

AUGUST 25, 1989

SUPREME COURT ADVISORY COMMITTEE
REPORT TO SUPREME COURT OF TEXAS

RULE:

TRCP 3a
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TRCP 5
TRCP 10
TRCP 18b
TRCP 21
TRCP 21a
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LHS Control
Copy for 2-9-90
Revisions

RECOMMENDED BY:

Unanimity
Unanimity
Unanimity
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Unanimity
Unanimity
Unanimity
Unanimity
Unanimity

- ~~1. state or not a burden~~
2. Balancing test
- ~~3. Open government~~
4. Discovery - Trade Secret Fair Trial
5. Settlement agreements
NOT filed
6. Destruction of Exhibits?

Unanimity

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TRCP 3a		Unanimity
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TRCP 60		Unanimity
TRCP 63		Unanimity
TRCP 67		Unanimity
TRCP 72		Unanimity
TRCP 73		Unanimity
TRCP 87		Unanimity
TRCP 106		Unanimity
TRCP 107		Unanimity
TRCP 120a		Unanimity
TRCP 166		Unanimity
TRCP 166a		Unanimity
TRCP 166b		Unanimity
TRCP 167a		Majority
TRCP 168		Unanimity
TRCP 169		Unanimity
TRCP 183		Unanimity
TRCP 184		Majority
TRCP 184a		Majority
TRCP 200		Unanimity
TRCP 201		Unanimity
TRCP 206		Unanimity
TRCP 208		Unanimity
TRCP 216		Unanimity
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TRCP 272	Unanimity
TRCP 273	Unanimity
TRCP 274	Unanimity
TRCP 275	Unanimity
TRCP 276	Unanimity
TRCP 277	Unanimity
TRCP 278	Unanimity
TRCP 279	Unanimity
TRCP 294	Unanimity
TRCP 296	Majority
TRCP 297	Unanimity
TRCP 298	Unanimity
TRCP 299	Majority
TRCP 299A	Majority
TRCP 305	Unanimity
TRCP 308a	Unanimity
TRCP 534	Unanimity
TRCP 536	Unanimity
TRCP 536a	Unanimity
TRCP 571	Unanimity
TRCP 687	Unanimity
TRCP 749c	Unanimity
TRCP 771	Unanimity
TRCP 781	Unanimity
TRAP 1	Unanimity
TRAP 4	Unanimity
TRAP 5	Unanimity
TRAP 9	Unanimity
TRAP 12	Unanimity
TRAP 15a	Unanimity
TRAP 17	Unanimity
TRAP 20	Unanimity
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TRAP 43	Unanimity
TRAP 46	Unanimity
TRAP 47	Unanimity
TRAP 49	Unanimity
TRAP 51	Unanimity
TRAP 52	Unanimity
TRAP 53	Unanimity
TRAP 54	Unanimity
TRAP 56	Unanimity
TRAP 57	Unanimity
TRAP 59	Unanimity
TRAP 72	Unanimity
TRAP 74	Unanimity
TRAP 79	Unanimity
TRAP 90	Unanimity
TRAP 91	Unanimity
TRAP 100	Unanimity
TRAP 130	Unanimity
TRAP 131	Unanimity
TRAP 132	Unanimity

TRAP 133	Unanimity
TRAP 134	Unanimity
TRAP 135	Unanimity
TRAP 136	Unanimity
HEADING TO SECTION TEN	Unanimity
TRAP 160	Unanimity
TRAP 172	Unanimity
TRAP 181	Unanimity
TRAP 182	Unanimity
TRAP 190	Unanimity
HEADING TO SECTION TWELVE	Unanimity
HEADING TO SECTION THIRTEEN	Unanimity
HEADING TO SECTION FOURTEEN	Unanimity
HEADING TO SECTION SEVENTEEN	Unanimity
HEADING TO SECTION EIGHTEEN	Unanimity
APPENDIX FOR CRIMINAL CASES	Unanimity
TRCE 604	Unanimity
TRCE 614	Unanimity
TRCE 703	Unanimity

Minutes contained herein as an Appendix.

TRCP 3a. ~~RULES BY OTHER COURTS~~ [Local Rules]

Each ~~court or appellate~~, administrative judicial region, district court, county court, county court at law, and probate court, may make and amend ~~the~~ [local] rules governing practice before such courts, provided;

(1) No change.

~~[(2) no time period provided by these rules may be altered by local rules; and]~~

~~(2)~~ (3) any proposed [local] rule or amendment shall not become effective until it is submitted and approved by the Supreme Court of Texas; and

~~(3)~~ (4) any proposed [local] rule or amendment shall not become effective until at least thirty (30) days after its publication in a manner reasonably calculated to bring it to the attention of attorneys practicing before the court or courts for which it is made; ~~and~~

~~(4)~~ (5) all [local] rules [or amendments] adopted and approved in accordance herewith are made available upon request to the members of the bar/[, and]

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

[COMMENT TO 1990 CHANGE: To make Texas Rules of Civil Procedure timetables mandatory and to preclude use of unpublished local rules or other "standing" orders or local practices from determining issues of substantive merit.]

TRCP 4. Computation [of Time]

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor a legal holiday. [Saturdays, Sundays, and legal holidays shall not be counted for any purpose in any time period of five days or less in these rules, except that Saturdays, Sundays, and legal holidays shall be counted for purpose of the three day period in Rule 21a, extending other periods by three days when service is made by registered or certified mail or by telephonic document transfer.]

[COMMENT TO 1990 CHANGE: Amended to omit counting Saturdays, Sundays, and legal holidays in all periods of less than five days except in the three day extension provision of Rule 21a.]

TRCP 5. Enlargement [of Time]

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

[If any document] is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail ~~on/day/for/next~~ [on or] before the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed filed in time. ~~/provided/in/cases/that/a~~ [A] legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing.

[COMMENT TO 1990 CHANGE: To make the last date for mailing under Rule 5 coincide with the last date for filing.]

TRCP 10. Withdrawal of Counsel

Withdrawal of an attorney may be effected /ay/ upon motion showing good cause and under such conditions imposed by the court /or/ by upon presentation by such attorney of a notice of substitution designating the name, address, telephone number, and State Bar of Texas identification number of the substitute attorney, with the signature of the attorney to be substituted, and an averment that such substitution has the approval of the client and that the withdrawal is not sought for delay only. If the attorney in charge withdraws and /or/ other counsel remain /or/ become substituted, another counsel may be designated /or/ referred with notice to all other parties in accordance with Rule 21a, as attorney in charge.

[An attorney may withdraw from representing a party only upon written motion for good cause shown. If another attorney is to be substituted as counsel for the party, the motion shall state: the name, address, telephone number, telecopier number, if any, and State Bar of Texas identification number of the substitute attorney; that the party approves the substitution; and that the withdrawal is not sought for delay only. If another attorney is not to be substituted as counsel for the party, the motion shall state: that a copy of the motion has been delivered to the party; that the party has been notified in writing of his right to object to the motion; whether the party consents to the motion; and all pending settings and deadlines. If the motion is granted, the withdrawing attorney shall immediately notify the party in writing of any additional settings or deadlines of which

the attorney has knowledge at the time of the withdrawal and has not already notified the party. The court may impose further conditions upon granting leave to withdraw. Notice or delivery to a party shall be either made to the party in person or mailed to the party's last known address by both certified and regular first class mail. If the attorney in charge withdraws and other counsel remains or becomes substituted, another attorney in charge must be designated of record with notice to all other parties in accordance with Rule 21a.]

[COMMENT TO 1990 CHANGE: The amendment repeals the present rule and clarifies the requirements for withdrawal.]

TRCP 18b. Grounds For Disqualification and Recusal of Judges

(1) Disqualification. (No change.)

(2) Recusal. ~~Judges shall recuse themselves in proceedings in which their impartiality might reasonably be questioned, including but not limited to, instances in which they have a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.~~ A judge shall recuse himself in any proceeding in which:

- (a) his impartiality might reasonably be questioned;
- (b) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
- (c) he or a lawyer with whom he previously practiced law has been a material witness concerning it;
- (d) he participated as counsel, adviser or material witness in the matter in controversy, or expressed an opinion concerning the merits of it, while acting as an attorney in government service;
- (e) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(f) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person;

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(3) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(4) In this rule:

(a) "proceeding" includes pretrial, trial, or other stages of litigation;

(b) the degree of relationship is calculated according to the civil law system;

(c) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(d) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

(v) an interest as a taxpayer or utility ratepayer, or any similar interest, is not a "financial interest" unless the outcome of the proceeding could substantially affect the liability of the judge or a person related to him within the third degree more than other judges.

(5) The parties to a proceeding may waive any ground for recusal after it is fully disclosed on the record.

(6) If a judge does not discover that he is recused under subparagraphs (a)(5) or (a)(6)(iii) until after he has devoted substantial time to the matter, he is not required to recuse himself if he or the person related to him divests himself of the interest that would otherwise require recusal.]

[COMMENT TO 1990 CHANGE: The grounds for a judge's mandatory recusal have been expanded from those in prior Rule 18b(2).]

TRCP 21. [Filing and Serving Pleadings and] Motions

A ny [pleading, plea, motion, or] application to the court for an order, whether in the form of a motion, plea or other form of request, unless presented during a hearing or trial, shall be ~~made~~ [filed with the clerk of the court] in writing, shall state the grounds therefor, shall set forth the relief or order sought, [and a true copy shall be served on all other parties,] and shall be ~~filed/and~~ noted on the docket.

An application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, shall be served upon [all other] ~~the/adversely/party~~ [parties], not less than three days before the time specified for the hearing unless otherwise provided by these rules or shortened by the court.

[If there is more than one other party represented by different attorneys, one copy of such pleading shall be delivered or mailed to each attorney-in-charge.]

[The party or attorney of record, shall certify to the court compliance with this rule in writing over signature on the filed pleading, plea, motion or application.]

[After one copy is served on a party that party may obtain another copy of the same pleading upon tendering reasonable payment for copying and delivering.]

[COMMENT TO 1990 CHANGE: To require filing and service of all pleadings and motions on all parties and to consolidate notice and service Rules 21, 72 and 73, into a single rule.]

TRCP 21a. ~~Notice~~ [Methods of Service]

Every notice required by these rules, [and every pleading, plea, motion, or other form of request required to be served under Rule 21,] other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy [thereof] ~~of the notice or of the document to be served, or his~~ of the notice or of the document to be served, or his [the party's] duly authorized agent or ~~his~~ attorney of record, either in person or by [agent or by courier receipted delivery or by certified or] registered mail, to [the party's] ~~his~~ last known address, [or by telephonic document transfer to the party's current telecopier number,] or it may be given in such other manner as the court in its discretion may direct. Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Whenever a party has the right or is required to do some act ~~or take some proceedings~~ within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon by mail [or by telephonic document transfer], three days shall be added to the prescribed period. ~~If~~ [Notice] may be served by a party to the suit, ~~or his~~ [an] attorney of record, ~~or by the proper~~ [a] sheriff or constable, or by any other person competent to testify. [The party or attorney

of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument.] A ~~written~~ ~~statement~~ certificate by [a party or] an attorney of record, or the return of an officer, or the affidavit of any person showing service of a notice shall be prima facie evidence of the fact of service. Nothing herein shall preclude any party from offering proof that the notice or ~~document~~ [instrument] was not received, or, if service was by mail, that it was not received within three days from the date of deposit in a post office or official depository under the care and custody of the United States Postal Service, and upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just. The provisions hereof relating to the method of service of notice are cumulative of all other methods of service prescribed by these rules. ~~When these rules provide for notice or service by registered mail / such notice or service may also be had by certified mail /~~

[COMMENT TO 1990 CHANGE: Delivery means and technologies have significantly changed since 1941 and this amendment brings approved service practices more current.]

TRCP 21b. Sanctions for Failure to Serve or Deliver Copy of Pleadings and Motions

If any party fails to serve on or deliver to the other parties a copy of any pleading, plea, motion, or other application to the court for an order in accordance with Rules 21 and 21a, the court may in its discretion, on notice and hearing order all or any part of such document stricken, direct that such party shall not be permitted to present grounds for relief or defense contained therein, require such party to pay to the other parties the amount of reasonable costs and expenses including attorneys fees incurred as a result of the failure, or make such other order with respect to the failure as may be just pursuant to Rule 215.

[COMMENT TO 1990 CHANGE: Repealed provisions of Rule 73, to the extent same are to remain operative, are moved to this new Rule 21b to provide sanctions for the failure to serve any filed documents on all parties.]

TRCP 26. Clerk's Court Docket

Each clerk shall also keep a court docket in a ~~well/bound~~
~~book~~ [permanent record] ~~in~~ that ~~he~~ shall ~~enter~~ [include] the
number of the case and the names of parties, the names of the
attorneys, the nature of the action, the pleas, the motions, and
the ruling of the court as made.

[COMMENT TO 1990 CHANGE: To conform to modern technologies for
keeping of permanent records by clerks.]

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.]

TRCP 60. Of Intervenor

Any party may intervene, subject to being stricken out by the court for sufficient cause on the motion of the opposite party; and such intervenor shall, in accordance with Rule 72 [21 and 21a], notify the opposite party or his attorney of the filing of such pleadings within five days from the filing of same.

[COMMENT TO 1990 CHANGE: To revise rule reference to Rules 21 and 21a instead of repealed Rule 72.]

TRCP 63. Amendments [and Responsive Pleadings]

Parties may amend their pleadings, [respond to pleadings on file of other parties,] file suggestions of death and make representative parties, and file such other pleas as they may desire by filing such pleas with the clerk at such time as not to operate as a surprise to the opposite party; provided, that any ~~amendment~~ [pleadings, responses, or pleas,] offered for filing within seven days of the date of trial or thereafter, or after such time as may be ordered by the judge under Rule 166, shall be filed only after leave of the judge is obtained, which leave shall be granted by the judge unless there is a showing that such ~~amendment~~ [filing] will operate as a surprise of the opposite party.

[COMMENT TO 1990 CHANGE: To require that all trial pleadings of all parties, except those permitted by Rule 66, be on file at least seven days before trial unless leave of court permits later filing.]

TRCP 67. Amendments to Conform to Issues Tried Without
Objection

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. In such case such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made by leave of court upon motion of any party at any time up to the submission of the case to the Court or jury, but failure so to amend shall not affect the result of the trial of these issues; provided that written pleadings, before the time of submission, shall be necessary to the submission of ~~special~~ ~~issues~~ [questions], as is provided in Rules ~~277~~ [271] and ~~279~~ [275].

[COMMENT TO 1990 CHANGE: References to Rules 277 and 279 are changed because the pertinent language of Rule 277 was rearranged to Rule 271 and of Rule 279 to Rule 275].

TRCP 72 Filing/Pleadings/Copy/Delivered/To/All/Parties/Of
/////////Attorneys [Repealed]

Whenever any party files, or asks leave to file any pleading, plea, or motion of any character which is not by law or by these rules required to be served upon the adverse party, he shall at the same time either deliver or mail to the adverse party or their attorney(s) of record a copy of such pleading, plea or motion. The attorney or authorized representative of such attorney, shall certify to the court on the filed pleading in writing over his personal signature, that he has complied with the provisions of this rule. If there is more than one adverse party and the adverse parties are represented by different attorneys, one copy of such pleading shall be delivered or mailed to each attorney representing the adverse parties, but a firm of attorneys associated in the case shall count as one. Not more than four copies of any pleading, plea, or motion shall be required to be furnished to adverse parties, and if there be more than four adverse parties, four copies of such pleading shall be deposited with the clerk of court, and the party filing them, or asking leave to file them, shall inform all adverse parties or their attorneys of record that such copies have been deposited with the clerk. The copies shall be delivered by the clerk to the first four applicants entitled thereto, and in such case no copies shall be required to be mailed or delivered to the adverse parties or their attorneys by the attorney thus filing the

attorney // he cannot require another copy of the same pleading to
be furnished to him

[COMMENT TO 1990 CHANGE: Repealed and surviving provisions
consolidated to Rule 21.]

TRCP 73. Failure to furnish copy of pleading to adverse party

[Repealed]

If any party fails to furnish the adverse party with a copy of any pleading in accordance with the preceeding rule, the court may in its discretion, on motion, order all or any party of such pleading struck, or direct that such party shall not be permitted to present grounds for relief or defense contained therein, require such party to pay to the adverse party the amount of reasonable costs and expenses incurred as a result of the failure, including attorney fees, or make such order with respect to the failure as may be just.

[COMMENT TO 1990 CHANGE: Repealed and surviving provisions moved to new Rule 21b.]

TRCP 87. Determination of Motion to Transfer

1. Consideration of Motion. (No change.)

2. Burden of Establishing Venue

(a) (No change.)

(b) Cause of Action. It shall not be necessary for a claimant to prove the merit[s] of a cause of action, but the existence of a cause of action, when pleaded properly, shall be taken as established as alleged by the pleadings[.]. ~~When the [defendant specifically denies the] claimant's~~ venue allegations are specifically denied, the pleader [claimant] is required, by prima facie proof as provided in paragraph 3 of this rule, to support his [such] pleading that the cause of action taken as established by the pleadings, or a part thereof of such cause of action, accrued in the county of suit. by prima facie proof as provided in paragraph 3 of this rule. If a defendant seeks transfer to a county where the cause of action or a part thereof accrued, it shall be sufficient for the defendant to plead that if a cause of action exists, then the cause of action or part thereof accrued in the specific county to which transfer is sought, and such allegation shall not constitute an admission that a cause of action in fact exists. ~~A~~ But the defendant who seeks to transfer a case to a county where the cause of action or part thereof accrued shall be required to support his ~~motion~~ pleading, by prima facie proof as provided in paragraph 3 of this rule, that, if a cause of action exists, it or a part thereof accrued in the county to which transfer is sought.

(c) (No change.)

3. Proof

(a) Affidavit and Attachments. All venue facts, when properly pleaded, shall be taken as true unless specifically denied by the adverse party. When a venue fact is specifically denied, the party pleading the venue fact must make prima facie proof of that venue fact[; provided, however, that no party shall ever be required for venue purposes to support by prima facie proof the existence of a cause of action or part thereof, and at the hearing the pleadings of the parties shall be taken as conclusive on the issues of existence of a cause of action. Prima facie proof is made when the venue facts are properly pleaded and an affidavit, and any duly proved attachments to the affidavit, are filed fully and specifically setting forth the facts supporting such pleading. Affidavits 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.

(b) The Hearing. (No change.)

(c) (No change.)

4. No Jury. (No change.)

5. No Rehearing. (No change.)

6. (No change.)

[COMMENT TO 1990 CHANGE: To clarify that no proof of any kind is required of any party to establish any element of a cause of action or part thereof; proof is restricted to place, if any, and

the pleadings establish all other elements and may not be contro-
verted for venue purposes as to the existence of a cause of
action or part thereof.]

TRCP 106. Method of Service.

(a) (No change.)

(b) Upon motion supported by affidavit stating the location of the defendant's usual place of business or usual place ~~of~~ of abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempted under either (a)(1) or (a)(2) at the location named in such affidavit but has not been successful, the court may authorize service

(1) (No change.)

(2) (No change.)

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

TRCP 107. Return of ~~Citation~~ [Service]

(No change.)

(No change.)

No default judgment shall be granted in any cause until the citation~~[, or process under Rule 108 or 108a,]~~ with proof of service as provided by this rule [or by Rule 108 or 108a], or as ordered by the court in the event citation is executed under Rule 106, shall have been on file with the clerk of the court ten days, exclusive of the day of filing and the day of judgment.

[COMMENT TO 1990 CHANGE: To state more directly that a default judgment can be obtained when the defendant has been served with process in a foreign country pursuant to the provisions of Rule 108 or 108a.]

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 166. Pre-Trial [Conference] ~~Próccéadairé / Fóirneálaí~~
~~I\$Vé\$~~

In any action, the court may in its discretion [, or on request of any party,] direct the attorneys for the parties and the parties or their duly authorized agents to appear before it for a conference to consider:

(a) All [pending] dilatory pleas[,] ~~and/all~~ motions[,] and exceptions ~~relating to a suit/pending~~;

(b) The necessity or desirability of amendments to the pleadings;

[(c) Discovery schedule;]

[(d) Requiring written statements of the parties' contentions;]

(e) [Contested issues of fact and] ~~The~~ simplification of the issues;

(f) The possibility of obtaining ~~admissions~~ [stipulations] of fact ~~and/of documents which will avoid unnecessary proof~~;

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

[(h) The exchange of a list of direct fact witnesses, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before the time of trial, who will be called to testify at trial, stating their address and telephone number, and the subject of the testimony of each such witness;

(i) The exchange of a list of expert witnesses who will be called to testify at trial, stating their address and telephone number, and the subject of the testimony and opinions that will be proffered by each expert witness;

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

(k) Proposed jury charge questions, instructions, and definitions for a jury case or proposed findings of fact and conclusions of law for a non-jury case;

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

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

~~(n)~~ [n] The advisability of a preliminary reference of issues to a master or auditor for findings to be used as evidence when the trial is to be by jury.

[(o) The Settlement of the case. To aid such consideration, the court may encourage settlement.]

~~(p)~~ (p) Such other matters as may aid in the disposition of the action. The court shall make an order that recites the action taken at the pre-trial conference, the amendments allowed to the pleadings, the time within which same may be filed, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions[,] ~~of~~ agreements of counsel[,] or rulings of the court]; and such order when ~~entered~~ [rendered]

shall control the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or extend it to all actions.

[COMMENT TO 1990 CHANGE: To add new paragraphs to broaden the scope of the rule and to express the ability of the trial courts at pretrial hearings to encourage settlement.]

TRCP 166a. Summary Judgment

(a) (No change)

(b) (No change)

(c) (No change)

[(d) Appendixes], References and Other Use of Discovery
Not Otherwise on File.]

Discovery products not on file with the clerk may be used as for summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the specific discovery or specific references or other instruments, is served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least twenty-one (21) days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least seven (7) days before the hearing if such proofs are to be used to oppose the summary judgment.

(d) (e) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including

the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted.

(f) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(g) When Affidavits are Unavailable. 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 refuse the application for judgment or 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.

(h) Affidavits Made in Bad Faith. 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 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.

[COMMENT TO 1990 CHANGE: This amendment provides a mechanism for using previously non-filed discovery in summary judgment practice. Such proofs must all be filed in advance of the hearing in accordance with Rule 166a. Paragraphs (d) through (g) are renumbered (e) through (h).]

TRCP 166b. 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/ forms/ a/ basis/ either/ in whole/ or/ in part/ of/ the/ opinion/ of/ an/ expert/ who/ is/ to be/ called/ a/ witness/ [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/ forms/ a/ basis/ either/ in/ whole/ or/ in/ part/ of/ the/ opinion/ of/ an/ expert/ who/ is/ to/ be/ called/ a/ witness/ [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 [consulting] expert's work/product/notes/ opinion or impressions will be called as a [n expert] witness [opinion or impressions have been reviewed by a testifying expert].

c. Witness Statements. The written statements of potential witnesses and parties, if/when/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/without/exception/of/discovery/able/communications/prepared/by/for/experts//and/other/discovery/able/communications 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 discover-

