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Meeting of the
Supreme Court Advisory Committee
November 7-8, 1986

SUPREME COURT OF TEXAS ADVISORY COMMITTEE
AGENDA

November 7-8, 1986

1. Harry Tindall to report on Rule 329 request by Charles Childress. Report with Professor William Dorsaneo on Rules 296-331. Harry Tindall also to report on proposed changes to Rules 99-107.
2. Report of Professor J. Hadley Edgar on Rule 205-209.
3. Professor Dorsaneo and Russell McMains to report on requested changes to Rules of Appellate Procedure 74, 80a, 90a, 131, 136a, Texas Rules of Civil Procedure 342-472, and Rules of Civil Procedure 474-515. Professor Dorsaneo also to report on repeal of Rule 182.
4. Report of Judge Linda Thomas regarding the revision of Rule 14b, the request of Michael Schattman regarding cases abandoned by an attorney (new Rule 81) and the request of John Cochran regarding Rule 13.
5. Report of Sam Sparks (El Paso) regarding drafting of a rule permitting ruling on written motions if neither party asks for a hearing and permitting telephone hearings if either party asks for a hearing. Sam Sparks is also to report on Doak Bishop's input regarding Rule 188a.
6. Report of Professor Dorsaneo and Mr. McMains regarding length of appellate briefs.
7. Report on requested Rule changes addressed by the Standing Subcommittee on Rules 166b-215: Anthony Sadberry.
8. Report on requested Rule changes addressed by the Standing Subcommittee on Trial Rules 216-314: Franklin Jones, Jr.
9. Report of the Standing Subcommittee on Justice Court Rules 523-591: Broadus Spivey.
10. Report of the Standing Subcommittee on Special Procedures Rules 737-813: Luke Soules and Professor J. Hadley Edgar.
11. Discussion of F.R.A.P. 10 proposed by Frank W. Baker.

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12. Report of Professor Newell Blakely on Michael Schattman's Rule of Evidence 613 request.
13. Report of Pat Beard on Professor Wicker's 621a request and David Keltner's Rule 685 request.
14. Remaining reports on all pending business.
15. Editorial critique of final rule proposals pursuant to forwarding to Supreme Court.
16. Appointment of "edit" subcommittee to review proposals prior to transmittal to Supreme Court for deliberations.
17. Appointment of interim Standing Sub-committees for referrals pursuant to the next called meeting or other interim action.

MINUTES OF THE
SUPREME COURT ADVISORY COMMITTEE MEETING

September 12-13, 1986

The Advisory Committee of the Supreme Court of Texas convened at 8:30 a.m. on September 12, 1986, pursuant to call of the Chairman.

Members of the Committee in attendance were Mr. Luther H. Soules III, Chairman, Mr. Gilbert Adams, Professor Newell H. Blakely, Mr. Frank Branson, Professor William V. Dorsaneo III, Professor J.H. Edgar, Mr. Vester T. Hughes, Jr., Mr. Franklin Jones, Jr., Mr. Gilbert I. Low, Mr. Russell H. McMains, Mr. Charles Morris, Mr. Harold W. Nix, Chief Justice Jack Pope, Mr. Tom L. Ragland, Mr. Harry M. Reasoner, Mr. Sam Sparks, Mr. Sam D. Sparks, Mr. Broadus A. Spivey, Honorable Linda B. Thomas, Mr. Harry Tindall, Honorable Bert H. Tunks, Honorable James P. Wallace, Mr. L.N.D. Wells, Jr.

The minutes of the last meeting were unanimously approved upon motion by Frank Branson and a second by Professor Blakely.

Mr. Spivey reported that the ad hoc committee working with the Supreme Court and their space requirements met and it was the consensus of the committee that it would not be in the best interest of the Supreme Court to make a recommendation seeking financial or or budgetary support at this time for additional facilities.

Professor Edgar moved that the suggestion by Ray Hardy to change Rule 8 be rejected, and the motion was seconded by Mr. Ragland. The suggestion to change Rule 8 was unanimously rejected by vote of the Committee.

Mr. Branson moved to reject the suggestion by Ray Hardy to change Rule 10, and Mr. Jones seconded. The suggestion to change Rule 10 was unanimously rejected by the Committee.

After discussion, Judge Pope's recommendation to add the language "Any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the Court," to Rule 7 was unanimously recommended by show of hands, as was Professor Edgar's suggestion to change the title of Rule 7

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to "Appearance and Withdrawal of the Attorney." Judge Thomas will re-write Rule 7 using these recommendations as well as language from Appellate Rule 7.

The Committee decided, after discussion of same, that Rule 8 is awkwardly worded and Chairman Soules directed it be sent back to Judge Thomas' subcommittee for re-writing. Professor Dorsaneo will work with Judge Thomas in Rule 8's revision.

By a vote of 9-2 the Committee decided against the addition of the following sentence to Rule 18a "The motion shall be verified and must state with particularity the grounds why the Judge before whom the case is pending should not sit." Discussion concerning verification as opposed to verification based on information and belief ensued. Chairman Soules suggested that the sentence "The motion shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence provided that facts may be stated based upon information and belief if the grounds of such belief are specifically stated." be added to subparagraph a of 18a. Professor Blakely moved that Chairman Soules' suggestion be adopted, Professor Dorsaneo seconded the motion, and it carried unanimously by show of hands. The proposal that states "the grounds are limited to" died for lack of a motion.

Proposed Rule 14b was unanimously approved. There was discussion regarding who is responsible for withdrawing model exhibits. The Committee decided that the clerk is to give written notice to the party who offered the exhibit to come and get same within thirty days or it will be destroyed, with the clerk bearing the costs of destroying the exhibits and keeping the proceeds, if any, of such dispositions. The Committee unanimously decided to add the words "by the offering party" after the words "will be withdrawn." Judge Thomas will re-write the rule, using the suggestions of the Committee as follows: retain all of the first paragraph, delete all of the next paragraph, retain the third paragraph, except strike the words "as provided by Rule 356" and the fourth paragraph will be changed so that the clerk will give written notice to a party to withdraw the exhibits within 30 days or they will be disposed of by the clerk.

With respect to Rule 277, the Committee unanimously decided, after extensive discussion, that the phrase "on questions containing a combination of elements" be stricken. The Committee voted, 18 to 1, that the first paragraph will state "In all jury cases the Court shall submit the cause upon broad form questions to the extent feasible. The Court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict. The second paragraph will state "Inferential rebuttal questions shall not be submitted in the charge. The placing of the burden of proof may be accomplished by instructions rather

than by inclusion in the question." The next paragraph will state "In any cause in which the jury is required to apportion the loss among the parties, the Court shall submit a question or questions inquiring what percentage, if any, of the negligence of causation, as the case may be, that caused the occurrence or injury in question, is attributable to each of the persons found to have been coupled. The Court shall also instruct the jury to answer the damage question or questions without any reduction because of the percentage of the negligence of causation, if any, of the person injured. The Court may predicate the damage question or questions upon affirmative findings of liability." The next paragraph will state "The court may submit a question disjunctively when it is apparent from the evidence that one or the other of the conditions or facts inquired necessarily exists." The next paragraph will state "The court shall not in its charge comment directly on the weight of the evidence or advise the jury of the effect of their answers but the court's charge shall not be objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence or advises the jury of the effect of their answers where it is a part of a proper instruction or definition."

The Committee unanimously decided that the word "controlling" would be deleted in proposed Rule 278 (formerly Rule 279). After discussion, it was voted 9-1 that the sentence "Various phases of different shades of the same question, definition, or instruction shall not be submitted" be deleted. It was voted, 8-7, that the term "inferential rebuttal" should not be mentioned in the rule. After a recount, it was again voted, 10-7 that it not be used. By a show of 15 hands to 2, the rule will be submitted to the Supreme Court as follows: "The Court shall submit the questions, instructions, and definitions in the form provided by Rule 277 which are raised by the written pleadings and the evidence and, except in trespass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to submission of any question raised only by a general denial and not raised by affirmative written pleading by that party. Nothing herein shall change the burden of proof from what it would have been under a general denial. Failure to submit a question shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however that the objection to such failure shall suffice in such respect if the question is one relied upon by the opposing party. Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment."

The Committee voted unanimously that the first sentence of proposed Rule 279 shall remain renumbered in proposed Rule 278 as it is written. The Committee voted unanimously that the first sentence will read, "Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and no element of which is submitted or requested are waived." Professor Edgar moved that applied findings will be deemed in such a way as to support the the judgment even if it contradicts the verdict, Mr. Low seconded the motion, and the motion carried by show of hands, 12-4. Chief Justice Pope moved that the paragraph stating "If a contention is made that a submission. . ." be deleted in its entirety, Mr. Sparks (El Paso) seconded the motion, and it was carried, 10-9. The record is to reflect that this is a tie vote, since the Chairman broke the tie in favor of the motion with his vote.

The meeting recessed at 5:30 p.m.

The Advisory Committee of the Supreme Court of Texas re-convened on September 13, 1986, at 8:30 a.m. pursuant to call of the Chairman.

Members of the Committee in attendance were Mr. Luther H. Soules III, Chairman, Mr. Gilbert Adams, Professor Newell H. Blakely, Mr. David J. Beck, Professor William V. Dorsaneo III, Professor J.H. Edgar, Mr. Anthony J. Sadberry, Mr. Franklin Jones, Jr., Mr. Gilbert I. Low, Mr. Russell H. McMains, Mr. Charles Morris, Mr. Harold W. Nix, Chief Justice Jack Pope, Mr. Tom L. Ragland, Mr. Harry M. Reasoner, Mr. Sam Sparks, Mr. Sam D. Sparks, Mr. Broadus A. Spivey, Honorable Linda B. Thomas, Mr. Harry Tindall, Honorable Bert H. Tunks, Honorable James P. Wallace, and Mr. L.N.D. Wells, Jr.

The meeting was brought to order by the Chairman and discussion ensued regarding the last paragraph of proposed renumbered Rule 278. It was unanimously voted by show of hands that the last paragraph "A claim that evidence was legally or factually insufficient. . ." be recommended to the Supreme Court.

The Committee voted unanimously to change "of" to "from" and "change" to "charge" in Rule 286.

Whether to change the caption of Rule 295 was discussed next with 11 favoring the title "Correction of Verdict"; 6 favoring "Correction of Defective Verdict" and 6 voting for the caption "Correction of Informal or Defective Verdict." It was moved by Mr. Tindall that the caption read "Correction of Defective Verdict". The motion was seconded by Mr. Sparks (San Angelo), with a show of hands 12-4 in favor. Mr. Morris moved that the last sentence in Rule 295 be deleted in its entirety. Mr. Beck seconded the motion and by show of hands the motion was carried 11-1, to delete the last sentence. Mr Low moved and Professor

Edgar seconded, that Rule 295 be submitted to the Supreme Court as follows: "If the purported verdict is defective, the Court may direct it to be reformed. If it is incomplete, not responsive to the questions contained in the court's charge, or the answers to the questions are in conflict, the court shall, in writing, instruct the jury in open court of the nature of the incompleteness, unresponsiveness, or the conflicts, provide the jury such additional instructions as may be proper, and retire the jury for further deliberations.

Professor Edgar requested that the record reflect that Rule 294 needs to be changed, using Professor Dorsaneo's suggestions that the word "issue" be replaced with the word "question" when appropriate, and the term "explanatory instruction" be replaced with the word "instruction", and that Rule 301 and Rule 324c be changed using those terms as well.

Mr. Tindall then took the floor with his report. Discussion ensued regarding Rule 324. Mr. Tindall moved that the proposed amendments to Rule 324 be rejected, Mr. Low seconded, and by show of hands, the proposal was rejected.

After discussion, Mr. Tindall moved that Chairman Soules' suggestion that Rule 329(d) state "If the motion is filed more than 30 days after the judgment was signed, the time period shall be computed pursuant to Rule 306a(7)" be adopted, Judge Thomas seconded the motion, and it carried unanimously by show of hands. The suggestion that additional language in Rule 329(a) regarding service upon the attorney under Rule 21(a) was also unanimously rejected by show of hands.

Mr. Tindall moved that Rule 331 be repealed and Professor Edgar seconded. Chairman Soules deferred Rules 315 through 331 to the next meeting so that Mr. Tindall may study them more closely.

Chief Justice Pope moved to recommend that Rule 331 be repealed and Mr. Tindall seconded. The motion was unanimously approved by show of hands.

Mr. Tindall will address Rule 330 at the next meeting.

Mr. Sparks (El Paso) then took the floor with his report. He gave a brief history of the Rule 103 changes that have come before the Committee. The Committee voted unanimously that Rule 103 shall be amended and the Committee will propose the following: "All process may be served by (1) any sheriff or constable or (2) by any person who is not less than eighteen years of age and who is authorized by written order of the Court. No person who is a party to or interested in the outcome of the suit shall serve any process. In addition to the above, service by registered or certified mail and citation by publication

shall, if requested, be made by the clerk of the court in which the case is pending. The order authorizing a person to serve process may be made without written motion and no fee shall be imposed for issuance of such order."

Mr. Tindall's suggested Rule 107 amendment was unanimously approved by show of hands, with the modification of the word "any" being changed to "the return of citation."

Mr. Tindall made the following suggestions regarding Rule 106: strike "officer" and replace it with the word "person" in the second line of 106(a). In 106b(1) delete the phrase "an officer or by any disinterested adult named in the court's order" so that it would read "by leaving a true copy of the citation. . ." The caption "Service of Citation" will be changed to "Method of Service."

The proposals regarding Rules 103-107 were tabled with the consensus that Mr. Tindall will again change the rules in conformity with the Committee's discussions and they will be brought up for approval at the next meeting.

The Committee agreed that it would meet on Friday, November 7, 1986, from 8:30 a.m. to 6:30 p.m. and on Saturday, November 8, 1986, from 8:30 a.m. to 1:30 p.m.

Chairman Soules then called for discussion regarding the Supreme Court's proposal to limit briefs to appellate courts to 30 pages, double-spaced, typed or equivalent, on 8½" x 11" paper, exclusive of index and table of cases with the provision that the party may petition the Court to permit additional briefing. After discussion, it was the consensus of the Committee that the Federal Rule of Procedure 28g regarding page limitation is more workable. Mr. McMains and Professor Dorsaneo volunteered to draft a proposed rule regarding same for discussion by the Committee at its next meeting.

Mr. Soules then requested the consensus of the Committee regarding the question of whether all points of error raised in the Court of Appeals and not addressed by that court and its opinion are to be considered overruled as a matter of law. After discussion, 1 member felt the points should be considered overruled if the Court of Appeals doesn't address them and 7 members felt they should not. Mr. Reasoner felt the Court should develop some nonmechanical rule so that the Supreme Court would have discretion on whether to remand or not. Justice Wallace will report to the Supreme Court on the Committee's suggestions.

Mr. Blakely took the floor with his report regarding the transfer of certain Rules of Civil Procedure 176-185 into the Rules of Evidence. He pointed out that the Committee approved the recommendation to repeal Rules 184 and 184a in its March

meeting, so his subcommittee has not considered them at all. His subcommittee decided unanimously to keep Rules 176-180 as they are. With regard to Rules 181 and 182, 4 members were for status quo and 2 were for moving them to Rule 610b as additional subsections. The Committee voted 4-2, to allow Rule 182a to remain where it was, with the suggestion from the dissenting members that it could be moved into the Rules of Evidence as the last sentence in the dead man statute. The subcommittee voted 4-2 to allow Rule 183 to remain where it was, with the suggestion from the dissenting members that it could be made the last sentence of Rule of Evidence 604. With this in mind, Mr. Blakely then moved that no changes be made and Judge Tunks seconded the motion. Mr. Soules suggested that Rule of Civil Procedure 182 be adjusted to conform to the Rules of Evidence and that Mr. Blakely's subcommittee be charged with making the adjustment to Rule of Civil Procedure 182 and to put cross-references in the Rules of Civil Procedure where they would be appropriate. Mr. Blakely incorporated this suggestion into his motion, Judge Tunks again seconded, and the Committee unanimously approved.

Mr. Blakely agreed to add language to the effect that "The trial court may instruct the jury on the effect of Rule 601b pursuant to Texas Rule of Civil Procedure 182a" to Rule 601b and he will write a letter to Justice Wallace, with a copy to Chairman Soules, requesting this addition.

Professor Edgar then took up the Supreme Court Order relating to retention and disposition of deposition transcripts and depositions upon written questions. After discussion, it was the consensus of the committee that the order will be rewritten to allow that the clerk would mail a notice to the attorney of record, or that attorney's successor, that a deposition transcript would be available for that attorney to come take them or they will be disposed of by the clerk in 30 days, with the exception that in cases where there is citation by publication, the deposition transcripts would be disposed of in 2 years. Judge Thomas will also use this philosophy in re-writing her rule on the disposition of exhibits.

The meeting adjourned at 1:30 p.m.



LEGAL AID

BEXAR COUNTY LEGAL AID ASSOCIATION
434 SOUTH MAIN AVENUE, SUITE 307
SAN ANTONIO, TEXAS 78204 (512) 22



A United Way Service

*Addressed
and resolved*

March 19, 1984

Justice James Wallace
The Supreme Court of Texas
Box 12248
Austin, Texas 78711

Re: 1984 Amendments to the Texas Rules
of Civil Procedure, Rule 329.

Dear Sir:

The revision to Rule 329, Motion for New Trial on Judgment Following Citation by Publication, effective April 11, 1984, permits a motion for new trial following judgment on publication to be filed within two years after entry of the judgment, but provides that:

- d. If the motion is filed more than thirty days after the judgment was signed, all of the periods of time specified in Rule 306a(7) shall be computed as if the judgment were signed thirty days before the date of filing the motion.

As I read this new rule, and as it was explained in the videotape training provided by the State Bar of Texas, it is designed to kick these proceedings into the normal appellate timetable, which means that the motion is overruled by operation of law if not decided within 45 days after filing, appeal bond must be filed in 60 days and the record must be at the Court of Civil Appeals 70 days after filing of the motion.

This action, of course, reverses at least forty years of caselaw on the issue of when such a motion should be decided, and is probably an advance toward prompt disposition of such suits. The revision committee may, however, have overlooked the effect of failing to also amend subsection (a) of Rule 329, which states:

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- (a) The court may grant a new trial upon petition of the defendant showing good cause, supported by affidavit, filed within two years after such judgment was signed. The parties adversely interested in such judgment shall be cited as in other cases. (emphasis added)

This last sentence has been interpreted to mean that certified mail service on the attorney of record for the publication plaintiff is not sufficient. Gilbert et al. v. Lobley, 214 SW2d 646 (Tex.Civ.App.- - Ft. Worth, 1948 writ ref'd). Personal service on the parties adversely interested and an opportunity to reply "as in other cases" has been the rule. 4 McDonald, Tex.Civ.Prac. §18.23.2 (1971). Since filing the motion tolled the two-year period this procedure was reasonable, and no time limit was imposed as to the period within which the motion had to be determined. 4 McDonald Tex.Civ.Prac., §18.23.1 (1971).

The new time limits, combined with the old practice relating to service of citation creates obvious problems. Citation as in other cases would permit the respondent to answer on "the Monday next after the expiration of 20 days" after service (Rule 101). After answering, a respondent is entitled to 10 days notice of a setting (Rule 245). Therefore, under the best possible conditions of citation and setting, movant would have 14 days or less to get an order granting new trial entered. Furthermore, since the time runs from the date of filing the motion, a respondent can effectively defeat a motion for new trial simply by evading service.

It appears to me there are two appropriate remedies to this dilemma. First, the court could allow Rule 21a service of the motion for new trial following publication upon the judgment plaintiff's attorney of record, so that issue could be joined and the matter decided as in other types of motions for new trial. This resolution seems questionable to me, since most attorneys do not maintain contact with former clients in any systematic way. It is probable, therefore, that Rule 21a service would prove ineffective to give actual notice to the parties affected, especially when the judgment may be discovered a year or longer after entry. Second, the court could compute the time limits from the date issue is joined, or from the date of service on the last respondent to be served, rather than from the date of filing the motion. The rules relating

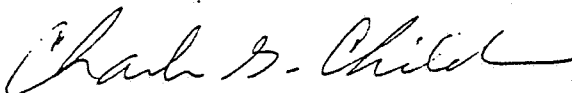
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to due diligence in issuance and service of citation which have been developed with respect to tort suits could be applied to prevent abusive delays in proceeding with such motions; it should also be made clear that respondents to such motions are not entitled to more than the minimum notice of hearing provided by Rule 21, or such time as is provided by local rules relating to other motions (in Bexar County this is normally 10 days).

In the meantime, as a senior attorney at Bexar County Legal Aid, I am advising my younger colleagues to issue citation and notice of a hearing, so that the respondent is given a setting on the motion within 45 days after filing. I have also advised them to issue certified mail notice to the attorney of record in the hope that an answer will render the service question moot.

I appreciate your time and attention in reviewing this comment. If I have misconstrued the revision or can be of any assistance in addressing the problem, please feel free to call on me.

Sincerely,



CHARLES G. CHILDRESS
Chief of Litigation

CGC:lph

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Tina
SAR
Aguda



October 1, 1986

Harry L. Tindall, Esquire
Tindall & Foster
2801 Texas Commerce Tower
Houston, Texas 77002-3094

Re: Revision of the "300 Series"
Rules (actually Tex.R.Civ.P.
296 through and including
crazy Rule 331)

Dear Harry,

Well, here is the "first" draft reorganizing the above referenced rules. I prepared it when we were working up the Texas Rules of Appellate Procedure. As you can see, not all of the "source" rules are covered either because of the Court Administration Act (e.g. Rule 330) or because I had already redrafted them to correspond to the TRAP package (e.g. Rules 306a and 306c).

What should we do now?

Best regards,

Bill

William V. Dorsaneo III

WVDIII:vm

enc.

cc: Luke Soules

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Rule _____. Judgment.

(a) In General. The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the parties all the relief to which they may be entitled either in law or equity. When a verdict is rendered, the court shall render judgment in conformity with the verdict unless the verdict is set aside or a new trial is granted or judgment is rendered notwithstanding the verdict or in disregard of particular jury findings as provided in Rule _____. Only one final judgment shall be rendered in any cause except where it is otherwise specially provided by law. Judgment may in a proper case, be given for or against one or more of several plaintiffs, and for or against one or more of several defendants or intervenors.

(b) On Counterclaim. If the defendant establishes a demand against the plaintiff upon a counterclaim exceeding that established against him by the plaintiff, the court shall render judgment for defendant for such excess.

When a counterclaim is pleaded, the party in whose favor final judgment is rendered shall also recover the costs, unless it be made to appear on the trial that the counterclaim of the defendant was acquired after the commencement of the suit, in which case, if the plaintiff establishes a claim existing at the commencement of the suit, he shall recover his costs.

(c) Draft of Judgment. Counsel of the party for whom a judgment is rendered shall prepare the form of the judgment to be entered and submit it to the court.

(d) Conformity with Findings. In non-jury cases, where findings of fact and conclusions of law are requested and filed, and in jury cases, where a special verdict is returned, any party claiming that the findings of the court or the jury, as the case may be, do not support the judgment, may have noted in the record an exception to said judgment and thereupon take an appeal or writ of error, where such writ is allowed, without a statement of facts or further exceptions in the transcript, but the transcript in such cases shall contain the conclusions of law and fact or the special verdict and the judgment rendered thereon.

COMMENT: Paragraph (a) is based upon Tex. R. Civ. P. 300 and 301 (first and last two sentences). Paragraph (b) is Tex. R. Civ. P. 302 and 303. Paragraph (c) is Tex. R. Civ. P. 305. Paragraph (d) is Tex. R. Civ. P. 307.

Rule _____. Confession of Judgment.

Any person against whom a cause of action exists may, without process, appear in person or by attorney, and confess judgment therefor in open court as follows:

(a) A petition shall be filed and the justness of the debt or cause of action be sworn to by the person in whose favor the judgment is confessed.

(b) If the judgment is confessed by attorney, the power of attorney shall be filed and its contents be recited in the judgment.

(c) Every such judgment duly made shall operate as a release of all errors in the record thereof, but such judgment may be impeached for fraud or other equitable cause.

COMMENT: This proposed rule is copied from Tex. R. Civ. P. 314. This is a strange rule because before suit is brought, a person may not accept service and waive process, enter an appearance in open court or confess a judgment. C.P.R.C. § 30.001 superseding R.C.S. Art. 2224.

Rule _____. Particular Judgments; Enforcement.

(a) In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise.

(b) Judgment for Personal Property. Where the judgment is for personal property, and it is shown by the pleadings and evidence and the verdict, if any, that such property has an especial value to the plaintiff, the court may award a special writ for the seizure and delivery of such property to the plaintiff; and in such case may enforce its judgment by attachment, fine and imprisonment.

(c) Judgment Against Personal Representative. A judgment for the recovery of money against an executor, administrator or guardian, as such, shall state that it is to be paid in the due course of administration. No execution shall issue thereon, but it shall be certified to the proper court, sitting in matters of probate, to be there enforced in accordance with law, but judgment against an executor appointed and acting under a will dispensing with court action in reference to such estate shall be enforced against the property of the testator in the hands of such executor, by execution, as in other cases.

(d) Child Support Orders; Contempt. In cases where the court has ordered periodical payments for support of a child or children, as provided in the statutes relating to divorce, and it is claimed that such order has been disobeyed, the person claiming that such disobedience has occurred shall make same known to the judge of the court ordering such payments. Such judge may

thereupon appoint a member of the bar of his court, to advise with and represent said claimant. It shall be the duty of said attorney, if he shall in good faith believe that said order has been contemptuously disobeyed, to file with the clerk of said court a written statement, verified by the affidavit of said claimant, describing such claimed disobedience. Upon the filing of such statement, or upon his own motion, the court may issue a show cause order to the person alleged to have disobeyed such support order, commanding him to appear and show cause why he should not be held in contempt of court. Notice of such order shall be served on the respondent in such proceedings in the manner provided in Rule 21a of the Texas Rules of Civil Procedure, not less than ten days prior to the hearing on such order to show cause. The hearing on such order may be held either in term time or in vacation. No further written pleadings shall be required. The court, the parties and the attorneys may call and question witnesses to ascertain whether such support order has been disobeyed. Upon a finding of such disobedience, the court may enforce its judgment by orders as in other cases of civil contempt.

Except with the consent of the court, no fee shall be charged by or paid to the attorney representing the claimant for his services. If the court shall be of the opinion that an attorney's fee shall be paid, the same shall be assessed against the party in default and collected as costs.

(e) Judgments in Foreclosure Proceedings. Judgments for the foreclosure of mortgages and other liens shall be that the

plaintiff recover his debt, damages and costs, with a foreclosure of the plaintiff's lien on the property subject thereto, and, except in judgments against executors, administrators and guardians, that an order of sale shall issue to any sheriff or any constable within the State of Texas, directing him to seize and sell the same as under execution, in satisfaction of the judgment; and, if the property cannot be found, or if the proceeds of such sale be insufficient to satisfy the judgment, then to take the money or any balance thereof remaining unpaid, out of any other property of the defendant, as in case of ordinary executions.

When an order foreclosing a lien upon real estate is made in a suit having for its object the foreclosure of such lien, such order shall have all the force and effect of a writ of possession as between the parties to the foreclosure suit and any person claiming under the defendant to such suit by any right acquired pending such suit; and the court shall so direct in the judgment providing for the issuance of such order. The sheriff or other officer executing such order of sale shall proceed by virtue of such order of sale to place the purchaser of the property sold thereunder in possession thereof within thirty days after the day of sale.

COMMENT: Paragraph (a) of this proposed rule is based upon Tex. R. Civ. P. 308's first sentence and Tex. R. Civ. P. 621. Paragraph (b) is taken from the remainder of Tex. R. Civ. P. 308. Paragraph (c) is a slightly modified version of Tex. R. Civ. P. 313. Paragraph (d) is Tex. R. Civ. P. 308-A. Paragraph (e) is Tex. R. Civ. P. 309 and 310.

Rule _____. Findings by the Court.

(a) Request. In any case tried in the district or county court without a jury, the judge shall, at the request of either party, state in writing his findings of fact and conclusions of law. Such request shall be filed within ten days after the final judgment is signed. Notice of the filing of the request shall be served on the opposite party as provided in Rule 21a of the Texas Rules of Civil Procedure.

(b) Time to File; Need for Reminder. When demand is made therefor, the court shall prepare its findings of fact and conclusions of law and file same within thirty days after the judgment is signed. Such findings of fact and conclusions of law shall be filed with the clerk and shall be part of the record. If the trial judge shall fail so to file them, the party so demanding, in order to complain of the failure, shall, in writing, within five days after such date, call the omission to the attention of the judge, whereupon the period for preparation and filing shall be automatically extended for five days after such notification.

(c) Additional or Amended Findings. After the judge so files original findings of fact and conclusions of law, either party may, within five days, request of him specified further, additional, or amended findings; and the judge shall, within five days after such request, and not later, prepare and file such further, other or amended findings and conclusions as may be proper, whereupon they shall be considered as filed in due time. Notice of the filing of the request provided for herein

shall be served on the opposite party as provided in Rule 21a of the Texas Rules of Civil Procedure.

(d) Omitted Findings. Where findings of fact are filed by the trial court they shall form the basis of the judgment upon all grounds of recovery and of defense embraced therein. The judgment may not be supported upon appeal by a presumption of finding upon any ground of recovery or defense, no element of which has been found by the trial court, but where one or more elements thereof have been found by the trial court, omitted unrequested elements, where supported by evidence, will be supplied by presumption in support of the judgment. Refusal of the court to make a finding requested shall be reviewable on appeal.

COMMENT: This proposed rule is based on Tex. R. Civ. P. 296-299.

Rule _____. Motion for Judgment N.O.V. or in Disregard of Jury Findings.

(a) Motions. Upon motion and reasonable notice, the court may render judgment non obstante veredicto if a directed verdict would have been proper. Upon like motion and notice, the court may disregard any jury finding that has no support in the evidence.

(b) Judgment Notwithstanding Jury Findings; Cross-Points. When judgment is rendered non obstante veredicto or notwithstanding the findings of a jury on one or more special issues, the appellee may bring forward by cross-point contained in his brief filed in the Court of Appeals any ground which would have vitiated the verdict or would have prevented an affirmance of the judgment had one been rendered by the trial court in harmony with the verdict, including although not limited to the ground that one or more of the jury's findings have insufficient support in the evidence or are against the overwhelming preponderance of the evidence as a matter of fact, and the ground that the verdict and judgment based thereon should be set aside because of improper argument of counsel.

The failure to bring forward by cross-points such grounds as would vitiate the verdict shall be deemed a waiver thereof; provided, however, that if a cross-point is upon a ground which requires the taking of evidence in addition to that adduced upon the trial of the cause, it is not necessary that the evidentiary hearing be held until after the appellate court determines that the cause be remanded to consider such cross-point.

COMMENT: Paragraph (a) of this proposed rule is based upon the "provisos" in the second sentence of Tex. R. Civ. P. 301. Paragraph (b) is taken from the last paragraph of current Tex. R. Civ. P. 324.

Rule _____. Remittitur.

Any party in whose favor a judgment has been rendered may remit any part thereof:

(a) In open court, and such remittitur shall be noted on the docket and entered in the minutes.

(b) In vacation, by executing and filing with the clerk a written release signed by him or his attorney of record, and attested by the clerk with his official seal. Such releases shall be a part of the record of the cause.

(c) Execution shall issue for the balance only of such judgment.

COMMENT: This proposed rule is Tex. R. Civ. P. 315. See Tex. R. Civ. P. 319.

Rule _____. Relief from Clerical Errors.

(a) Correction of Mistakes. Mistakes in the record of any judgment or decree may be amended by the judge in open court according to the truth or justice of the case after notice of the application therefor has been given to the parties interested in such judgment or decree, and thereafter the execution shall conform to the judgment as amended.

The opposite party shall have reasonable notice of an application to enter a judgment *munc pro tunc*.

(b) Misrecitals Corrected. Where in the record of any judgment or decree of a court, there shall be any omission or mistake, miscalculation or misrecital of a sum or sums of money, or of any name or names, if there is among the records of the cause any verdict or instrument of writing whereby such judgment or decree may be safely amended, it shall be corrected by the court, wherein such judgment or decree was rendered, or by the judge thereof in vacation, upon application of either party, according to the truth and justice of the case. The opposite party shall have reasonable notice of the application for such amendment.

(c) Correction in Vacation. The judge making such correction in vacation shall embody the same in a judgment, and certify thereto and deliver it to the clerk who shall enter it in the minutes. Such judgment shall constitute a part of the record of the cause, and any execution thereafter issued shall conform to the judgment as corrected.

COMMENT: Paragraph (a) of this proposed rule is Tex. R. Civ. P. 316. Paragraph (b) is Tex. R. Civ. P. 317. Paragraph (c) is Tex. R. Civ. P. 318. See Tex. R. Civ. P. 319.

Rule _____. New Trials.

(a) In General. New trials may be granted and judgment set aside for good cause, on motion or on the court's own motion on such terms as the court shall direct. 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 is clearly separable without unfairness to the parties, the court may grant a new trial as to that party only, provided that a separate trial on unliquidated damages alone shall not be ordered if liability issues are contested.

(b) Form of Motion for New Trial. Each motion for new trial shall be in writing and signed by the party or his attorney.

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.

(c) Misconduct of Jury or Officer. When the ground of a motion for new trial, supported by affidavit, is misconduct of the jury or of the officer in charge of them, or because of any

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

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

(d) Excessive or Inadequate Damages. New trials may be granted when the damages are manifestly too small or too large, provided that whenever the court shall direct a remittitur in any action, and the same is made, and the party for whose benefit it is made shall appeal in said action, then the party remitting shall not be barred from contending in the appellate court that said remittitur should not have been required either in whole or in part, and if the appellate court sustains such contention it

shall render such judgment as the trial court should have rendered without respect to said remittitur.

(e) Weight of the Evidence. Not more than two new trials shall be granted either party in the same cause because of insufficiency or weight of the evidence.

COMMENT: This proposed rule is based upon Tex. R. Civ. P. 320, 321, 322, 326, 327 and 328.

Rule _____. When Motion for New Trial is Prerequisite to
Complaint on Appeal.

(a) Motion for New Trial Not Required. A point in a motion for a new trial is not a prerequisite to a complaint on appeal in either a jury or a nonjury case, except as provided in subdivision (b).

(b) Motion for New Trial Required. A point in a motion for a new trial is a prerequisite to the following complaints on appeal:

(1) 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 that a jury finding is against the overwhelming weight of the evidence;

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

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

COMMENT: This proposed Rule is taken from the first two paragraphs of Tex. R. Civ. P. 324.

Rule _____. Time for Filing Post-Trial 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 Rules ____ and ____) in all district and county courts:

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

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

(c) In the event an original or amended motion for new trial or a motion to modify, correct or reform a judgment is not determined by written order signed within seventy-five days after the judgment was signed, it shall be considered overruled by operation of law on expiration of that period.

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

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

(f) On expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law; provided that the court may at any time correct a clerical error in the record of a judgment and render judgment nunc pro tunc under Rules 316 and 317, and may also sign an order declaring a previous judgment or order to be void because signed after the court's plenary power had expired.

(g) A motion to modify, correct, or reform a judgment (as distinguished from motion to correct the record of a judgment under Rules ___ and ___), if filed, shall be filed and determined within the time prescribed by this rule for a motion for new trial and shall extend the trial court's plenary power and the time for perfecting an appeal in the same manner as a motion for new trial. Each such motion shall be in writing and signed by the party or his attorney and shall specify the respects in which the judgment should be modified, corrected, or reformed. The overruling of such a motion shall not preclude the filing of a motion for a new trial, nor shall the overruling of a motion for a new trial preclude the filing of a motion to modify, correct, or reform.

(h) If a judgment is modified, corrected or reformed in any respect, the time for appeal shall run from the time the modified, corrected, or reformed judgment is signed, but if a correction is made pursuant to Rule ___ or ___ after expiration of the period of plenary power provided by this rule, no complaint shall be heard on appeal that could have been presented in an appeal from the original judgment.

COMMENT: This proposed rule is based upon Tex. R. Civ. P.
3296.

Rule _____. Motion for New Trial on Judgment Following Citation
by Publication.

In cases in which judgment has been rendered on service of process by publication, when the defendant has not appeared in person or by attorney of his own selection:

(a) The court may grant a new trial upon petition of the defendant showing good cause, supported by affidavit, filed within two years after such judgment was signed. The parties adversely interested in such judgment shall be cited as in other cases.

(b) Execution of such judgment shall not be suspended unless the party applying therefor shall give a good sufficient bond payable to the plaintiff in the judgment, in an amount fixed in accordance with Rule 364 relating to supersedeas bonds, to be approved by the clerk, and conditioned that the party will prosecute his petition for new trial to effect and will perform such judgment as may be rendered by the court should its decision be against him.

(c) If property has been sold under the judgment and execution before the process was suspended, the defendant shall not recover the property so sold, but shall have judgment against the plaintiff in the judgment for the proceeds of such sale.

(d) If the motion is filed more than thirty days after the judgment was signed, all of the periods of time specified in Rule 306a(7) shall be computed as if the judgment were signed thirty days before the date of filing the motion.

COMMENT: This proposed rule is Tex. R. Civ. P. 329a.

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OF LEGAL SPECIALIZATION

* FAMILY LAW
** IMMIGRATION & NATIONALITY

MEMORANDUM

TO: All Supreme Court Advisory Committee Members
FROM: Harry L. Tindall
DATE: October 22, 1986
RE: Rules 99 through 107, Texas Rules of Civil Procedure

I enclose for each of you a revised set of proposed Rule changes for Rules 103 - 107, Texas Rules of Civil Procedure. Slight changes incorporate suggestions that I have received from Sam Sparks of El Paso. I also enclose proposed changes to Rules 99 - 102 incorporating suggestions of William V. Dorsaneo, III and Tom Ragland. These later changes have not been discussed by the Committee and are not necessarily connected to changes in Rules 103 - 107. I would ask that each of you review the enclosed proposed Rule changes and contact me with any comments regarding the same prior to our meeting on November 7, 1986.

Harry L. Tindall

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Repeal 99

RULE 99. PROCESS

(a) CITATION ISSUANCE: Upon the filing of the petition, the Clerk shall forthwith issue a Citation and deliver the Citation to Plaintiff or Plaintiff's attorney, who shall be responsible for the prompt service of the Citation and a copy of the petition. Upon request of the plaintiff separate or additional Citations shall issue against any defendant.

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(b) FORM OF CITATION: The Citation shall be signed by the Clerk, be under the seal of the Court, contain the name of the Court, and the names of the parties, be directed to the defendant, shall state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and shall command the defendant to appear in the case by filing a written answer to the plaintiff's pleading at or before 10:00 A.M. of the Monday next after the expiration of twenty days after the date of service of Citation.

Rule 100 (repeal)
Rule 100 (repeal)

COMMENT: This rule combines Rules 99 through 101 into a single rule. It closely follows Federal Rule of Civil Procedure 4 but does not alter the substantive requirements of current Texas practice. Existing Rules 99-101 will be repealed.

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COMMENT: This rule combines Rules 99 through 101 into a single rule. It closely follows Federal Rule of Civil Procedure 4 but does not alter the substantive requirements of current Texas practice. Existing Rules 99-101 will be repealed.

Rule 102. Territorial Limits of Effective Service. Repealed

COMMENT: This rule is obsolete and does not correctly state the law. Citation may be served beyond the jurisdiction of this State and thus is not consistent with existing practice. The Rule was written before Rule 120a was added to the current Rules.

Repeal

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