

MEETING AGENDA  
SUPREME COURT ADVISORY COMMITTEE  
AUGUST 12, 1989 MEETING

1. Approval of Minutes of July 15, 1989, meeting (attached).
2. Corrections to text (attached) of rules approved at July 15, 1989, meeting.
3. Form Standing Subcommittee on Multi-County and Multi-District Rules
4. Form Special Subcommittee for Comprehensive Review and Reformatting of Texas Rules of Civil Procedure in numerical order of Federal Rules of Civil Procedure
5. Report on consolidation of all trial "notice" and "service" rules, i.e. TRCP 21, 21a, 21b, 72, 73, etc.: David Beck
6. Report on TRAP 15a and TRCP 18b: David Beck
7. Report on TRCP 271-279: Professor J. Hadley Edgar
8. Report on TRAP 40, 74, 91, 100, 130, 131, 132, 136, & 190: Rusty McMains
9. Report on TRCP 4: Frank Branson
10. Report on TRCP 10 and TRAP 7: Frank Branson
11. Report on TRCP 63: Professor J. Hadley Edgar
12. Report on TRCP 166: Professor Dorsaneo
13. Report on TRCP 204 and 206(1): Professor Dorsaneo
14. Report on TRCP 248: Professor J. Hadley Edgar
15. Report on TRCP 296: Professor J. Hadley Edgar
16. Report on TRCP 329: Harry Tindall
17. Report on TRCP 534: Anthony Sadberry
18. Report and action on TRAP 82: Doak Bishop
19. Report on TRAP 90(e): Rusty McMains
20. Report on TRAP 130(a) and 130(b): Mike Hatchell
21. Report on TRAP 181: Rusty McMains
22. Report on suggested technical corrections: Justice Nathan L. Hecht

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MINUTES OF THE  
SUPREME COURT ADVISORY COMMITTEE

JULY 15, 1989

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock a.m. on Saturday, July 15, 1989, pursuant to call of the Chairman.

Members present: Chair Luther H. Soules III, Justice Nathan L. Hecht, Honorable Sam Houston Clinton, Honorable Austin McCloud, Honorable David Peeples, Honorable Solomon Casseb, Jr., Honorable Raul Rivera, David Beck, R. Doak Bishop, Anthony Sadberry, Chuck Herring, Elaine Carlson, Rusty McMains, John O'Quinn, Tom Davis, Charles Morris, Franklin Jones, J. Hadley Edgar, Professor Newell Blakely, Harry Tindall, Pat Beard, William Dorsaneo III, and Kenneth Fuller. Also present were Chief Justice Thomas R. Phillips, Sarah B. Duncan, and Holly J. Halfacre.

Members absent were: Gilbert T. Adams, Jr., Frank L. Branson, John E. Collins, Michael A. Hatchell, Vester T. Hughes, Jr., Gilbert I. Low, Steve McConnico, Tom L. Ragland, Harry M. Reasoner, Broadus A. Spivey, Sam D. Sparks, and Sam Sparks.

Minutes of the May 26-27, 1989 meeting were approved.

Professor Elaine Carlson reported on progress of Texas Pattern Local Rules Project.

Discussion was had regarding letters receiving from state representatives regarding SB 1013 and HB 2223. Resolution was made for better communication with the legislature.

Redlined rules approved at the May 26-27, 1989 meeting for promulgation by the Supreme Court were approved with minor corrections to Rule 167a and 297a.

A report was given by Ken Fuller on Family Law Project regarding sealing of records and letter from John H. McElhaney. A committee was appointed to study same which consists of members Charles Morris- Co-Chair, Charles Herring - Co-Chair, Ken Fuller, Judge Solomon Casseb, Jr., Judge David Peeples, and Luke Soules and invitee John McElhaney. Luke Soules will prepare letter to Orlando Garcia and report formation of the committee and invite suggestions.

A request for reorganization of the TRAP rules was reported on, motion was made and the committee voted unanimously to

recommend that the Supreme Court not promulgate the requested reorganization but refer the project to the rules recodification effort over the next bi-innum.

A report was made by Justice Sam Houston Clinton regarding changes to proposed TRAP 1 and TRAP 20, motion was made and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendments.

A request for amendment to TRAP 4 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRAP 9 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRAP 47 was reported on by Professor Elaine Carlson, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRAP 49 was reported on by Elaine Carlson, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRAP 40 was reported on, motion was made, and the committee voted unanimously to table same for assignment Rusty McMains to do fully study and deliver a written report at next meeting, August 12, 1989.

A request for amendment to TRAP 46d was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRAP 40(a)(4) was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRAP 51(b) was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRAP 53 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRAP 51(c) was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court not promulgate the requested amendment.

A request for amendment to TRAP 52(d) was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 299 and 299a was reported on, motion was made, and the committee voted 13 to 2 to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRAP 90 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 99-107 was reported on, these rules have currently been amended. No action of committee required.

A request for amendment to TRCP 38(c) and 51(b) was reported on, motion was made to reject, and the committee voted unanimously to recommend that the Supreme Court not promulgate the requested amendment.

A request for amendment to TRCP 57 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 120a was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 238 was reported on, motion was made to reject, and a majority of the committee voted to recommend that the Supreme Court not promulgate the requested amendment.

A request for amendment to TRCP 82 was reported on, motion was made, and the committee voted to table for assignment to R. Doak Bishop to deliver a written report at next meeting, August 12, 1989.

A request for amendment to TRCP 130a was reported on, motion was made to table, and the committee voted unanimously to reassign to Rusty McMains to deliver a written report at next meeting, August 12, 1989.

A request for amendment to heading of Section 17 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 13 was reported on, motion was made to reject, and the committee voted unanimously to recommend that the Supreme Court not promulgate the requested amendment.

A request for amendment to TRCP 166(b)(3)(b) was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 237a was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 278 was reported on, motion was made, and the committee voted unanimously to reassign to Hadley Edgar to deliver a written report on August 12, 1989. The following members were appointed to prepare suggested redline versions and submit to Hadley Edgar by July 21: Rusty McMains, Professor Dorsaneo, John O'Quinn, Professor Edgar, Pat Beard and Luke Soules.

A request for amendment to TRCP 308a was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 305 was reported on, motion was made to reject, and the committee voted unanimously to recommend that the Supreme Court not promulgate the requested amendment.

A request for amendment to TRCP 329b was reported on, motion was made to reject, and the committee voted unanimously to recommend that the Supreme Court not promulgate the requested amendment.

A request for amendment to TRCP 329 was reported on, motion was made to reject, and the committee voted unanimously to recommend that the Supreme Court not promulgate the requested amendment.

A request for amendment to TRCP 329c was reported on, and the committee voted unanimously to recommend that the Supreme Court not promulgate the requested amendment until further information is received with briefing Skipper Lay.

A request for amendment to TRCP 749c was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 534 was reported on, motion was made, and the committee voted unanimously to refer to Anthony Sadberry for written report at next meeting, August 12, 1989.

The following matters were placed on the agenda for August 12, 1989:

Form standing subcommittee on Multi-County, Multi-District Rules.

Form special subcommittee for consideration towards comprehensive reformatting and review of Texas Rules of Civil Procedure in order of Federal Rules of Civil Procedure.

Report of special subcommittee to combine all trial "notice" and "service" rules in a single rule, e.g. TRCP 21a and 72 - David Beck.

Report on Rule 278 - Professor Edgar

Report on Rule 40 - Rusty McMains

Report on Rule 82 - Doak Bishop

Report on Rule 329c - Harry Tindall

Report on Rule 534 - Sadberry

Report on Rule 130a (premature filing of application) - Hatchell

Report on TRAP 90(e) - Rusty McMains

Report on TRAP 121 - Rusty McMains

Report on TRAP 181 - Rusty McMains

Report on TRCP 10 - Frank Branson

Report on TRAP 15a and 18b - David Beck

Staff was recognized with appreciation.

Meeting adjourned.

TRCP 57 Signing of Pleadings

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, with his State Bar of Texas identification number, address, ~~and~~ telephone number[, and, if available, telecopier number]. A party not represented by an attorney shall sign his pleadings, state his address, ~~and~~ telephone number[, and, if available, telecopier number].

[COMMENT TO 1990 CHANGE: To supply attorney telecopier information with other identifying information on pleadings.]

00006

c:/dw4/scac/redlines

TRCP166b. Forms and Scope of Discovery; Protective Orders;  
Supplementation of Responses

1. Forms of Discovery. (No change.)

2. Scope of Discovery. Except as provided in paragraph 3 of this rule, unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

a. In General. (No change.)

b. Documents and Tangible Things. (No change.)

c. Land. (No change.)

d. Potential Parties and Witnesses. (No change.)

e. Experts and Reports of Experts. Discovery of the facts known, mental impressions and opinions of experts, otherwise discoverable because the information is relevant to the subject matter in the pending action but which was acquired or developed in anticipation of litigation and the discovery of the identity of experts from whom the information may be learned may be obtained only as follows:

(1) In General. A party may obtain discovery of the identity and location (name, address and telephone number) of an expert who may be called as a [n expert] witness, the subject matter on which the witness is expected to testify, the mental impressions and opinions held by the expert and the facts known to the expert (regardless of when the factual information was acquired) which relate to or form the basis of the

mental impressions and opinions held by the expert. The disclosure of the same information concerning an expert used for consultation and who is not expected to be called as a [n expert] witness at trial is required if the expert's work products formed a basis for the whole or part of the opinion of the expert. [consulting expert's opinion or impressions have been reviewed by a testifying expert.]

(2) Reports. A party may also obtain discovery of documents and tangible things including all tangible reports, physical models, compilations of data and other material prepared by an expert or for an expert in anticipation of the expert's trial and deposition testimony. The disclosure of material prepared by an expert used for consultation is required even if it was prepared in anticipation of litigation or for trial when it formed a basis for the whole or part of the opinion of the expert. [if the consulting expert's opinions or impressions have been reviewed by a testifying expert.]

(3) Determination of Status. (No change.)

(4) Reduction of Report to Tangible Form. If the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert who will be called as a [n expert] witness have not been recorded and reduced to tangible form, the trial judge may order these matters reduced to tangible

form and produced within a reasonable time before the date of trial.

f. Indemnity, Insuring and Settlement Agreements.

(No change.)

g. Statements. (No change.)

h. Medical Records; Medical Authorization. (No change.)

3. Exemptions. The following matters are protected from disclosure by privilege:

a. Work Product. (No change.)

b. Experts. The identity, mental impressions and opinions of an expert who has been informally consulted or of an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial or any documents or tangible things containing such information if the expert will not be called as a [n expert] witness, except that the identity, mental impressions and opinions of an expert who will not be called to testify [as an expert] and any documents or tangible things containing such impressions and opinions are discoverable if the expert's work product forms a basis either in whole or in part of the opinions of an expert who will be called as a [n expert] witness.

c. Witness Statements. The written statements of potential witnesses and parties, ~~if /the /statement /was~~ [when] made subsequent to the occurrence or transaction upon which the suit is based and in connection with the prosecution, investigation, or defense of the particular suit, or in anticipation of the

prosecution or defense of the claims made in [a part of] the pending litigation, except that persons, whether parties or not, shall be entitled to obtain, upon request, copies of statements they have previously made concerning the action or its subject matter and which are in the possession, custody, or control of any party. The term "written statements" includes (i) a written statement signed or otherwise adopted or approved by the person making it, and (ii) a stenographic, mechanical, electrical or other type of recording, or any transcription thereof which is a substantially verbatim recital of a statement made by the person and contemporaneously recorded. [For purpose of this paragraph a photograph is not a statement.]

d. Party Communications. With the exception of discoverable communications prepared by or for experts, and other discoverable [C]ommunications between agents or representatives or the employees of a party to the action or communications between a party and that party's agents, representatives or employees, when made subsequent to the occurrence or transaction upon which the suit is based, and in connection with the prosecution, investigation or defense of the particular suit, or in anticipation of the prosecution or defense of the claims made in [a part of] the pending litigation. [This exemption does not include communications prepared by or for experts that are otherwise

discoverable.] For the purpose of this paragraph, a photograph is not a communication.

e. Other Privileged Information. Any matter protected from disclosure by any other privilege.

Upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means, a party may obtain discovery of the materials otherwise exempt from discovery by subparagraphs c and d of this paragraph 3. Nothing in this paragraph 3 shall be construed to render non-discoverable the identity and location of any potential party, any person having knowledge or relevant facts, any expert who is expected to be called as a witness in the action, or of any consulting expert whose opinions or impressions have been reviewed by a testifying expert.

4. Presentation of Objections. [Either an objection or a motion for protective order made by a party to discovery shall preserve that objection without further support or action by the party unless the objection or motion is set for hearing and determined by the court. Any party may at any reasonable time request a hearing on any objection or motion for protective order.] The failure of a party to obtain a ruling prior to trial on any objection to discovery or motion for protective order does not waive such objection or motion.] In ~~response~~ [objecting] to an appropriate discovery request within the scope of paragraph 2, ~~directly/adding/it/the/next/~~ a party ~~who/seek~~ [seeking] to exclude any matter from discovery on the basis of an exemption

or immunity from discovery, must specifically plead the particular exemption or immunity from discovery relied upon and [at or prior to any hearing shall] produce [any] evidence [necessary to] support~~ing~~ such claim [either] in the form of affidavits [served at least seven days before the hearing] or [by] live testimony. presented at a hearing requested by either the requesting /or/ objecting party // When a party's objection concerns the discoverability of documents and is based on a specific immunity /or/ exemption // such as attorney-client privilege /or/ attorney-work product /the party's objection may be supported by an affidavit /or/ live testimony If the trial court determines that an IN/CAMERA/inspection [in camera inspection and review by the Court] of some or all of the documents [requested discovery] is necessary, the objecting party must segregate and produce the documents [discovery to the court in a sealed wrapper or by answers made in camera to deposition questions, to be transcribed and sealed in event the objection is sustained]. The court's /order/ concerning the need for an inspection shall specify a reasonable time /place and manner for making the inspection/ When a party seeks to exclude documents from discovery and the basis for objection is undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights, rather than a specific immunity or exemption, it is not necessary for the court to conduct an inspection /or/ the individual documents [an inspection and review of the particular discovery] before ruling on the objection. [After the date on which answers are to be served, objections are waived unless an

extension of time has been obtained by agreement or order of the court or good cause is shown for the failure to object within such period.

5. Protective Orders. (No change.)

6. Duty to Supplement. A party who has responded to a request for discovery that was correct and complete when made is under no duty to supplement his response to include information thereafter acquired, except the following shall be supplemented not less than thirty days prior to the beginning of trial unless the court finds that a good cause exists for permitting or requiring later supplementation.

a. A party is under a duty ~~§~~[r]easonably to supplement his response if he obtains information upon the basis of which:

(1) (No change.)

(2) (No change.)

b. (No change.)

c. (No change.)

[7. Discovery Motions. All discovery motions shall contain a certificate by the party filing same that efforts to resolve the discovery dispute without the necessity of court intervention have been attempted and failed.]

[COMMENT TO 1990 CHANGE: To eliminate the contradiction between Rule 166b 2(e)(1) and (2) and corresponding Rule 166b 3(e), Rule 166b 2(e)(1) and (2) have been modified. As modified, Rule 166b 2(e)(1) and (2) now make discoverable the impressions and opinions of a consulting expert if a testifying expert has reviewed those opinions and material, regardless of whether or not the

opinions and material form a basis for the opinion of the testi-  
fyng expert. The revisions keep the intent of Rule 166b 2(e)(1)  
and (2) and Rule 166b 3(e) consistent with regard to consulting  
experts. The amendments to Section 3 standardize language for  
the same meaning. New Section 7 was added to ensure that court  
time will not be taken to resolve discovery disputes unless the  
parties cannot resolve them without court intervention and  
provide that matters exempt under paragraph 3(c) are not made  
discoverable solely because the consultant may or is to be a fact  
witness only. The amendments to Section 4 expressly dispense with  
the necessity of doing anything more than serving objections to  
preserve discovery complaints in order to avoid unnecessary time  
and expense to parties and time of the courts, particularly where  
no party ever requests a hearing on the objection. The failure  
of any party to do more than merely object fully shall never  
constitute a waiver of any objection. The last sentence added to  
Section 4 was previously the second sentence of Rule 168(6) and  
was moved because it applies to all discovery objections.]

TRCP 120a. Special Appearance

1. (No change.)

2. (No change.)

[3. The court shall determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony. The affidavits, if any, shall be served at least seven days before the hearing, shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.]

7/ [4.] If the court sustains the objection to jurisdiction, an appropriate order shall be entered. If the objection to jurisdiction is overruled, the objecting party may thereafter appear generally for any purpose. Any such special appearance or such general appearance shall not be deemed a waiver of the objection to jurisdiction when the objecting party or subject matter is not amenable to process issued by the courts of this State.

[COMMENT TO 1990 CHANGE: To provide for proof by affidavit at special appearance hearings, with safeguards to responding parties. These amendments preserve Texas prior practice to place the burden of proof on the party contesting jurisdiction.]

TRCP 237a. Cases Remanded From Federal Court

When any cause is removed to the Federal Court and is afterwards remanded to the state court, the plaintiff shall file a certified copy of the order of remand with the clerk of the state court and shall forthwith give written notice of such filing to the attorneys of record for all adverse parties. All such adverse parties shall have fifteen days from the receipt of such notice within which to file an answer. [No default judgment shall be rendered against a party in a removed action remanded from federal court if that party filed an answer in federal court during removal.]

[COMMENT TO 1990 CHANGE: To preclude a default judgment is a case remanded from federal court if an answer was filed in federal court during removal.]

TRCP 299. Omitted Findings

~~Where~~ [When] 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~~ [ed] finding upon any ground of recovery or defense, no element of which has been ~~found by the trial court~~ [included in the findings of fact]; but ~~where~~ [when] one or more elements thereof have been found by the trial court, omitted unrequested elements, ~~where~~ [when] supported by evidence, will be supplied by presumption in support of the judgment. Refusal of the court to make a finding requested shall be reviewable on appeal.

[COMMENT TO 1990 CHANGE: Textual corrective change only.]

[TRCP 299A. Findings of Fact To Be Separately Filed and Not Recited In A Judgment

Findings of fact shall not be recited in a judgment. If there is a conflict between findings of fact recited in a judgment in violation of this rule and findings of fact made pursuant to Rules 297 and 298, the Rule 297 and 298 findings will control for appellate purposes. Findings of fact shall be filed with the clerk of the court as a document or documents separate and apart from the judgment.]

[COMMENT TO 1990 CHANGE: To cause trial courts to make findings of fact separate from the judgment and provide that the separate findings of fact are controlling on appeal.]

TRCP 308a. In Child Support Cases

In cases where the court has ordered periodical payments for the 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 // that // court // to // advise // with // and // represent // said // claimant // // it // shall // be // the // duty // of // said // attorney // // if // the // attorney // in // good // faith // believes // 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 // its // own // motion // // the // court // may // issue // a // show // cause // order // to // the // person // alleged // to // have // disobeyed // such // support // order // // commanding // that // person // to // appear // and // show // cause // why // they // 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 // // 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 any services. //If the court shall be of the opinion that any attorney's fee shall be paid, the same shall be assessed against the party in default and collected as costs.

[When the court has ordered child support or possession of or access to a child and it is claimed that the order has been violated, the person claiming that a violation has occurred shall make this known to the court. The court may appoint a member of the bar to investigate the claim to determine whether there is reason to believe that the court order has been violated, the attorney shall take the necessary action as provided under Chapter 14, Family Code. On a finding of a violation, the court may enforce its order as provided in Chapter 14, Family Code.]

Except by order of the court, no fee shall be charged by or paid to the attorney representing the claimant. If the court determines that an attorney's fee should be paid, the fee shall be adjudged against the party who violated the court's order. The fee may be assessed as costs of court, or awarded by judgment, or both.]

[COMMENT TO 1990 CHANGE: This rule has been completely rewritten and designed to broaden its application to cover problems dealing with possession and access to a child as well as support.]

TRCP 749c. Appeal Perfected

The appeal in any forcible detainer case shall be perfected when an appeal bond has been filed.

When a pauper's affidavit has been filed in lieu of the appeal bond, the appeal shall be perfected when the pauper's affidavit is filed with the court; / *however* / when the case involves nonpayment of rent / such appeal is perfected when both the pauper's affidavit has been filed and when the rental period's rent has been paid in the justice court registry. In a case where the pauper's affidavit is contested by the landlord, the appeal shall be perfected when the contest is overruled / and / if the case involves nonpayment of rent / the rental period's rent has been paid in the justice court registry.

[COMMENT TO 1990 CHANGE: To dispense with the appellant requirement of payment of any rent into the court registry.]

TRAP 9      Substitution of Parties

- (a) Death of a Party in Civil Cases. (No change.)
- (b) Death of Appellant in a Criminal Case. (No change.)
- (c) Public Officers; Separation from Office. (No change.)

[(d) Substitution for Other Causes. If substitution of a successor to a party in the appellate court is necessary for any reason other than death or separation from public office, the appellate court may order such substitution upon motion of any party at any time or as the court may otherwise determine.]

[COMMENT TO 1990 CHANGE: To provide mechanism for substitution of appellate parties as may be necessary.]

TRAP 20. Amicus Briefs

The clerk of the appellate court may receive but not file amicus curiae briefs. An amicus curiae shall comply with the briefing rules for the parties, and shall show in the brief that copies have been furnished to all attorneys of record in the case. [In civil cases, an amicus curiae brief shall not exceed 50 pages in length, exclusive of pages containing the table of contents, index of authorities, points of error, and any addendum containing statutes, rules, regulations, etc. The court may, upon motion and order, permit a longer brief.]

[COMMENT TO 1990 CHANGE: To provide for a maximum length for amicus curiae briefs in civil cases to conform with Rules 74(h) and 136(e).]





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

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

(c) (No change.)

(d) (No change.)

(e) (No change.)

(f) (No change.)

(g) Conservatorship or Custody. When the judgment is one involving the conservatorship or custody of a ~~child~~ [minor], the appeal, with or without security shall not have the effect of suspending the judgment as to the conservatorship or custody of

the ~~child~~ minor, unless it shall be so ordered by the court rendering the judgment. However, the appellate court, upon a proper showing, may permit the judgment to be superseded in that respect also.

(h) (No change.)

(i) (No change.)

(j) (No change.)

(k) (No change.)

[COMMENT TO 1990 CHANGE: To conform the rule to statute.]



TRAP 51. The Transcript on Appeal

(a) Contents. (No change.)

(b) Written Designation. At or before the time prescribed for perfecting the appeal, any party may file with the clerk a written designation specifying matter for inclusion in the transcript; the designation must be specific and the clerk shall disregard any general designation such as one for "all papers filed in the cause." ~~The failure of the clerk to include designated matter will not be grounds for complaint on appeal if the designation specifying such matter is not timely filed.~~ The party making the designation shall serve a copy of the designation on all other parties. [Failure to timely make the designation provided for in this paragraph shall not be grounds for refusing to file a transcript or supplemental transcript tendered within the time provided by Rule 5 4(a); however, t] The failure of the clerk to include designated matter will not be grounds for complaint on appeal, if the designation specifying such matter is not timely filed.

(c) Duty of Clerk. (No change.)

(d) Original Exhibits. (No change.)

[COMMENT TO 1990 CHANGE: To eliminate any consideration that timely designation is a jurisdictional requisite for appeal.]

TRAP 52.                    Preservation of Appellate Complaints

(a) General Rule. (No change.)

(b) Informal Bills of Exception and Offers of Proof. (No change.)

(c) Formal Bills of Exception. (No change.)

(d) Necessity for Motion for New Trial in Civil Cases. A point in a motion for new trial is prerequisite to appellate complaint in those instances provided in paragraph (b) of Rule 324 of the Texas Rules of Civil Procedure. [A party desiring to complain on appeal in a non-jury case that the evidence was legally or factually insufficient to support a finding of fact, that a finding of fact was established as a matter of law or was against the overwhelming weight of the evidence, or of the inadequacy or excessiveness of the damages found by the court shall not be required to comply with subdivision (a) of this rule.]

[COMMENT TO 1990 CHANGE: To clarify appellate requisites from non-jury trials.]

TRAP 53. The Statement of Facts on Appeal

(a) Appellant's Request. The appellant, at or before the time prescribed for perfecting the appeal, shall make a written request to the official reporter designating the portion of the evidence and other proceedings to be included therein. A copy of such request shall be filed with the clerk of the trial court and another copy served on the appellee. [Failure to timely request the statement of facts under this paragraph shall not prevent the filing of a statement of facts or a supplemental statement of facts within the time prescribed by Rule 5 4(a).]

(b) Other Requests. (No change.)

(c) Abbreviation of Statement. (No change.)

(d) Partial Statement. (No change.)

(e) Unnecessary Portions. (No change.)

(f) Certification by Court Reporter. (No change.)

(g) Reporter's Fees. (No change.)

(h) Form. (No change.)

(i) Narrative Statement. (No change.)

(j) Free Statement of Facts. (No change.)

(k) Duty of Appellant to File. (No change.)

(l) Duplicate Statement in Criminal Cases. (No change.)

(m) When No Statement of Facts Filed in Appeals of Criminal Cases. (No change.)

[COMMENT TO 1990 CHANGE: To eliminate any consideration that timely request is a jurisdictional requisite for appeal.]

TRAP 90. Opinions, Publication and Citation

(a) Decision and Opinion. The court of appeals shall hand down a written opinion which shall be as brief as practicable but which shall address every issue raised and necessary to final disposition of the appeal. Where the issues are clearly settled, the court shall write a brief memorandum opinion. ~~/which should not be published/~~

(b) Signing of Opinions. A majority of the justices participating in the decision of the case shall determine whether the opinion shall be signed by a justice or issued per curiam. The names of the justices participating in the decision shall be noted on all written opinions or orders handed down by a panel.

~~(c)~~ (c) Determination to Publish. A majority of the justices participating in the decision of a case shall determine, prior to the time it is issued, whether an opinion meets the criteria for publishing, and if it does not meet the criteria for publication, the opinion shall be distributed only to the persons specified in Rule 91, but a copy may be furnished to any interested person. On each opinion a notation shall be made to "publish" or "do not publish."

~~(d)~~ (d) Standards for Publication. An opinion by a court of appeals shall be published only if, in the judgment of a majority of the justices participating in the decision, it is one that (1) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal

issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority.

(d) [(e)] Concurring and Dissenting Opinions. Any justice may file an opinion concurring in or dissenting from the decision of the court of appeals. A concurring or dissenting opinion may be published if, in the judgment of its author, it meets one of the criteria established in paragraph (c), but in such event the majority opinion shall be published as well.

(f) (No change.)

(g) (No change.)

(h) Order of the Supreme Court. Upon the grant or refusal of an application for writ of error, ~~whether by affirmance or refusal of by refusal of or by refusal of or by refusal of or by refusal of~~ an opinion previously unpublished shall forthwith be released [by the clerk of the court of appeals] for publication. ~~///if the statute/confirm/so/for/for/~~

[Upon the denial or dismissal of an application for writ of error[,] an opinion previously unpublished shall forthwith be released by the clerk of the court of appeals for publication, if the Supreme Court so orders.

(i) (No change.)

[COMMENT TO 1990 CHANGE: To require publication of a court of appeals opinion following grant or refusal of writ of error by the Supreme Court of Texas and textual corrective changes.]

SECTION SEVENTEEN. SUBMISSIONS, ORAL ARGUMENTS, AND OPINIONS [IN  
THE COURT OF CRIMINAL APPEALS]

[COMMENT TO 1990 CHANGE: To correct caption.]

