

SUPREME COURT ADVISORY COMMITTEE

MAY 26 - 27, 1989 MEETING

AGENDA

1. Report on Suggested Pattern Local Rules: Luther H. Soules III
2. Report on n.r.e. designation: Rusty McMains
3. Report on Special Project on Family Law Section: Kenneth Fuller
4. Report on Special Project re: Code of Judicial Conduct: David J. Beck and Frank Branson
5. Report of Standing Subcommittee on Rules of Civil Evidence: Newell Blakely
6. Report of Standing Subcommittee on Rules of Appellate Procedure: Rusty McMains
7. Report of Standing Subcommittee on TRCP 1-14: Frank Branson or other committee person
8. Report of Standing Subcommittee on TRCP 15-165 including special report on Rule 51(b): David Beck
9. Report of Standing Subcommittee on TRCP 166b-215: Professor Dorsaneo
10. Report of Standing Subcommittee on TRCP 216-314: Professor Edgar
11. Report of Standing Subcommittee on TRCP 315-331: Harry Tindall
12. Report of Standing Subcommittee on TRCP 523-591: Anthony Sadberry
13. Report of Standing Subcommittee on TRCP 592-734: Steve McConnico
14. Report of Standing Subcommittee on TRCP 737-813: Professor Carlson

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Rule 54. Time to File Record

(a) No change.

(b) In Criminal Cases - Ordinary Timetable. The transcript and statement of facts shall be filed in the appellate court within sixty days after the day sentence is imposed or suspended in open court or the order appealed from has been signed, if a motion for new trial is not filed. If a timely motion for new trial is filed, the transcript and statement of facts shall be filed within one hundred twenty days after the day sentence is imposed or suspended in open court or the order appealed from has been signed.

(c) No change.

Comment: To conform to the rule amendment adopted by the Court of Criminal Appeals.

Court of Criminal Appeals

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

TELEFAX
SAN ANTONIO
(512) 224-7073
AUSTIN
(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
HERBERT GORDON DAVIS
ROBERT E. ETLINGER
MARY S. FENLON
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J. KEN NUNLEY
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SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL *
LUTHER H. SOULES III **
WILLIAM T. SULLIVAN
JAMES P. WALLACE *

WRITER'S DIRECT DIAL NUMBER:

April 17, 1989

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

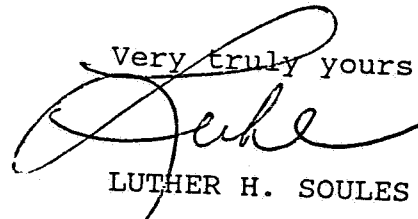
Re: Proposed Changes to Rule 54
Texas Rules of Civil Procedure

Dear Mr. Beck:

Enclosed please find a copy of a letter I received from Ralph H. Brock regarding suggested changes to Rule 54 along with a redlined version of same. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,



LUTHER H. SOULES III

LHSIII/hjh

Enclosure

cc: Justice Nathan Hecht
Justice Stanton Pemberton

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MoPac EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 1201
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

TEXAS BOARD OF LEGAL SPECIALIZATION
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RESIDENTIAL REAL ESTATE LAW

00594

RALPH H. BROCK
LAWYER

First Federal Plaza Annex
1313 Broadway, Suite 6A

P.O. Box 959
Lubbock, Texas 79408-0959

Telephone
806/762-5671

HJH
SCAC SubC
C.A.S.
SCAC Agenda
J

Saturday, April 15, 1989

Luther H. Soules, III
Chairman
Supreme Court Advisory Committed
Tenth Floor
175 East Houston Street
San Antonio, Texas 78205-2230

Dear Luke:

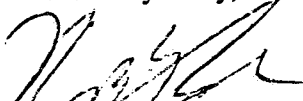
Thank you for your letter of the 11th concerning the recent order of the Court of Criminal Appeals amending the Rules of Appellate Procedure. I agree that the adoption of the amendments contained in the Supreme Court's order of July 15, 1987, cures all of the problems related to those rules.

There are now two versions of Rule 54 (b), though! Even though Rule 54 (a) and the Court of Criminal Appeals' version of Rule 54 (b) each provide 120 days for filing the record after a timely motion for new trial, the text of the Supreme Court's version of Rule 54 (b) still purports to allow only 100 days in criminal cases. The Supreme Court needs to adopt the Court of Criminal Appeals' amendment in order to achieve complete consistency.

I was aware of the Court of Criminal Appeals' January 9, 1989, order shortly after it appeared in the *Texas Register*, and I intended to mention the amendments in the latest *Appellate Advocate*, but (as you will see when your copy arrives in the next few weeks) there just wasn't room. Frankly, I failed to notice the two versions of Rule 54 (b), and it was only when I received your letter and took a closer look that I discovered the problem with Rule 54 (b). Of course, that is a housekeeping matter which can be easily remedied.

Thank you for the opportunity to offer this input to your committee.

Yours very truly,



Ralph H. Brock
RHB/

cc: Hon. Nathan Hecht
Hon. Sam Houston Clinton

60595



COPY TO LHS
11/20/87

CHIEF JUSTICE
JOHN L. HILL

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

CLERK
MARY M. WAKEFIELD

JUSTICES
ROBERT M. CAMPBELL
FRANKLIN S. SPEARS
C. L. RAY
JAMES P. WALLACE
TED Z. ROBERTSON
WILLIAM W. KILGARLIN
RAUL A. GONZALEZ
OSCAR H. MAUZY

EXECUTIVE ASS'T.
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.
MARY ANN DEFIBAUGH

November 19, 1987

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Reed & Butts
800 Milam Building
San Antonio, Tx 78205


Mr. Doak Bishop, Chairman
Administration of Justice Committee
Hughes & Luce
1000 Dallas Bldg.
Dallas, Tx 75201

Re: TEX. R. CIV. P. 62 and 63.

Dear Luke and Doak:

We have considered two different applications recently regarding whether a counterclaim is an amended pleading as contemplated by Tex. R. Civ. P. 62 and 63. If we are getting the question that means it is probably arising with some frequency in the lower courts. Perhaps we should clarify it.

Sincerely,


James P. Wallace
Justice

JPW:fw
Enclosure

00596



THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

CHIEF JUSTICE
JOHN L. HILL

JUSTICES
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Sincerely,


James P. Wallace
Justice

JPW:fw
Enclosure

00597

TRCP

Rule 72 Filing Pleadings: Copy Delivered to All Parties or Attorneys

[A] Whenever any party [who] 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 [all other parties] the adverse party, he shall at the same time either deliver [by any method approved for service in Rule 21a to] or mail to the adverse party [all parties not required to be served] or their attorney(s) [attorneys] of record a copy of such pleading, plea, or motion. The [party or] attorney or authorized representative of such attorney [of record], shall certify to the court [compliance with this rule in writing over signature] on the filed pleading, [plea or motion]. In writing over his personal signature, that he has complied with the provisions of this rule. If there is more than one adverse [other] 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 thereof, 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/pleading. After [one] a copy of a pleading is furnished, to/an
attorney/the [a party] cannot require another copy of the same
pleading to/be/furnished/to/him [without tendering reasonable
charge for copying and delivering.]

COMMENT: Copy technology has significantly changed since 1941
and this amendment brings approved copy service practices more
current.

LAW OFFICES
LUTHER H. SOULES III
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR
REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

KENNETH W. ANDERSON
KEITH M. BAKER
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LAURA D. HEARD
REBA BENNETT KENNEDY
CLAY N. MARTIN
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
LUTHER H. SOULES III

WAYNE I. FAGAN
ASSOCIATED COUNSEL

TELECOPIER
(512) 224-7073

September 16, 1988

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

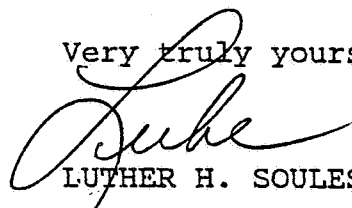
Re: Proposed Change to Rules 21, 21a, 72 and 73

Dear Mr. Beck:

Enclosed herewith please find a copy of my letter to Judge Stanley Pemberton regarding regarding Rules 21, 21a, 72 and 73. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,


LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Honorable William W. Kilgarlin

00600

Unan. approved

R 72

STATE BAR OF TEXAS

COMMISSION ON ADMINISTRATION OF JUSTICE

AMENDMENT OF EXISTING RULE - TEXAS RULES OF CIVIL PROCEDURE

Rule 72. Filing Pleadings: Copy Delivered to All Parties or Attorneys

...les, or asks leave to file any pleading, plea, or motion not by law or by these rules required to be served upon all other parties the adverse party, he shall at the same time either deliver or mail to the adverse party all parties not required to be served or their attorney(s) attorneys of record a copy of such pleading, plea, or motion. The party or attorney of record, shall certify to the court compliance with this rule in writing over his personal signature, that he has complied with the provisions of this rule. If there is more than one adverse other 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 pleading. After a copy of a pleading is furnished to an attorney, he cannot require another copy of the same pleading to be furnished to him.

- ii. Proposed Rule: Mark through deletions to existing rule with dashes; underline proposed new wording.

A Whenever any party who 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 all other parties the adverse party, he shall at the same time either deliver by any method approved for service in Rule 21a to or mail to the adverse party all parties not required to be served or their attorney(s) attorneys of record a copy of such pleading, plea, or motion. The party or attorney of record, shall certify to the court compliance with this rule in writing over signature on the filed pleading, plea or motion. in writing over his personal signature, that he has complied with the provisions of this rule. If there is more than one adverse other 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

(continued on attached page)

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE – TEXAS RULES OF CIVIL PROCEDURE.

- I. Exact wording of existing Rule: Rule 72. Filing Pleadings: Copy Delivered to All Parties or Attorneys

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 pleading. After a copy of a pleading is furnished to an attorney, he cannot require another copy of the same pleading to be furnished to him.

- II. Proposed Rule: Mark through deletions to existing rule with dashes; underline proposed new wording.
- A ~~Whenever any party who~~ 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 all other parties ~~the adverse party,~~ he shall at the same time either deliver by any method approved for service in Rule 21a to or mail to the adverse party ~~all parties not required to be served~~ or their ~~attorney(s)~~ attorneys of record a copy of such pleading, plea, or motion. The party or attorney ~~or~~ authorized representative of such attorney of record, shall certify to the court compliance with this rule in writing over signature on the filed pleading, plea or motion. ~~in writing over his personal signature,~~ that he has complied with the provisions of this rule. If there is more than one adverse other 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
- (continued on attached page)

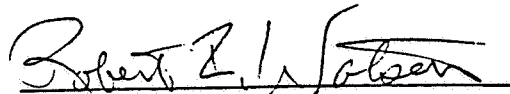
Rule 72. (continued)

- II. 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 pleading. After one a copy of a pleading is furnished, to an attorney, he a party cannot require another copy of the same pleading to be furnished to him without tendering reasonable charge for copying and delivering.

Brief statement of reasons for requested changes and advantages to be served by proposed new Rule:

Copy technology has significantly changed since 1941 and this amendment brings approved copy service practices more current. It also revives the requirement that service be made on all other parties, not just those which are adverse. Because of the numerous instances when parties on the same side of a case may have interests that are not necessarily consistent, it is submitted that it is fairer and far more efficient to notify all parties, not just those which are nominally adverse. This can eliminate unnecessary duplication of effort on the part of parties and the courts when persons who did not receive notice are required to seek reconsideration of issues which they believe have a material effect on them and on the potential outcome of the case.

Respectfully submitted,



Robert F. Watson
LAW, SNAKARD & GAMBILL
3200 Texas American Bank Bldg.
Fort Worth, Texas 76102

January 16, 1989

LAW OFFICES

SOULES & WALLACE

ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
TENTH FLOOR

REPUBLIC OF TEXAS PLAZA
175 EAST HOUSTON STREET
SAN ANTONIO, TEXAS 78205-2230
(512) 224-9144

TELEFAX
SAN ANTONIO
(512) 224-7073

AUSTIN
(512) 327-4105

KENNETH W. ANDERSON, JR.
KEITH M. BAKER
CHRISTOPHER CLARK
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ROBERT E. ETLINGER†
MARY S. FENLON
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CLAY N. MARTIN
J. KEN NUNLEY
JUDITH L. RAMSEY
SUSAN SHANK PATTERSON
SAVANNAH L. ROBINSON
MARC J. SCHNALL •
LUTHER H. SOULES III **
WILLIAM T. SULLIVAN
JAMES P. WALLACE †

WRITER'S DIRECT DIAL NUMBER:
(512) 299-5340

January 30, 1989

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77002

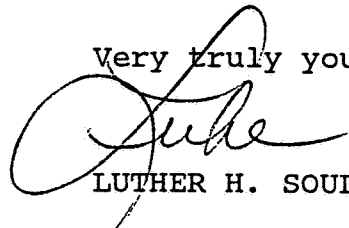
Re: Proposed Changes to Rules 21, 21(a), 72 and 73

Dear Mr. Beck:

Enclosed please find a copy of a letter forwarded to me by Evelyn A. Avent, Secretary for the Committee on Administration of Justice regarding changes to Rules 21, 21(a), 72 and 73. Please prepare to report on the matter at our next SCAC meeting. I will include the matter on our next agenda.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,



LUTHER H. SOULES III

LHSIII/hjh
Enclosure
cc: Justice Nathan Hecht

AUSTIN, TEXAS OFFICE: BARTON OAKS PLAZA TWO, SUITE 315
901 MO PAC EXPRESSWAY SOUTH, AUSTIN, TEXAS 78746
(512) 328-5511
CORPUS CHRISTI, TEXAS OFFICE: THE 600 BUILDING, SUITE 2020
600 LEOPARD STREET, CORPUS CHRISTI, TEXAS 78473
(512) 883-7501

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00604

STATE BAR OF TEXAS

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SANC
& Agenda*



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January 23, 1989

To the Committee on Administration of Justice

From Evelyn A. Avent, Secretary

Enclosed are proposed changes in final form to Rules 21, 21a, 72 and 73 submitted by Robert F. Watson.

Also enclosed are proposed changes in final form to Rules 223 and 245 submitted by Charles Tighe.

These items will be on the Agenda for action at the March 11 meeting.

Evelyn A. Avent

Enclosures

00605

Rules 21, 21a, 72 &

LAW OFFICES OF
LAW, SNAKARD & GAMBILL

A PROFESSIONAL CORPORATION
3200 TEXAS AMERICAN BANK BUILDING
500 THROCKMORTON STREET
FORT WORTH, TEXAS 76102

AREA 817 335-7373

METRO 429-2991

TELECOPY 332-7473

DIRECT DIAL NUMBER:

(817) 878-6374

January 16, 1989

THOS H LAW
ROBERT M RANDOLPH
RICE M TILLEY JR
SAMUEL A DENNY
WALTER S FORTNEY
ROBERT F WATSON
KENT D KIBBIE
JOE SHANNON, JR.
DENNIS R SWIFT
MARVIN CHAMPLIN
JAY S GARRETT
G THOMAS BOSWELL
JAMES W SCHELL
WILLIAM F MCCANN
MICHAEL L MALONE
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WALKER FRIEDMAN
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JOSEPH C. SCHMITT
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TODD P. KELLY
JAMES H. CHEATHAM IV
JAY K. RUTHERFORD
STEPHEN G. WILCOX
M. ELAINE BUCCIERI

OF COUNSEL

RICE M. TILLEY
ROBERT F. SNAKARD
LAWTON G. GAMBILL
HARRY HOPKINS

*LICENSED IN A STATE
OTHER THAN TEXAS

Ms. Evelyn A. Avent
7303 Wood Hollow Drive, #208
Austin, Texas 78731

Dear Evelyn:

Enclosed are copies of the proposed changes to Rules 21, 21a, 72 and 73. You will notice two versions of Rule 21a are enclosed. One provides for service by first class mail. The other does not. As I indicated at our recent meeting, our sub-committee has no particular feelings either way on the issue of first class mail, and welcomes the consideration of the entire committee of this issue.

After a more thorough review of the language of the proposed rules as amended and the language of existing Rule 8, it appears that any reference to the "attorney in charge" concept of Rule 8 would be redundant inasmuch as the last paragraph of the rule states "All communications from the court or other counsel with respect to a suit shall be sent to the attorney in charge." This would appear to leave no latitude on the part of anyone attempting to comply with the methodology set forth in proposed Rules 21a and 72, when delivering a copy to a party's "attorney of record" to address it to anyone other than the "attorney in charge" as mandated by Rule 8. I would be very grateful if you would send copies of the proposed rules to all members of the committee so that they may be considered at our meeting on March 11th.

Sincerely,



Robert F. Watson

RFW/ran#5
L.RULES

00606

REPORT
of the
COMMITTEE ON THE ADMINISTRATION OF JUSTICE

December 1, 1988

The Committee on the Administration of Justice has been divided into subcommittees which tract those of the Supreme Court Advisory Committee to which it reports its proposals regarding the Texas Rules of Civil Procedure. The first meeting of the new bar year was held September 10, 1988 at which time there was discussion of proposed Local Rules following a report by Luther Soules, Chairman of the Supreme Court Advisory Committee and the Court's Subcommittee on Local Rules. Mr. Soules presented a proposed draft of the rules for consideration and input. Professor William V. Dorsaneo, III, Chairman of COAJ's Subcommittee on Local Rules, has done a considerable amount of work on the project. A number of other matters came before the committee for discussion and various proposed Rules changes were referred to appropriate subcommittees.

At its meeting held November 19, Judge George Thurmond, Chairman of the Judicial Section, reported that a draft of the Local Rules was presented during the recent Judicial Conference in Fort Worth. He stated that the members attending the Conference were divided into five groups to study the draft and a member of the Advisory Committee acted as moderator to each group. The final work product will serve as a guide for judges over the state after its approval.

A report was made by Judge Don Dean, a member of the Subcommittee on Rules 1-165a. Some changes were proposed to Rule 21a to bring approved delivery practices more current as delivery means and technologies have significantly changed since 1941. The changes will be put into written form and presented to the full committee at its January meeting for action as required under the committee's bylaws. Changes to Rule 72 were also proposed which will bring copy service more current and this amendment will be presented in written form at the next meeting.

Four Rules changes are being considered by the Subcommittee on Rules 166-215 which is chaired by Guy Hopkins. Mr. Hopkins was unavoidably absent from the November meeting and reports on these Rules were deferred.

Charles Tighe, Chairman of the Subcommittee on Rules 216-314, reported that the group has considered Rule 245 and, on the recommendation of Mr.

Soules, would recommend a revision at the next meeting to change notice of "not less than ten days" to "not less than forty-five days" as the period prior to trial for jury fee and demand was extended from ten to thirty days and the increase from ten to forty-five days would permit a party who receives a non-jury setting together with an answer to preserve its right to trial by jury and avoid an otherwise essential but burdensome practical requirement to make demand and pay the jury fee in all cases when they are filed, thus clogging the jury dockets unrealistically and unnecessarily. Mr. Tighe said it would be necessary to consider this change along with Rule 216 which provides for the filing of a jury fee. He said the subcommittee was also considering Rules 223 and 224 which deal with the jury list.

Mr. James O'Leary said his Subcommittee on Rules 315-331 was looking at Rule 324(b) where motion for a new trial is required. A question has arisen with regard to venue for a new trial and the group feels this needs study.

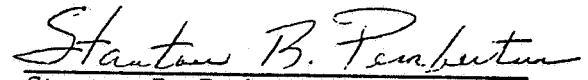
With regard to the Texas Rules of Appellate Procedure, Judge J. Curtiss Brown, chairman, reported that a proposal has been received regarding TRAP Rules 4 and 5 which relate to the question of the time of filing of records, briefs and other instruments. He said the subcommittee did not feel that a real problem existed with these two Rules but would look at them more closely to determine if revisions should be made.

A complaint regarding Rules 40 and 53j was received from a district judge regarding a problem faced by a court reporter in his jurisdiction who prepared a lengthy statement of facts for an indigent party as required under Rule 40 but who was refused payment for his services under Rule 53j. The subcommittee considered the matter but recommended that no action be taken on these Rules at this time and that the matter be removed from the docket, recognizing that there may be a greater problem with the Rules in the future.

With regard to TRAP Rule 100, Judge Brown referred to a copy of a proposed change to the Rule which has been circulated to the full committee. The proposed amendment will clarify the Rule by providing that en banc review may be conducted at any time within a period of plenary jurisdiction of a court of appeals. He moved that the change be approved and his motion was seconded and adopted.

The meeting was then held open for discussion of any Rules problems which might need to be addressed. It was mentioned that "legal holidays" differ from county to county, and discussion was also held on certain Rules of discovery and the possibility of having a limit on the number of interrogatories that may be made.

The Committee will meet again on January 14, 1989 at which time final action will probably be taken on a number of the items presently under consideration.


Stanton B. Pemberton
Stanton B. Pemberton, Chairman

SPIVEY, GRIGG, KELLY AND KNISELY
ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION
1111 WEST 6TH STREET, SUITE 300
P. O. BOX 2011
AUSTIN, TEXAS 78768-2011
(512) 474-6061

BROADUS A. SPIVEY
BOARD CERTIFIED
PERSONAL INJURY TRIAL LAW
DICKY GRIGG
BOARD CERTIFIED
PERSONAL INJURY TRIAL LAW
PAT KELLY
BOARD CERTIFIED
PERSONAL INJURY TRIAL LAW
PAUL E. KNISELY
BOARD CERTIFIED
CIVIL APPELLATE LAW

November 23, 1988

INVESTIGATOR:
RICK LEEPER

BUSINESS MANAGER:
MELVALYN TOUNGATE

BAS88.303(6202)

Mr. David J. Beck
Fulbright & Jaworski
1301 McKinney St.
Houston, TX 77010

Re: Supreme Court Advisory Committee
Subcommittee on Rules 72, 73 and 74

Dear Mr. Beck:

I have read your letter and the attachments, and Mr. Loomis has a complaint which appears very valid. Frankly, I was unaware that it might be proper to forward a copy of any pleading to the court, or any other party, without immediately notifying every other party. I know Charles Babb, and have always found him to be a very honorable lawyer and person, but even without any intent or effort to give notice to the other side in a tardy fashion, it is the party who is injured.

I am sorry I did not retain the cite or reference, but I noticed in the case section of last week's Texas Lawyer that a court of appeals reversed a case out of Lubbock where notice was given to a party rather than an attorney, and thus the attorney for that party was deprived of the opportunity of timely responding to a motion for summary judgment.

This type of "sand-bagging" is unacceptable. It is apparent that we should address these specific problems.

Sincerely,

Broadus A. Spivey
Broadus A. Spivey

BAS/sm

cc: Mr. Luther H. Soules, III
Justice William Kilgarlin
Mr. Tom Ragland

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1988 WL 115312 (Tex.App.-Amarillo)			

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

George KRCHNAK, Appellant,
v.
Joe Kirk FULTON, Appellee.
07-88-0124-CV.
Court of Appeals of Texas, Amarillo.
Nov. 1, 1988.

Before REYNOLDS, C.J., and DODSON and BOYD, JJ.

BOYD

Appellant George KRCHNAK brings this appeal from a default summary judgment. In that judgment, appellee Joe Kirk FULTON was awarded \$22,820 for boarding care, stud fees, and veterinary services rendered to appellant's mare named Miss Mighty Moon, plus \$2,500 attorney's fees. In the judgment, appellee was also awarded a foreclosure of stablemen's lien. We reverse and remand.

In six points, appellant argues the trial court erred in (1) overruling his motion to transfer venue; (2) holding a hearing on appellee's motion for summary judgment with only six days notice to defense counsel; (3) overruling appellant's motion for new trial because genuine issues of fact existed as to appellee's right to recover on account and foreclosure of a stablemen's lien; (4) overruling his motion for new trial because he had set up meritorious defenses to appellee's suit and established that his failure to respond to the motion for summary judgment was the result of insufficient notice and time to respond and was not intentional or the result of conscious indifference; (5) denying his motion for extension of time to file a response to appellee's motion for summary judgment; and (6) granting the summary judgment because it unconstitutionally denied appellant the right to a trial.

In his first point, appellant says the trial court erred in overruling his motion to transfer venue. The general venue rule is that now set out in the Texas Civil Practice and Remedies Code Annotated section 15.001 (Vernon 1986). It provides:

Except as otherwise provided by this subchapter or Subchapter B or C, all lawsuits shall be brought in the county in which all or part of the cause of action accrued or in the county of defendant's residence if defendant is a natural person.

Texas Rule of Civil Procedure 87 specifies the method and mechanics for determination of a motion to transfer. Paragraph 2(a) provides that a party seeking to maintain venue in reliance upon section 15.001 has the burden to make proof, as provided in paragraph 3 of the rule. Paragraph 3(a) provides that all properly pleaded venue facts are taken as true unless specifically denied by the adverse party. If specifically denied, the party pleading the venue fact must make prima facie proof of that venue fact. It also provides that prima facie proof is made "when the venue facts are properly pleaded and

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an affidavit, and any duly proved attachments to the affidavit, are filed fully and specifically setting forth the facts supporting such pleading." Paragraph (b) provides that the court shall determine the motion to transfer on the basis of the pleadings, any stipulations made by and between the parties, and such affidavits and attachments as may be filed by the parties.

It is undisputed that appellant was a resident of Austin County and that the mare in question was delivered to, and the services for which recovery is sought were performed at, appellee's ranch, which was located in Lee County, Texas. That being the case, in order to maintain venue, appellee must have made prima facie proof that all or a part of the cause of action accrued in Lubbock County. It is appellee's theory that this burden was met by his allegation, in his response to the motion supported by his affidavit, that appellant orally agreed to make payment in Lubbock, Lubbock County, Texas. Parenthetically, we note that in his motion to transfer, appellant specifically asserted that he "did not enter into the alleged contract in Lubbock County and none of the performance of the alleged contract was to take place in Lubbock County." Neither in his response to the transfer motion nor in his supporting affidavit does appellee allege where the contract was entered into. Our task, therefore, is to determine whether appellee's allegation and supporting affidavit that an agreement was entered into, in Lubbock, Lubbock County, and that the agreement provided that payment due thereunder was to be made in Lubbock, Lubbock County, was sufficient prima facie proof of the necessary venue fact that a part of the cause of action accrued in Lubbock County.

A "cause of action" consists of a plaintiff's primary right and the defendant's act or omission which violates that right. *Stone Fort Nat. Bank of Nacogdoches v. Forbess*, 126 Tex. 568, 91 S.W.2d 674, 676 (1936); *Martinez v. Goodyear Tire & Rubber Co.*, 651 S.W.2d 18, 19 (Tex.App.--San Antonio 1983, no writ). Moreover, a "cause of action" comprises every fact which is necessary for a plaintiff to prove in order to obtain judgment. It does not comprise every evidentiary fact, but does comprise every essential fact. *Hoffer Oil Corporation v. Brian*, 38 S.W.2d 596, 597 (Tex.Civ.App.--Eastland 1931, no writ). The essential elements, then, of appellee's cause of action would be that an agreement existed under which services were rendered by appellee for which payment was not made by appellant. A part of that underlying contract would be an agreement that payment would be made in Lubbock County.

The accrual of a cause of action means the right to institute and maintain a suit and whenever one person may sue another a cause of action has accrued. *Luling Oil & Gas Co. v. Humble Oil & Refining Co.*, 144 Tex. 475, 191 S.W.2d 716, 721 (1945). As early as 1854, the Texas Supreme Court held that in a case such as this, the contract, its performance and its breach were all essential parts of the cause of action. *Phillio v. Blythe*, 12 Tex. 124, 127-28 (1854). Since the payment, under the allegations of appellee, was to be made in Lubbock County, and that payment was not made, a portion of the cause of action accrued in that county and, within the purview of Texas Civil Practice & Remedies Code Annotated section 15.001 (Vernon 1986), the suit was permissibly maintainable in that county. *Hoffer Oil Corporation v. Brian*, 38 S.W.2d at 597.

In his argument to the contrary, appellant places primary emphasis upon *Gay Ranch Co. v. Rowland*, 50 S.W. 1086 (Tex.Civ. App.--San Antonio 1899, no writ). However, that case is distinguishable. While the case did hold that a suit for similar services rendered at that appellee's ranch in Runnels County was maintainable in that county, there were no allegations as to an underlying

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contract or as to the provisions of that contract. Moreover, that case construed a venue statute which provided that suit was maintainable in the county in which the cause of action arose. That language is, of course, different from the language of present section 15.001 and, for the reasons above stated, we conclude that a part of the instant cause of action accrued in Lubbock County. Appellant's first point is overruled.

In appellant's second point, he says the trial court erred in holding a hearing on appellee's motion for summary judgment with only six days notice to appellant's counsel. In his fifth point, appellant says the trial court erred in denying his motion for extension of time to file a response to appellee's motion for summary judgment. Because of the nature of this complaint, it is necessary to make a chronological listing of the sequence of events.

Appellee's motion for summary judgment was filed on January 11, 1988, and was set for hearing on February 12, 1988, at 1:15 P. M. That motion contained a certificate of service certifying that a copy and notation of hearing time was sent to appellant by certified mail, return receipt requested. No copy of the motion was sent to appellant's counsel.

On February 2, 1988, appellee's counsel sent a copy of the motion to appellant's counsel, which was received on February 4, 1988. In that letter, it was stated that a copy was mailed to appellant on the day of its filing by certified mail, but was returned unclaimed to appellee's counsel. In the letter, appellee's counsel said he had inadvertently failed to forward a copy to opposing counsel, apologized for the delay, and commented that he felt they had complied with the requirements of Texas Rule of Civil Procedure 21A, the rule prescribing the method of giving notice. With the letter, appellee's counsel included a copy of the Lubbock County local rule on summary judgment practice, which provided for no oral arguments unless requested, and commented that he would not be requesting such argument. The motion for summary judgment, according to the trial judge's findings, was granted on February 24, 1988.

On February 15, 1988, appellant's counsel mailed a motion to extend time for filing a response to the summary judgment motion. The basis of that motion was that he had commenced trial in federal court in Harris County on February 1, which would continue until "at least" February 15, 1988. Although counsel's certificate of service states that it was mailed on February 15, the Lubbock County District Clerk's mail stamp shows it was not filed until February 24, 1988, at which time it was overruled with the trial judge's handwritten notation that the summary judgment had already been granted.

Texas Rule of Civil Procedure 166a (c) provides:

(c) Motion and Proceedings Thereon. The motion for summary judgment shall state the specific grounds therefor. Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response. No oral testimony shall be received at the hearing....

Appellant argues that implicit in the above rule is the requirement that his counsel have twenty-one (21) days notice of the hearing date and motion for summary judgment so that he would have fourteen (14) full days to prepare his counter-affidavits and prepare his objections to the summary judgment evidence of the proponents. The thrust of his argument is that the requisite twenty-one

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day notice must be given to counsel, where there is counsel of record, and appellee's failure to do so requires reversal.

In support of his proposition, appellant cites *Williams v. City of Angleton*, 670 S.W.2d 414 (Tex.App.--Houston [1st Dist.] 1987, writ ref'd n.r.e.); *Delta (Del.) Petroleum v. Houston Fishing*, 670 S.W.2d 295 (Tex.App.--Houston [1st Dist.] 1983, no writ); *International Ins. v. Herman G. West, Inc.*, 649 S.W.2d 824 (Tex.App.--Fort worth 1983, no writ); *Gulf Refining v. A.F.G. Management 34 Ltd.*, 605 S.W.2d 346 (Tex.Civ.App.--Houston [14th Dist.] 1980, writ ref'd n.r.e.); and *Booker v. Hill*, 570 s.w.2d 460 (Tex.Civ.App.--Waco 1978, no writ). However, while these cases do speak to the proposition that a full twenty-one day notice must be given, they are inapposite to the question before us, i.e., whether that notice is required to be given to opposing counsel or to the opposing party.

Texas Rule of Civil Procedure 21a provides:

Every notice required by these rules, 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 of the notice or of the document to be served, as the case may be, to the party to be served, or his duly authorized agent or his attorney of record, either in person or by registered mail to his last known address, 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 him by mail, three days shall be added to the prescribed period. It may be served by a party to the suit or his attorney of record, or by the proper sheriff, or constable, or by any other person competent to testify. A written statement by an attorney of record, or the return of the officer, or the affidavit of any other 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 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.

Under this rule, a certificate of service, such as the instant one, creates a presumption that the requisite notice was served and, in the absence of evidence to the contrary, has the force of a rule of law. *Cliff v. Huggins*, 724 S.W.2d 778, 780 (Tex. 1987); *Costello v. Johnson*, 680 S.W.2d 529, 532 (Tex.App.--Dallas 1984, writ ref'd n.r.e.). While the sending of such a notice directly to the party without a copy to his attorney of record should not be encouraged, and indeed, it would seem proper that the rule require this, it does not do so. The notice of setting of appellee's motion for summary judgment was, then, in accordance with allowable procedure. moreover, since appellant's motion to extend the time for filing a response to the motion was

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not prepared nor received in Lubbock until after the hearing date, nor was it received in Lubbock until after the granting of the motion, no error is shown in the overruling of that motion. Appellant's second and fifth points of error are overruled.

In his third and fourth points, appellant argues that the trial court erred in overruling his motion for new trial. Consideration of these points requires that we first determine the standard to be used in reviewing the motion and the trial court's overruling of that motion. There is a split in authority on this question.

In *Costello v. Johnson*, 680 S.W.2d at 531, the Court held the standard of review of a motion for new trial in a summary judgment proceeding where no response to the motion was filed is the same as in reviewing such a motion in a default judgment proceeding. That standard is that a default judgment should be set aside and a new trial ordered in any case in which (1) the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part but was due to mistake or an accident, (2) the motion for a new trial sets up a meritorious defense, and (3) is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff. *Craddock v. Sunshine Bus Lines*, 134 Tex. 388, 133 S.W.2d 124, 126 (Tex. Comm'n App. 1939, opinion adopted). Parenthetically, we note that in the recent case of *Lopez v. Lopez*, 31 Tex. Sup. Ct. J. 648, 649 (September 14, 1988), the Supreme Court has qualified the requirement as to a showing of a meritorious defense by stating that in a case where a defendant was not properly notified of a hearing date, to require such a showing as a condition of granting a new trial would violate due process rights under the fourteenth amendment to the United States Constitution.

However, in *International Corp. v. Exploitation Engineers*, 705 S.W.2d 749, 751 (Tex.App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.), the Court, without noting the *Costello* case, and citing *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 678 (Tex. 1979), held that the *Craddock* standard was not applicable to an appeal from a summary judgment. The Houston Court's rationale for making that distinction was "[a] summary judgment is not granted because a movant fails to answer, but because the movant's summary judgment proof is sufficient as a matter of law." 705 S.W.2d at 751. We disagree with that premise.

The teaching of *Clear Creek*, as relevant here, is that the trial court may not grant a summary judgment by default for lack of an answer or response to the motion by the non-movant but, in the words of the Court, "(t)he movant still must establish his entitlement to a summary judgment on the issues expressly presented to the trial court...." 589 S.W.2d at 678. However, in a case such as this, the mere fact that the issues presented by a summary judgment motion, and the evidence in connection with the motion, in the absence of any response, might appear to justify the judgment is not sufficient to justify a deviation from the basic fairness of applying the *Craddock* test to a motion for new trial after such summary judgment.

If a summary judgment respondent, in his motion for new trial, could meet the requirements of the *Craddock* rule, logically and reasonably the situations are so analogous that the same standard should be applied. Of course, in our situation, the meritorious defense prong, if required, would be satisfied by a showing that fact questions exist which should be decided by a fact finder. Our conclusion that the *Costello* approach is the correct one is strengthened by

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the oft-quoted axiom that summary judgment is a harsh remedy and a party's entitlement to that remedy should be strictly construed in procedural as well as substantive matters. *International Ins. v. Heman G. West, Inc.*, 649 S.W.2d 825.

Having made the determination that our review of the trial court action challenged in these points should be conducted in the light of the Craddock explication, it is necessary to review that motion and its surrounding circumstances. When the original transcript was received in this court, it appeared that the appeal bond would not have been timely filed unless a motion for new trial had been timely filed. No such motion was contained in the transcript. We abated this appeal and directed the trial court to determine whether such a motion was filed with the proper authority within the requisite time frame.

As a result of that hearing, the trial court determined that a motion for new trial was not timely filed in the clerk's office but a motion for new trial was received by the Lubbock County courthouse mailroom on March 7, 1988, and was thereafter lost or mislaid. With this finding, this Court found that appellant had substantially complied with the proper requisites for the filing of such a motion and, on July 1, 1988, ordered the filing of the tendered transcripts and allowed the appeal.

A copy of the motion for new trial is shown in the transcript. Attached to the motion is an affidavit executed by appellant in which he categorically denies that he agreed to pay appellee for stallion service or for care and board for his mare. His version was that a friend of appellee's, in appellant's presence, placed a call to appellee and "asked for and received approval for the offer to breed my mare without charge because he wanted to have some good foals out of his stallion," and, in reliance upon that agreement, he delivered his mare to appellee's ranch. In the affidavit he also asserted facts by virtue of which he asserted deceptive trade practice and conversion claims.

In *Ivy v. Carrell*, 407 S.W.2d 212 (Tex. 1966), the Court had occasion to explicate the Craddock requirement that a motion for new trial in a default judgment case set up a meritorious defense. The Court said:

The motion must allege facts which in law would constitute a defense to the cause of action asserted by the plaintiff, and must be supported by affidavits or other evidence proving prima facie that the defendant has such meritorious defense. [Emphasis in original].

Id. at 214.

The motion and affidavit in the case at bar were sufficient to establish prima facie that fact questions requiring resolution by a fact finder exist in this case. That, of course, would be a meritorious defense to a motion for summary judgment. The motion and its attachments are also sufficient to show that appellant's failure to file a response to the summary judgment motion was not intentional but was the result of a mistaken assumption that he had twenty-one days from the date appellant's counsel received notification and that it was filed at a time when the granting of the motion would not occasion delay or otherwise work an injury to appellee. That being the case, appellant's motion for new trial should have been granted. Appellant's third and fourth points of error are sustained and that sustention requires reversal of the trial court judgment and a remand for new trial. The disposition which we have made of these two points obviates the necessity for discussion of appellant's sixth point.

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In summary, appellant's third and fourth points having been sustained, the judgment of the trial court is reversed and the cause remanded to the trial court for new trial.

Tex.App.-Amarillo, 1988.

George KRCHNAK, Appellant, v. Joe Kirk FULTON, Appellee.

1988 WL 115312 (Tex.App.-Amarillo)

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