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BEFORE THE  
SUPREME COURT OF TEXAS

IN ADMINISTRATIVE SESSION TO CONSIDER  
CHANGES PROPOSED IN TEXAS RULES OF COURT

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BE IT REMEMBERED that the  
above entitled matter came on for hearing on the  
30th day of November, 1989, beginning at 9:00  
o'clock a.m. in the courtroom of the Supreme  
Court of Texas, Supreme Court Building, Austin,  
Texas, before the Justices of the Supreme Court  
of Texas, and the following proceedings were  
reported by JUDITH CAROLYN COX, Certified  
Shorthand Reporter in and for the State of  
Texas.



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APPEARANCES

Supreme Court of Texas:

- Chief Justice Thomas R. Phillips
- Justice Franklin S. Spears
- Justice C.L. Ray
- Justice Raul A. Gonzalez
- Justice Oscar H. Mauzy
- Justice Eugene A. Cook
- Justice Jack Nighthower (Not Present)
- Justice Nathan L. Hecht
- Justice Lloyd Doggett

Speakers:

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CHIEF JUSTICE PHILLIPS: Good morning, and welcome to the Supreme Court's public hearing on the adoption -- proposed adoption of new rules of civil and appellate procedure. We very much appreciate your interest in the rules of procedural law of the State of Texas and your taking time to be here to help give us the benefit of your thoughts on what rules we should adopt and -- and how they should read.

This is, frankly, a bigger crowd than we had anticipated. It's going to necessitate our proceeding, I think -- rather than just letting everybody get up and give their whole say, we will proceed by blocks of rule numbers, and if you want to speak in that area, then we will speak to it.

Also, we are recording -- we are having these sessions reported. That is not something new. We have 40 or 50 years of reports on the Supreme Court Rules Advisory Committees, and those are very helpful sometimes in interpreting the rules, and so we are

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1 also reporting for posterity these proceedings  
2 today.

3 Since the court reporter does not  
4 know all of you by name, please state your name  
5 before you proceed to make any remarks so that  
6 she will be able to have an accurate statement.  
7 Why don't you state your name and home town so  
8 that she will have an accurate statement of who  
9 has said what in these proceedings.

10 Justice Nathan Hecht is the head  
11 of -- he is the liaison with the Supreme Court  
12 to the various rule-making advisory bodies that  
13 help the Supreme Court promulgate its rules, so  
14 Justice Hecht will preside over these  
15 proceedings today, and I will turn it over to  
16 him at this time.

17 JUSTICE HECHT: Thank you, Mr. Chief  
18 Justice.

19 We want to begin by thanking our  
20 Rules Advisory Committee for its hard work and  
21 the proposals that they have laid upon the  
22 table. Some of the members are here including  
23 the chairman, Luke Soules, this morning, and  
24 many of these -- this committee has in the past  
25 served at its own expense and gives a lot of

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1 time and energy to the multitude of proposals  
2 that the Court gets each year on changes in the  
3 rules, and we thank them.

4 This is the first session that I  
5 recall, at least in recent memory, in which the  
6 Supreme Court has entertained direct comment on  
7 proposed changes in the rules, so if we were a  
8 little unsure as to how many would want to make  
9 comments, we have received over 50 letters in  
10 response to the invitation in the Bar Journal,  
11 and, of course, we have a good number of you  
12 here this morning.

13 The -- as the Chief Justice said, a  
14 record is being made of these proceedings, as of  
15 all committee proceedings, to help show some of  
16 the discussion that goes into the changes that  
17 are made.

18 Besides the proposed changes that  
19 were printed in the State Bar Journal, a number  
20 of other projects are pending which some of you  
21 wish to comment on today, too, by your forms  
22 that -- on which you signed up.

23 One of those is the local rules  
24 project: an effort to make some sense out of  
25 the local rules and to consolidate them.

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1 Sealing of court records: that subcommittee of  
2 the Rules Advisory Committee is proceeding in  
3 its work and has a tentative proposal, I  
4 believe, and is continuing to discuss it.

5 There is a long-term, ongoing  
6 project to try to recodify the rules and  
7 renumber them for simplicity's sake.

8 And then, of course, our ultimate  
9 concern, which is to simplify the rules and  
10 reduce the delay and expense in civil  
11 litigation.

12 So the rules changes are proceeding  
13 along different tracks, some fairly technical  
14 and some fairly general; and you are welcome to  
15 address any of those this morning.

16 I believe the best way to proceed is  
17 to go through the proposed changes that were  
18 printed in the State Bar Journal, and we will  
19 take them by blocks of rules. If you wish to  
20 comment on a specific rule when that block comes  
21 up, we'll ask you to come to the end of the  
22 table here and, as the Chief Justice said, state  
23 your name and anybody that you are representing,  
24 the city in which you reside, and then you are  
25 welcome to make whatever comments you wish. And

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1 the Court may have some questions for you along  
2 the way, as well.

3 I think the first block that it  
4 makes sense to discuss are Texas Rules of Civil  
5 Procedure 1 through 21b, those rules. If --  
6 whoever wishes to speak to rules -- Texas Rules  
7 of Civil Procedure 1 through 21b, please come to  
8 the witness chair. Who will be first?

9 MR. NIEMANN: May I approach the  
10 bench, Your Honor?

11 JUSTICE HECHT: Yes, such as it is.

12

13

LARRY NIEMANN,

14

appearing before the Supreme Court of Texas in  
15 administrative session to consider proposed  
16 changes to Texas Rules of Civil Procedure, Texas  
17 Rules of Appellate Procedure, and Texas Rules of  
18 Civil Evidence, stated as follows:

19

20

MR. NIEMANN: May it please the  
21 Court, my name is Larry Niemann. I represent  
22 the Texas Apartment Association, some 7,000  
23 members in Texas, and the Texas Building Owners  
24 & Managers Association.

24

25

I wish to compliment the committee

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1 for their hard work, but I also wish to register  
 2 a -- an objection and state my reasons to the  
 3 Court why we think that Texas Rule of Civil  
 4 Procedure No. 4 has gone a bit too far. That is  
 5 the rule in which the proposed change is for  
 6 time periods under five days to have weekends  
 7 and holidays not counted in the calculation of  
 8 that time period. I have written a rather  
 9 comprehensive letter to the Court regarding  
 10 that, but let me try to summarize it.

11 The reason we are concerned is that  
 12 these -- Rule 4 has a very serious effect on --  
 13 an adverse effect on the eviction process,  
 14 forcible entries and detainers.

15 Just how important is this rule to  
 16 our industry and to the people of Texas is  
 17 exemplified by the fact that there are 900,000  
 18 civil cases filed in original jurisdiction  
 19 courts in Texas every year. Very surprisingly,  
 20 12 percent of that total, or 106,000 cases, are  
 21 forcible entry and detainer cases. So we're  
 22 talking about a very serious effect on a lot of  
 23 people in a lot of cases.

24 Now, how does the proposed change --  
 25 what is the basic reason, as I understand it,

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1 for the proposed change in Rule 4? And that is  
2 to conform the calculation method to that of the  
3 federal rules where weekends are not counted in  
4 these short five-day time periods, and to  
5 prevent lawyers from playing games where they  
6 will deliver a five-day time period type notice  
7 or pleading on a Friday afternoon, and the  
8 opposing lawyer simply does not have time to  
9 properly prepare and react.

10 My comments there are that this  
11 game-playing problem does not exist in  
12 evictions. Now, where does the five-day rule  
13 come into evictions? Following the eviction  
14 judgment, the rules require that there be a  
15 mandatory five-day wait before the landlord can  
16 get a writ of possession to execute on the  
17 judgment he has just won. So after the landlord  
18 wins, the tenant still gets to stay there five  
19 more days before the landlord can get a writ of  
20 possession to implement the judgment.

21 The other way it comes into effect  
22 is that there can be no -- there is a five-day  
23 time period for appeal by the tenant -- or by  
24 the landlord, for that matter -- to the county  
25 court following an eviction.

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1           Now, if this new rule is adopted --  
2           if, for example, a judgment was granted on a  
3           Friday, the Saturday and Sunday wouldn't be  
4           counted. The next five days would count, but  
5           the landlord couldn't get his writ of possession  
6           until the Monday following, so that is expanding  
7           a five-day rule into a nine-day rule. And the  
8           same applies for the eviction: the five days to  
9           nine days under those circumstances. And, of  
10          course, it cuts back to seven days if the  
11          judgment is rendered on a Thursday.

12           Now, unfortunately, in nearly all  
13          evictions there are non-payment -- well, I would  
14          say at least 90 or 95 percent of all evictions  
15          are non-payment of rent evictions, and the  
16          substantive effect of the proposed rule is to  
17          give the tenants, as a practical matter, two to  
18          four days more free rent. Theoretically, it is  
19          not free rent, because the tenant is liable for  
20          it, but as a practical matter in a non-payment  
21          of rent eviction, it is -- it is very seldom a  
22          recovery of unpaid rent under those -- under  
23          those circumstances. So you're affecting the  
24          substantive pocketbook, so to speak, of the  
25          landlord, and we think it is an unfair

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1 substantive effect to elongate the time for  
2 getting the writ of possession and the time for  
3 getting -- for appealing the case.

4 JUSTICE HECHT: Mr. Niemann, you  
5 have also commented on 749c --

6 MR. NIEMANN: Yes, Your Honor, I  
7 have.

8 JUSTICE HECHT: -- the requirement  
9 of a deposit of one month's rent to perfect an  
10 appeal even if the appellant is in forma  
11 pauperis.

12 MR. NIEMANN: That's right, Your  
13 Honor.

14 JUSTICE HECHT: And you say in your  
15 letter that when this rule was promulgated, the  
16 Supreme Court and the Texas Tenants Association  
17 were both of the opinion that these rules were  
18 unconstitutional.

19 MR. NIEMANN: Did I say  
20 "unconstitutional"?

21 JUSTICE HECHT: It seems a little  
22 strange that -- I assume you meant that you  
23 thought that they were both constitutional.

24 MR. NIEMANN: That was a very  
25 serious typographical error, Your Honor, and I

1 can't blame that --

2 JUSTICE HECHT: And then you add:  
3 "No one has ever challenged the  
4 constitutionality of these rules." Actually,  
5 749c has been challenged, although the point was  
6 not reached in our decision of Walker versus  
7 Blue Water Garden Apartments.

8 But why, if a month's deposit is  
9 required for supersedeas, doesn't that protect  
10 you against the problem that you are concerned  
11 about, which is the elongated holding-over  
12 period?

13 MR. NIEMANN: No, Your Honor, I  
14 don't think that a supersedeas bond is  
15 applicable in an eviction appeal. The special  
16 rules that apply to eviction appeals, I don't  
17 think, apply -- don't bring in the supersedeas  
18 bond. I -- I --

19 JUSTICE HECHT: 749b does require a  
20 month's deposit to supercede the FE and D  
21 judgment and to hold over during the appeal. As  
22 long as you have that protection, why do you  
23 need also the deposit of a month's rent in order  
24 to perfect the appeal when the appellant is in  
25 forma pauperis and says he can't make the

1 deposit?

2 MR. NIEMANN: I understand. The  
3 749b says that during the appeal rent shall  
4 continue to be paid. It doesn't say that any  
5 monies must be tendered in to the court as a  
6 condition of appeal. And I think what we will  
7 find is that if -- if we simply have a rule that  
8 during appeal rents must continue to be paid,  
9 then that is not self-enforcing; the tenant  
10 doesn't pay the rent and what the landlord has  
11 to do is to go to court, get a hearing, set it,  
12 get a -- get a judgment to say "This tenant has  
13 not continued to pay the rent, Your Honor;  
14 therefore, we" -- "we want him out."

15 And we think that as a practical  
16 matter what is going to happen is that following  
17 an eviction, a very astute tenant is going to  
18 say, "I'm a pauper. Even though I have lost my  
19 case on non-payment of rent, I'll sign a  
20 pauper's affidavit; and the judge certainly  
21 can't disprove that I'm a pauper, and the  
22 landlord can't disprove that I'm a pauper." And  
23 we think as a practical matter there are going  
24 to be frivolous appeals to the county courts  
25 based on pauper.

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1                   Now, I would say, Your Honor, that  
2                   several years ago when these rules regarding  
3                   pauper appeals and conditions for pauper appeals  
4                   were presented to the committee, they were, in  
5                   fact, initially drafted by the attorney for the  
6                   tenants -- I think it was Mr. Jim Piper  
7                   (phonetic) at the time -- and myself, and  
8                   thoroughly considered by the -- the Supreme  
9                   Court Advisory Committee.

10                   And briefs were written at that time  
11                   and submitted to the committee, and I think both  
12                   the tenant lawyer and myself were of the  
13                   conclusion that requiring the payment of the one  
14                   rental period's rent in non-payment of rent  
15                   cases was a constitutional protection of the  
16                   landlord.

17                   JUSTICE HECHT: Any other questions  
18                   of Mr. Niemann?

19                   CHIEF JUSTICE PHILLIPS: What's your  
20                   solution to Rule 4? To just not make the change  
21                   at all, or make --

22                   MR. NIEMANN: No, no.

23                   CHIEF JUSTICE PHILLIPS: -- the five  
24                   days four days?

25                   MR. NIEMANN: No. As I -- as I

1 requested in my letter, Your Honor, we think  
2 that the appropriate solution would simply be to  
3 carve out from Rule 4 the five-day time periods  
4 contained in Rules 748 on a writ of possession,  
5 and Rule 749, I think, a, b, c, and d, regarding  
6 appeals of eviction cases. You have similarly  
7 done that already in the proposed Rule 4 in that  
8 you have carved out an exception for three days  
9 when service is made by registered certified  
10 mail.

11 JUSTICE HECHT: Thank you, Mr.

12 Niemann.

13 MR. NIEMANN: Thank you, Your Honor.

14 JUSTICE HECHT: Other comments to  
15 Rules 1 through 21b?

16 Yes, sir.

17  
18 JUDGE GUY JONES,

19 appearing before the Supreme Court of Texas in  
20 administrative session to consider proposed  
21 changes to Texas Rules of Civil Procedure, Texas  
22 Rules of Appellate Procedure, and Texas Rules of  
23 Civil Evidence, stated as follows:

24  
25 JUDGE JONES: Mr. Chief Justice,

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1 gentlemen, my name is Guy Jones. I'm judge of  
2 the 202nd District Court, Texarkana, Texas. I'm  
3 here representing myself. The record will  
4 reflect that it's at my own nickel and -- if it  
5 please the Court.

6 I appear before the Court today  
7 seeking a change in Rule 13. This Court adopted  
8 Rule 13, and as all of you know and are very  
9 familiar with the rule, there is an escape  
10 mechanism in the rule by what is known as the  
11 90-day rule.

12 I wrote a letter to Justice Hecht  
13 and then didn't mail it. I decided to appear  
14 personally before the Court, because I have very  
15 strong feelings about the ineffectiveness of  
16 Rule 13.

17 To start with, I'll read just a  
18 portion of the letter that I had originally  
19 intended to mail to Justice Hecht. And I'm  
20 going to give it to him. In fact, I have copies  
21 for the Court, if you would like to have it.  
22 But I'll read a portion of it, and it says that  
23 "the rule gives to the trial courts a very  
24 valuable weapon with which to correct an age-old  
25 problem of frivolous suits, irresponsible

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1 pleadings, falsified documents, and general" --  
2 and this is important -- "general slipshod  
3 practice of law. But the addition of the  
4 sentence" -- the 90-day escape clause  
5 sentence -- "renders this almost totally  
6 ineffective. In addition to this sentence" --  
7 that is, the 90-day escape clause -- "it simply  
8 tells the trial judge that an attorney or party  
9 can offend the very heart of what Rule 13 tries  
10 to do and then says that you can escape by the  
11 simple expediency of just saying, 'Whoops, I'm  
12 sorry, Your Honor, I withdraw the offending  
13 pleading. The damage has been done, but I'm  
14 sorry, I withdraw the offending pleading,' and  
15 the case is over. There's no sanctions that  
16 can be applied under Rule 13."

17 I submit to you, gentlemen, that  
18 once the heart of Rule 13 has been offended, the  
19 damage is immediate. The offended party or  
20 parties -- and which could be the Court, the  
21 taxpayers -- once they are offended, that damage  
22 is immediate. And if someone has, in fact --  
23 has, in fact, offended the very heart of Rule 13  
24 and what it strives to do, they should be  
25 allowed no escape mechanism.

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1 I'll give you an example of  
2 something that just happened to show you -- to  
3 show you why that this rule needs to be amended.

4 Incidentally, I have a proposed  
5 substitution to Rule 13. I'm not going to even  
6 suggest that I think that you gentlemen may  
7 adopt my rule in toto, but I'm hoping that by my  
8 presence here today and my presentation, and by  
9 giving you the proposed substitution to Rule 13  
10 and my reasons therefor, that perhaps we can get  
11 some more teeth into Rule 13.

12 I had a lawsuit where a -- this is  
13 just one example. Now, I can sit here -- I  
14 can't take this much time; obviously, you have a  
15 lot of other people that want to appear. I will  
16 give you one prime example.

17 A car dealer sold an automobile to a  
18 lady. It was a used car, had 26,000 miles on  
19 it. The lady ultimately, some two years  
20 later -- a little less than two years later --  
21 called the bank which was the lending  
22 institution, without recourse, and she said,  
23 "You can come get this car. I don't want it.  
24 It don't run. Come get it."

25 The bank comes and gets it, has the

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1 motor repaired, and sold it, sued the lady for  
2 the deficiency.

3 The lady went to a lawyer. Now, it  
4 was a very small deficiency, but it was district  
5 court case. She went to a lawyer; he  
6 immediately files a third-party action against  
7 the automobile dealer saying, "If you hadn't  
8 sold her a lemon" -- or -- "Judge, if that car  
9 dealer hadn't sold her a lemon, we wouldn't be  
10 here suffering this deficiency, so any  
11 deficiency judgment you render against her, we  
12 would ask you to carry that over to the  
13 defendant," a third-party defendant car dealer.

14 Now, there are some lawyers,  
15 gentlemen, and I'm sure you are all aware of  
16 this, that if you have got a person that comes  
17 into your office with a warm body and 50 bucks,  
18 they will file a lawsuit.

19 Now -- so this dealer has to go get  
20 him a lawyer and defend his third-party action.  
21 Comes proof time. The lady gets on the stand.  
22 The lawyer who filed the third-party action  
23 wasn't there. He sent some young boy that was  
24 just a young, wet-behind-the-ears lawyer over to  
25 try the case.

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