

**AGENDA  
MAY 20-21, 1994  
SCAC MEETING**

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## REPORT TO SUPREME COURT ADVISORY COMMITTEE FROM JURY CHARGE SUBCOMMITTEE

Dear Committee Members:

Attached are the proposed revisions to Rules 226, 226a, 236, 271, 272, 273, 274, 275, 276, 277, 278 and 279.

Our subcommittee has essentially concluded its work on those Rules. The changes are typed in bold type, and each change from existing language is marked with one or more asterisks. The asterisks are keyed under the Rules to denote the source of the change or in some case to explain the change.

Most of the changes have been unanimously approved by the subcommittee, and are submitted with the recommendation that they be approved by the full committee. Each of the changes that is not identified specifically below is essentially, "ministerial" or "grammatical". Many of the changes simply have to do with clarifying language or removing archaic terminology.

The changes that the subcommittee believes merit full committee discussion are identified below, as are the issues which the subcommittee felt should be brought to the full committee's attention.

1. Rule 226. The language at the end of Rule 226 "so help you God" (which is also found at the end of the oath in Rule 236), has been identified as objectionable by the ACLU in correspondence to Justice Hecht. That correspondence is attached for your reference. The subcommittee agrees that this manner should be debated by the full committee.
2. Rule 226a(1)(4). The "meddling" language was reinserted based on discussion at the last meeting has been placed in Rule 226a(1)(4). However, we have altered it, to delete the language and about selecting "fair and impartial jurors who are free from any bias or prejudice". Whether or not the "fair and impartial" language should stay in is a matter about which the subcommittee is not unanimous and which should therefore be resolved by the full committee.
3. In Rule 226a(2)(6), there is great discussion in the subcommittee about the impact of the Rule as it is now written. The second sentence of paragraph 6 provides that "if an objection to an witness's answer is sustained, disregard that answer. It is not evidence and should not be considered." Judge Brister has pointed out, and several of us on the

subcommittee agree, that this language is significant. Does it absolve a party who has objected from the requirement that that party seek an instruction for the jury to disregard? What does it do for purposes of determining whether or not there is evidence in the record referable to an appellate point? What does the language in this Rule do to a party's desire from time to time during the trial to have the judge instruct the jury to disregard a particular answer which is exceptionally offensive? Will the parties lose the right to make such a request?

4. Rule 272(2)(d), dealing with disjunctive submission, has also been flagged for discussion by the full committee. As now phrased, the Rule says "the court may submit a question disjunctively when the evidence shows as a matter of law that one or the other conditions or facts inquired about necessarily exists". The subcommittee is unanimous that the term "conditions or facts" should be replaced by the term "matters". The subcommittee does not agree about the necessity or impact of the phrase "as a matter of law". Do we want this phrase included? Is our intent actually to require that a court decide that "as a matter of law" one of the matters necessarily exists? Is this an excessive burden? Is the language necessary or appropriate?
5. Rule 274(2). Luke Soules suggested adding a sentence at the end of this Rule which reads "A party objecting to the charge must point out distinctly the matter complained of and the grounds of the complaint by an objection that identifies the portion of the charge to which complaint is made and is specific enough to inform the trial court to make a correct ruling on the objection or to support a presumption on appeal that the trial court was informed and chose to overrule the objection". The subcommittee has voted not to include this language, feeling that it is duplicative and problematic.
6. Rule 274, Comment. The comment at the end of Rule 274 is new, and has not yet been seen by the committee as a whole. It was requested at the time of the last full committee meeting, and has been drafted by the subcommittee. It is submitted for discussion.
7. Rule 274. Judge McCown discussed and has drafted a comment for possible inclusion at the end of Rule 274. The subcommittee has decided that the comment should not be added. The proposed language from Judge McCown is as follows: Comment under Tex. R. Civ. P. 301, a Motion for Directed Verdict is not a prerequisite to a Motion for Judgment notwithstanding a verdict. 4 R. McDonald, Texas Civil Practice Sec. 26.9 (1992 ed.). Under Fed. R. Civ. P. 50(b), a Motion for Directed Verdict is a prerequisite to a Motion for Judgment notwithstanding the verdict. The changes proposed here do not change Texas practice. The Federal rule is not adopted. [Comment recommended at last committee meeting, and drafted by Judge Scott McCown.]

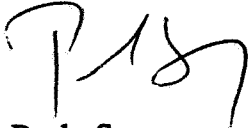
The subcommittee has essentially concluded its work on the listed Rules. Our next order of business will be to undertake what we consider to be "part 2" of our task, which is to address Rules 216, 217, 218, 219, 220, 221, 222, 223, 224 and 225, as well as 227, 228, 229, 230, 231, 232, 233, 234 and 235.

The only decision with regard to those Rules which have been made so far is that, with regard

to the conduct of voir dire, the subcommittee has decided not to attempt to draft Rules which address the proper procedures for Batson challenges. The Batson law is evolving too fast, and anything we drafted would potentially be obsolete before a new rule book could even be printed. The subcommittee requests that committee members look at these "part 2" rules, and make any suggestions to us on or before April 1st. This will allow us to discuss those changes and to meet a few times before the May 20-21 full committee meeting.

Thank you for your attention to these matters.

Best regards,

A handwritten signature in black ink, appearing to read "PS" followed by a stylized flourish.

Paula Sweeney

PS/dsa

Enclosure

## **RULE 216. REQUEST AND FEE FOR JURY TRIAL**

- a. **Request.** No jury trial shall be had in any civil suit, unless a written request for a jury trial is filed with the clerk of the court a reasonable time before the date set for trial of the cause ~~on the nonjury docket\*~~, but not less than thirty days in advance.
- b. **Jury Fee.** Unless otherwise provided by law, a fee of ten dollars if in the district court and five dollars if in the county court must be deposited with the clerk of the court within the time for making a written request for a jury trial. The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.

\* **Note to Subcommittee:** The suggestion for deletion of this language came from Luke Soules. Please see his attached suggestion, which I do not completely understand.

## **RULE 217. OATH OF INABILITY**

The deposit for a jury fee shall not be required when the party shall within the time for making such deposit, file with the clerk his affidavit to the effect that he is unable to make such deposit, and that he can not, by the pledge of property or otherwise, obtain the money necessary for that purpose; and the court shall then order the clerk to enter the suit on the jury docket.

## **RULE 218. JURY DOCKET**

The clerks of the district and county courts, shall each keep a docket, styled, "The Jury Docket," in which shall be entered in their order the cases in which jury fees have been paid or affidavit in lieu thereof has been filed as provided in the two preceding rules.

## **RULE 219. JURY TRIAL DAY**

The court shall designate the days for taking up the jury docket and the trial of jury cases. Such order may be revoked or changed in the court's discretion.

## **RULE 220. WITHDRAWING CAUSE FROM JURY DOCKET**

When any party has paid the fee for a jury trial, he shall not be permitted to withdraw the cause from the jury docket over the objection of the parties adversely interested. If so permitted, the court in its discretion may by an order permit him to withdraw also his jury fee deposit. Failure of a party to appear for trial shall be deemed a waiver by him of the right to trial by jury.

## **RULE 221. CHALLENGE TO THE ARRAY**

When the jurors summoned have not been selected by jury commissioners or by drawing the names from a jury wheel, any party to a suit which is to be tried by a jury may, before the

jury is drawn challenge the array upon the ground that the officer summoning the jury has acted corruptly, and has wilfully summoned jurors known to be prejudiced against the party challenging or biased in favor of the adverse party. All such challenges must be in writing setting forth distinctly the grounds of such challenge and supported by the affidavit of the party or some other credible person. When such challenge is made, the court shall hear evidence and decide without delay whether or not the challenge shall be sustained.

#### **RULE 222. WHEN CHALLENGE IS SUSTAINED**

If the challenge be sustained, the array of jurors summoned shall be discharged, and the court shall order other jurors summoned in their stead, and shall direct that the officer who summoned the persons so discharged, and on account of whose misconduct the challenge has been sustained, shall not summon any other jurors in the case.

#### **RULE 223. JURY LIST IN CERTAIN COUNTIES**

In counties governed as to juries by the laws providing for interchangeable juries, the names of the jurors shall be placed upon the general panel in the order in which they are randomly selected, and jurors shall be assigned for service from the top thereof, in the order in which they shall be needed, and jurors returned to the general panel after service in any of such courts shall be enrolled at the bottom of the list in the order of their respective return; provided, however, after such assignment to a particular court, the trial judge of such court, upon the demand prior to voir dire examination by any party or attorney in the case reached for trial in such court, shall cause the names of all members of such assigned jury panel in such case to be placed in a receptacle, shuffled, and drawn, and such names shall be transcribed in the order drawn on the jury list from which the jury is to be selected to try such case. There shall be only one shuffle and drawing by the trial judge in each case.

#### **RULE 224. PREPARING JURY LIST**

In counties not governed as to juries by the laws providing for interchangeable juries, when the parties have announced ready for trial the clerk shall write the name of each regular juror entered of record for that week on separate slips of paper, as near the same size and appearance as may be, and shall place the slips in a box and mix them well. The clerk shall draw from the box, in the presence of the court, the names of twenty-four jurors, if in the district court, or so many as there may be, if there be a less number in the box; and the names of twelve jurors if in the county court, or so many as there may be, and write the names as drawn upon two slips of paper and deliver one slip to each party to the suit or his attorney.

#### **RULE 225. SUMMONING TALESMAN**

When there are not as many as twenty-four names drawn from the box, if in the district court, or as many as twelve, if in the county court, the court shall direct the sheriff to summon such number of qualified persons as the court deems necessary to complete the panel. The

names of those thus summoned shall be placed in the box and drawn and entered upon the slips as provided in the preceding rules.

**Note to Subcommittee:** No proposed changes have been made, to my knowledge, to Rule 217 through 225.

#### **RULE 226. OATH TO JURY PANEL**

Before the parties or their attorneys begin the examination of the jury panel, the jurors shall be sworn by the court or under its direction as follows: "Do you solemnly swear or affirm that you will give true answer to all questions \*asked you concerning your qualifications as a juror,, \*\*so help you God?"

- \* It is suggested that these words be deleted.
- \*\* See attached correspondence from the ACLU. The issue about whether or not this language should be deleted needs to be debated at the full committee.

#### **RULE 226a. INSTRUCTIONS TO JURY PANEL AND JURY**

The judge shall give the following instructions to the jury panel and to the jury. If the case is tried to a six-person jury, the references to ten or eleven jurors in these instructions should be changed to read "five."

#### **PART 1 - JURY PANEL**

After the members of the panel have been sworn as provided in Rule 226 and before the voir dire examination, the judge shall read \*to the jury panel the following instructions, with such modifications as the circumstances of the particular case may require, to the jury panel:

*\*Members of the Jury Panel: The case that is now on trial is \_\_\_\_\_ v. \_\_\_\_\_ . This is a civil lawsuit that will be tried before a jury. Your duty as jurors will be to decide the disputed facts. It is my ~~\*the duty of the~~ \*as judge to see that the case is tried in accordance with the rules of law. It is very important that you follow carefully all instructions that I give you now and later during the trial. If you do not obey these instructions, it may become necessary for another jury to retry this case with all of the attendant \*resulting waste of your time here and the expense to the litigants and the taxpayers of this county for another trial. \*Your initial instructions are as follows:*

1. Do not mingle ~~\*with~~ or talk with the parties, the lawyers, the witnesses, or any other person who might be connected with or interested in this case, except for casual greetings. You may not even have casual conversation about things completely unrelated to this lawsuit with any of ~~those~~ \*these people.

2. Do not accept any favors from these people, and do not give them any favors. You must avoid even slight favors, such as rides, food, or refreshments.

3. Do not discuss this case with anyone, including your spouse. Do not let anyone discuss the case in your presence *\*hearing*. If anyone tries to talk about the case with you or in your hearing, tell me *\*or the bailiff* immediately.

4. The attorneys will now have an opportunity to talk with you about the case and the people involved, and to ask you some questions about your backgrounds, experiences, attitudes, and opinions. *\*\*\*In questioning you, they are not meddling in your personal affairs, but are trying to select fair and impartial jurors who are free from any bias or prejudice in this particular case. Listen to the questions and give true and complete answers. Do not conceal information. If you cannot hear or understand the questions, please let me know.*

5. If a question is asked of the whole panel *\*\*or part of the panel that requires an answer from you*, please raise your hand and keep it raised long enough for everyone to make a quick note of the people *\*those who responded*. *\*Counsel you may proceed*.

#### PART 2 - JURY

Immediately after the jurors are selected and have been sworn as provided in Rule 236, the judge shall give each juror a copy of the following written instructions and then read them to the jury:

*By your oath, you are now officials of this court, and active participants in the administration of justice. It is essential to the administration of fair and impartial justice that you follow these instructions:*

1. You must continue to obey the instructions I gave you earlier. Do not talk about the case with anyone, and do not have any contact with the parties, attorneys, witnesses, or other interested persons outside the courtroom.

2. Do not even discuss the case among yourselves until you have heard all of the evidence, the court's charge, the attorneys' arguments, and I have sent you to the jury room to begin your deliberations.

3. You are the judges of the facts of this case. It is your duty to listen to and consider carefully the evidence admitted under my rulings, and to answer the specific questions about the facts that I will submit to you in writing. ~~*\*in the court's charge.*~~

4. ~~*In arriving at your verdict*~~ *\*answering these questions, you can consider only the evidence admitted during the trial. Do not make any investigation about the facts of this case. Do not seek out any information contained in documents, books, or records that are not in*

evidence. Do not make personal inspections or observations outside the courtroom. Do not let anyone else do any of these things for you. This avoids a trial based upon secret evidence.

5. The law is determined by the legislature and courts of this state. You are obligated to follow my instructions about the law, regardless of whether you think the law is right or wrong.

6. During the presentation of evidence, the attorneys may make legal objections. If an objection to a question is sustained, disregard the question, and do not speculate ~~as to~~ *\*about why it was asked or what the answer would \*might have been.* If an objection to a witness's answer is sustained, *\*\*\*disregard that answer.* It is not in evidence, and should not be considered. Do not speculate about or consider for any reason the objections or my rulings *themselves \*on them.*

I stress again that it is imperative that you follow these instructions, as well as any others that I may ~~later~~ give you *\*later.* If you do not obey these instructions, then it may become necessary for another jury to retry this case with all of the ~~attendant~~ *\*resulting* waste of your time here and the expense to the litigants and the taxpayers of this county for another trial. Keep your copy of these instructions, and refer to them should any questions arise about the rules that govern your conduct during the trial. A violation of any instruction must be reported to me *\*or the bailiff as soon as possible.*

### PART 3 - COURT'S CHARGE

The *\*judge shall give the following written instructions \*to the jury, with such modifications as the circumstances of the particular case may require, \*shall be given by the court to the jury as part of the charge:*

1. This case is submitted to you by asking questions about the facts. Your answers must be based only upon the evidence, including exhibits, admitted during the trial.

2. In considering the evidence, ~~you are bound to~~ *\*must follow the law set forth in this charge, as well as all instructions concerning jurors' conduct that you \*I have been given \*you.*

3. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony.

4. Do not let bias, prejudice, or sympathy play any part in your deliberations.

5. Do not become a secret witness by telling other jurors about other incidents, experiences, or lawsuits. Do not tell other jurors about any special knowledge, information, or expertise you may have. You must confine your deliberations to the evidence presented in ~~open~~ *court \*the courtroom.* This avoids a trial based upon secret evidence.

6. Do not discuss or consider attorneys' fees. [Omit when attorneys' fees are in issue.]

7. Do not discuss or consider whether *\*any party has insurance* ~~\*protects any party.~~ [Omit when coverage is in issue *\*insurance is admissible.*]

8. This charge includes ~~all~~ *\*the legal instructions and definitions that are* ~~\*you should use necessary to assist you in reaching your verdict.~~ *\*If no definition is given, the normal meaning of words applies. \*Do not look up ~~so do not seek out~~ any information in law books or dictionaries.*

9. Every answer required by the charge is important.

10. Do not decide who think should win and then try to answer the questions accordingly. ~~Simply answer the questions; and do not concern yourselves with the effect of your answers.~~

11. Do not decide a question by any method of chance.

12. ~~Do not answer a question that calls for a numerical answer by adding together each juror's figure and then dividing by the number of jurors to get an average.~~ *\*If a question calls for a numerical answer, the figure should be one agreed to by the jurors, not one reached by adding together each juror's figure and then dividing by the number of jurors to get an average.*

13. Do not do any trading on your answers. That is , one juror must not agree to answer one questions a certain way if other jurors will agree to answer another question a certain way.

14. After you retire to the jury room, you will select a presiding juror. You will then deliberate upon your answers.

15. It is the duty of that presiding juror:

- a. to preside during the deliberations to ~~provide~~ *\*maintain order and compliance with the charge* ~~\*all instructions given you;~~
- b. to write, sign and deliver to the bailiff any communication to me;
- c. to conduct the vote; and
- d. to write your answers in the spaces provided.

16. You may render your verdict on the vote of ten or more members of the jury, but the same ten or more must agree upon each ~~of the~~ *\*and every answers made.*

17. *If the verdict is reached by unanimous agreement, the presiding juror will sign the verdict on the certificate page for the entire jury.*

18. *If the verdict is less than unanimous, the ten or eleven jurors who agree to each and every answer will sign the verdict individually on the certificate page.*

19. *If you observe a violation of my instructions outside the jury room, by either a juror or any other person, you must report that to me ~~\*or the bailiff~~.*

20. *During your deliberations, any juror who observes a violation of my instructions shall point out the violation ~~\*to the offending juror and caution the offending~~ ~~\*that juror not to violate the instruction again.~~*

21. *You must not discuss the case with anyone, not even with other members of the jury, unless all of the jurors are in the jury room. If anyone other than a juror tries to talk to you about the case before you reach a verdict, tell me ~~\*or the bailiff immediately~~.*

22. *When ~~\*you have answered all required~~ ~~\*applicable questions have been answered,~~ ~~the presiding juror has written your answers on the charge, and the~~ ~~\*and signed the verdict has been signed,~~ you ~~\*should inform will summon the bailiff and be returned to court~~ ~~\*before returning to the courtroom with your verdict.~~*

[Instructions, definitions and questions to be placed here.]

#### Certificate

We , the jury have answered the questions as shown and return these answers to court as our verdict.

Signature of presiding juror, if unanimous. [One signature line here.]

Signatures of jurors voting for the verdict, if not unanimous. [Eleven signatures lines here.]

#### PART 4 - JURY RELEASE

The judge shall give the jury the following oral instructions after accepting the verdict and then release them:

*I earlier instructed you to observe strict secrecy during the trial, ~~\*and not to discuss this case with anyone except other jurors while you were deliberating. I am~~ ~~\*now about to discharge you. Once I have done that~~ ~~\*discharged you, you are released from that~~ ~~\*secrecy and~~ ~~\*from all of the other orders that I gave you. You will be~~ ~~absolutely~~ ~~\*completely free to discuss~~*

*anything about this case with anyone. You will be just as free to decline to talk about the case if that is your decision.*

[Judge's commendation of jurors and the important service they have performed may be added here.]

- \* Change suggested by the subcommittee
- \*\* Change suggested at full committee meeting
- \*\*\* Change of concern to subcommittee which requires committees input.

**RULE 227 - 270** have not yet been addressed by this subcommittee except for rule 236 which follows.

#### **RULE 236. JUROR'S OATH**

*The jury shall be sworn by the court or under its direction as follows: "Do you solemnly swear or affirm that you will return a true verdict, according to the law stated in the court's charge and to the evidence submitted to you under the rulings of this court, \*\*so help you God?"*

- \*\* See attached correspondence from the ACLU. The issue about whether or not this language should be deleted needs to be debated at the full committee.

#### **RULE 271. CHARGE TO THE JURY**

The trial court shall prepare a written charge to the jury. The court shall provide counsel with written copies of the proposed charge, and shall provide a reasonable opportunity for the parties to prepare their requests and objections and to present them on the record outside the presence of the jury after the conclusion of the evidence and before the charge is read to the jury. After the requests and objections are made and ruled upon and any modifications to the charge are made, the court shall read the charge to the jury in open court in the precise words in which it is written. The court shall deliver one or more copies of the written charge to the jury. The charge shall be signed by the court and filed with the clerk.

#### **RULE 272. STANDARDS FOR THE JURY CHARGE**

1. General Standards
  - a. Pleading Required. A party who has the burden of pleading a matter shall not be entitled to the submission of a question, instruction, or definition regarding that matter unless if the matter is affirmatively raised by the party's pleading.
  - b. Comment on the Evidence. The court shall not directly comment on the weight of the evidence or advise the jury of the effect of their answers, but an otherwise proper

question, instruction, or definition shall not be objectionable on the ground that it incidentally ~~constitutes a comments~~\* on the weight of the evidence or advises the jury of the effect of their answers.

## 2. Questions

a. In General. The court shall submit questions ~~on~~ \*about the disputed material factual issues ~~which~~ \*\*are raised by the pleadings and the evidence.

b. Broad Form Submission. The court shall, whenever feasible, submit the case ~~upon~~ \*by broad form questions.

c. Conditional Submission. The court may predicate the jury's consideration of one or more questions upon specified answers to another question or questions on which the materiality of the predicated question or questions depends.

d. Disjunctive Submission. The court may submit a question disjunctively when the evidence shows \*\*\*~~as a matter of law~~ that one or the other of the ~~conditions or facts~~ \*matters inquired about necessarily exists.

e. Inferential Rebuttal. Inferential rebuttal questions shall not be submitted.

## 3. Instructions and Definitions

a. In General. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict.

b. Burden of Proof. The placing of the burden of proof may be accomplished by instructions or by inclusion in the questions.

**RULE 273. REPEALED.**

**RULE 274. PRESERVATION OF APPELLATE COMPLAINTS**

1. Requests. A party may not assign as error the failure to give \*\*\*~~submit~~ a question, definition, or instruction on a contention which that party was required to plead unless the record reflects that, after the conclusion ~~on~~ \*of the evidence and before or at the time of objecting, the party tendered such question, definition, or instruction to the judge \*\*\*~~court~~ in writing. Defects in a requested question, definition, or instruction shall not constitute a waiver of error if the request provides the trial court reasonable guidance in fashioning a correct question, definition, or instruction. If a request has been filed and bears the judge's \*\*\*~~court's~~ signature, it shall be presumed, unless otherwise noted in the record, that the request was tendered at the proper time.

2. Objections. ~~No~~ **\*\*A party may \*\*not** assign as error the giving or the failure to give a question, definition, or instruction unless that party objects thereto before the charge is read to the jury, stating distinctly the matter objected to and the grounds of the objection. An objection is required even if the objecting party is required to tender a request under paragraph 1 of this rule. Objections shall be in writing or shall be made orally in the presence of the court, the court reporter, and opposing counsel. It shall be presumed, unless otherwise noted in the record, that a party making objections did so at the proper time. ~~\*\*\*A party objecting to the charge must point out distinctly the matter complained of and the grounds of the complaint by an objection that identifies the portion of the charge to which complaint is made and is specific enough to inform the trial court to make a correct ruling on the objection or to support a presumption on appeal that the trial court was informed and chose to overrule the objection.~~

**\*\*\*\*Comment:** *The change in the second sentence, requiring an objection by a party required to tender is intended to modify the rule enunciated in State v. Payne.*

- \* Language changes suggested by the subcommittee.
- \*\* Changes suggested at last full committee meeting.
- \*\*\* Changes suggested at last full committee meeting but questioned by subcommittee and reurged for committee discussion.
- \*\*\*\* Full committee agreed that a comment was needed but no drafting was done.

3. Obscured or Concealed Objections or Requests. When an objection or request is obscured or concealed by voluminous unfounded objections or requests, minute differentiations or numerous unnecessary objections or requests, such objection or request shall not preserve appellate complaint. No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only. A judgment shall not be reversed because of the failure of the court to submit different shades of the same question, definition, or instruction.

4. Rulings. The court shall announce its rulings on objections ~~in open court~~ **\*\*on the record** before reading the charge to the jury. In the absence of an express ruling, any objection not cured by the charge is deemed overruled.

5. Evidentiary Sufficiency Complaints. A claim that there ~~was~~ **\*is** no evidence to support the submission of a question, or that the answer to the question ~~was~~ **\*is** established as a matter of law, may be made for the first time **\*\*** after the verdict. A claim that there ~~was~~ **\*is** factually insufficient evidence to support the jury's answer to a question, or that the answer to a question ~~was~~ **\*is** against the great weight and preponderance of the evidence, ~~must~~ **\*may** be made **\*only** after the verdict. ~~Any of~~ **\*Such** claims may be made regardless of whether the submission of the question was requested by the complainant.

- \* Change suggested by subcommittee.
- \*\* Comment under Tex. R. Civ. P. 301, a Motion for Directed Verdict is not a prerequisite to a Motion for Judgment notwithstanding a verdict. 4 R. McDonald,

**Texas Civil Practice Sec. 26.9 (1992 ed.). Under Fed. R. Civ. P. 50(b), a Motion for Directed Verdict is a prerequisite to a Motion for Judgment notwithstanding the verdict. The changes proposed here do not change Texas practice. The Federal rule is not adopted. [Comment recommended at last committee meeting, and drafted by Judge Scott McCown.]**

**RULE 275. REPEALED.**

**RULE 276. REPEALED.**

**RULE 277. REPEALED.**

**RULE 278. REPEALED.**

**RULE 279. OMISSIONS FROM THE CHARGE**

1. Omission of Entire Ground. Any independent grounds\* of recovery or of\* defense which is not conclusively established under the evidence and all elements of which are omitted from the charge without preservation of appellate complaint by the party relying thereon is waived.

2. Omission of One or More Elements. When an independent ground of recovery or defense consists of more than one element, and one or more of the elements necessary to sustain such ground of recovery or defense, and necessarily referable thereto, is submitted to and found by the jury, and one or more of such elements is omitted from the charge, the court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted element or elements, if the party aggrieved by the findings has failed to preserve appellate complaint with respect to the omitted elements. If no such written findings are made, the omitted elements shall be deemed found by the court in such manner as to support the judgment if such deemed findings are supported by legally and factually sufficient evidence. The legal and factual sufficiency of the evidence to support express findings made under this rule may be challenged in the same manner as challenges to express findings in nonjury cases.

\* Change suggested by subcommittee

**RULE 166d. FAILURE TO MAKE OR COOPERATE IN DISCOVERY: REMEDIES**

**1. Procedure.** If a person or entity fails in whole or in part to respond to or supplement discovery, or abuses the discovery process in seeking or resisting discovery, the court may grant relief as set forth below.

*(a) Motion.* Any person or entity affected by such failure or abuse may file a motion specifically describing the violation. The motion shall be filed in the court in which the action is pending, except that a motion involving a person or entity who is not a party shall be filed in any district court in the district where the discovery is to take place. ~~Motions or responses made under this rule shall be filed and served in accordance with Rule 21 and 21.~~ Nonparties affected by the motion shall be served as if parties. The motion shall contain a certificate that the movant (or the movant's counsel) has spoken with the opposing party (or the opposing party's counsel if represented by counsel) in person or by telephone to try to resolve the discovery dispute ~~without the necessity of court intervention~~, or has made diligent attempts to do so, and that such efforts have failed.

Deleted by vote; Tr. 801, 803.

*(b) Hearing.* Oral hearing is required for motions requesting sanctions under paragraph 3, unless waived by those involved. No oral hearing is required for motions requesting relief provided by paragraph 2. ~~The court shall base its decision upon (1) pleadings, affidavits, stipulations, and discovery results submitted with the motion, (ii) judicial notice taken of the usual and customary expenses including attorney's fees and the contents of the case file, and (iii) testimony if the hearing is oral.~~

Deleted by subcommittee; approved Tr. 798-803.

*(c) Order.* An order under this rule shall be in writing. An order granting relief or imposing sanctions shall be against, the party, attorney, law firm, or other person or entity whose actions necessitated the motion. An order imposing sanctions under paragraph 3 of this rule shall contain written findings, or be supported by oral findings on the record, stating specifically (1) the conduct meriting sanctions, (ii) the reasons for the court's decision, (iii) why a lesser sanction would be ineffective, and (iv) if the sanctions would preclude a decision on the merits of a party's claim, counterclaim, or defense, the conduct demonstrating that the party, ~~a person under the control of the party~~ or the party's counsel has acted in flagrant bad faith or with callous disregard for the rules.

Deleted by vote; Tr. 886, 888.  
Subcommittee encouraged to address by comment.

**2. Motion to Compel or Quash Discovery.**

~~The court may compel or quash discovery as provided by Rule 166b. In addition, so long as the amount involved is not substantial, the court may award the prevailing person or entity reasonable expenses necessary in connection with the motion, including attorney's fees. The court may presume the usual and customary fee in connection with the motion is not substantial, unless circumstances or an objection suggests such award may preclude access to the courts. An award of expenses that is substantial is governed by paragraph 3(c). If a motion is granted in part and denied in part, the court may apportion expenses in a just manner. The court may enter these orders without any finding of bad faith or negligence, but shall not award expenses if the unsuccessful motion or opposition was reasonably justified, in fact or law, or any other circumstances make an award of expenses unjust.~~

(a) ~~The court may compel, limit or deny or~~ quash discovery as provided by Rule 166b.

(b) Except in cases involving special circumstances, as set forth in subparagraphs 2(c) and 2(d), a party may not seek, and the court shall not award, expenses, including attorney's fees, or any sanction under paragraph 3, in connection with a motion to compel or quash discovery.

(c) A party may seek, and the court may make, an award of expenses, including attorney's fees, in connection with a motion to compel or quash discovery or a written response to such a motion, ~~supported by affidavit, where~~ the court finds that the following special circumstances exist: (1) the amount of expenses, including attorney's fees, incurred in connection with the motion or opposition by the party seeking such relief is unreasonably burdensome ~~in relation to the resources of the party;~~ and (2) the position of the party against whom such relief is sought was not reasonably justified in seeking or resisting the discovery at issue.

Subcommittee version deleted by vote; Tr. 898, 901.

Substituted version adopted by vote; Tr. 898, 901.

Deleted from proposal; Tr. 894.

(d) A party may seek, and the court may make, an award of ~~sanctions under paragraph 3~~ expenses, including attorney's fees, in connection with a motion to compel or quash discovery or a written response to such a motion, ~~supported by affidavit where~~ if the court finds that one or more of the following special circumstances exists: (1) a person subject to an order previously entered under this paragraph has failed to comply with such an order; (2) a party, ~~a person under the control of a party, or an attorney, law firm, or other person or entity for a party,~~ not acting in good faith, has destroyed evidence or engaged in other conduct that cannot effectively be remedied by an order compelling or quashing discovery; (3) a party, attorney, ~~or law firm, or other person or entity~~ has repeatedly or on a continuing basis: ~~(i) failed to file timely discovery responses, (ii) (i) filed untimely or clearly inadequate or incomplete discovery responses; (iii) (ii) failed to comply with specific requirements of a discovery rule, subpoena or order; or (iv) propounded (iii) made~~ discovery requests, or raised objections to discovery which ~~that~~ are not reasonably justified.

(e) A motion to compel or quash discovery, or a written opposition to such a motion, that also seeks either recovery of expenses, including attorney's fees, or imposition of sanctions shall so state and shall ~~be supported by affidavit evidence describing~~ describe specifically the acts or omissions constituting special circumstances under paragraphs 2(c) or (d).

Deleted from proposal; Tr. 894.

3. ~~Sanctions. In addition to or in lieu of the relief provided above~~ If one of the special circumstances described in subparagraph 2(d) exists, or if a party, a person under the control of a party, attorney, law firm, or other person or entity acts in flagrant bad faith or with callous disregard of a rule, subpoena, or order, the court may ~~enter~~ make an order imposing one or more of the sanctions set forth below. Any sanction imposed must be just and must be directed to remedying the particular violations involved. A sanction should be no more severe than necessary to satisfy its legitimate purposes.

(a) Reprimanding the offender ~~in writing, either publicly or privately;~~

Deleted by vote; Tr. 902-03.

(b) Disallowing further discovery in whole or in part;

(c) Assessing a substantial amount in ~~discovery or trial~~ expenses, including attorney's fees, ~~of discovery or trial;~~

Subcommittee edits approved by vote; Tr. 902-03.

(d) Deeming certain facts or matters to be established for the purposes of the action;

(e) Barring introduction of evidence supporting or opposing designated claims or defenses;

