AGENDA
SEPTEMBER 15-16, 1995
SCAC MEETING

INDEX

1. Report of the Sanctions Subcommittee dated September 11, 1995

2. TRCP 25 - Medical Records of Non-Party

3. TRCP 145 - Affidavit of Inability

4. Report of Subcommittee on TRCP 1-14 dated September 12, 1995

5. Report of Subcommittee on TRCP 315-331

09-12-95
4543.001
cc: LHS
hhd
Van

LIDDELL, SAPP, ZIVLEY, HILL & LABOON, L.L.P.
A REGISTERED LIMITED LIABILITY PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS
ATTORNEYS
SUITE 800
700 LAVACA
AUSTIN, TEXAS 78701-3102
(512) 404-2000
TELECOPIER (512) 404-2099

SUITE 3400
600 TRAVIS
HOUSTON, TEXAS 77002-3095
(713) 226-1200
TELECOPIER (713) 223-3717

SUITE 900
2200 ROSS AVENUE
DALLAS, TEXAS 75201-2774
(214) 220-4800
TELECOPIER (214) 220-4899

September 11, 1995

Dear Justice Hecht, Mr. Lee Parsley and Members of the Committee:

Please find enclosed the revised drafts of the Sanctions Subcommittee to proposed Rules 13 and 166d. We have made some revisions, which we believe to be relatively minor, to the drafts that we have sent you earlier. We look forward to discussing these proposed drafts on Friday at our meeting in Austin so please bring these drafts with you. Thank you for your attention.

Yours truly,

Joseph Latting

JL/cb
Enclosures

A1/230603.
1000/002

RULE 13. EFFECT OF PRESENTING PLEADINGS AND MOTIONS; SANCTIONS

(a) Presenting pleadings and motions. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading or motion, an attorney or unrepresented party is certifying that to the best of the presenter's knowledge, information, and belief, formed after reasonable inquiry:

(1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or by the establishment of new law;

(3) the allegations and other factual contentions in the pleading or motion have evidentiary support, or, for specifically identified allegations or factual contentions, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) each denial in a pleading or motion of a factual contention is warranted on the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief; provided however, that the filing of a general denial under Rule 92 does not violate this provision.

(b) Motion for sanctions. A party seeking sanctions under this rule shall file a motion for sanctions separately from other motions or requests, and shall describe the specific conduct alleged to violate paragraph (a) of this rule. The motion shall be served at least twenty-one (21) days before being filed or presented to the court; if the challenged pleading or motion is withdrawn or corrected within that twenty-one (21) day period, the motion shall not be filed or presented to the court. The court may award to a part prevailing on a motion under this rule the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.

(c) Court's initiative. The court on its own initiative may enter an order describing the specific conduct that appears to violate paragraph (a) of this rule and directing the alleged violator to show cause why the conduct has not violated the rule.

(d) Sanctions. A court that determines that a person has presented a motion or pleading in violation of paragraph (a) of this rule may impose a sanction on the person, a party represented by the person, or both. Any sanction shall be limited to what is sufficient to

deter repetition of the conduct or comparable conduct by others similarly situated. A sanction may include any of the following:

(1) an order directing the violator to perform, or refrain from performing, an act;

(2) an order to pay a penalty into court;

(3) an order to pay the other party the amount of the reasonable expenses incurred by the other party because of the presentation of the pleading, motion, or other paper, including reasonable attorney's fees; and

(4) an award of an appropriate amount of costs for inconvenience, harassment, and out-of-pocket expenses incurred or caused by the subject litigation.

The court may not award monetary sanctions against a represented party for a violation of paragraph (a)(2). The court may not award monetary sanctions on its own initiative unless the court issues its show-cause order before a voluntary dismissal or voluntary settlement of the claims made by or against the party or the party's attorney against whom sanctions are proposed.

An order under this rule shall contain written findings, or be supported by oral findings on the record, stating specifically (1) the conduct meriting sanctions, and (2) why a lesser sanction would be ineffective.

Except with respect to motions and pleadings involving post-judgment discovery under Rule 162a, the trial court may grant relief under this rule only while the court has plenary jurisdiction.

(e) Exception. This rule is inapplicable to discovery requests, responses and objections.

Comments:

1. This rule and CPRC Chapter 10 govern only the presentation of pleadings and motions to the court. FRCP 11, upon which Chapter 10 was largely based, governs "other papers" as well. The subcommittee does not recommend extending Rule 13 beyond that stated in the statute.

2. The language of CPRC 10.002 allows courts to award "costs for inconvenience, harassment, and out-of-pocket expenses incurred or caused by the subject litgation" when "no due diligence is shown." The subcommittee's rule does not contain the "due diligence" language, but allows imposition of this sanction when paragraph (a) of the rule has been

violated. Paragraph (a) imposes an obligation of "reasonable inquiry," which is the equivalent of "due diligence." The subcommittee fears that using "due diligence" in addition to "reasonable inquiry" tends to create confusion.

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

1. Procedure.

(a) Motion. Any person affected by a failure of another person to respond to or supplement discovery, or by an abuse of the discovery process in seeking or resisting discovery, 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. 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, or has made diligent attempts to do so, and that such efforts have failed.

(b) Hearing. Oral hearing is required for motions requesting relief under this rule, unless waived by those involved.

(c) Order. An order under this rule may compel, limit or deny discovery, award expenses pursuant to paragraph 2, and impose sanctions pursuant to paragraph 3. The order 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, and (2) why a lesser sanction would be ineffective.

2. Expenses for compelling, limiting, or denying discovery. The court may make an award of expenses, including attorney's fees, incurred in connection with a motion made pursuant to paragraph 1 or a written response to such a motion, only if the court finds that: (a) the amount of expenses, including attorney's fees, incurred in connection with the prosecution or defense of the motion, is unreasonably burdensome on the party seeking relief, and (b) the party against whom relief is sought was not reasonably justified in seeking or resisting the discovery at issue.

3. Sanctions.

(a) Sanctionable conduct. In addition to or in lieu of the relief provided above, the court may impose one or more of the sanctions set forth in subparagraph (b) below if the court finds that:

(i) a person subject to a discovery order, other than a Discovery Control Plan under Rule 1, has failed to comply with the order; or

(ii) a party, a party's attorney, or a person under the control of a party: (A) has disregarded a rule, a Discovery Control Plan, or subpoena repeatedly or in bad faith; (B) has destroyed evidence in bad faith or engaged in other conduct that an order compelling, denying, or limiting discovery cannot effectively remedy; or (C) has repeatedly made discovery responses that are untimely, clearly inadequate or made for purposes of delay or discovery requests or objections to discovery that are not reasonably justified; or (D) has otherwise abused the discovery process in seeking, making or resisting discovery.

(b) *Sanctions.* A court may impose any of the following sanctions that are just under the circumstances:

(1) Reprimanding the offender;
(2) Disallowing further discovery in whole or in part;
(3) Assessing discovery or trial expenses, including attorney's fees caused by the sanctionable conduct;
(4) Deeming certain facts or matters to be established for the purposes of the action;
(5) Barring introduction of evidence supporting or opposing designated claims or defenses;
(6) 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;
(7) Granting the movant a monetary award in addition to or in lieu of actual expenses; or
(8) Making such other orders as are just.

4. **Time for Compliance.** Orders under this rule shall be operative at such time as directed by the court. If a party contends that monetary award precludes access to the court, the 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.

5. **Review.** An order under this rule shall be subject to review on appeal from the final judgment by any person or entity affected by the order.

Comment. Paragraph (5) 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).*

[??] *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

Rule 25 Medical Records of Non-Party

Before requesting production of medical records of a non-party and before serving a subpoena upon any custodian of records seeking the medical records of a non-party, the party seeking the records shall first serve the non-party with a copy of the subpoena. A request or subpoena which seeks medical records without identifying specific individuals and which seeks only records redacted of any individual-identifying information is not subject to this requirement. Any other exception to the requirement of this rule may be made only by court order for good cause shown. Nothing in this rule excuses compliance with laws concerning the confidentiality of medical records.

LIDDELL, SAPP, ZIVLEY, HILL & LABOON, L.L.P
A REGISTERED LIMITED LIABILITY PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS

ATTORNEYS

SUITE 3400
600 TRAVIS
HOUSTON, TEXAS 77002-3095
(713) 226-1200
TELECOPIER (713) 223-3717

SUITE 900
2200 ROSS AVENUE
DALLAS, TEXAS 75201-2774
(214) 220-4800
TELECOPIER (214) 220-4899

SUITE 800
700 LAVACA
AUSTIN, TEXAS 78701-3102
(512) 404-2000
TELECOPIER (512) 404-2099

JOHN H. MARKS, JR., P.C.
(214) 220-4458

August 14, 1995

Honorable Scott A. Brister
234th District Court
Room 206
301 Fannin Street
Houston, TX 77002

Mr. Stephen Yelenosky
Advocacy, Incorporated
7800 Shoal Creek Boulevard
Suite 171-E
Austin, TX 78757

Re: Court Rules Committee

Gentlemen:

Following is my recommendation with respect to the production of the medical records of non-parties:

> "When the production of medical records of a non-party is sought and the non-party has not signed a medical authorization the party seeking such production shall do so by oral or written deposition. The non-party whose records are sought shall be served with notice of deposition in the same manner as required under these rules for service of notice to a party unless otherwise ordered by the Court upon a showing of good cause by the party seeking such records. However, if the identity of the non-party whose records are being sought is not directly or indirectly being disclosed by production of such records notice pursuant to this rule shall not be required."

16-10

RULE 145 AFFIDAVIT OF INABILITY

In lieu of filing security for costs of an original action, a party who is unable to afford said costs shall file an affidavit or attorney's certificate as herein described. A "party who is unable to afford costs" is defined as a person who is presently receiving a governmental entitlement based on indigency or any other person who has no ability to pay costs. Except as provided by paragraph 3, the affidavit, and the party's action, shall be processed by the clerk in the manner prescribed by paragraphs 1 and 2. The procedure for contesting an affidavit shall not apply to the attorney's certification set forth in paragraph 3.

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

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

~~3.~~ **Attorney's Certification.** If a party (1) is receiving free legal services, without contingency, due to the party's indigency and, (2) is represented by an attorney who is providing legal services either directly or by referral from a program funded by the Interest on Lawyers' Trust Accounts (IOLTA) program; the attorney may file a certificate in lieu of the procedures described in paragraphs 1 and 2. The certificate shall confirm that the party has been screened for income eligibility, under the IOLTA income guidelines, by the IOLTA funded program or that the party has been referred to the attorney from a program funded by IOLTA and such program represents it has screened the party for income eligibility, under the IOLTA income guidelines. Upon receipt of such certification, the clerk shall docket the action, issue citation and provide such other customary services as provided any party.

~~4.~~ **Attorney's fees and costs.** Nothing herein shall preclude any existing right to recover attorney's fees, expenses or costs from any other party.

Notes and Comments

Source: Art. 2070

Change by amendment effective ____, 1994: Section one now allows court clerks to contest affidavits to prevent abuses by parties who are able to afford the costs of suit.

Section three facilitates participation by pro bono attorneys in representing low income clients. It allows an attorney associated with an IOLTA funded program to certify the party's eligibility for services based on prior income screening.

Legal Aid Society of Central Texas
611 East 6th Street Suite 300
Austin, Texas 78701

hen Yelenosky (512) 476-7244 ext. 412 FAX (512) 476-3940 Clients calling long-distance may dial toll-free 1-800-369-9270

January 25, 1994

Honorable Bonnie Wolbrueck
District Clerk of Williamson County
P.O. Box 24
Georgetown, Texas 78627

RE: Proposed amendment to Rule 145

Dear Ms. Wolbrueck:

It was nice to meet you at the last session of the Supreme Court Advisory Committee, and I look forward to working with you on Rule 145 and other matters.

Enclosed is a copy of the proposed amendment to Rule 145 as recommended by the State Bar Committee on Legal Services to the Poor.

The proposed change would restore the authority of the court clerks to challenge affidavits of inability.

The proposed change would also allow an attorney working for an IOLTA-funded program or accepting a case from such a program on a pro bono basis to obtain a waiver of fees by certifying that the client was screened by the program under IOLTA income guidelines. The attorney certification would take the place of an affidavit of inability and would not be contestable.

The proposed attorney certification procedure responds to concerns raised by pro bono attorneys accepting cases from legal services programs and other non-profit, IOLTA-funded programs. Attorneys who had volunteered to help an indigent client found that they first had to battle a defendant's often frivolous, but bothersome, challenge to the client's affidavit of inability to pay costs of court. Those experiences may be discouraging pro bono representation.

I hope that your subcommittee gives consideration to proposing this amendment to the Supreme Court Advisory Committee. Please call me if you have any questions or wish to discuss this further.

Sincerely,

STEPHEN YELENOSKY

xc. Honorable Doris Lange

DELGADO, ACOSTA & BRADEN, L.L.P.

Attorneys at Law

221 NORTH KANSAS · SUITE 1400 · EL PASO, TEXAS 79901 · TELEPHONE (915) 544-9997 · FACSIMILE (915) 544-8544

HECTOR DELGADO, P.C.*
ALEJANDRO ACOSTA, JR., P.C.*
PAUL A. BRADEN, P.C.*
J. EDUARDO CADENA
**Professional Corporations Practicing in Partnership*

CORRESPONDENT OFFICE, CIUDAD JUAREZ:
ENRIQUEZ, GONZALEZ, AGUIRRE Y OCHOA, S.C.
BOULEVARD MANUEL GOMEZ MORIN 7045-I
32509 CD. JUAREZ, CHIH., MEXICO
TEL. (16) 18-23-51
FAX (16) 18-23-91

CORRESPONDENT OFFICE, MEXICO CITY:
PÉREZ CHOW Y ASOCIADOS, S.C.
BOSQUE DE DURAZNOS NO. 75-303
COL. BOSQUES DE LAS LOMAS
11700 MÉXICO, D.F.
TEL. (5) 251-93-93
FAX (5) 596-51-06

September 12, 1995

All Members of the Supreme Court Advisory Committee

Dear Committee Members:

Enclosed please find our subcommittee's proposed final report on the Texas Rules of Civil Procedure Nos. 1-14. The changes proposed by the Supreme Court Advisory Committee have been incorporated in this report. Thank you for your attention to this matter.

Yours truly,

DELGADO, ACOSTA & BRADEN, L.L.P.

By: Alejandro Acosta JR

Alejandro Acosta, Jr.

Enclosure

aa09125.supreme

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Michael Prince

Justice of the Peace:

Honorable Paul Till

District Clerk:

Honorable Bonnie Wolbrueck

Current Rules

Rule 1	No change.
Rule 2	No change.
Rule 3	No change.
Rule 3a	No change.
Rule 4	Changes suggested.
Rule 5	Changes to make consistent with appellate rules.
Rule 6	~~Delete~~ Changes suggested.
Rule 7, 8, 10 and 12	Recommend consolidation with some minor changes.
Rule 9	~~Delete~~ Changes suggested.
Rule 11	Changes suggested.
Rule 14	Delete.
Rule 14b	No change.
Rule 14c	No change.

Letters from SCAC Agenda

Pg. 000004: No smoking rule	~~Recommend adoption with some changes. See new Rule 6.~~ Recommendation: No change.
Pgs. 000021-23, 27: Concern over meaning of "legal holiday" in Rule 4	See changes made to Rule 4, consistent with TRAP changes.
Pgs. 000024-25: Certificate of mailing as proof of mailing, Rule 5	Adopt same rule as appellate rules discussed earlier in SCAC.
Pg 000030: Concern over "good cause" standard in TRCP 5(b) for enlarging time when TRAP rules allow upon "reasonable explanation."	No change recommended at this time. The "good cause" standard of TRCP 5(b) applies only when the motion to extend time is filed after the time to act has expired. If made within the time to act, the standard is "for cause." The TRAP standard of "reasonable explanation" applies so long as the request is made within 15 days of the expiration of time. The Committee may want to consider changing the TRCP mechanism for motions to extend time to the TRAP method, but the Subcommittee does not recommend doing so at this time.
Pg 33-37: Allow service on Sundays, contrary to Rule 6	~~Subcommittee recommends deletion of Rule 6.~~ Recommendation: no change.
Suppl. p. 21-23: Rule 2 should be amended so TRCP applies to small claims court	Recommendation: No change. TRCP should not apply to small claims court.
Suppl. p. 24: Mailbox rule as applied to Fed Express.	Recommendation: No change as per lengthy discussion in SCAC concerning TRAP.
Feb. 1995 letter from Terry Jacobson regarding changing Rule 6 to allow service of process on Sundays, at least in family law matters	Recommendation: ~~Solved by recommended deletion of Rule 6.~~ No change.

Rule 1. Objective of Rules.

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

Subcommittee Recommendation: *No change*

Rule 2. Scope of Rules.

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

Subcommittee Recommendation: *No change.*

SCAC Action: *accepted subcommittee recommendation.*

Rule 3. Construction of Rules.

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

Subcommittee Recommendation: *No change.*

SCAC Action: *accepted subcommittee recommendation.*

Rule 3a. Local Rules.

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

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

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

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

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

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

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

Subcommittee Recommendation: *No change.*

SCAC Action: *accepted subcommittee recommendation.*

Rule 4. Computation of Time.

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday or legal holiday. Saturdays, Sundays and legal holidays shall not be counted for any purpose in any time period of five days or less in these rules, except that Saturdays, Sundays and legal holidays shall be counted for purpose of the three-day periods in Rule 21a, extending other periods by three days when service is made by registered or certified mail or by telephonic document transfer, and for purposes of the five-day periods provided for under Rules 748, 749, 749a, 749b, and 749c. When the act to be done is the filing of a paper in court, and the clerk's office is closed or inaccessible on the last day of the period so computed, the period extends to the end of the next day on which the clerk's

office is open and accessible. Proof of closing or inaccessibility of the clerk's office may be made by a certificate of the clerk or counsel or by affidavit of the party.

Subcommittee Recommendation: *The subcommittee recommends that the reference to "Rule 21" be deleted so that Saturdays, Sundays and holidays are not counted for the three-day notice period required for notice of hearings. The change prevents giving notice on Friday of a Monday hearing. Notice of a Monday hearing must be given on Wednesday unless a court orders otherwise. The subcommittee has also added the language from TRAP proposed Rule 5(a) regarding a closed or inaccessible clerk's office. The other change, "which" to "that," is merely grammatical.*

The Subcommittee also recommends that the TRCP contain a general rule for filed papers similar to TRAP 4 as reported out of the Appellate Rules Subcommittee that would contain the provisions of at least TRCP 4, 5, 21, 57, 74, 75, and 57.

SCAC Action: *accepted subcommittee recommendation. General rule for filed papers to be drafted with chairmen of other affected subcommittees.*

Subcommittee Recommendation: *delete plural as noted*

Rule 5. Enlargement of Time.

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

If any document is sent to the proper clerk by first-class United States mail or by registered or certified 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 days after the last day for filing, shall be filed by the clerk and be deemed filed in time. A legible postmark affixed by the United States Postal Service, 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 *in the absence of such proof,* other proof may be considered.

Comment: This rule does not require clerks to keep envelopes or wrappers.

Subcommittee Recommendation: *Changes are to make TRCP consistent with TRAP 4(b). The subcommittee has added the italicized language "in the absence of such proof" in the last line for clarity, and suggests that the change be made to TRAP 4(b) as well.*

SCAC Action: *accepted subcommittee recommendation with added comment.*

Rule 6. Suits Commenced on Sunday.

No civil suit shall be commenced nor process issued or served on Sunday, except in cases of injunction, attachment, garnishment, sequestration, or distress proceedings; provided that citation by publication published on Sunday shall be valid.

SCAC Action: *The SCAC voted to retain this rule over the Subcommittee's recommendation that it be deleted. The Subcommittee's suggested Rule 6 entitled "No Smoking" was rejected by the SCAC.*

Rule 7. Representation by an Attorney.

a. Representation by an Attorney. Any party to a suit may appear either personally ~~on his own behalf~~ or through an attorney. When a party is represented by an attorney of record, any reference in these rules to notice to a "party" shall be read to require, instead, notice to that party's attorney. If a party is represented by more than one attorney, notice shall be made to the attorney in charge. The attorney in charge shall be the attorney whose signature first appears on the initial pleading of the represented party, unless another attorney is specifically designated in that pleading or by notice.

b. Motion to Show Authority. The authority of an attorney to represent a party may be challenged by a sworn motion stating the basis of the belief that the attorney lacks authority, and causing the attorney to be cited to appear before the court and show his authority to act. Notice of the motion and hearing shall be served at least ten days before the hearing. The burden of proof shall be upon the challenged attorney to show sufficient authority. Upon the attorney's failure to show authority, the court shall refuse to permit the attorney to appear in the cause. If neither the party nor any~~no~~ person who is authorized to represent the party appears, the court may strike the pleadings. The motion may be heard and determined at any time before the parties have announced ready for trial, but the trial shall not be unnecessarily continued or delayed for the hearing.

c. Withdrawal of Attorney. An attorney may withdraw from representing a party only upon written motion for good cause shown. If another attorney is to be substituted as attorney for the party, the motion shall state: the name, address, telephone number, telecopier number, if any, and State Bar of Texas identification number of the substitute attorney; that the party approves the substitution; and that the withdrawal is not sought for delay only. If another attorney is not to be substituted as attorney for the party, the motion shall state: that a copy of the motion has been delivered to the party; that the party has been notified in writing of his right to object to the motion; whether the party consents to the motion; the party's last known address and all pending settings and

deadlines. If the motion is granted, the withdrawing attorney shall immediately notify the party in writing of any additional settings or deadlines of which the attorney has knowledge at the time of the withdrawal and has not already notified the party. The Court may impose further conditions upon granting leave to withdraw. Notice or delivery to a party shall be either made to the party in person or mailed to the party's last known address by both certified and regular first class mail. If the attorney in charge withdraws and another attorney remains or becomes substituted, another attorney in charge must be designated of record with notice to all other parties.

Subcommittee Recommendation: *The subcommittee has consolidated all of the rules relating to a party's representation by counsel. [Current Rules 7, 8, 10 and 12 now deleted] Substantive changes are few: (1) The subcommittee added a provision requiring notice upon the attorney when the party is represented by counsel. (2) Upon the failure to show authority to represent a party when challenged, the rule now provides that the court "shall" strike the party's pleadings. The subcommittee recommends that the rule provide that the court "may" strike pleadings to give the court discretion in situations where it would not be appropriate to strike the pleadings. Other changes are intended merely to make the rule more concise and clear.*

SCAC Action: *accepted subcommittee recommendation with noted changes.*

Rule 9. Number of Counsel Heard.

Not more than two counsel on each side shall be heard on any question or on the trial, except ~~in important cases, and~~ upon special leave of the court.

SCAC Action: *The SCAC voted to retain this rule with noted changes, over the Subcommittee's recommendation that it be deleted.*

Subcommittee's recommendation: *Instead of including this as a separate rule, add it to the end of Rule 7(a).*

Rule 11. Agreements to Be in Writing.

Unless otherwise provided in these rules, n~~N~~o agreement between attorneys or parties touching any suit pending will be enforced unless it is~~be~~ in writing~~,~~ and signed by the attorney for the party to be charged, or by the party to be charged,~~and filed with the clerk at the time the party seeks enforcement,~~ or unless it be made in open court or in a deposition upon oral examination and recorded by the court reporter.

Subcommittee Recommendation: *The Subcommittee is aware of two problems with the current rule: (1) Can a court enforce a written agreement that is filed after the dispute arises? (2) What does "entered of record" mean? Is it sufficient that an oral agreement*

be recorded by the court reporter, or does it have to be transcribed or incorporated into a court order or "approved" by the court before it is enforceable? The appellate opinions are somewhat inconsistent on both issues. The recommended rule makes clear that written agreements should be enforceable if the writing is filed when enforcement is sought, after the dispute arises. If this is not the rule, the court's file may be filled with incidental agreements between counsel that are never in dispute. The recommended rule further states that oral agreements should be enforced if recorded by a court reporter in open court or in a deposition. This recommendation reflects the Subcommittee's belief that the purpose of this rule is largely evidentiary. Thus, if the agreement is recorded by a court reporter, that purpose is satisfied regardless of where the recording is made. Note that this rule only concerns the initial requirement of a record of the agreement for enforcement. An alleged agreement may satisfy this rule, but not be enforceable for some other reason that is a matter of contract law.

The agreements covered by this rule will include settlement agreements and agreements between counsel modifying procedures set out in the rules. Because this rule allows enforceable agreements to be made in depositions, current Rule 166c is no longer necessary.

SCAC Action: *The SCAC adopted the subcommittee's recommendation with changes as noted. The SCAC version contains no filing requirement for enforcement of agreements covered by this rule.*

Rule 14b. Return or Other Disposition of Exhibits.

The clerk of the court in which the exhibits are filed shall retain and dispose of the same as directed by the Supreme Court.

Subcommittee Recommendation: *No change.*

SCAC Action: *accepted subcommittee recommendation.*

Supreme Court Order Relating to Retention and Disposition of Exhibits

In compliance with the provisions of Rule 14b, the Supreme Court hereby directs that exhibits offered or admitted into evidence shall be retained and disposed of by the clerk of the court in which the exhibits are filed upon the following basis.

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

appellate court's mandate such that the case is no longer pending on appeal or in the trial court.

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

If the exhibit is not a document or otherwise capable of reproduction, the party who offered the exhibit shall be entitled to claim same; provided, however, that the party claiming the exhibit shall provide a photograph of said exhibit to any other party upon request and payment of the reasonable cost thereof by the other party.

Subcommittee Recommendation: *No change.*

SCAC Action: *accepted subcommittee recommendation.*

Rule 14c. Deposit in Lieu of Surety Bond.

Wherever these rules provide for the filing of a surety bond, the party may in lieu of filing the bond deposit cash or other negotiable obligation of the government of the United States of America or any agency thereof, or with leave of court, deposit a negotiable obligation of any bank or savings and loan association chartered by the government of the United States of America or any state thereof that is insured by the government of the United States of America or any agency thereof, in the amount fixed for the surety bond, conditioned in the same manner as would be a surety bond for the protection of other parties. Any interest thereon shall constitute a part of the deposit.

Subcommittee Recommendation: *No change.*

SCAC Action: *accepted subcommittee recommendation.*

REPORT OF THE SUPREME COURT ADVISORY COMMITTEE

TRCP 1 - 14

Rule 4. Computation of Time

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time beings to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day ~~which~~ that is not a Saturday, Sunday or legal holiday. Saturdays, Sundays and legal holidays shall not be counted for any purpose in any time period of five days or less in these rules, except that Saturdays, Sundays and legal holidays shall be counted for purpose of the three-day periods in Rules ~~21 and~~ 21a, extending other periods by three days when service is made by registered or certified mail or by telephonic document transfer, and for purposes of the five-day periods provided for under Rules 748, 749, 749a, 749b, and 749c. When the act to be done is the filing of a paper in court, and the clerk's office is closed or inaccessible on the last day of the period so computed, the period extends to the end of the next day on which the clerk's office is open and accessible. Proof of closing or in accessibility of the clerk's office may be made by a certificate of the clerk or counsel or by affidavit of the party.

Comment to 1995 change: _____

Rule 5. Enlargement of Time

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (a) with or without motion or notice, order the period

enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or (b) upon motion permit the act to be done after the expiration of the specified period where good cause is shown for the failure to act. The court may not enlarge the period for taking any action under the rules relating to new trials except as stated in these rules.

If any document is sent to the proper clerk by first-class United States mail or by registered or certified 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 days ~~tardily~~ after the last day for filing, shall be filed by the clerk and be deemed filed in time. A legible postmark affixed by the United States Postal Service ~~shall be prima facie evidence of the date of mailing~~, 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 in the absence of such proof, other proof may be considered.

Comment to 1995 change: _____

Rule 7. ~~May Appear~~ Representation by an Attorney

a. Representation by an Attorney. Any party to a suit may appear ~~and prosecute or defend his rights therein, either in person~~ either personally or ~~by~~ through an attorney. When a party is represented by an attorney of record, any reference in these rules to notice to a "party" shall be read to require, instead, notice to that party's attorney. If a party is represented by more than one attorney, notice shall be made to the attorney in charge. **[FROM FORMER RULE 8]** ~~On the occasion of a party's first appearance~~

~~through counsel,~~ The attorney in charge shall be the attorney whose signature first appears on the initial pleading~~s for any party shall be the attorney in charge~~ of the represented party, unless another attorney is specifically designated ~~therein~~ in that pleading or by notice. ~~Thereafter, until such designation is changed by written notice to the court and all other parties in accordance with Rule 21a, said attorney in charge shall be responsible for the suit as to such party.~~

~~All communications from the court or other counsel with respect to a suit shall be sent to the attorney in charge~~.

[FROM FORMER RULE 12]

b. ~~Attorney~~ Motion to Show Authority. The authority of an attorney to represent a ~~A~~ party ~~in a suit or proceeding pending in a court of this state~~ may~~,~~ be challenged by a sworn ~~written~~ motion stating ~~that he believes the suit or proceeding is being prosecuted or defended without~~ the basis of the belief that the attorney lacks authority, and causeing the attorney to be cited to appear before the court and show his authority to act. ~~The~~ nNotice of the motion and hearing shall be served ~~upon the challenged attorney~~ at least ten days before the hearing ~~on the motion~~. ~~At the hearing on the motion, t~~ The burden of proof shall be upon the challenged attorney to show sufficient authority ~~to prosecute or defend the suit on behalf of the other party~~. Upon ~~his~~ the attorney's failure to show ~~such~~ authority, the court shall refuse to permit the attorney to appear in the cause.~~, and shall~~ If neither the party nor any person who is authorized to represent the party appears, the court may strike the pleadings ~~if no person who is authorized to prosecute or defend appears~~. The motion may be heard and determined at any time before the parties have

announced ready for trial, but the trial shall not be unnecessarily continued or delayed for the hearing.

[FROM FORMER RULE 10]

c. Withdrawal of Attorney

An attorney may withdraw from representing a party only upon written motion for good cause shown. If another attorney is to be substituted as attorney for the party, the motion shall state: the name, address, telephone number, telecopier number, if any, and State Bar of Texas identification number of the substitute attorney; that the party approves the substitution; and that the withdrawal is not sought for delay only. If another attorney is not to be substituted as attorney for the party, the motion shall state: that a copy of the motion has been delivered to the party; that the party has been notified in writing of his right to object to the motion; whether the party consents to the motion; the party's last known address and all pending settings and deadlines. If the motion is granted, the withdrawing attorney shall immediately notify the party in writing of any additional settings or deadlines of which the attorney has knowledge at the time of the withdrawal and has not already notified the party. The Court may impose further conditions upon granting leave to withdraw. Notice or delivery to a party shall be either made to the party in person or mailed to the party's last known address by both certified and regular first class mail. If the attorney in charge withdraws and another attorney remains or becomes substituted, another attorney in charge must be designated of record with notice to all other parties ~~in accordance with Rule 21a~~.

Comment to 1995 change: _____

Rule 8. ~~Attorney in Charge~~ [Repealed]

Comment to 1995 change: The provisions of Rule 8 have been moved to Rule 7 as modified.

Rule 9. Number of Counsel Heard

Not more than two counsel on each side shall be heard on any question or on the trial, except ~~in important cases, and~~ upon special leave of the court.

Comment to 1995 change: _____

Rule 10. ~~Withdrawl of Attorney~~ [Repealed]

Comment to 1995 change: The provisions of Rule 10 have been moved to Rule 7 as modified.

Rule 11. Agreements to be in Writing

Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it ~~be~~ is in writing~~,~~ and signed by the attorney for the party to be charged, or by the party to be charged, ~~and filed with the papers as part of the record,~~ or unless it be made in open court ~~and entered of record~~ or in a deposition upon oral examination and recorded by the court reporter.

Comment to 1995 change: _____

Rule 12. ~~Attorney to Show Authority~~ [Repealed]

Comment to 1995 change: The provisions of Rule 12 have been moved to Rule 7 as modified.

REPORT OF THE SUBCOMMITTEE
TRCP 315-331

TO

SUPREME COURT ADVISORY COMMITTEE

Summary Of Changes In Current Rules

Rule	Change
315	Moved to proposed TRCP 320(e)(2)
316	No change
317-19	Previously repealed
320	Rewritten to include TRCP 315, 320, 321, 322, 327, 329
321	Rewritten to include TRCP 324(b), TRAP 52(a), (b), (c), (d)
322	Rewritten to include TRCP 306a, 329b
323	Previously repealed
324	Moved to proposed TRCP 321(b), TRAP 74(e)
325	Previously repealed
326	No change
327	Moved to proposed TRCP 320(d)
328	Previously repealed
329	No change except to change rule reference
329a	No change
329b	Moved to TRCP 322(b), 322(c)
330	No change but belongs in Government Code
331	Previously repealed

Summary Of Responses To Letters

Page	Subject	Action
Pg 886-899	Preservation of "no evidence" arguments	Cured by proposed TRCP 321(b) and (c)
Pg 900	Reduction of time limits on appeal	No action; current time limits work well for most
Pg 901	Standardized "non-jury" in Rule 324	Cured by proposed TRCP 321(d) which uses "nonjury"
Pg 902-903	Rewrite Rule 329b to eliminate confusion on "vacating" a judgment	Cured in part by proposed TRCP 323(b) providing rules for motion for new trial and to modify (eliminates motion to vacate)
Spg 425-427 Repeated by letter of 10/4/94	Change date N/N/T overruled as a M/L from 75 to 60 days to cure *Casebolt* problem	No action taken
Letter of 8/31/94	Request motion for entry of default judgment	No action; such a motion , if added, should be in TRCP 301 .
Letter of 10/23/95	Resubmits request of Pg 902-903	See above, Pg 902-903
Memo 3/20/95	Request new general rule on TC's plenary power & when it ends	May be worthy of action; TRCP 330 could be rewritten in terms of proposed TRAP 24

RULES 315-331

Rule 315. Remittitur [Moved to TRCP 320(e)(2).]

Rule 316. Correction of Clerical Mistakes in Judgment Record [No change.]

Rule 317 to 319 [Previously repealed.]

RULE 320. MOTIONS FOR NEW TRIAL

(a) **Grounds.** For good cause, a new trials may be granted and a judgment may be set aside ~~for good cause~~ on motion of a party or on the judge's ~~court's~~ own motion, ~~on such terms as the court shall direct~~ in the following instances, among others:

(1) when the evidence is factually insufficient to support a jury finding;

(2) when a jury finding is against the overwhelming preponderance of the evidence;

(3) when the damages awarded by the jury are manifestly too large or too small because of the factual insufficiency or overwhelming preponderance of the evidence;

(4) when the trial judge has made an error of law that is reasonably calculated to cause and probably did cause rendition of an improper judgment;

(5) when: (i) misconduct of the jury; or (ii) misconduct of the officer in charge of the jury; or (iii) any communication made to the jury; or (iv) a juror's erroneous or incorrect answer on voir dire examination—

has probably resulted in injury to the movant;

(6) when new evidence has been discovered that was not available at the trial by the movant's use of reasonable diligence and, if presented at the trial, probably would have resulted in a verdict favorable to the movant;

(7) when a default judgment was improper: (i) because of a defect in service of process or the petition; or (ii) because of insufficiency of the evidence of damages; or (iii) because the movant's failure to file an answer or to appear at the trial, after proper notification, may be excused on equitable grounds and the movant has set up a meritorious claim or defense;

(8) when a defendant cited by publication moves to set aside a judgment for good cause;

(9) when there is a material and irreconcilable conflict in jury findings; or

(10) when any improperly admitted evidence, error in the court's charge, argument of counsel, or other trial court occurrence or ruling probably resulted in an improper verdict or judgment adverse to the movant.

Source: Rules 320, 327 and 329

(b) Form. Complaints in general terms shall not be considered. Each complaint in a motion for new trial shall identify the matter of which complaint is made in such a way that the complaint can be understood by the judge. ~~Grounds of objections couched in general terms—as that the court erred in its charge, in sustaining or overruling exceptions to the pleadings, and in excluding or admitting evidence, the verdict of the jury is contrary to law, and the like—shall not be considered by the court. Each point relied upon in a motion for new trial or in arrest of judgment shall briefly refer to that part of the ruling of the court, charge given to the jury, or charge refused, admission or rejection of evidence, or other proceedings which are designated to be complained of, in such a way that the objection can be clearly identified and understood by the court.~~

Source: First sentence — Rule 322; second sentence — Rule 321.

(c) Affidavits. Supporting affidavits are required for complaints based on facts not otherwise in the record, such as:

(1) jury misconduct;

(2) newly discovered evidence;

(3) equitable grounds to set aside a default judgment;

(4) good cause to set aside a judgment after citation by publication.

(d) Procedure for Jury Misconduct.

(1) Hearing. When the ground of a the motion for new trial, supported by affidavit, is misconduct of the jury or of the officer in charge of ~~them~~ the jury, or ~~because of~~ any communication made to the jury, or a juror's ~~that a juror gave an~~

erroneous or incorrect answer on voir dire examination, the judge ~~court~~ shall hear evidence ~~thereof~~ from members of the jury or others in open court~~,~~ and may grant a new trial if ~~such misconduct proved, or the communication made, or the erroneous or incorrect answer on voir dire examination, be material, and if~~ it reasonably appears from the evidence both on the hearing of the motion and from the record as a whole on the trial of the case ~~and from the record as a whole~~ that injury probably resulted to the complaining party.

(2) Testimony Of Jurors. A juror may not testify as to any matter or statement occurring during the ~~course of the~~ jury's deliberations or ~~to the effect of anything upon his or~~ on any ~~other~~ juror's mind or emotions or mental processes, as influencing any other juror's ~~him to~~ assent to or dissent from the verdict ~~concerning his mental processes in connection therewith, except that a juror may testify whether any outside influence was improperly brought to bear upon any juror~~. Nor may a juror's ~~his~~ affidavit or ~~evidence of~~ any statement by a juror ~~him~~ concerning ~~a~~ any matter about which the juror ~~he~~ would be precluded from testifying be ~~received for~~ admitted in evidence for any of these purposes. However, a juror may testify whether any outside influence was improperly brought to bear upon any juror.[1]

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[1]The subcommittee, without taking any formal vote, suggests to the Supreme Court Advisory Committee and to the Subcommittee on Texas Rules of Evidence, that the time may have come to consider changing the last sentence of Texas Rule of Civil Procedure 320(d)(2) and adopting the federal approach. Federal Rule of Evidence 606(b) states that "a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." As the analysis below indicates, consideration of such change may be ripe.

Because of the restrictions on a juror's testimony under Texas Rule of Civil Procedure 327(b) and its companion, Texas Rule of Civil Evidence 606(b), it is more difficult to prove jury misconduct under the Texas Rules as compared to Federal Rule of Evidence 606(b), especially where jurors violate instructions of the court and relay information to other jurors. Although both the Texas and Federal Rules allow a juror to testify where "any outside influence was improperly brought to bear upon any juror," only the Federal Rules add that a juror may testify "on the question of whether extraneous prejudicial information was improperly brought to the jury's attention." As a review of relevant caselaw indicates, the additional language in the Federal Rules allows a broader range of juror testimony to be introduced, resulting in a modest number of reversals for jury misconduct where reversal under the Texas Rules is almost impossible.

At the federal level, broad allegations of extraneous influences on a jury are often allowed into evidence to determine the existence of undue influence on the jury. *See United States v. Pennell*, 737 F.2d 521 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985) (five jurors contacted at home during period of deliberations by anonymous caller who made threatening statements); *United States v. Rugiero*, 20 F.3d 1387 (6th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 208 (1994) (jurors became aware during deliberations of TV broadcast linking defense counsel to organized crime); *Mattox v. United States*, 146 U.S. 140, 149 (1892) and *United States v. Thomas*, 463 F.2d 1061 (7th Cir. 1972) (exposure of the jury to a prejudicial newspaper article), *Parker v. Gladden*, 385 U.S. 363, 365 (1966) (bailiff's comments on the defendant); *United States v. Bruscino*, 662 F.2d 450 (7th Cir. 1981), on rehearing 687 F.2d 938 (7th Cir. 1982), *cert. denied*, 459 U.S. 1211 (1983) (unadmitted document of Bureau of Prisons indicating a reasonable possibility that the defendant was connected with the Mexican Mafia); *In re Beverly Hills Fire Litigation*, 695 F.2d 207 (6th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983) (juror's own external experiment conducted amounted to additional evidence not admitted at trial); *United States v. Williams*,

Source: Rule 327

(e) Excessive Damages; Remittitur

(1) Excessive Damages. If the judge is of the opinion that the damages found by the jury are not supported by legally or factually sufficient evidence, the judge may determine the greatest amount of damages reasonably sustainable by the evidence and may, as a condition of overruling a motion for new trial, suggest that the party claiming such damages file a remittitur of the excess within a specified period.

(2) Remittitur By Party. Any party in whose favor a judgment has been rendered may remit any part thereof in open court, or by executing and filing with the clerk a written remittitur signed by the party or the party's attorney of record, and duly acknowledged by the party or the party's attorney. Such remittitur shall be a part of the record of the cause. Execution shall issue for the balance only of such judgment.

Source: Paragraph (2) — Rule 315.

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613 F.2d 573 (5th Cir. 1980) (conversation between juror and trial judge); *Hard v. Burlington Northern Railroad*, 812 F.2d 482 (9th Cir. 1987), *appeal after remand*, 870 F.2d 1454 (1989) (statement of juror as to defendant's settlement practices); *King-Size Publications, Inc. v. American News Co.*, 194 F. Supp. 109 (D.N.J.), *cert. denied*, 368 U.S. 920 (1961) (post-verdict letter from a juror which revealed such extreme prejudice that the court exercised its discretion to order a new trial); *Haugh v. Jones & Laughlin Steel Corp.*, 949 F.2d 914 (7th Cir. 1991) (marshall tells jury it will be locked up until it renders a verdict, regardless of how long that may take); *Jimenez v. Heyliger*, 792 F. Supp. 910 (D. Puerto Rico 1992) (presence of silent security officer in jury room during deliberations); *United States v. Gaffney*, 676 F. Supp. 1544 (M.D.Fla. 1987) (disclosure to jury and jury's subsequent discussion of extortion defendant's prior criminal record).

By contrast, under the Texas Rules, only evidence regarding "outside influence" brought to bear on a juror is allowed. Because "outside influence" means a force external to the jury and its deliberations, and does not include information acquired by a juror and communicated to other jurors, even where the information is not in evidence and is specifically offered for the purpose of influencing the jury's decision, evidence similar to that allowed under the Federal Rules is often excluded under the Texas Rules. *See, e.g., Durbin v. Dal-Briar Corp.*, 871 S.W.2d 263 (Tex. App.—El Paso 1994, n.w.h.) (contrary to the trial court's instructions, presiding juror told other jurors about the potentially devastating financial effect its verdict may have on the community); *Soliz v. Saenz*, 779 S.W.2d 929 (Tex. App.—Corpus Christi 1989) (contrary to court's instructions, juror relayed his personal experiences regarding the noise level at issue at a local bar); *Baley v. WW Interests, Inc.*, 754 S.W.2d 313 (Tex. App.—Houston [14th Dist] 1988, writ denied) (contrary to court's instructions, two jurors visited scene of murder and described their experiences to other jurors); *Shaw v. Greater Houston Trans. Co.*, 791 S.W.2d 204, 210 (Tex. App.—Corpus Christi 1990) ("Discussion of newspaper articles, insurance coverage and improperly answered voir dire questions are not outside influence."); *Kendall v. Whataburger, Inc.*, 759 S.W.2d 751, 755 (Tex. App.—Houston [1st Dist.] 1988, no writ) (juror who was a paralegal told other jurors that plaintiffs would recover damages assessed even though they found no negligence or proximate cause); *Baker v. Wal-Mart Stores, Inc.*, 727 S.W.2d 53, 54-56 (Tex. App.—Beaumont 1987, no writ) (juror who was a nurse told other jurors that the medication taken by plaintiff could have made the plaintiff drowsy, causing the fall); *Perry v. Safeco Ins. Co.*, 821 S.W.2d 279, 281 (Tex. App.—Houston [1st Dist.] 1991) (juror's use of a published article not admitted into evidence, and another juror's use of a dictionary, both used to influence other jurors, were not outside influences).

(f) **Partial New Trial.** If the judge is of the opinion ~~When it appears to the court~~ that a new trial should be granted on a point or points that affect only a part of the matters in controversy ~~and that such part~~ that is clearly separable without unfairness to the parties, the judge ~~court~~ may grant a new trial as to that part only, but ~~provided that~~ a separate trial on unliquidated damages alone shall not be ordered if liability issues are contested.

Source: Rule 320.

RULE 321. PRESERVATION OF COMPLAINTS

(a) **General Preservation Rule.** ~~In order to preserve~~ As a prerequisite to the presentation of a complaint for appellate review, ~~a party must have presented to the trial court~~ a timely request, objection, or motion must appear of record, stating the specific grounds for the ruling ~~he~~ that the complaining party desired the trial court to make if the specific grounds were not apparent from the context. No complaint shall be considered waived if the ground stated is sufficiently specific to make the judge aware of the complaint. ~~It is also necessary for the complaining party to obtain a~~ The judge's ruling upon the complaining party's request, objection or motion must also appear of record provided that the overruling by operation of law of a motion for new trial or a motion to modify the judgment is sufficient to preserve for appellate review the complaints properly made in the motion unless the taking of evidence is necessary for proper presentation of the complaint in the trial court. A ruling may be shown in the judgment, in a signed separate order, in the statement of facts, or in a formal bill of exceptions. If the trial judge refuses to rule, an objection to the judge's ~~court's~~ refusal to rule is sufficient to preserve the complaint. ~~It is not necessary to formally except~~ Formal exceptions to rulings or orders of the trial court are not required. A party properly notified but absent from the trial waives all objections and complaints that the party would be required to raise at trial if present, unless the party's absence was wrongfully induced by another party. An absent party does not waive a lack of a proper record of the trial.[2]

Source: Texas Rule Of Appellate Procedure 52(a).

(b) **When A Motion For New Trial Is Required.** As a prerequisite to appellate review, the following complaints shall be made in a motion for new trial:

(1) jury misconduct, newly discovered evidence, equitable grounds to set aside a default judgment, or any other complaint on which evidence must be heard;

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[2]The last two sentences have been added to the TRAP 52(a) submitted to the Supreme Court for adoption; these sentences, it is believed, codify the existing practice.

~~A complaint on which evidence must be heard such as one of jury misconduct or newly discovered evidence or failure to set aside a judgment by default;~~

(2) ~~A complaint of~~ factual insufficiency of ~~the~~ evidence to support a jury finding;

(3) ~~A complaint~~ a jury finding is against the overwhelming ~~weight~~ preponderance of the evidence;

(4) ~~A complaint of~~ factual inadequacy or excessiveness of the damages found by the jury; ~~or~~

~~(5) Incurable jury argument if not otherwise ruled on by the trial court;~~

(5) a material and irreconcilable conflict in jury findings;

(6) any complaint not otherwise ruled upon by the trial judge.

Source: Rule 324(b).

(c) Jury Cases; Legal Sufficiency of Evidence. A complaint that a jury finding is not based on legally sufficient evidence or that a finding is established as a matter of law need not be made in a motion for new trial if otherwise shown in the record, but must be made in the trial court and may be included in a motion for judgment as a matter of law, a motion to declare an issue established in the movant's favor as a matter of law, a motion to modify the judgment, or in a motion for new trial as a prerequisite to appellate review of denial of the relief requested in the motion.

(d) ~~Necessity for Motion for New Trial in Civil Cases~~ Nonjury Cases; Legal and Factual Sufficiency of Evidence. ~~A point in a motion for new trial is prerequisite to appellate complaint in those instances provided in Rule 324(b) of the Texas Rules of Civil Procedure. A party desiring to complain on appeal in a nonjury case that the evidence was legally or factually insufficient to support a finding of fact, that a finding of fact was established as a matter of law or was against the overwhelming weight of the evidence, or of the inadequacy or excessiveness of the damages found by the court shall not be required to comply with paragraph (a) of this rule.~~ In a nonjury case, a complaint regarding the legal or factual insufficiency of the evidence, including a complaint that the damages found by the court are excessive or inadequate, as distinguished from a request that the judge amend a fact finding or make an additional finding of fact, may be made for the first time on appeal in the complaining party's brief.

Source: Texas Rule of Appellate Procedure 52(d).

(e) Presentation of Motions. Unless the taking of evidence is necessary for presentation of a complaint in a motion for new trial, the overruling by operation of law of a motion for new trial or of a motion to modify the judgment is sufficient to preserve for appellate review the complaints properly made in the motion.

(f) Informal Bills of Exception and Offers of Proof. When ~~the court excludes~~ evidence is excluded, the offering party ~~offering same~~ shall as soon as practicable, but before the ~~court's~~ charge is read to the jury~~,~~ or before the judgment is signed in a nonjury case, be allowed to make, in the absence of the jury, an offer of proof in the form of a concise statement. The ~~court~~ judge may, or at the request of a party shall, direct the making of the offer in question and answer form. A transcription of the reporter's notes or of the electronic tape recording showing the offer, whether by concise statement or question and answer, showing the objections made, and showing the ruling ~~thereon~~, when included in the ~~record~~ statement of facts certified by the reporter or recorder, shall establish the nature of the evidence, the objections and the ruling. The ~~court~~ judge may add any other or further statement ~~which shows~~ showing the character of the evidence, the form in which ~~it was~~ offered, the objection made and the ruling. No further offer need be made. No formal bills of exception ~~shall be~~ are needed to authorize appellate review of ~~the question whether the court erred in excluding the~~ exclusion of evidence. When the ~~court~~ judge hears objections to offered evidence out of the presence of the jury and rules that ~~such~~ the evidence be admitted, ~~such~~ the objections ~~shall be~~ are deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating ~~those objections~~ them.

Source: Texas Rule of Appellate Procedure 52(b).

(g) Formal Bills of Exception. The preparation and filing of formal bills of exception shall be governed by the following rules:

(1) No particular form of words shall be required in a bill of exception, but the objection to the ruling or action of the judge ~~court~~ and the ruling complained of shall be stated with such circumstances, or so much of the evidence as may be necessary to explain, and no more, and the whole as briefly as possible.

(2) When the statement of facts contains all the evidence requisite to explain the bill of exception, evidence need not be set out in the bill; but it shall be sufficient to refer to the same as it appears in the statement of facts.

(3) The ruling of the judge ~~court~~ in giving or qualifying instructions to the

jury shall be regarded as approved unless a proper and timely objection is made.

(4) Formal bills of exception shall be presented to the judge for ~~his~~ allowance and signature.

(5) The judge ~~court~~ shall submit the ~~such~~ bill to the adverse party or ~~his~~ the adverse party's counsel, if in attendance ~~on~~ at the court, and if the adverse party finds it ~~found~~ to be correct, the judge shall sign it without delay and file it with the clerk.

(6) If the judge finds the ~~such~~ bill incorrect, ~~he~~ the judge shall suggest to the parties ~~party~~ or their ~~his~~ counsel such corrections as the judge deems necessary ~~therein~~, and if they are agreed to ~~he~~ the judge shall make such corrections, sign the bill and file it with the clerk.

(7) Should the parties ~~party~~ not agree to the judge's suggested ~~such~~ corrections, the judge shall return the bill to ~~him~~ the complaining party with ~~his~~ the judge's refusal endorsed on it ~~thereon~~, and shall prepare, sign and file with the clerk such a bill of exception as will, in ~~his~~ the judge's opinion, present the ruling of the court as it actually occurred.

(8) Should the complaining party be dissatisfied with the ~~said~~ bill filed by the judge, ~~he~~ the complaining party may, upon procuring the signature of three respectable bystanders, citizens of this State, attesting to the correctness of the bill as originally presented ~~by him~~, have it ~~the same~~ filed as part of the record of the cause.~~; and~~ The truth of the matter ~~in reference thereto~~ may be controverted and maintained by affidavits, not exceeding five in number on each side, ~~to be~~ filed with the papers of the cause, within ten days after the filing of the ~~said~~ bill ~~and to be considered as a part of the record relating thereto~~. On appeal the truth of the ~~such~~ bill ~~of exceptions~~ shall be determined from the ~~such~~ affidavits so filed.

(9) In the event of ~~a formal bill of exceptions is filed and there is a~~ conflict between a formal bill and ~~its provisions and the provisions of~~ the statement of facts, the bill ~~of exceptions~~ shall control.

(10) Anything occurring in open court or in chambers that is reported or recorded and so certified by the court reporter or recorder may be included in the statement of facts rather than in a formal bill of exception.~~; provided that~~ In a civil case the party requesting that all or part of the jury arguments or the voir dire examination of the jury panel be included in the statement of facts shall pay the cost thereof, which ~~cost~~ shall be separately listed in the certified bill of costs ~~certificate of costs prepared by the clerk of the trial court~~, and ~~the same~~ may be taxed in whole or

in part by the appellate court against any party to the appeal.

(11) Formal bills of exception shall be filed in the trial court within sixty days after the judgment is signed in a civil case or within sixty days after the sentence is pronounced or suspended in open court in a criminal case, or if a timely motion for new trial, motion to modify, request for findings, or motion to reinstate pursuant to Texas Rule Of Civil Procedure 165a has been filed, formal bills of exception shall be filed within ninety days after the judgment is signed in a civil case or within ninety days after sentence is pronounced or suspended in open court in a criminal case. When a formal bills of exception ~~are~~ is filed, it ~~they~~ may be included in the transcript or in a supplemental transcript.

Source: Texas Rule of Appellate Procedure 52(c).

J. TIMETABLES

RULE 322. TIME FOR FILING AND RULING ON MOTIONS

(a) Motion for Judgment as a Matter of Law in Jury Cases. A motion for judgment as a matter of law or for a declaration that the evidence is legally insufficient for a reasonable jury to find a particular issue of fact against the movant or that a finding in the movant's favor is established by the undisputed evidence may be presented at the close of the adverse party's evidence, or at the close of all the evidence, or after the verdict and before judgment, or after judgment, and shall not be considered waived if not presented earlier. If presented after judgment, the motion shall be presented in a motion to modify the judgment within the time allowed for filing such motion.

(b) Motion for New Trial or to Modify Judgment.

(1) A motion for new trial or to modify the judgment, if filed, shall be filed before ~~prior to~~ or within thirty days after the judgment or other order complained of is signed.

(2) One or more amended motions for new trial or to modify the judgment may be filed without leave of court before any preceding motion requesting the same relief ~~for new trial~~ filed by the movant is overruled and within thirty days after the judgment or other order complained of is signed.

(3) If ~~In the event~~ an original or amended motion for new trial or to modify ~~, correct, or reform~~ the judgment is not determined by written order signed within

seventy-five days after the judgment was signed, it shall be considered overruled by operation of law at the expiration of that period.

(4) ~~The trial court,~~ Regardless of whether an appeal has been perfected, the trial court has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed.

(5) If a motion for new trial or to modify the judgment is timely filed by any party, ~~the trial court,~~ regardless of whether an appeal has been perfected, the trial court has plenary power to grant a new trial or to vacate, modify, correct or reform the judgment until thirty days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.

(6) On expiration of the time within which the trial court has plenary power, the trial court cannot set aside a judgment ~~cannot be set aside by the trial court~~ except on ~~by~~ bill of review for sufficient cause filed within the time allowed by law; but ~~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 Texas Rule Of Civil Procedure 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 Texas Rule Of Civil Procedure 297.

Source: Rule 329b.

(c) Effective Dates and Beginning of Periods ~~Periods to Run from Signing of Judgment.~~

(1) **Beginning of Periods.** The date ~~a of~~ judgment or order is signed as shown of record ~~shall~~ determines the ~~beginning of the periods prescribed by these rules for the~~ court's plenary power to grant a new trial or to vacate, modify, correct or reform a judgment or order and for filing in the trial court ~~the various~~ documents that ~~these rules authorize~~ a party ~~to~~ may file within ~~such~~ those periods, including~~, but not limited to,~~ motions for new trial, motions to modify ~~judgment~~, motions to reinstate a case dismissed for want of prosecution, and ~~motions to vacate a judgment~~ requests for findings of fact and conclusions of law. ~~but this rule shall not determine what constitutes rendition of a judgment or order for any other purpose.~~

(2) **Date to be Shown.** ~~Judges, attorneys and clerks are directed to use their best efforts to cause all~~ All judgments, decisions, and orders of any kind ~~to~~ shall be reduced to writing and signed by the trial judge with the date of signing expressly

stated ~~therein~~ in it. If the date of signing is not recited in the judgment or order, it may be shown in the record by a certificate of the judge or otherwise; ~~provided, however, that~~ the absence of a showing of the date in the record does ~~shall~~ not invalidate ~~any~~ a judgment or an order.

(3) **Notice of Judgment.** When ~~the final judgment or other appealable order~~ an appealable judgment or appealable order is signed, the clerk of the court shall immediately give notice of the signing to the parties ~~or their attorneys of record~~ by first-class mail ~~advising that the judgment or the order was signed.~~ Failure to comply with ~~the provisions of~~ this rule shall not affect the periods mentioned in paragraph (1) ~~of this rule~~, except ~~as provided in~~ under paragraph (4).

(4) **No Notice of Judgment; Additional Time.** ~~If within twenty days after the judgment or other appealable order is signed, a party adversely affected by it or his attorney has neither received the notice required by paragraph (3) nor acquired actual knowledge of the order, then with respect to that party all the periods mentioned in paragraph (1) shall begin on the date that such party or his attorney received such notice or acquired actual knowledge of the signing, whichever occurred first, but in no event shall those periods begin more than ninety days after the original judgment or other appealable order was signed.~~ If a party affected by a judgment or other appealable order has not, within twenty days after the judgment or appealable order was signed, received the notice require by paragraph (3) and has not acquired actual knowledge of the signing of the judgment or appealable order, then all periods provided in these rules that run from the date the judgment or appealable order is signed shall begin for that party on the date that party received notice or acquired actual knowledge of the signing of the judgment or appealable order, whichever occurred first; provided, however, that in no event shall the periods begin more than ninety days after the judgment or appealable order was signed.

(5) ~~**Motion, Notice, and Hearing.**~~ **Procedure to Gain Additional Time.** ~~In order to~~ To establish the application of ~~sub~~paragraph (41) ~~of this rule~~, the party adversely affected must file a motion in the trial court stating ~~is required to prove in the trial court, on sworn motion and notice,~~ the date on which the party or the party's ~~his~~ attorney first either received a notice of the judgment or appealable order or acquired actual knowledge of the signing of the judgment or appealable order and that this date was more than twenty days after the judgment or appealable order was signed. The trial judge, after conducting a hearing on the motion, shall find the date ~~upon which~~ the party or the party's ~~his~~ attorney first either received a notice of the judgment or appealable order or acquired actual knowledge of the signing of the judgment or appealable order ~~at the conclusion of the hearing~~ and include this finding in a written ~~the court's~~ order.

(6) ~~Nunc Pro Tunc Order~~. **Periods Affected by Modified Judgment.** If a judgment is modified, corrected or reformed in any respect during the period of the trial court's plenary power, all periods provided in these rules which run from the date the judgment is signed shall run from the time the modified, or reformed judgment is signed. ~~when a corrected judgment has been signed~~ If a correction to a judgment is made pursuant to Texas Rule of Civil Procedure 316 after expiration of the trial court's plenary power, ~~pursuant to Rule 316 of the Texas Rules of Civil Procedure, the periods mentioned in subparagraph (b)(1) of this rule~~ all periods provided in these rules which run from the date the judgment is signed shall run from the date of the signing of the corrected judgment ~~with respect to~~ for any complaint that would not ~~be applicable~~ apply to the original judgment.

(7) ~~When~~ **Process** ~~Served~~ **by Publication.** ~~With respect to~~ For a motion for new trial filed more than thirty days but within two years after the judgment was signed ~~pursuant to Rule 329~~ when process has been served by publication, the periods ~~provided by paragraph in subparagraph (1)~~ shall be computed as if the judgment were signed on the date of filing the motion.

Source: Paragraphs 1-6 - Rule 306a; Paragraph 7 - Rule 329b(h).

Rule 323. [Previously repealed.]

Rule 324. Prerequisites Of Appeal [Moved to TRCP 321(b) and TRAP 74(e).]

Rule 325. [Previously repealed.]

Rule 326. Not More Than Two [No change.]

Rule 327. For Jury Misconduct [Moved to TRCP 320(d).]

Rule 328. [Previously repealed.]

Rule 329. Motion For New Trial On Judgment Following Citation By Publication
[No change, except subdivision (d) should be amended to change reference to "Rule 306a(7)" to "Texas Rule of Civil Procedure 322(c)(7)."]

Rule 329a. [No change.]

Rule 329b. [Moved to TRCP 322(b) and 322(c).]

Rule 330. [No change but should be moved to Government Code.]

Rule 331. [Previously repealed.]