~~-~~ of the method by which the testimony will be recorded and whether or not a certified court reporter will be present. ~~type of non-stenographic recording which will be used.~~ The party requesting the non-stenographic recording will be responsible for taking, preserving, and filing the non-stenographic recording and assuring that the recorded testimony will be intelligible, accurate and trustworthy. Any transcription of the non-stenographic recording may be used as evidence only if it complies with the provisions of Rules 205 and 206.

b. Any party may designate another method to record the deponent's testimony in addition to the method specified. The additional record or transcript shall be made at the expense of the designating party, unless the court otherwise orders.

c~~b~~. After ~~the~~ notice of the non-stenographic recording is given, ~~-~~any party may move ~~make a motion~~ for a protective order ~~relief~~ under 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.

d~~c~~. Any party shall have reasonable access to the original non-stenographic recording and may obtain a duplicate copy at its ~~his~~ own expense.

e~~d~~. The side initiating the ~~expense of a~~ non-stenographic recording shall bear the expense of the non-stenographic recording, subject to an order of the court, upon motion and notice, at the conclusion of the case, taxing the expense as court costs. ~~not be taxed as costs, unless before the deposition is taken the parties so agree or the court orders on motion and notice.~~

~~e. The non-stenographic recording shall not dispense with the requirement of a stenographic transcription of the deposition unless the court shall so order on motion and notice before the deposition is taken and such order shall also make such provision concerning the manner of taking, preserving and filing the non-stenographic recording as may be necessary to assure that the recorded testimony will be intelligible, accurate and trustworthy. Such order shall not prevent any party from having a stenographic transcription made at his~~

~~own expense. In the event of an appeal, the non-stenographic recording shall be reduced to writing.~~

2. Deposition by Telephone. ~~The parties may stipulate in writing, or the court may upon motion order, that~~ Any party may give reasonable prior notice that a deposition will~~may~~ be taken by telephone or other remote electronic means, subject to subsection 1(b) of this rule.~~.~~ For the purposes of this rule and Rules 201, 215-1a and 215-2a, a deposition taken by telephone is taken in the district and at the place where the deponent is to answer the questions asked~~propounded to him~~. The officer taking the deposition may be located with the deposing parties instead of with the witness if the identification of the witness is substantiated and the witness does not waive examination and signature of the transcribed deposition.

Rule 203 should be deleted from the deposition rules and included in the sanctions rules.

RULE 203. FAILURE OF PARTY OR WITNESS TO ATTEND OR TO SERVE SUBPOENA; EXPENSES

1. **Failure of Party Giving Notice to Attend.** If the party giving the notice of the taking of an oral deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees.

2. **Failure of Witness to Attend.** If a party gives notice of the taking of an oral deposition of a witness and the witness does not attend because of the fault of the party giving the notice, if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees.

RULE 204. EXAMINATION, CROSS-EXAMINATION AND OBJECTIONS

1. Oath; Examination. 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 by an officer authorized to do so.[3] The parties may orally examine and cross-examine the deponent. ~~**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 provided for in Rule 200,~~ Aany party, in lieu of participating in the oral examination, may serve written questions in a sealed envelope on the party proposing to take the deponent who shall transmit them ~~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~~. The proceedings shall be recorded at the time it is given and thereafter transcribed by the officer taking the deposition, or by some person under that person's personal supervision.[4]

2. Time Limitation. Each side, the plaintiffs and the defendants, have 50 hours to examine and cross-examine deponents other than their own expert witnesses. Third-party defendants share the defendants' 50 hours with regard to issues common to the defendants, however, third-party defendants have an additional 10 hours for examination regarding issues upon which they oppose the defendants. Breaks during depositions do not count against any party's deposition time limitation. The officer taking the deposition shall state as part of the certificate required by Rule 206 the amount time each examiner used to examine the deponent.

~~**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.~~

3. Conduct during the deposition. The oral deposition shall be conducted as if the testimony were being obtained in court during trial. Counsel are expected to cooperate with and be courteous to each other and the deponents.

4. Instructions not to answer. Instructions to the deponent not to answer a question are improper except (1) to preserve a privilege against disclosure, (2) to enforce a limitation on evidence directed by the court, (3) to protect a witness from an abusive question, or (4) to present a motion under paragraph (5). Should a court later order the deponent to answer a question to which the deponent was instructed not to answer, the court may order that the

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[3] This language is verbatim from current Rule 204(2), except the last phrase has been added.

[4] This language is from current Rule 204(3).

reconvened deposition shall not count against the deposition time of the party taking the deposition.

5. Terminating the deposition. At any time during a deposition, a party or the deponent may move to terminate or limit the deposition on the ground that it is being conducted or defended in bad faith or in such a manner as to unreasonably annoy, embarrass, or oppress the party or the deponent. Upon demand of the objecting party or deponent, the deposition shall be suspended for the time necessary to secure a ruling. Should a court rule that the deposition should not have been terminated, the court may order that the reconvened deposition shall not count against the deposition time of the party taking the deposition.

6. Conferences. Private conferences between deponents and their attorneys during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Private conferences may be held, however, during normal recesses and adjournments. All statements, objections and discussions conducted during the oral deposition shall be on the record, count against the examining party's deposition time, and may, upon leave of court, be presented to the jury during trial.

7. Objections to testimony. No objections shall be made during the oral deposition. The parties may make and the court shall consider any objections to the questions or the testimony when the deposition is tendered as evidence. A court may consider an objection to leading questions, however, only if the objecting party advised the questioning party before the questioning began that the objecting party would make objections to leading questions at trial. Should the parties agree or a court order that objections be made during an oral deposition, the objection shall be made by simply stating the grounds therefore. A narrative objection will not preserve the objection for the court's later determination.

8. Deposition master. If the court finds a serious pattern of abuse of the deposition process, it may appoint a master to preside over any deposition or depositions. The master may allow the parties to make concise objections, upon which the master shall rule. If the master overrules an objection, the deponent shall answer the question unless the objecting party invokes de novo review by the judge. If a master sustains an objection, the requesting party may move to compel an answer, and the objection shall be reviewed de novo by the judge. The cost of the master shall be assessed against the party or parties responsible for the abuse.

~~**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 a question or the nonresponsiveness of answers are waived if not made at the taking of an oral deposition and;~~

~~(b) except as provided in (a) 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.~~

Rule 208: Deposition Upon Written Questions.

1. ~~Serving Questions; Notice~~**When Depositions May Be Taken.** ~~After commencement of the action,~~ During the discovery period provided for in Rule ___ 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 201. The time during which the deponent is being examined or cross-examined on written questions shall be counted against the examining party's deposition time limitation, and the officer taking the deposition shall record the time, as provided in Rule 204(2). Depositions on written questions that seek only to obtain, authenticate, or identify documents from persons not parties to the litigation do not count against the deposition time limitation.

2. **Notice.**

a. A party proposing to take a deposition upon written questions shall serve the questions~~them~~ upon every other party or his attorney with a written notice that complies with Rule 200 thirty (30)~~ten~~ days before the deposition is to be taken. ~~The notice shall state the name and if known, the address of the deponent, the suit in which the deposition is to be used, the name or descriptive title and address of the officer before whom the deposition is to be taken, and if the production of documents or tangible things in accordance with Rule 201 is desired, a designation of the items to be produced by the deponent either by individual item or by category and which describes each item and category with reasonable particularity. 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.~~

b. A party may in his notice name as the witness a public or private corporation, ~~or~~ a partnership, ~~or~~ association, ~~or~~ governmental agency or other organization as provided by Rule 200(2)(b). ~~and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents, or other persons to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The person so designated shall testify as to matters known or reasonably available to the organization. This paragraph does not preclude taking a deposition by any other procedure authorized in these rules.~~

~~2. Notice by Publication. In all civil suits where it shall be shown to the court, by affidavit, that a party is beyond the jurisdiction of the court, or that he cannot be found, or has died since the commencement of the suit, and such death has been suggested at prior term of court, so that the notice and copy of written questions cannot be served upon him for the purpose of taking depositions, and such party has no attorney of record upon whom they can~~

~~be served, or if he be deceased and all the persons entitled to claim by or through such deceased defendant have not made themselves parties to the suit, and are unknown, the party wishing to take depositions may file his notice in the court where the suit is pending, and the clerk of such court or justice of the peace shall thereupon cause a notice to be published in some newspaper in the county where the suit is pending, if there be a newspaper published in said county, but if not, then in the nearest county where a newspaper is published, once each week for two (2) consecutive weeks, stating the number of the suit, the names of the original parties, in what court the suit is pending, name and residence of the witness to whom the written questions are propounded, and that a deposition will be taken on or after the fourteenth day after the first publication of such notice.~~

~~In suits where service of citation has been made by publication, and the defendant has not answered within the time prescribed by law, service of notice of depositions upon written questions may be made at any time after the day when the defendant is required to answer, by filing the notice among the papers of the suit at least twenty days before such depositions are to be taken.~~

3. Cross-Questions, Redirect Questions, Re-cross Questions and Formal Objections. ~~Any~~ party may serve cross-questions upon all other parties within 14~~ten~~ days after the notice and written~~direct~~ questions are served. Within 7~~five~~ days after being served with cross-questions a party may serve redirect questions upon all other parties. Within 7~~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. Objections to the form ~~and within five days after service~~ of the last questions authorized must be made the day before the deposition is to be taken. ~~The court may for cause shown enlarge or shorten the time.~~

4. 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 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.

5. Officer to take Responses and Prepare Record. The party taking the deposition shall deliver a ~~A~~ copy of the notice and copies of all questions served ~~shall be delivered by the party taking the deposition~~ to the officer designated in the notice, who shall proceed promptly to administer an oath to the witness in the manner provided in paragraph 2 of Rule 204, to take the testimony of the witness in response to the questions in the manner provided in ~~paragraph 3 of~~ Rule 204 and to prepare, certify and deliver the deposition, in the manner provided by Rules 205 and 206, attaching thereto the copy of the notice and questions received ~~by him~~.

The officer delivering the deposition transcript shall give prompt notice of its delivery to all parties. It shall be sufficient notice of delivery for the officer to forward to each party a copy of the officer's certification described in paragraph 1 of Rule 206.

Rule 37: Additional Parties

Additional parties may be brought in without leave of court before the commencement of the discovery period provided for in Rule ___ and during the first three (3) months of the discovery period. Thereafter, parties may be brought in only with leave of court or upon the agreement of the parties. Leave shall be granted unless there is insufficient time to complete discovery that would be made necessary by adding the party, in which case leave shall be denied or the discovery period extended. Leave shall not be granted if it would unreasonably delay the trial.

Rule 38: Third Party Practice

(a) When Defendant May Bring in Third Party. Subject to Rule 37, 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 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 as provided in 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 same 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 the 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.

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Rule 63: Amendments and Responsive Pleadings

Parties may amend and supplement their pleadings and respond to other parties' pleadings without leave of court before the commencement of the discovery period provided for in Rule ___ and during the first three (3) months of the discovery period. Thereafter, parties may file pleadings that amend, supplement, or respond only with leave of court or upon the agreement of the parties. Leave shall be granted unless there is insufficient time to complete discovery that would be made necessary by the amendment, supplement, or response, in which case leave shall be denied or the discovery period extended. Leave shall not be granted if it would unreasonably delay the trial.

Rule 166: Pretrial Conference

1. **Conference.** When appropriate, the court may order the attorneys for the parties and the parties or their duly authorized agents to appear before it for a pretrial conference. There may be more than one pretrial conference. The court may consider any matter than may aid in the disposition of the action, including:

a. The settlement of the case;

b. Referral of the case to alternate dispute resolution;

c. Development of a scheduling order, including discovery;

d. Determination of uncontested and contested issues of law and fact; and

e. Trial procedure, including exchange of fact witnesses, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before trial, exchange of expert witnesses, exchange of proposed jury charges or findings of fact and conclusions of law, and exchange of exhibits.

2. **Order.** The court shall make an order that recites the action taken at the pretrial conference. This order shall control the subsequent course of action, unless modified to prevent manifest injustice.

RULE ____. Modification Of Discovery Procedure and Limitations By Agreement and By Court Order.

1. **Modification by Agreement.** The parties may by written agreement modify the procedures and limitations set forth in these rules. An agreement affecting an oral deposition is enforceable if the agreement is recorded in the deposition transcript.

2. **Modification by Court Order.** The procedures and limitations set forth in these rules may be modified by the court for good reason.

RULE ____. Discovery Period

1. Discovery Period. All discovery shall be conducted during the discovery period. The discovery period shall begin on the date of the first oral deposition or the date on which the first documents are produced upon the request of any party to the action, whichever is earlier, and shall continue for no more than six months. Any party added as a defendant or third-party defendant pursuant to Rule ____ within the first three months of the discovery period shall be entitled to a full six-month discovery period. Neither the addition of a party after the first three months of the discovery period, the amendment of a pleading, nor the intervention by a party shall effect the duration of the discovery period.

Rule ___ : Response, Amendment, and Supplementation to Discovery Requests

1. **Duty to Respond.** When responding to discovery requests made under Rules __ [mandatory disclosure, interrogatories, request for production], a party shall make a complete response, based upon all information reasonably available to the responding party or its attorney at the time the response is made. An objection to the form of a discovery request relieves the objecting party from any further duty to respond. An objection on the basis of a specific immunity or exemption from discovery relieves the objecting party only of the duty to respond with information or material specifically subject to the objection. The relief provided by an objection continues until the court overrules the objection.

2. **Duty to Amend Discovery Responses.** A party is under a duty to amend its prior responses to discovery requests made under Rules ___ [same as above] when it learns that a prior response was incorrect or incomplete when made, and if the corrective or additional information has not otherwise been made known to the other parties in discovery or in writing. The amendment shall be in the same form as the original response.

3. **Duty to Supplement Discovery Responses.** A party is under a duty to supplement its prior responses to discovery requests made under Rules __ [same as above] 60 days before trial if the party learns that a prior response, although correct and complete when made is no longer complete and correct and if the additional or corrective information has not otherwise been made known to the other parties in discovery or in writing. The supplement shall be in the same form as the original response.

4. **Additional Discovery After Supplementation.** The opposing parties may initiate discovery within 10 days of receiving the [amendment or]supplement in the form of document requests under Rule 167 , interrogatories under Rule 168 , and depositions under Rule ___ , although a party must respond to written discovery under Rules 167 and 168 not less than 20 days after the date of service, and the opposing parties together are allowed five (5) additional hours of deposition time. Such discovery shall be limited to matters related to any new information disclosed in the amendment or supplement.

5. **Failure to Provide Discovery.**

(a) Exclusion. If a party deliberately or with conscious indifference to its duty under these rules fails to disclose information in discovery, the court may exclude the information not timely disclosed. Exclusion is not a favored remedy and shall only be done when the circumstances clearly warrant.

(b) Continuance and expenses. When exclusion is not an appropriate remedy, but a failure to disclose as required by these rules may create a significant risk of an erroneous fact finding, the court shall continue the hearing to allow the opposing party to prepare to confront or to prepare to use the previously undisclosed information. When appropriate, the court may impose the expense of the delay, including attorney's fees and any difference between prejudgment and postjudgment interest, on the party that failed to disclose.

Note: Subparts (a), (b), and (c) do not apply to depositions. For subdivisions (b) and (c), information obtained in a deposition is obtained "in discovery" and need not be given again in a formal supplementation.

Rule ____ : Standard Requests.

1. Disclosure of standard information. The following matters are subject to disclosure by a party upon request from any other party:

a. A statement of the correct names of the parties to the lawsuit.

b. The information specified in Rule 166b(2)(d) regarding potential parties and persons with knowledge of relevant facts;

c. The information specified in Rule 166b(2)(e)(1) regarding expert witnesses and consulting experts whose opinions or impressions have been provided to or reviewed by a testifying expert;

d. The information and documents specified in Rule 166b(2)(f) regarding indemnity, insuring and settlement agreements;

e. A party's own statement as set forth in Rule 166b(2)(g);

f. In a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that:

(1) are reasonably related to the injuries or damages asserted; and

(2) are in the actual possession of the responding party or party's attorney; and

g. A copy of any written instrument upon which a claim or defense is based.

2. By Interrogatory. An interrogatory asking for standard information under this rule does not count against the interrogatory limit.

3. By Production Request. A response to a request for production asking for standard information does not begin the discovery period.

Rule 167. Requests For Production and Inspection

1. **Requests.** At any time prior to thirty (30) days before the end of the discovery period, any party may serve upon any other party a Request for Production and/or for Inspection, to inspect, sample, test, photograph and/or copy any designated documents, electronic data information or tangible things which constitute or contain matters within the scope of Rule 166b that are in the possession, custody or control of the party upon whom the Request is served. The term "electronic data information" includes, but is not limited to, all computerized systems, including floppy disks, hard drives, all back up systems, and archived tapes.

2. **Contents of Request for Production.** The Request shall set forth the items to be produced or inspected, either by individual item or by category, and describe each item and category with reasonable particularity. A party seeking production of electronic data information must specifically set forth the type of electronic data information the producing party is to produce. The Request shall specify a reasonable time (not less than 30 days after service of the written Request) and place for production. The Request shall also state the manner of inspection or copying of the requested items. If the requesting party intends to sample or test the requested items, the desired testing and sampling shall be described with sufficient specificity to inform the producing party of the means, manner, and procedure for testing or sampling.

3. **Production of Documents or Things.** The producing party shall produce the documents, electronic data information, or tangible things at the time and place requested, as follows:

a. Copies. The responding party may, at its option, produce copies only if the party has no originals or the originals remain available for inspection at the requesting party's request on no less than 10 days' written notice. If originals are produced, the producing party is entitled to retain the originals while the requesting party inspects and copies them.

b. Organization. The producing party shall produce documents, electronic data information, and things as they are kept in the usual course of business, or shall organize and label them to correspond with the categories in the Request.

4. **Objections and Responses.**

a. Objections to manner of production. The responding party may make objections to the time, place, or manner of production, testing, inspection, or sampling. Such an objection must be made within ten (10) days after service of the request and shall state when, where, and how the responding party proposes to comply with the request. A party who makes an objection to the time, place, or manner of production, testing, inspection, or sampling nonetheless must file within thirty (30) days of service of the request a response which describes any documents, electronic data information, or tangible things responsive to the request. The response also shall give notice of the number of such documents, electronic

data information, or tangible things and where they are located.

b. Objections to substance of request. The responding party also may object to the substance of the request in whole or in part and shall specifically state the reasons why such request should not be allowed. Objections to the substance of a request must be made within thirty (30) days after service of the request. A party who makes an objection to the substance of a request nonetheless must within thirty (30) days after service of the request produce any documents, electronic data information, or tangible things responsive to any portion of the request for which no objection has been filed.

5. Destruction or Alteration. Testing, sampling or examination shall not extend to destruction or material alteration of an article without notice, hearing, and a prior order of the court.

6. Expenses of Production. Unless otherwise ordered by the court, the expense of producing a documents, electronic data information, or tangible things will be borne by the producing party. The expense of inspecting, sampling, testing, photographing, and/or copying the documents, electronic data information, or tangible things produced will be borne by the requesting party.

Rule 168: Interrogatories to Parties.

1. **Availability.** Any party may file with the court and 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 that ask another party only to identify or authenticate specific documents as contemplated by Article IX of the Texas Rules of Civil Evidence or that require no more than a yes or no answer shall be unlimited in number. Other interrogatories shall not exceed 30 in number, including discrete subparts. Interrogatories may 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.

2. **Answers and Objections.**

a. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for the objection and shall answer to the extent the interrogatory is not objectionable. Answers and objections shall be preceded by the interrogatory to which they respond.

b. The answers shall be signed and verified by the party making them, and the objections shall be signed by the attorney making them. The provisions of Rule 14 shall not apply.

c. The party upon whom the interrogatories have been served shall file with the court and serve a copy of the answers, and objections, if any, not less than 30 days after the service of the interrogatories, except that, if the interrogatories accompany citation, a defendant may serve answers within 50 days after service of the citation and petition upon that defendant.

d. All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

3. **Scope, Use at Trial.** Interrogatories may relate to any matters that can be inquired into under Rule 166b, but the answers, subject to any objections as to admissibility, may be used only against the party answering the interrogatories. It is not ground for objection that an interrogatory involves an opinion or contention that relates to fact or the application of law to fact.

4. **Contention interrogatories.** A party can use contention interrogatories that require more than a yes or no answer only to request another party to state the factual and legal theories upon which that party bases particular allegations. The answer to such an interrogatory shall provide information sufficient to apprise the requesting party of the positions the answering party will take at trial. A party need not marshall its proof to answer the interrogatory, but need only disclose more precisely the basis of its pleadings.

5. 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 provide 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, and shall specify a reasonable time and place at which the documents can be examined not to exceed 10 days after the date the interrogatory answer is filed.

Note: Open-ended contention interrogatories may be used only to secure information that would be provided if the other party were required to plead more particularly. Parties seeking to obtain disclosure of facts supporting or rebutting particular allegations should use other discovery devices.

RULE 170. Expert Witnesses.

1. **Designation of Expert Witnesses.** The plaintiff shall designate any witness who is expected to offer expert testimony at trial no later than sixty (60) days before the end of the discovery period. The defendant shall designate any witness who is expected to offer expert testimony at trial no later than forty-five (45) days before the end of the discovery period. Failure to timely designate an expert expected to testify at trial shall be grounds for exclusion of the witness's expert testimony.

2. **Disclosure of General Information.** At the time a party designates expert witnesses, the party shall disclose the following information with respect to each expert designated:

a. *Identity.* The expert's name, address, and telephone number.

b. *Background.* The expert's background, including a current resume and bibliography.

c. *Subject Matter.* The subject matter on which the expert is expected to testify.

d. *General Substance.* The general substance of the expert's mental impressions and opinions.

e. *Dates.* Two dates within the forty-five (45) days following the date of designation on which the expert will be available to testify by deposition.

3. **Production of Documents and Tangible Things.** Any document or tangible thing prepared by, provided to, or reviewed by the expert in anticipation of the expert's testimony must be provided to the other side at the time of designation. Any document or tangible thing subsequently prepared by, provided to, or reviewed by the expert must be provided to the expert as soon as it is available unless the expert designation is or has been withdrawn.

4. **Additional Discovery.** A party may obtain additional discovery regarding the mental impressions and opinions held by the expert and the facts provided to the expert only by oral deposition of the expert.

5. **Expert Depositions.** A party's experts may be deposed during the forty-five (45) day period immediately following the designation of the experts. The deposition testimony of only two experts designated by any side shall count against the deposition testimony limitation set forth in Rule ___. If any side designates more than two experts, the opposing side shall be allowed an additional six (6) hours of deposition testimony to depose each additional expert designated.

6. **Failure to Use Expert Testimony.** If a case goes to trial, the court may upon the request of a party require an opposing party to reimburse the costs, including attorney's

fees, of deposing any expert designated by such opposing party whose testimony is not used during trial.

RULE 200. Depositions Upon Oral Examination

1. **When Depositions May Be Taken.** During the discovery period provided for in Rule ___, any party may take the testimony of any person, including a party, by deposition upon oral examination, which will be recorded stenographically by any officer authorized to take depositions.[1]

2. **Notice.**

a. A party proposing to take a deposition upon oral examination must give reasonable notice in writing to every other party. The notice shall state the name of the deponent, the time and the place of the taking of the deposition, and if the production of documents or tangible things is desired, a designation of the items to be produced by the deponent that complies with Rule 167. If the deponent is a party, or a party's agents, employees, or persons subject to a party's control, the procedure of Rule 167 shall apply. The notice shall also state the identity of persons who will attend the deposition 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 identify of such other persons.

b. A party may in the notice name as the deponent a public or private corporation, partnership, association, governmental agency, or other organization .and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. The subdivision does not preclude taking a deposition by any other procedure authorized by these rules.[2]

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[1] This requires a CSR certified under Gov't Code 52.021, unless Rule 202 is followed.

[2] The present Texas rule regarding depositions of organizations has been replaced with the Federal Rule, which is clearer and has developed a body of interpretative cases that can be referred to for guidance. The provisions of the Federal Rule can be found in this rule and Rule 204 concerning subpoenas.

Rule 201. Compelling Appearance; Production of Documents and Things; Deposition of Organization

Any person may be compelled to appear and give testimony by deposition in a civil action.

1. **Subpoena.** 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 an officer at the time and place stated in the notice for the purpose of giving his deposition.

2. **Production.** A witness may be compelled by subpoena duces tecum to produce items or things designated in the notice according to Rule 200(2)(a) and within his care, custody or control. The subpoena will be subject to the provisions of Rules 177a and 166b.

3. **Party.** When the deponent is a party, service of the notice upon the party's attorney shall have the same effect as a subpoena served on the party. If the deponent is an agent, employee, or persons subject to the control of a party, notice to take the deposition served upon the party's attorney shall have the same effect as a subpoena served on the deponent.

4. **Organizations.** When the deponent named in the subpoena or notice is a public or private corporation, partnership, association, governmental entity, or other organization, and the notice describes the matters on which examination is requested in accordance with Rule 200(2)(b), the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The person so designated shall testify as to matters known or reasonably available to the organization.

5. **Time and Place.** The time and place designated for the deposition shall be reasonable. The place shall be in the county of the witness' residence or, where he is employed or regularly transacts business in person or at such other convenient place as may be directed by the court in which the cause is pending; provided, however, the deposition of a party or the person or persons designated by a party under paragraph 4 above may be taken in the county of suit subject to the provisions of Rule 166b(5). A nonresident or transient person may be required to attend in the county where he is served with a subpoena, or within one hundred fifty 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.

Rule 202. Non-Stenographic Recording; Deposition by Telephone

1. Non-stenographic Recording. Any party may cause the testimony and other available evidence at a deposition upon oral examination to be recorded by other than stenographic means, including videotape recordings, without leave of court, and the non-stenographic recording may be presented at trial in lieu of reading from a stenographic transcription of the deposition, subject to the following rules:

a. Any party intending to make a non-stenographic recording shall give reasonable prior notice to the deponent and other parties, either in the deposition notice or in writing, of the method by which the testimony will be recorded and whether or not a certified court reporter will be present. The party requesting the non-stenographic recording will be responsible for taking, preserving, and filing the non-stenographic recording and assuring that the recorded testimony will be intelligible, accurate and trustworthy. Any transcription of the non-stenographic recording may be used as evidence only if it complies with the provisions of Rules 205 and 206.

b. Any party may designate another method to record the deponent's testimony in addition to the method specified. The additional record or transcript shall be made at the expense of the designating party, unless the court otherwise orders.

c. After notice of the non-stenographic recording is given, any party may move for a protective order under 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.

d. Any party shall have reasonable access to the original non-stenographic recording and may obtain a duplicate copy at its own expense.

e. The side initiating the non-stenographic recording shall bear the expense of the non-stenographic recording, subject to an order of the court, upon motion and notice, at the conclusion of the case, taxing the expense as court costs.

2. Deposition by Telephone. Any party may give reasonable prior notice that a deposition will be taken by telephone or other remote electronic means, subject to subsection 1(b) of this rule. For the purposes of this rule and Rules 201, 215-1a and 215-2a, a deposition taken by telephone is taken in the district and at the place where the deponent is to answer the questions asked. The officer taking the deposition may be located with the deposing parties instead of with the witness if the identification of the witness is substantiated and the witness does not waive examination and signature of the transcribed deposition.

Rule 204. Examination, Cross-Examination and Objections

1. Oath; Examination. 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 by an officer authorized to do so.[3] The parties may orally examine and cross-examine the deponent. Any party, in lieu of participating in the oral examination, may serve written questions in a sealed envelope on the party proposing to take the deposition who shall transmit them to the officer who shall propound them to the witness. The proceedings shall be recorded at the time it is given and thereafter transcribed by the officer taking the deposition, or by some person under that person's personal supervision.[4]

2. Time Limitation. Each side, the plaintiffs and the defendants, have 50 hours to examine and cross-examine deponents other than their own expert witnesses. Third-party defendants share the defendants' 50 hours with regard to issues common to the defendants, however, third-party defendants have an additional 10 hours for examination regarding issues upon which they oppose the defendants. Breaks during depositions do not count against any party's deposition time limitation. The officer taking the deposition shall state as part of the certificate required by Rule 206 the amount time each examiner used to examine the deponent.

3. Conduct during the deposition. The oral deposition shall be conducted as if the testimony were being obtained in court during trial. Counsel are expected to cooperate with and be courteous to each other and the deponents.

4. Instructions not to answer. Instructions to the deponent not to answer a question are improper except *(a)* to preserve a privilege against disclosure, *(b)* to enforce a limitation on evidence directed by the court, *(c)* to protect a witness from an abusive question, or *(d)* to present a motion under paragraph 5. Should a court later order the deponent to answer a question to which the deponent was instructed not to answer, the court may order that the reconvened deposition shall not count against the deposition time of the party taking the deposition.

5. Terminating the deposition. At any time during a deposition, a party or the deponent may move to terminate or limit the deposition on the ground that it is being conducted or defended in bad faith or in such a manner as to unreasonably annoy, embarrass, or oppress the party or the deponent. Upon demand of the objecting party or deponent, the deposition shall be suspended for the time necessary to secure a ruling. Should a court rule that the deposition should not have been terminated, the court may order that the reconvened deposition shall not count against the deposition time of the party taking the deposition.

6. Conferences. Private conferences between deponents and their attorneys during the actual taking of the deposition are improper except for the purpose of determining

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[3] This language is verbatim from current Rule 204(2), except the last phrase has been added.

[4] This language is from current Rule 204(3).

whether a privilege should be asserted. Private conferences may be held, however, during normal recesses and adjournments. All statements, objections and discussions conducted during the oral deposition shall be on the record, count against the examining party's deposition time, and may, upon leave of court, be presented to the jury during trial.

7. **Objections to testimony.** No objections shall be made during the oral deposition. The parties may make and the court shall consider any objections to the questions or the testimony when the deposition is tendered as evidence. A court may consider an objection to leading questions, however, only if the objecting party advised the questioning party before the questioning began that the objecting party would make objections to leading questions at trial. Should the parties agree or a court order that objections be made during an oral deposition, the objection shall be made by simply stating the grounds therefore. A narrative objection will not preserve the objection for the court's later determination.

8. **Deposition master.** If the court finds a serious pattern of abuse of the deposition process, it may appoint a master to preside over any deposition or depositions. The master may allow the parties to make concise objections, upon which the master shall rule. If the master overrules an objection, the deponent shall answer the question unless the objecting party invokes de novo review by the judge. If a master sustains an objection, the requesting party may move to compel an answer, and the objection shall be reviewed de novo by the judge. The cost of the master shall be assessed against the party or parties responsible for the abuse.

Rule 208: Deposition Upon Written Questions.

1. **When Depositions May Be Taken.** During the discovery period provided for in Rule ___ any party may take the testimony of any person, including a party, by deposition upon written questions. Attendance of witnesses and the production of designated items may be compelled as provided in Rule 201. The time during which the deponent is being examined or cross-examined on written questions shall be counted against the examining party's deposition time limitation, and the officer taking the deposition shall record the time, as provided in Rule 204(2). Depositions on written questions that seek only to obtain, authenticate, or identify documents from persons not parties to the litigation do not count against the deposition time limitation.

2. **Notice.**

a. A party proposing to take a deposition upon written questions shall serve the questions upon every other party or his attorney with a written notice that complies with Rule 200 thirty (30) days before the deposition is to be taken.

b. A party may in his notice name as the witness a public or private corporation. a partnership, association, governmental agency or other organization as provided by Rule 200(2)(b).

3. **Cross-Questions, Redirect Questions, Re-cross Questions and Formal Objections.** A party may serve cross-questions upon all other parties within 14 days after the notice and written questions are served. Within 7 days after being served with cross-questions a party may serve redirect questions upon all other parties. Within 7 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. Objections to the form of the last questions authorized must be made the day before the deposition is to be taken.

4. **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 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.

5. **Officer to take Responses and Prepare Record.** The party taking the deposition shall deliver a copy of the notice and copies of all questions served to the officer designated in the notice, who shall proceed promptly to administer an oath to the witness in the manner provided in paragraph 2 of Rule 204, to take the testimony of the witness in response to the questions in the manner provided in Rule 204 and to prepare, certify and deliver the deposition, in the manner provided by Rules 205 and 206, attaching thereto the

copy of the notice and questions received. The officer delivering the deposition transcript shall give prompt notice of its delivery to all parties. It shall be sufficient notice of delivery for the officer to forward to each party a copy of the officer's certification described in paragraph 1 of Rule 206.

SCHOOL OF LAW
THE UNIVERSITY OF TEXAS AT AUSTIN

727 East 26th Street • Austin, Texas 78705 • (512) 471-5151
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TELECOPY COVER LETTER

May 13, 1994 — DATE
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PLEASE DELIVER THE FOLLOWING PAGES TO:

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COMPANY:

TELEPHONE NUMBER: ( )

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FROM: J. PATRICK HAZEL

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PROPOSED RULE ON DISCLOSURE

DISCOVERY SUBCOMMITTEE OF THE COMMITTEE ON COURT RULES

TABLE OF CONTENTS

PROPOSED RULE ON DISCLOSURE

I. EXISTING RULE

There is no existing rule.

II. NEW RULE

Rule 166d. DISCLOSURE UPON WRITTEN REQUEST

(A) DISCLOSURES TO BE MADE

Upon written request by any party to any other party, the following must to the extent known by the Requested Party at the time of response or supplementation be disclosed and produced, when requested, if in the possession, custody, or control of the Requested Party or that party's attorneys, agents, servants, or employees:

(1) PERSONS WITH KNOWLEDGE OF RELEVANT FACTS[1]

Identify[2] each person believed to have knowledge or discoverable information relevant to the events, transactions, or occurrences that gave rise to the claims or damages and defenses to the claims or damages; the general subject matter about which each named person is likely to have knowledge or discoverable information; and a summary of the main facts about which the person may have knowledge or discoverable information which are favorable[3] to the Requested Party.

(2) EXPERTS

As to any expert whom the Requested Party may call to testify at the time of trial or as to any expert whose mental impressions or opinions

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1. I added "titles" to the numbers for the sake of simplicity and clarification. Without them one must read almost the entire subsection to know what generally is included.

2. The term "identify" has been defined in the proposed rule on definitions, Proposed Rule 166g(5).

3. While it is required that persons having knowledge or discoverable information be disclosed, it is not required that the unfavorable information itself be disclosed. It is the job of the Requesting Party to do its own investigation or other discovery to find out that information.

have been provided to or reviewed by an expert whom the Requested Party may call to testify at the time of trial:

(a) the identity, profession. and whether a testifying or consulting expert;

(b) the subject matter about which each expert may testify or has been consulted;

(c) the mental impressions or opinions which each testifying expert is expected to state in testimony;

(d) a general summary of the bases for each of those mental impressions or opinions; and

(e) Production of documents and tangible things prepared by, provided to, or reviewed by each named expert.

(3) INSURANCE OR INDEMNITY AGREEMENTS

Production of a copy of any insurance or indemnity agreement which may cause or require another person or entity:

(a) to be liable to satisfy part or all of a judgment which may be rendered in the action against the Requested Party or

(b) to indemnify or reimburse payments made by the Requested Party to satisfy all or part of a judgment which may be rendered in the action against the Requested Party.

(4) SETTLEMENT AGREEMENTS

Production of a copy of, or where no written agreement exists a statement of the terms of[4], any settlement agreement entered into by the Requested Party and any person or entity relating to the subject of any claims or defenses arising from the events, transactions, or occurrences which are the subject matter of the suit.

(5) REQUESTING PARTY'S STATEMENT

Production of a copy of any statement, *i.e.* a written statement signed or otherwise adopted or approved by the Requesting Party and any stenographic, mechanical, electronic or other type of recording, or any transcription thereof which is a substantially verbatim recital of a statement made by the Requesting Party and contemporaneously recorded.

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4. "Verbal agreements" as well as those which are in writing should be disclosed.

(6) FACTUAL BASES

The factual basis(es) which, if proven at trial, would establish each claim or defense of the Requested Party.[5]

(7) CLAIMS OR DEFENSES

The claims or defenses[6] of the Requested Party and the legal theory(ies) upon which each claim or defense is based. Such legal theory(ies) shall be set forth with sufficient specificity to give the Requesting Party adequate notice to prepare for trial[7] with respect to such legal theory(ies) and, when necessary for a reasonable understanding of the theory(ies), citations of pertinent legal or case authorities.[8]

(8) DAMAGES

Each element of damages is to be listed, and

(a) When the amount is capable of being determined by some calculation, the method of calculating such damages and the total amount claimed;

(b) When the amount is within the discretion of the trier of facts, the total amount claimed for each element; and

(c) Production of any documents or tangible things upon which the Requested Party's damage computation is based, including those which bear on the nature and extent of injuries suffered.

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5. "Which, if proven at trial" is a substitute for "fair notice." The substitute has more teeth to it than "fair notice."

6. The original stated the "legal theory(s) upon which each claim or defense is based." There was no requirement to state what the claim or defense was. I am not sure what the difference is between a claim/defense and a legal theory upon which it is based. I assume there is a difference, and, if there is, the requested party ought to have to state the claim or defense as well as the legal theory.

7. The original said "fair" notice. However, that is the requirement for a pleading to avoid a default judgment. We are seeking what such a pleading would have to be amended to state if there had been a special exception to that pleading that was granted. Hence, the wording "adequate notice to prepare for trial."

8. The only example that comes to mind is a statement that the opposing party "violated a statute of this State." To give this some reasonable understanding, the statute should be included. If the claimant or defendant has some unusual or new legal theory created under the common law, the case authority ought to be cited. This latter may, however, cause more confusion than enlightenment.

(9) POTENTIAL PARTIES

The identity of any potential party to the suit.

(10) HEALTH CARE PROVIDERS AND AUTHORIZATIONS

When the Requested Party seeks to recover damages for physical or mental injury:

(a) the identity by name, address, and telephone number of each health care provider who has provided treatment to the Requested Party for five (5) years preceding the events or occurrences giving rise to the suit; and

(b) production of a written authorization signed by the Requested Party authorizing the Requesting Party, its attorneys, agents, servants, or employees to view and obtain copies of medical records from any health care provider named in "(a)" above.

(11) WRITTEN OBLIGATION

When the suit is based upon a written obligation(s), production of copies of any documents upon which the suit is based.

(12) HEALTH CARE PROVIDER SUITS[9]

When the suit is against a health care provider and

(a) when the Requested Party is a claimant:

(i) a description of each act or omission which the Requested Party claims was below the relevant standard of health care for the person committing such act or omission;

(ii) the name of the person who committed the act or omission;

(iii) the date or dates of each act or omission;

(iv) a description of the injury or impairment which the Requested Party claims was a result of the act or omission; and

(v) a statement of the date and time of last treatment from this Requesting Party for the condition complained of by the Requested Party.

(b) When the Requested Party is a defendant and has listed any persons who provided health care to the Requesting Party in response to "A(1)", state to the extent known:

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9. *See*. Article 4590i. § 13.02. V.A.T.S.

(i) places and dates when such person received formal education;

(ii) dates of graduation;

(iii) degree(s) obtained and specialty(ies), if any;

(iv) places and dates of any internship, residences, or fellowships;

(v) identification and dates of any board certification; and

(vi) dates and places of all jobs including a brief description of the duties in each job.

(B) FORM, CONTENTS, TIME, AND SERVICE OF REQUEST

(1) FORM

Any request under this rule must be in writing and is restricted to the items listed in **Paragraph (A)** above

(2) CONTENTS

The request need only state that the Requesting Party requests the information and/or documents described by stating the particular paragraph of this rule by number and title. For example, "Defendant requests that Plaintiff provide the information and documents described in Rule 166d, subparagraphs **(1) PERSONS WITH KNOWLEDGE OF RELEVANT FACTS, (2) EXPERTS, (4) SETTLEMENT AGREEMENTS, AND (7) CLAIMS OR DEFENSES.**"

(3) TIME

The request may be served by a Defendant on a Plaintiff contemporaneously with Defendant's answer being filed or any time thereafter. The request may be served by a Plaintiff on a Defendant or any other party or by a Defendant on any other party any time after forty-five (45) days from the day the Requested Party has appeared in the case.[10]

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10. This is an unusual provision. Usually plaintiffs get the first bite at the apple. However, I believe most would agree that defendants (and, especially their lawyers) know the least about a case in its early stages. This recognizes that plaintiffs' attorneys are in a better position to answer these questions early on. There will be some controversy about this one simply because it departs from the normal rules so much. The concept began with the legislature. *See*, Article 4590i, § 13.02(a) and (b). V.A.T.S.

These time requirements are not applicable to cases filed under the Texas Family Code in which cases the request may be served by Petitioner on Respondent at any time after or with service of citation and by Respondent on Petitioner at any time after the suit has commenced.

(4) SERVICE

The request must be served upon the Requested Party pursuant to Rule 21a; copies are to be delivered to all other parties; and a copy is to be filed with the clerk of the court.[11]

(C) RESPONSE

(1) TIME TO SERVE

A response to and production of copies responsive to any request must be served pursuant to Rule 21a within forty-five (45)days of the date of service of the request; copies of the response and production of copies are to be delivered to all other parties, and a copy of the response only must be filed with the clerk of the court.[12] The time for responding may be shortened or extended by agreement of the parties in writing or by order of the court on motion and notice of either party and for good cause shown.

(2) FORM AND SIGNATURE

Each separate response is to be preceded by the subsection number, title, and full written request and the general response is to be signed by the Requested Party's attorney or by the Requested Party when unrepresented. The response need not be verified, but the signature of an attorney or party constitutes a certification that to the best of his or her knowledge, information, and belief, after an inquiry that is reasonable under the circumstances, the disclosure or supplementation is correct and complete as of the time it is made.

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11. The filing of a copy is to conform to our committee vote and present rules other than depositions. Note that the original goes to the party and only a copy goes to the clerk of the court. This is in conformity with present and past practice.

12. Since we are going to file things with the clerk of the court, I thought we ought to keep in conformity with present practice of not filing things produced.

(3) INAPPLICABLE REQUESTS

No response shall be required where a particular request is clearly inapplicable under the circumstances of the case. The Requested Party shall state briefly why the information requested is not applicable to the suit.[13]

(D) SUPPLEMENTATION

A party who has responded to a request for disclosure of information or production of documents pursuant to this Rule is required to supplement the responses as required by Rule 166b(6) of these rules.

(E) OBJECTIONS AND PRIVILEGED MATTER

An objection grounded upon irrelevance is improper; objections upon any other grounds are rebuttably presumed improper; when made; however, objections are to be made within the same time as the time required for responses. Any request made pursuant to this rule is not intended to require disclosure of privileged documents; requested information; however, is not privileged. The Requested party shall identify with each response or supplementation a listing of any documents not produced because the Requested Party asserts they are privileged and state the specific privilege(s) asserted.

(F) ADMISSIBILITY

Answers supplied to the disclosure requests are admissible to the same extent as answers to Interrogatories pursuant to Rule 168. The response and supplementation to disclosure requests **(6) FACTUAL BASES, (7) CLAIMS OR DEFENSES, AND (8) DAMAGES** of **Paragraph (A)** of this rule shall be deemed to be a supplement to pleadings and shall be treated as pleadings in all respects, including admissibility.[14]

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13. This should be rare, but it can happend that a Requesting Party requests information or documents which have no bearing on the type of suit.

14. The question arises: "Should these be admissible?" If they are not, such would make it much easier to state them with candor. If they are, the failure to state them with candor can be used at trial to burn the offending party. Perhaps requiring all parties to amend their pleadings, say sixty (60) days before the case is set for trial, and limiting those amendments to matters included in these responses (but allowing dropping matters no longer contended) would suffice. In such instance the responses could be subject to sanctions but not admissible.

(G) OTHER DISCOVERY

Nothing in this rule shall preclude any party from taking additional non-duplicative discovery. The disclosures requested in this rule shall not constitute a set of interrogatories under Rule 168 of these rules and either party may serve additional non-duplicative interrogatories as authorized by Rule 168.

(H) SANCTIONS

Failure to serve true and complete responses and supplementation to the requests for information and production of documents or the making of groundless objections shall, on the motion of any party, be grounds for sanctions by the Court pursuant to Rule _____.[15]

(I) NEW PARTIES

Upon service of a written request by a new party to the suit to an original Responding Party, true copies of any written disclosure responses under this rule, including production of documents, must be supplied to the new party by the original Responding Party within thirty (30) days of the request.

III. BRIEF STATEMENT OF REASONS FOR AND ADVANTAGES OF PROPOSAL

The seventy-third legislature of Texas enacted Article 4590i, §§ 13.01 and 13.02, V.A.T.S. which authorized the Supreme Court of Texas to create a set of standard interrogatories and requests for production in health care cases. The Federal Rules also require mandatory disclosures of certain information where the option to opt out has not been exercised. Other jurisdictions are mandating similar disclosure provisions. All of these efforts on the part of legislatures and court rules committees are designed to try to cut down on the time spent on discovery and satellite litigation which erupts from discovery disputes. This Proposed Rule will require the Requested Party to provide certain basic information and documents that are generally needed in most litigation and will give the Requesting Party a better ability to evaluate the case early in the litigation for potential settlement and, in the event no settlement is reached at this early point, to set the stage for a scheduling conference and agreement or order which will provide for needed and avoid unneeded discovery in preparation for trial. The implementation of this Proposed Rule is triggered, however, not by the

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15. See, Article 4590i, § 13.02(h), V.A.T.S.

filing of a lawsuit but by the written request of a party. Further, the Requesting Party can tailor the requests to the particular case.

This Proposed Rule, with the disclosure early in the proceeding of the legal theories and essential facts of the case, will help accomplish several purposes: (1) see that justice is done with fairness to all sides of the lawsuit; (2) see that critical disclosures are made quickly and at the least possible expense to litigants; and (3) reduce the time of litigation and the acrimony between litigants or their lawyers. The Proposed Rule also has the flexibility afforded by not being mandatory but driven by request. This means that routine cases can avoid the expense of disclosure if the parties wish to avoid it; or, in cases where disclosure could increase acrimony (such as divorces or other family law cases where there is a public policy of a cooling down period and a preference for an intact family unit), delay such disclosure until there is certainty about proceeding in the lawsuit.

Another purpose of the Proposed Rule is to require the Requested Party to state with particularity the factual and legal bases for the claims or defenses. This should help to narrow the scope of the lawsuit and, hence, narrow the scope of discovery and cut down on litigation costs.

Must of the information and discovery which may be requested is peculiarly within the knowledge of the attorneys, and a response need not be verified or signed by a party when represented by an attorney. An attempt has been made to incorporate the spirit and provisions of Article 4590I, §§ 13.01 and 13.02, V.A.T.S.

Since this Proposed Rule is entirely new, some footnotes are provided in an effort to explain the purpose of certain provisions. Also, as of the date this proposal is sent to the Supreme Court Advisory Committee, it should be noted that the present proposal as specifically worded has not received approval of the full Committee on Court Rules. The full committee has approved the proposal generally and matters disapproved by the full committee have been eliminated. It is expected that the full committee will give its approval at its June 1994 meeting.