

SUPPLEMENT TO  
MEETING OF THE  
SUPREME COURT ADVISORY COMMITTEE

June 26-27, 1987

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MINUTES OF THE  
SUPREME COURT ADVISORY COMMITTEE MEETING

November 7-8, 1986

The Advisory Committee of the Supreme Court of Texas convened at 8:50 a.m. on November 7, 1986, pursuant to call of the Chairman.

Members of the Committee in attendance were Luther H. Soules III, Chairman, Pat Beard, David Beck, Frank Branson, Professor William V. Dorsaneo III, Professor J.H. Edgar, Russell H. McMains, Charles Morris, Tom L. Ragland, Sam Sparks (El Paso), Sam D. Sparks (San Angelo), Broadus Spivey, Harry Tindall, Honorable Bert H. Tunks, Honorable James P. Wallace, and Professor Orville Walker.

The minutes of the last meeting were unanimously approved.

Professor Dorsaneo reported on Rules of Appellate Procedure 74, 80(a), 90(a), 131 and 136(a). The Committee decided to add the language "Except as specified by local rule of the Court of Appeals, appellate briefs of Appellants and Appellees in civil cases" to Appellate Rule 74(h) and add the sentence "The Court may, upon motion, permit a longer brief." It was unanimously voted that there be a 50-page limit set for the length of all appellate briefs, excluding table of contents, index of authorities, and points of error. The Committee voted unanimously to change "shall" to "may" in Appellate Rule 74(f).

The Committee voted unanimously to approve the amendments to Appellate Rule 131(i), as well as Appellate Rule 136.

By a show of hands, 5-2, the proposed amendment to Appellate Rule 90(a) failed.

Mr. Tindall moved that the proposed amendment to Appellate Rule 80(c) be tabled, Judge Tunks seconded, and the motion was unanimously approved.

The suggestion by Professor Dorsaneo that Appellate Rule 136(a) have a sentence included to the effect that a brief in response is due within 15 days after filing of the application in the Supreme Court was unanimously approved.

Mr. McMains moved that the suggested new Rule 170 be tabled and by show of hands, the Committee voted unanimously to do so.

The proposed revision to Rule 329 was disposed of in a prior meeting.

The Committee favored a remittitur being acknowledged by a show of hands, 6-4. By a show of hands, 9-2, it was agreed that both the party and his attorney be permitted to sign the remittitur. With those changes, the proposed amendment to Rule 315 was approved, 5-1.

Mr. Soules requested that Mr. Tindall consider combining Rule 315 with 328 or moving it adjacent to 328 so that the concept of remittitur is in one section of the Rules:

The Committee unanimously agreed that the caption of Rule 316 will be changed to "Correction of Clerical Mistakes in the Record."

It was unanimously agreed that Rule 316 be amended to read "Clerical mistakes in the record of any judgment may be corrected by the Judge in open court according to the truth of justice" and that Rules 317, 318, and 319 be recommended for repeal.

References to Rule 317 will be deleted from Rules 329(b), 306a, 324, and Appellate Rule 5.

Professor Edgar moved that discussion regarding the repeal of Rule 330 be tabled, Mr. Tindall seconded, and the Committee agreed.

Mr. Tindall reported on Rule 103-107, then opened the discussion of same. The Committee unanimously approved the amendments to Rule 103 and the recommendation to repeal Rules 102 and 104.

Chairman Soules requested that Mr. Tindall's subcommittee study the 100 Rule series and their placement in the Rules sequence as a whole.

The suggested changes to Rules 105, 106 and 107 were unanimously approved by show of hands.

Oliver Heard addressed the Committee with regard to the Administrative Rules and aspects of debt collection as his law firm drafted them. He requested that he be allowed to speak further on the matter if the Committee takes up the discussion of the Administrative Rules again.

After discussion, the suggestion to combine Rules 99, 100, and 101 was tabled. Mr. Tindall will rewrite the amendment for the next meeting.

Pat Hazel, the chairman of the committee on Administration of Justice, was introduced and he attended the balance of the day's meeting.

After considerable discussion, it was unanimously voted that reference to delivery of mail restricted to addressee only be stricken from Rules 103 and 106.

Professor Dorsaneo reported on Rule 182. The Committee voted to recommend the rule for appeal by a show of hands, 9-1.

Professor Edgar then reported on Rules 205-209. The Committee voted unanimously to approve the amendment to Rule 209 and its accompanying Supreme Court Order, as written, as well as the housekeeping changes to Rules 205-208.

It was unanimously agreed that the heading "Section 2." will be moved to above Rule 524, and that Rules 567 and 568 will be merged to form one rule by deleting the caption of Rule 568 and including it as a second paragraph in Rule 567.

Professor Edgar moved, Professor Dorsaneo seconded, and the Committee voted unanimously to approve the amendment to Rule 749.

The amendment to Rule 751, changing its timetable from 5 to 8 days, was unanimously approved.

Professor Dorsaneo moved for the repeal of the trespass to try title rules, top to bottom. Discussion of the motion was tabled until the next meeting of the Committee.

The amendment to Rule 792, as stated by Professor Edgar, was approved, house-1.

The Committee voted unanimously to approve the amendment to Rule 748, deleting the last clause as the COAJ has recommended, and the COAJ's amendment to Rule 755.

The housekeeping amendments submitted by Professor Wicker were unanimously approved with regard to Rules 696, 741, 746, 772, 806, 807, 808, 810 and 811.

Discussion concerning F.R.A.P. 10 and 11 was tabled until the next meeting of the Committee.

The Committee voted unanimously that the change to Rule 267 be recommended for adoption.

Professor Dorsaneo then gave a brief history of Rule 166(b). After extensive discussion, amendment by insertion of the phrase "excluding written statements made to their attorneys" was approved, 4-2. Addition of the word "solely" before the words "in anticipation of litigation" was opposed 3-2.

Discussion concerning amendments to Rules 167 and 168 were tabled until the next meeting of the Committee.

The Committee re-convened on November 8, 1986 at 8:30 a.m. Members of the Committee in attendance were Luther H. Soules III, Professor Newell H. Blakely, Frank Branson, Professor William V. Dorsaneo III, Professor J.H. Edgar, Russell McMains, Charles Morris, Tom Ragland, Anthony Sadberry, Broadus Spivey, Harry Tindall, Honorable Bert H. Tunks, and Honorable James P. Wallace.

The amendment to Rule 685 that was recommended for adoption by the COAJ was rejected by a vote of hands, 5-1, by the Committee.

The housekeeping amendment to Rule 621a was unanimously approved by the Committee.

The Committee discussed, at considerable length, an amendment to Rule 169. It was decided on a vote of 5-2, that a judge should have discretion to grant amendments or withdrawals of admissions when delay of trial may result. The amendment of paragraph 2 of Rule 169, as written by Tom Ragland, shall read "Subject to the provisions of Rule 166 governing amendment of a pretrial order, the Court may permit withdrawal or amendment upon a showing of good cause for such withdrawal or amendment and that the parties relying upon the admissions will not be unduly prejudiced. Such amendment was unanimously approved by the Committee. The addition of the word "deemed" before the word "admissions" in the above amendment was approved by the Committee by a vote of 5-2.

It was voted at a prior meeting that Rules 184 and 184(a) shall be left intact in the Rules, subject to their uniformity with the Rules of Evidence.

The Committee unanimously approved the suggestion that Rule 329 should contain a reference to Appellate Rule 47.

The proposal regarding an amendment to Rule 202 was rejected by the Committee, 6-1.

The proposal regarding an amendment to Rule 206 was unanimously rejected by the Committee.

Mr. Ragland moved and Mr. Branson seconded approval of the proposed change to Rule 216. It was unanimously approved by the Committee.

The Committee voted unanimously to reject the proposal that a uniform jury information card be adopted.

After discussion, the Committee voted to table further action on attempting to create a uniform set of local rules for the entire state. Mr. Branson suggested that a subcommittee be appointed for this purpose.

The Committee voted unanimously to repeal existing Rule 264 and recommend for adoption new Rule 264, "Videotape Trial."

Mr. McMains motioned and Mr. Branson seconded the rejection of a suggested amendment to Rule 265(a) submitted by Judge Onion.

The proposed amendments to Rules 296 and 297 were unanimously rejected by the Committee, as was the proposed amendment to Rule 306(c).

The Committee unanimously agreed that the proposal regarding an attorney abandoning his clients is not within the purview of the Committee and is addressed in the Code of Professional Responsibility. Professor Edgar moved that the Committee was without jurisdiction to discuss the proposal, Mr. Ragland seconded, and the motion carried.

It was unanimously voted by the Committee that the proposal regarding Rule 13 be tabled until the next meeting.

The proposal to amend Appellate Rule 121(a)(2)(h) to require that 12 copies of an application be filed with the Supreme Court was unanimously approved by the Committee.

Chairman Soules reported that Mr. L.N.D. Wells had resigned from the Committee, as had Mr. W. James Kronzer. Three new members have been appointed to the Committee. They are Elaine Carlson, Diana Marshall, and Ken Fuller.

New subcommittee chairman were appointed as follows: Frank Branson - Rules 1-14; Sam Sparks (El Paso) - Rules 15-165; Professor Dorsaneo - Rules 166b-215; Professor Edgar - Rules 216-314; Harry Tindall - Rules 315-331; Russell McMains - the Appellate Rules (old Rules 342-515); Anthony Sadberry - Rules 523-591; Elaine Carlson - Rules 737-813. A new subcommittee chairman for Rules 592-734 will be appointed at a later date.

The Committee then edited the first draft of the proposed rules and rule changes to be submitted by the Committee for promulgation by the Supreme Court.

The next meeting of the Committee will be June 26-27, 1987,  
both full days.

*W. Glendon*

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ANN MARIE WATERS  
JENNY L. WATFORD

June 18, 1987

FEDERAL EXPRESS

Mr. Luke Soules  
Soules, Reed & Butts  
800 Milam Building  
East Travis at Soledad  
San Antonio, Texas 78205

In Re: Report of the Subcommittee on T.R.A.P. Rules 47, 48  
and 49

Dear Luke:

On June 17, 1987, our subcommittee had a telephone conference. Pat Beard, Elaine Carlson, Bill Dorsaneo, Harry Reasoner, Marie Yeates and I participated.

First, we discussed the House and Senate resolution requesting that the specific House and Senate committees study the area of supersedeas bonds. A copy of this resolution is attached. This resolution was signed by Gov. Clements on June 10, 1987.

Next, all participants agreed that we should consider amending our rules to give the trial court discretion in setting the amount of supersedeas bonds.

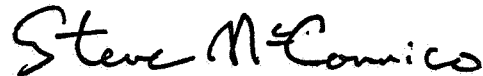
We then discussed how closely any Texas change should follow Fed. R. Civ. P. 62. Pat Beard, Elaine Carlson, Harry Reasoner and I supported the concept that any Texas change should be broadly written like the Federal rule. Bill Dorsaneo supported the concept of a rule which gave more specific instructions to the trial court.

Elaine Carlson is going to draft proposed rule changes and circulate those drafts to the subcommittee members by June 22, 1987. The subcommittee will then meet at my firm's Austin office at 3:00 p.m. on June 25, 1987, to discuss

Mr. Luke Soules  
June 18, 1987  
Page 2

Elaine's drafts. Following that meeting, we will have another draft of our proposed changes to present to the Advisory Committee at its meeting on June 26, 1987.

Very truly yours,



Steve McConnico

CD2:69/dp  
Enclosure

cc: Mr. Pat Beard  
Prof. Elaine Carlson  
Mr. Bill Dorsaneo  
Mr. Tom Ragland  
Mr. Harry Reasoner

00000002

TEXAS LEGISLATIVE SERVICE

SCR 122 ✓  
AS FINALLY PASSED AND  
SENT TO THE GOVERNOR

1 9-18--305

SENATE CONCURRENT RESOLUTION

2 WHEREAS, The Texas Constitution provides a right of access to  
3 the appellate courts for a meaningful appeal through due course of  
4 law; and

5 WHEREAS, Texas's statutes and rules currently provide no  
6 method by which judgment liens may be superseded pending exhaustion  
7 of all appeals; and

8 WHEREAS, The current security for judgment procedure may not  
9 afford judicial discretion as to the amount and type of security  
10 available to supersede a money judgment; and

11 WHEREAS, The constitutionality of the Texas security for  
12 judgment procedure has been questioned as a denial of the due  
13 process and equal protection guarantees of the Fourteenth Amendment  
14 to the United States Constitution; and

15 WHEREAS, The worldwide surety bonding capacity under the most  
16 optimistic conditions is estimated to be less than \$1 billion; and

17 WHEREAS, The current security for judgment procedures in  
18 Texas are in conflict, are ambiguous, and are not under the  
19 administration of a single branch of government, and the importance  
20 of issues involved make this a matter requiring thoughtful and  
21 informed legislative action; now, therefore, be it

22 RESOLVED, That the 70th Legislature of the State of Texas  
23 hereby establish a special interim committee to study Texas law and  
24 procedure relating to security for judgments in order to clarify  
25 the law and afford equity, while preserving the right of persons to

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1 Obtain appropriate relief and access through the appellate  
2 processes in the court system; and, be it further

3 RESOLVED, That the study address: (1) the need to clarify  
4 the law to confirm that the courts have flexibility and discretion  
5 in determining the amount of bond required to supersede a judgment;  
6 (2) the desirability of providing that the posting of a bond in the  
7 required amount shall also supersede the right to obtain abstracts  
8 of judgments and full judgment liens; and (3) whether a maximum  
9 level of bond should be established consistent with the  
10 availability of surety bonding capacity and the Texas  
11 constitutional policy of ensuring open access to the courts; and,  
12 be it further

13 RESOLVED, That the interim study committee be named the Joint  
14 Special Committee on Security for Judgments; and, be it further

15 RESOLVED, That the committee be composed of 10 members: five  
16 members of the senate, to be appointed by the lieutenant governor;  
17 and five members of the house of representatives, to be appointed  
18 by the speaker of the house; that the lieutenant governor and  
19 speaker each designate one of their appointees as a cochair; and  
20 that the committee shall subsequently hold meetings and public  
21 hearings at the call of the cochairs; and, be it further

22 RESOLVED, That the committee have the power to issue process  
23 as provided in the senate and house rules of procedure and in  
24 Section 301.024, Government Code; and, be it further

25 RESOLVED, That the committee have all other powers and duties  
26 provided to special committees by the senate and house rules of

procedure, by Subchapter B, Chapter 301, Government Code, and by policies of the committees on administration; and, be it further

RESOLVED, That from the contingent expense fund of the senate and the contingent expense fund of the house equally, the members of the committee be reimbursed for their expenses incurred in carrying out the provisions of this resolution in accordance with the senate and house rules of procedure and the policies of the committees on administration, and that other necessary expenses of operation be paid from the contingent expense fund of the senate and the contingent expense fund of the house equally; and, be it further

RESOLVED, That the interim study committee make a complete report, including findings and recommendations and drafts of any legislation considered necessary, to the 71st Legislature when it convenes in January, 1989; five copies of the completed report shall be filed in the Legislative Reference Library; five copies shall be filed with the Texas Legislative Council; two copies shall be filed with the secretary of the senate; and two copies shall be filed with the speaker of the house; following official distribution of the committee report, all remaining copies shall be deposited with the legislative reference librarian.

S.C.R. No. 122

\_\_\_\_\_  
President of the Senate

\_\_\_\_\_  
Speaker of the House

I hereby certify that S.C.R. No. 122 was adopted by the Senate on May 23, 1987; and that the Senate concurred in House amendment on May 31, 1987, by a viva-voce vote.

\_\_\_\_\_  
Secretary of the Senate

I hereby certify that S.C.R. No. 122 was adopted by the House, with amendment, on May 30, 1987, by a non-record vote.

\_\_\_\_\_  
Chief Clerk of the House

Approved:

\_\_\_\_\_  
Date

\_\_\_\_\_  
Governor

00000006

SEE NEXT PAGE FOR ALL TEXT

Texas Rules of Civil Procedure

Rule 13. Penalty-for-Fictitious-Suits-or-Pleading [Effect of Signing of Pleadings, Motions and Other Papers; Sanctions]

[The signature<sup>s</sup> of any attorney<sup>s</sup> or party<sup>ies</sup> constitutes a certificate by <sup>them</sup> him that <sup>they have</sup> he has read the pleading, motion, or other paper; that to the best of <sup>them</sup> and belief formed after reasonable and brought in bad faith or groundless of harrassment.] Any Attorney<sup>s</sup> a fictitious suit as an experimen rt, or who shall file any fictitious h a purpose, or shall make statement ate ef--case which he knows to be the purpose of securing a delay of be held guilty of a contempt[.]--> e or, or--at--the--instance--of--any--pa .te ascertain--the--fact. [If a plea is signed in violation of this rule on its own initiative, shall impose le 215<sup>(3)</sup> upon the person who signed it .

R13  
Recom  
15/2

Courts shall presume that ~~pleadings~~, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction's order. "Groundless" for purposes of this rule means <sup>(3)</sup>no basis in law or fact<sup>(3)</sup> The court may not

and ~~not~~ not warranted by a good faith argument for the extreme hardship or need of equity law.

Texas Rules of Civil Procedure

Rule 13. ~~Penalty-for-Fictitious-Suits-or-Pleading~~ [Effect of Signing of Pleadings, Motions and Other Papers; Sanctions]

[The signature<sup>s</sup> of any attorney<sup>s</sup> or party<sup>ies</sup> constitute<sup>s</sup> a certificate by ~~him~~<sup>them</sup> that ~~he has read~~<sup>they have</sup> the pleading, motion, or other paper; that to the best of ~~his~~<sup>their</sup> knowledge, information, and belief formed after reasonable inquiry it is not groundless and brought in bad faith or groundless and brought for the purpose of harrassment.] ~~Any~~ Attorney<sup>s</sup> [or party<sup>ies</sup>] who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading ~~presenting-a-state-of-case~~ which he knows to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt[.] ~~and-the-court,-of-its-own-motion, or-at-the-instance-of-any-party,-will-direct-an-inquiry-to ascertain-the-fact.~~ [If a pleading, motion or other paper is signed in violation of this rule, the court, upon ~~motion~~ or upon its own initiative, shall impose sanctions available under Rule 215<sup>(3)</sup> upon the person who signed it, a represented party, or both.

Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction's order. "Groundless" for purposes of this rule means ~~(3)~~ no basis in law or fact. ~~(3)~~ The court may not

~~and~~ not warranted by a good faith argument for the extreme nonapplicability or reversal of existing law.

impose sanctions for violation of this rule if, before the 90th day after the court makes a determination of such violation, the offending party withdraws or amends the pleading, motion, or other paper, or offending portion thereof to the satisfaction of the court. A general denial does not constitute a violation of this rule. The amount requested for damages does not constitute a violation of this rule.]

[ SB No. 5, Article 2. Trial; Judgment, Section 2.01. Subtitle A, Title 2, Civil Practice and Remedies Code, Chapter 9 "Frivolous Pleadings and Claims" otherwise to be effective September 2, 1987, is repealed pursuant to Tex. Const. Art. 5 §31, and Tex. Gov. Code §22.004(c).]

~~A pleading is~~

or prior to the  
expiration of the  
trial court's plenary  
power, whichever  
first occurs.

~~both the  
or the  
trial court's  
plenary power  
is exhausted first  
or second~~

Texas Rules of Civil Procedure

Rule 13. ~~Penalty for Fictitious Suits or Pleading~~ [Effect of Signing of Pleadings, Motions and Other Papers; Sanctions]

[The signature of any attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is not groundless and brought in bad faith or groundless and brought for the purpose of harrassment.] Any attorney [or party] who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading ~~presenting a state of case~~ which he knows to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt [.] ~~and the court, of its own motion, or at the instance of any party, will direct an inquiry to ascertain the fact.~~ [If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose sanctions available under Rule 215 upon the person who signed it, a represented party, or both.

Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction's order. "Groundless" for purposes of this rule means no basis in law or fact. The court may not

impose sanctions for violation of this rule if, before the 90th day after the court makes a determination of such violation, the offending party withdraws or amends the pleading, motion, or other paper, or offending portion thereof to the satisfaction of the court. A general denial does not constitute a violation of this rule. The amount requested for damages does not constitute a violation of this rule.]

[ SB No. 5, Article 2. Trial; Judgment, Section 2.01. Subtitle A, Title 2, Civil Practice and Remedies Code, Chapter 9 "Frivolous Pleadings and Claims" otherwise to be effective September 2, 1987, is repealed pursuant to Tex. Const. Art. 5 §31, and Tex. Gov. Code §22.004(c).]

Rule 13

*Agenda*

**SPIVEY, GRIGG, KELLY AND KNISELY**

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PERSONNEL MANAGER:  
**ANDY BOGGS**

June 19, 1987

BAS.092

Mr. Luther H. Soules, III  
Soules, Reed & Butts  
800 Milam Building  
East Travis at Soledad  
San Antonio, Texas 78205

Re: Supreme Court Advisory Committee  
Subcommittee - Texas Version of Federal Rule 11

Dear Luke:

In response to your letter of June the 10th, and pursuant to our conversations recently, I have had a telephonic conference with every member of our subcommittee except Elaine Carlson, whom I was unable to contact. David Beck and I were not able to reach a decision as to a recommendation, but the balance of the subcommittee agreed with me that we should report favorably the proposed "amendment" attached to your letter of June the 10th, with the specific reservation that all parties, including the subcommittee, will debate this rule fully and freely at the time it is considered.

It was our consensus that we should use that proposed rule as a blueprint upon which to work, and we all felt that we could definitely improve the legislative attempt (legislative compromise). As I indicated to you, especially Gilbert, Lefty and I feel prepared to discuss this fully since we played a rather involved role in the legislative attempt at "tort reform."

Sincerely,

*Broadus*  
Broadus A. Spivey  
BAS/msh

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Mr. Luther H. Soules, III  
June 19, 1987  
Page Two

cc: Mr. Gilbert T. Adams, Jr.  
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Mr. Tom Ragland  
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00000010

Rule 13

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Zurich

June 19, 1987

Re: Supreme Court Advisory Committee

Mr. Broadus A. Spivey  
Spivey, Grigg, Kelly & Knisely, P.C.  
1111 W. 6th St.  
Austin, Texas 78768-2011

Dear Broadus:

I tried to reach you by telephone yesterday and today without success. Since I will be out of the country at the time of our meeting on June 26th, I wanted to pass on a few general comments with respect to the current draft of the proposed "sanctions" rule:

1. The imposition of sanctions under the current draft is predicated on a bad faith/good cause standard which is similar the pre-1983 Fed. R. Civ. P. 11 standard. As you know, the use of the "bad faith" standard caused considerable problems in the federal courts and was the subject of considerable criticism. See, e.g., Roadway Express, Inc. v. Piper, 447 U.S. 752, 757 n.4, (1980). See also Rosenberg & Kling, Curbing Discovery Abuse in Civil Litigation: Enough is Enough, 1981 B.Y.U.L. Rev. 579 (1981); Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 Vand. L. Rev. 1295 (1978); Kirkham, Complex Civil Litigation -- Have Good Intentions Gone Awry?, 70 F.R.D. 199 (1976). Since we have some experience upon which to draw, I question whether the use of such a standard would work in Texas when it obviously did not work when used by the federal courts.
2. When discussing the available sanctions, I believe that it is confusing to merely refer generally to Rule 215. I would suggest that

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Mr. Broadus A. Spivey  
June 19, 1987  
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we be specific and expressly state, for example, that attorney's fees and other related costs are available as sanctions. As you know, Fed. R. Civ. P. 11 now does precisely that.

3. The current draft appears in the first instance to make the imposition of sanctions mandatory, i.e., "shall impose sanctions." [Emphasis added]. However, the draft also allows a 90 day grace period in which the violation may be corrected. Since court delay is arguably a problem in some areas of Texas, wouldn't it be easier to simply make sanctions discretionary with the trial judge?

Very truly yours,



David J. Beck

DJB/st

cc: Luther H. Soules, III, Esq.  
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All Subcommittee Members

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1 order to reform the civil justice system of this state, enacts this  
2 legislation for the purpose of reforming the civil justice system  
3 of Texas. To this end, this Act revises appropriate procedural and  
4 substantive provisions of the Civil Practice and Remedies Code  
5 applicable to actions for personal injury, property damage, or  
6 death and other civil actions based on tortious conduct.

7 ARTICLE 2. TRIAL; JUDGMENT

8 SECTION 2.01. Subtitle A, Title 2, Civil Practice and  
9 Remedies Code, is amended by adding Chapter 9 to read as follows:

10 CHAPTER 9. FRIVOLOUS PLEADINGS AND CLAIMS

11 SUBCHAPTER A. GENERAL PROVISIONS

12 Sec. 9.001. DEFINITIONS. In this chapter:

13 (1) "Claimant" means a party, including a plaintiff,  
14 counterclaimant, cross-claimant, third-party plaintiff, or  
15 intervenor, seeking recovery of damages. In an action in which a  
16 party seeks recovery of damages for injury to another person,  
17 damage to the property of another person, death of another person,  
18 or other harm to another person, "claimant" includes both that  
19 other person and the party seeking recovery of damages.

20 (2) "Defendant" means a party, including a  
21 counterdefendant, cross-defendant, or third-party defendant, from  
22 whom a claimant seeks relief.

23 (3) "Groundless" means:

24 (A) no basis in fact; or

25 (B) not warranted by existing law or a good  
26 faith argument for the extension, modification, or reversal of

1 existing law.

2 (4) "Pleading" includes a motion.

3 Sec. 9.002. APPLICABILITY. (a) This chapter applies to an  
4 action in which a claimant seeks:

5 (1) damages for personal injury, property damage, or  
6 death, regardless of the legal theories or statutes on the basis of  
7 which recovery is sought, including an action based on intentional  
8 conduct, negligence, strict tort liability, products liability  
9 (whether strict or otherwise), or breach of warranty; or

10 (2) damages other than for personal injury, property  
11 damage, or death resulting from any tortious conduct, regardless of  
12 the legal theories or statutes on the basis of which recovery is  
13 sought, including libel, slander, or tortious interference with a  
14 contract or other business relation.

15 (b) This chapter applies to any party who is a claimant or  
16 defendant, including but not limited to:

17 (1) a county;

18 (2) a municipality;

19 (3) a public school district;

20 (4) a public junior college district;

21 (5) a charitable organization;

22 (6) a nonprofit organization;

23 (7) a hospital district;

24 (8) a hospital authority;

25 (9) any other political subdivision of the state; and

26 (10) the State of Texas.

1           (c) In an action to which this chapter applies, the  
2 provisions of this chapter prevail over all other law to the extent  
3 of any conflict.

4           Sec. 9.003. TEXAS RULES OF CIVIL PROCEDURE. This chapter  
5 does not alter the Texas Rules of Civil Procedure or the Texas  
6 Rules of Appellate Procedure.

7           Sec. 9.004. APPLICABILITY. This chapter does not apply to  
8 the Deceptive Trade Practices-Consumer Protection Act (Subchapter  
9 E, Chapter 17, Business & Commerce Code) or to Chapter 21,  
10 Insurance Code.

11                   [Sections 9.005-9.010 reserved for expansion]

12                           SUBCHAPTER B. SIGNING OF PLEADINGS

13           Sec. 9.011. SIGNING OF PLEADINGS. The signing of a pleading  
14 as required by the Texas Rules of Civil Procedure constitutes a  
15 certificate by the signatory that to the signatory's best  
16 knowledge, information, and belief, formed after reasonable  
17 inquiry, the pleading is not:

18                   (1) groundless and brought in bad faith;

19                   (2) groundless and brought for the purpose of  
20 harassment; or

21                   (3) groundless and interposed for any improper  
22 purpose, such as to cause unnecessary delay or needless increase in  
23 the cost of litigation.

24           Sec. 9.012. VIOLATION; SANCTION. (a) At the trial of the  
25 action or at any hearing inquiring into the facts and law of the  
26 action, after reasonable notice to the parties, the court may on

1 its own motion, or shall on the motion of any party to the action,  
2 determine if a pleading has been signed in violation of any one of  
3 the standards prescribed by Section 9.011.

4 (b) In making its determination of whether a pleading has  
5 been signed in violation of any one of the standards prescribed by  
6 Section 9.011, the court shall take into account:

7 (1) the multiplicity of parties;

8 (2) the complexity of the claims and defenses;

9 (3) the length of time available to the party to  
10 investigate and conduct discovery; and

11 (4) affidavits, depositions, and any other relevant  
12 matter.

13 (c) If the court determines that a pleading has been signed  
14 in violation of any one of the standards prescribed by Section  
15 9.011, the court shall, not earlier than 90 days after the date of  
16 the determination, at the trial or hearing or at a separate hearing  
17 following reasonable notice to the offending party, impose an  
18 appropriate sanction on the signatory, a represented party, or  
19 both.

20 (d) The court may not order an offending party to pay the  
21 incurred expenses of a party who stands in opposition to the  
22 offending pleading if, before the 90th day after the court makes a  
23 determination under Subsection (a), the offending party withdraws  
24 the pleading or amends the pleading to the satisfaction of the  
25 court or moves for dismissal of the pleading or the offending  
26 portion of the pleading.

1           (e) The sanction may include one or more of the following:

2                   (1) the striking of a pleading or the offending  
3 portion thereof;

4                   (2) the dismissal of a party; or

5                   (3) an order to pay to a party who stands in  
6 opposition to the offending pleading the amount of the reasonable  
7 expenses incurred because of the filing of the pleading, including  
8 costs, reasonable attorney's fees, witness fees, fees of experts,  
9 and deposition expenses.

10           (f) The court may not order an offending party to pay the  
11 incurred expenses of a party who stands in opposition to the  
12 offending pleading, if the court has, with respect to the same  
13 subject matter, imposed sanctions on the party who stands in  
14 opposition to the offending pleading under the Texas Rules of Civil  
15 Procedure.

16           (g) All determinations and orders pursuant to this chapter  
17 are solely for purposes of this chapter and shall not be the basis  
18 of any liability, sanction, or grievance other than as expressly  
19 provided in this chapter.

20           Sec. 9.013. REPORT TO GRIEVANCE COMMITTEE. (a) If the  
21 court imposes a sanction against an offending party under Section  
22 9.012, the offending party is represented by an attorney who signed  
23 the pleading in violation of any one of the standards under Section  
24 9.011, and the court finds that the attorney has consistently  
25 engaged in activity that results in sanctions under Section 9.012,  
26 the court shall report its finding to an appropriate grievance

1 committee as provided by the State Bar Act (Article 320a-1,  
2 Vernon's Texas Civil Statutes) or by a similar law in the  
3 jurisdiction in which the attorney resides.

4 (b) The report must contain:

5 (1) the name of the attorney who represented the  
6 offending party;

7 (2) the finding by the court that the pleading was  
8 signed in violation of any one of the standards under Section  
9 9.011;

10 (3) a description of the sanctions imposed against the  
11 signatory and the offending party; and

12 (4) the finding that the attorney has consistently  
13 engaged in activity that results in sanctions under Section 9.012.

14 Sec. 9.014. PLEADINGS NOT FRIVOLOUS. (a) A general denial  
15 does not constitute a violation of any of the standards prescribed  
16 by Section 9.011.

17 (b) The amount requested for damages in a pleading does not  
18 constitute a violation of any of the standards prescribed by  
19 Section 9.011.

20 SECTION 2.02. The heading of Chapter 33, Civil Practice and  
21 Remedies Code, is amended to read as follows:

22 CHAPTER 33. COMPARATIVE RESPONSIBILITY [NEGLIGENCE]

23 SECTION 2.03. The heading of Subchapter A, Chapter 33, Civil  
24 Practice and Remedies Code, is amended to read as follows:

25 SUBCHAPTER A. COMPARATIVE RESPONSIBILITY [NEGLIGENCE]

26 SECTION 2.04. Section 33.001, Civil Practice and Remedies

Texas Rules of Civil Procedure

Rule 164. Non-Suit

[Repealed]

R164

Una

Approved

Advisory Committee Comment: Rule is rendered unnecessary due to inclusion of pertinent language in amended Rule 162, effective January 1, 1988.



June 18, 1987

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Re: Proposed Rule 175A

Dear Subcommittee Members,

I have prepared a report concerning the above referenced rule for our June meeting. Please review the same and let me have your comments.

Best regards,

*Bill*

William V. Dorsaneo III

Enc.

cc: ✓ Honorable Luther H. Soules, III

Report on Proposed Rule  
175A (Offers of Judgment)

Proposed Rule 175A is modeled upon Fed. R. Civ. P. 68. The purpose of Rule 68 when it was adopted in 1938 was to promote settlement. However, as explained in the First Circuit Court's opinion in Crossman v. Marcoccio, 806 F.2d 329, 331 (1st Cir. 1986):

This rule, designed to encourage the settlement of private disputes, has long been among the most enigmatic of the Federal Rules of Civil Procedure because it offers imprecise guidance regarding which post-offer costs become the responsibility of the plaintiff. Opinions differ sharply on the issue of whether Rule 68 compels plaintiffs to pay defendants' post-offer costs or simply operates to deny prevailing plaintiff's recovery of their own post-offer costs.

In addition to this problem, Rule 68 has other related ones. The federal rule lacks teeth because the term "costs" does not include post-offer attorney's fees, unless attorney's fees "are properly awardable under the relevant substantive statute or other authority," Marek v. Chesny, 473 U.S. 1, 105 S.Ct. 3012, 3017, 87 L.Ed. 2d 1 (1985). In Marek, the Supreme Court held that a prevailing civil rights plaintiff, who recovers less than the defendant's Rule 68 offer of judgment, cannot recover his post-offer attorney's fees pursuant to 42 U.S.C. § 1988. The Court reasoned that "costs" included attorney's fees because § 1988 permits a prevailing plaintiff to recover them. But the Court did not reach the question whether the defendant should be able to recover its post-offer attorney's fees from the

plaintiff-offeree under the same circumstances. The defendants in Marek failed to appeal the portion of the district court's order denying their request for post-offer attorney's fees. But see Crossman v. Marcoccio, 806 F.2d at 334 (holding that recovery of defendant's post-offer attorney's fees not permissible because fees are not "properly awardable" to defendants in civil rights suit "unless the trial court determines that the plaintiff's action was 'frivolous, unreasonable or without foundation.'")

In addition, the Supreme Court has also held that the reference to a "judgment finally obtained by the offeree" in Rule 68 precludes an offeror from recovering its post-offer "costs" when the offeree suffers a take-nothing judgment. Delta Airlines, Inc. v. August, 450 U.S. 346, 101 S.Ct. 1146, 67 L.Ed.2d 287 (1981). Under this holding, federal Rule 68 is confined to cases in which the plaintiff has obtained a judgment but for an amount less favorable than the defendant's settlement offer.

Another problem concerning the proper interpretation of Rule 68 has involved the question of whether a defendant's offer must itemize the respective amounts being tendered for settlement of the underlying substantive claim and for costs (including attorney's fees, when appropriate). See Marek v. Chesny, 105 S.Ct. at 3015-3016 (holding that "[a]s long as the offer does not implicitly or explicitly provide that the judgment not include costs, a timely offer will be valid.")

I have evaluated proposed Rule 175A's redraft of Fed. R.

Civ. P. 68 against this procedural background. These are my comments.

Comment No. 1. The first sentence should be changed by adding the words "and attorneys' fees" after the word "costs." Otherwise the entire phrase beginning with "including" could be deleted.

Comment No. 2. The fourth sentence should be modified by replacing the words "finally obtained by the offeree" with "judgment finally rendered" or "finally obtained by or against the offeree." This modification would specifically reject the result reached by the Supreme Court in Delta Airlines, Inc. v. August, disc'd above.

Comment No. 3. The fifth sentence should be modified to add the words "to the offeror" after the word "awarded." Obviously, other adjustments may be needed. I have redrafted a second version of Proposed Rule 175A to reflect my comments. Please see attachment "A". I have also appended a copy of Fed. R. Civ. P. 68 as attachment "B" and a copy of a proposal for revision of the federal rule that is labeled attachment "C". The latter attachment takes a different approach that is somewhat like Tex. R. App. P. 84.

#### Supplement Analysis of Proposed Rule 175A

Proposed new Rule 175A differs from Federal Rule 68 in the following respects.

First, proposed new Rule 175A permits plaintiffs as well as defendants to make offers of judgment as a prerequisite to recovery of costs and attorney's fees from an adverse party. In contrast, Federal Rule 68 permits "a party defending against a claim" to make an offer of judgment.

Second, proposed new Rule 175A makes the offeree liable for both costs and attorneys's fees incurred by the offeror after the offer is made when a judgment is rendered that is not more favorable than the rejected offer. Federal Rule 68 does not address attorney's fees and refers only to "costs incurred after the making of the offer." However, in a civil rights action the United States Supreme Court has held that because the underlying statute defines costs to include attorney's fees, they are included. Marek v. Chesny, supra.

Third, new Rule 175A restricts the award of attorney's fees in favor of the offeror to cases in which the trial court determines that the offeree has acted unreasonably in refusing the offer. This issue is not addressed in federal Rule 68 and was not addressed in Marek. The First Circuit has stated that the Marek opinion limits the scope of Rule 68 to cases in which costs are "properly awardable" under the relevant statute. Crossman v. Marcoccio, 806 F.2d 329, 333 (1st Cir. 1986).

Applying this interpretation of Marek, the Crossman court held that defendant's attorney's fees were not properly awardable under 42 U.S.C. § 1988 because the statute awards costs only to a "prevailing party" and caselaw limits recovery of attorney's fees

by defendants to cases in which the plaintiff's claims are found to be frivolous, unreasonable or without foundation. In Crossman "there [was] absolutely no reason to believe that appellants case was frivolous or meritless; indeed appellants 'prevailed' at trial. It follows from this that appellee's attorney's fees were not 'properly awardable' costs as defined by section 1988." Crossman, 806 F.2d at 334. In contrast, proposed Rule 175A has unreasonableness as its primary standard and gives the court discretion as to what factors it may take into account in deciding the issue.

SEE NEXT PAGE FOR FULL TEXT

Attachment "A"

Dorsaneo's Draft

NEW RULE 175A

OFFER OF JUDGMENT

At any time more than 10 days before the trial begins, a party may serve upon the adverse party an offer of judgment, including costs and attorney's fees then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is not accepted shall be is not admissible except in the judgment finally rendered. If the offer, the offeree must pay incurred after the making of be awarded to the offeror unless determines that the losing party refusing the offer. In making consider among other factors the and the judgment and the important fact that an offer is made but subsequent offer. When the liability to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, either party may make an offer of judgment, which

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