

AGENDA
SEPTEMBER 15-16, 1995
SCAC MEETING

INDEX

1. Report of the Sanctions Subcommittee dated September 11, 1995
2. TRCP 25 - Medical Records of Non-Party
3. TRCP 145 - Affidavit of Inability
4. Report of Subcommittee on TRCP 1-14 dated September 12, 1995
5. Report of Subcommittee on TRCP 315-331

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September 11, 1995

Dear Justice Hecht, Mr. Lee Parsley and Members of the Committee:

Please find enclosed the revised drafts of the Sanctions Subcommittee to proposed Rules 13 and 166d. We have made some revisions, which we believe to be relatively minor, to the drafts that we have sent you earlier. We look forward to discussing these proposed drafts on Friday at our meeting in Austin so please bring these drafts with you. Thank you for your attention.

Yours truly,



Joseph Latting

JL/cb
Enclosures

**RULE 13. EFFECT OF PRESENTING PLEADINGS
AND MOTIONS; SANCTIONS**

(a) **Presenting pleadings and motions.** By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading or motion, an attorney or unrepresented party is certifying that to the best of the presenter's knowledge, information, and belief, formed after reasonable inquiry:

(1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or by the establishment of new law;

(3) the allegations and other factual contentions in the pleading or motion have evidentiary support, or, for specifically identified allegations or factual contentions, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) each denial in a pleading or motion of a factual contention is warranted on the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief; provided however, that the filing of a general denial under Rule 92 does not violate this provision.

(b) **Motion for sanctions.** A party seeking sanctions under this rule shall file a motion for sanctions separately from other motions or requests, and shall describe the specific conduct alleged to violate paragraph (a) of this rule. The motion shall be served at least twenty-one (21) days before being filed or presented to the court; if the challenged pleading or motion is withdrawn or corrected within that twenty-one (21) day period, the motion shall not be filed or presented to the court. The court may award to a part prevailing on a motion under this rule the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.

(c) **Court's initiative.** The court on its own initiative may enter an order describing the specific conduct that appears to violate paragraph (a) of this rule and directing the alleged violator to show cause why the conduct has not violated the rule.

(d) **Sanctions.** A court that determines that a person has presented a motion or pleading in violation of paragraph (a) of this rule may impose a sanction on the person, a party represented by the person, or both. Any sanction shall be limited to what is sufficient to

deter repetition of the conduct or comparable conduct by others similarly situated. A sanction may include any of the following:

- (1) an order directing the violator to perform, or refrain from performing, an act;
- (2) an order to pay a penalty into court;
- (3) an order to pay the other party the amount of the reasonable expenses incurred by the other party because of the presentation of the pleading, motion, or other paper, including reasonable attorney's fees; and
- (4) an award of an appropriate amount of costs for inconvenience, harassment, and out-of-pocket expenses incurred or caused by the subject litigation.

The court may not award monetary sanctions against a represented party for a violation of paragraph (a)(2). The court may not award monetary sanctions on its own initiative unless the court issues its show-cause order before a voluntary dismissal or voluntary settlement of the claims made by or against the party or the party's attorney against whom sanctions are proposed.

An order under this rule shall contain written findings, or be supported by oral findings on the record, stating specifically (1) the conduct meriting sanctions, and (2) why a lesser sanction would be ineffective.

Except with respect to motions and pleadings involving post-judgment discovery under Rule 162a, the trial court may grant relief under this rule only while the court has plenary jurisdiction.

- (e) **Exception.** This rule is inapplicable to discovery requests, responses and objections.

Comments:

1. This rule and CPRC Chapter 10 govern only the presentation of pleadings and motions to the court. FRCP 11, upon which Chapter 10 was largely based, governs "other papers" as well. The subcommittee does not recommend extending Rule 13 beyond that stated in the statute.

2. The language of CPRC 10.002 allows courts to award "costs for inconvenience, harassment, and out-of-pocket expenses incurred or caused by the subject litigation" when "no due diligence is shown." The subcommittee's rule does not contain the "due diligence" language, but allows imposition of this sanction when paragraph (a) of the rule has been

violated. Paragraph (a) imposes an obligation of "reasonable inquiry," which is the equivalent of "due diligence." The subcommittee fears that using "due diligence" in addition to "reasonable inquiry" tends to create confusion.

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

1. Procedure.

(a) *Motion.* Any person affected by a failure of another person to respond to or supplement discovery, or by an abuse of the discovery process in seeking or resisting discovery, 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. 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, or has made diligent attempts to do so, and that such efforts have failed.

(b) *Hearing.* Oral hearing is required for motions requesting relief under this rule, unless waived by those involved.

(c) *Order.* An order under this rule may compel, limit or deny discovery, award expenses pursuant to paragraph 2, and impose sanctions pursuant to paragraph 3. The order 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, and (2) why a lesser sanction would be ineffective.

2. Expenses for compelling, limiting, or denying discovery. The court may make an award of expenses, including attorney's fees, incurred in connection with a motion made pursuant to paragraph 1 or a written response to such a motion, only if the court finds that: (a) the amount of expenses, including attorney's fees, incurred in connection with the prosecution or defense of the motion, is unreasonably burdensome on the party seeking relief, and (b) the party against whom relief is sought was not reasonably justified in seeking or resisting the discovery at issue.

3. Sanctions.

(a) *Sanctionable conduct.* In addition to or in lieu of the relief provided above, the court may impose one or more of the sanctions set forth in subparagraph (b) below if the court finds that:

(i) a person subject to a discovery order, other than a Discovery Control Plan under Rule 1, has failed to comply with the order; or

(ii) a party, a party's attorney, or a person under the control of a party: (A) has disregarded a rule, a Discovery Control Plan, or subpoena repeatedly or in bad faith; (B) has destroyed evidence in bad faith or engaged in other conduct that an order compelling, denying, or limiting discovery cannot effectively remedy; or (C) has repeatedly made discovery responses that are untimely, clearly inadequate or made for purposes of delay or discovery requests or objections to discovery that are not reasonably justified; or (D) has otherwise abused the discovery process in seeking, making or resisting discovery.

(b) **Sanctions.** A court may impose any of the following sanctions that are just under the circumstances:

- (1) Reprimanding the offender;
- (2) Disallowing further discovery in whole or in part;
- (3) Assessing discovery or trial expenses, including attorney's fees caused by the sanctionable conduct;
- (4) Deeming certain facts or matters to be established for the purposes of the action;
- (5) Barring introduction of evidence supporting or opposing designated claims or defenses;
- (6) Striking pleadings or portions thereof, staying further proceedings until an order is obeyed, dismissing with or without prejudice the action or any part thereof, or rendering a default judgment;
- (7) Granting the movant a monetary award in addition to or in lieu of actual expenses; or
- (8) Making such other orders as are just.

4. Time for Compliance. Orders under this rule shall be operative at such time as directed by the court. If a party contends that monetary award precludes access to the court, the judge must either (i) provide that the award is payable only at a date that coincides with or follows entry of a final order terminating the litigation or (ii) makes written findings or oral findings on the record after a hearing that the award does not preclude access to the court.

5. Review. An order under this rule shall be subject to review on appeal from the final judgment by any person or entity affected by the order.

Comment. Paragraph (5) does not change or address the availability of mandamus relief in sanctions proceedings. *See, e.g., Walker v. Packer, 827 S.W.2d 833 (Tex. 1992).*

[??] **Nature of Hearing and Evidence.** Due process requires that, before sanctions are imposed, the alleged offender be afforded fair notice and an opportunity to be heard. The procedure employed may vary with the circumstances, provided that due process requirements are satisfied. The court, in its discretion, shall determine whether to hold a

Rule 25 Medical Records of Non-Party

Before requesting production of medical records of a non-party and before serving a subpoena upon any custodian of records seeking the medical records of a non-party, the party seeking the records shall first serve the non-party with a copy of the subpoena. A request or subpoena which seeks medical records without identifying specific individuals and which seeks only records redacted of any individual-identifying information is not subject to this requirement. Any other exception to the requirement of this rule may be made only by court order for good cause shown. Nothing in this rule excuses compliance with laws concerning the confidentiality of medical records.

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August 14, 1995

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Re: Court Rules Committee

Gentlemen:

Following is my recommendation with respect to the production of the medical records of non-parties:

"When the production of medical records of a non-party is sought and the non-party has not signed a medical authorization the party seeking such production shall do so by oral or written deposition. The non-party whose records are sought shall be served with notice of deposition in the same manner as required under these rules for service of notice to a party unless otherwise ordered by the Court upon a showing of good cause by the party seeking such records. However, if the identity of the non-party whose records are being sought is not directly or indirectly being disclosed by production of such records notice pursuant to this rule shall not be required."

16-10

RULE 145 AFFIDAVIT OF INABILITY

In lieu of filing security for costs of an original action, a party who is unable to afford said costs shall file an affidavit or attorney's certificate as herein described. A "party who is unable to afford costs" is defined as a person who is presently receiving a governmental entitlement based on indigency or any other person who has no ability to pay costs. Except as provided by paragraph 3, the affidavit, and the party's action, shall be processed by the clerk in the manner prescribed by paragraphs 1 and 2. The procedure for contesting an affidavit shall not apply to the attorney's certification set forth in paragraph 3.

1. Procedure. Upon the filing of the affidavit, the clerk shall docket the action, issue citation and provide such other customary services as are provided any party. After service of citation, the defendant or the clerk may contest the affidavit by filing a written contest giving notice to all parties, provided that temporary hearings will not be continued pending the filing of the contest. If the court shall find at the first regular hearing in the course of the action that the party (other than a party receiving a governmental entitlement) is able to afford costs, the party shall pay the costs of the action. Reasons for such a finding shall be contained in an order. Except with leave of court, no further steps in the action will be taken by a party who is found able to afford costs until payment is made. If the party's action results in monetary award, and the court finds sufficient monetary award to reimburse costs, the party shall pay the costs of the action. ~~If the court finds that another party to the suit can pay the costs of the action, the other party shall pay the costs of the action.~~

2. Affidavit. The affidavit shall contain complete information as to the party's identity, nature and amount of governmental entitlement income, nature and amount of employment income, other income, (interest, dividends, etc.), spouse's income if available to the party, property owned (other than homestead), cash or checking account, dependents, debts and monthly expenses. The affidavit shall contain the following statements: "I am unable to pay the court costs. I verify that the statements made in this affidavit are true and correct." The affidavit shall be sworn before a Notary Public.

3. Attorney's Certification. If a party (1) is receiving free legal services, without contingency, due to the party's indigency and, (2) is represented by an attorney who is providing legal services either directly or by referral from a program funded by the Interest on Lawyers' Trust Accounts (IOLTA) program; the attorney may file a certificate in lieu of the procedures described in paragraphs 1 and 2. The certificate shall confirm that the party has been screened for income eligibility, under the IOLTA income guidelines, by the IOLTA funded program or that the party has been referred to the attorney from a program funded by IOLTA and such program represents it has screened the party for income eligibility, under the IOLTA income guidelines. Upon receipt of such certification, the clerk shall docket the action, issue citation and provide such other customary services as provided any party.

4. Attorney's fees and costs. Nothing herein shall preclude any existing right to recover attorney's fees, expenses or costs from any other party.

Notes and Comments

Source: Art. 2070

Change by amendment effective ____, 1994: Section one now allows court clerks to contest affidavits to prevent abuses by parties who are able to afford the costs of suit.

Section three facilitates participation by pro bono attorneys in representing low income clients. It allows an attorney associated with an IOLTA funded program to certify the party's eligibility for services based on prior income screening.

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January 25, 1994

Honorable Bonnie Wolbrueck
District Clerk of Williamson County
P.O. Box 24
Georgetown, Texas 78627

RE: Proposed amendment to Rule 145

Dear Ms. Wolbrueck:

It was nice to meet you at the last session of the Supreme Court Advisory Committee, and I look forward to working with you on Rule 145 and other matters.

Enclosed is a copy of the proposed amendment to Rule 145 as recommended by the State Bar Committee on Legal Services to the Poor.

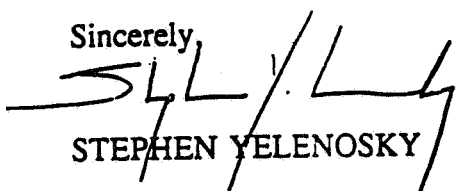
The proposed change would restore the authority of the court clerks to challenge affidavits of inability.

The proposed change would also allow an attorney working for an IOLTA-funded program or accepting a case from such a program on a pro bono basis to obtain a waiver of fees by certifying that the client was screened by the program under IOLTA income guidelines. The attorney certification would take the place of an affidavit of inability and would not be contestable.

The proposed attorney certification procedure responds to concerns raised by pro bono attorneys accepting cases from legal services programs and other non-profit, IOLTA-funded programs. Attorneys who had volunteered to help an indigent client found that they first had to battle a defendant's often frivolous, but bothersome, challenge to the client's affidavit of inability to pay costs of court. Those experiences may be discouraging pro bono representation.

I hope that your subcommittee gives consideration to proposing this amendment to the Supreme Court Advisory Committee. Please call me if you have any questions or wish to discuss this further.

Sincerely,



STEPHEN YELENOSKY

cc. Honorable Doris Lange

DELGADO, ACOSTA & BRADEN, L.L.P.

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September 12, 1995

All Members of the Supreme Court Advisory Committee

Dear Committee Members:

Enclosed please find our subcommittee's proposed final report on the Texas Rules of Civil Procedure Nos. 1-14. The changes proposed by the Supreme Court Advisory Committee have been incorporated in this report. Thank you for your attention to this matter.

Yours truly,

DELGADO, ACOSTA & BRADEN, L.L.P.

By:



Alejandro Acosta, Jr.

Enclosure

Supreme Court Advisory Committee Members

September 12, 1995

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Supreme Court Advisory Committee Members
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Honorable Paul Till

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Honorable Bonnie Wolbrueck

Current Rules

Rule 1	No change.
Rule 2	No change.
Rule 3	No change.
Rule 3a	No change.
Rule 4	Changes suggested.
Rule 5	Changes to make consistent with appellate rules.
Rule 6	Delete <u>Changes suggested.</u>
Rule 7, 8, 10 and 12	Recommend consolidation with some minor changes.
Rule 9	Delete <u>Changes suggested.</u>
Rule 11	Changes suggested.
Rule 14	Delete.
Rule 14b	No change.
Rule 14c	No change.

Letters from SCAC Agenda

Pg. 000004: No smoking rule	Recommend adoption with some changes. See new Rule 6. <u>Recommendation: No change.</u>
Pgs. 000021-23, 27: Concern over meaning of "legal holiday" in Rule 4	See changes made to Rule 4, consistent with TRAP changes.
Pgs. 000024-25: Certificate of mailing as proof of mailing, Rule 5	Adopt same rule as appellate rules discussed earlier in SCAC.
Pg 000030: Concern over "good cause" standard in TRCP 5(b) for enlarging time when TRAP rules allow upon "reasonable explanation."	No change recommended at this time. The "good cause" standard of TRCP 5(b) applies only when the motion to extend time is filed after the time to act has expired. If made within the time to act, the standard is "for cause." The TRAP standard of "reasonable explanation" applies so long as the request is made within 15 days of the expiration of time. The Committee may want to consider changing the TRCP mechanism for motions to extend time to the TRAP method, but the Subcommittee does not recommend doing so at this time.
Pg 33-37: Allow service on Sundays, contrary to Rule 6	Subcommittee recommends deletion of Rule 6. <u>Recommendation: no change.</u>
Suppl. p. 21-23: Rule 2 should be amended so TRCP applies to small claims court	Recommendation: No change. TRCP should not apply to small claims court.
Suppl. p. 24: Mailbox rule as applied to Fed Express.	Recommendation: No change as per lengthy discussion in SCAC concerning TRAP.
Feb. 1995 letter from Terry Jacobson regarding changing Rule 6 to allow service of process on Sundays, at least in family law matters	Recommendation: Solved by recommended deletion of Rule 6. <u>No change.</u>

Rule 1. Objective of Rules.

The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.

Subcommittee Recommendation: No change

Rule 2. Scope of Rules.

These rules shall govern the procedure in the justice, county, and district courts of the State of Texas in all actions of a civil nature, with such exceptions as may be hereinafter stated. Where any statute in effect immediately prior to September 1, 1941, prescribed a rule of procedure in lunacy, guardianship, or estates of decedents, or any other probate proceedings in the county court differing from these Rules, and not included in the "List of Repealed Statutes," such statute shall apply; and where any statute in effect immediately prior to September 1, 1941, and not included in the "List of Repealed Statutes," prescribed a rule of procedure in any special statutory proceeding differing from these rules, such statute shall apply. All statutes in effect immediately prior to September 1, 1941, prescribing rules of procedure in bond or recognizance forfeitures in criminal cases are hereby continued in effect as rules of procedure governing such cases, but where such statutes prescribed no rules of procedure in such cases, these rules shall apply. All statutes in effect immediately prior to September 1, 1941, prescribing rules of procedure in tax suits are hereby continued in effect as rules of procedure governing such cases, but where such statutes prescribed no rules of procedure in such cases, these rules shall apply; provided, however, that Rule 117a shall control with respect to citation in tax suits.

Subcommittee Recommendation: No change.

SCAC Action: accepted subcommittee recommendation.

Rule 3. Construction of Rules.

Unless otherwise expressly provided, the past, present or future tense shall each include the other; the masculine, feminine, or neuter gender shall each include the other; and the singular and plural number shall each include the other.

Subcommittee Recommendation: No change.

SCAC Action: accepted subcommittee recommendation.

Rule 3a. Local Rules.

Each administrative judicial region, district court, county court, county court at law, and probate court, may make and amend local rules governing practice before such courts, provided:

- (1) that any proposed rule or amendment shall not be inconsistent with these rules or with any rule of the administrative judicial region in which the court is located;
- (2) no time period provided by these rules may be altered by local rules;
- (3) any proposed local rule or amendment shall not become effective until it is submitted and approved by the Supreme Court of Texas;
- (4) any proposed local rule or amendment shall not become effective until at least thirty days after its publication in a manner reasonably calculated to bring it to the attention of attorneys practicing before the court or courts for which it is made;
- (5) all local rules or amendments adopted and approved in accordance herewith are made available upon request to members of the bar;
- (6) no local rule, order, or practice of any court, other than local rules and amendments which fully comply with all requirements of this Rule 3a, shall ever be applied to determine the merits of any matter.

Subcommittee Recommendation: *No change.*

SCAC Action: *accepted subcommittee recommendation.*

Rule 4. Computation of Time.

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday or legal holiday. Saturdays, Sundays and legal holidays shall not be counted for any purpose in any time period of five days or less in these rules, except that Saturdays, Sundays and legal holidays shall be counted for purpose of the three-day periods in Rule 21a, extending other periods by three days when service is made by registered or certified mail or by telephonic document transfer, and for purposes of the five-day periods provided for under Rules 748, 749, 749a, 749b, and 749c. When the act to be done is the filing of a paper in court, and the clerk's office is closed or inaccessible on the last day of the period so computed, the period extends to the end of the next day on which the clerk's

office is open and accessible. Proof of closing or inaccessibility of the clerk's office may be made by a certificate of the clerk or counsel or by affidavit of the party.

Subcommittee Recommendation: *The subcommittee recommends that the reference to "Rule 21" be deleted so that Saturdays, Sundays and holidays are not counted for the three-day notice period required for notice of hearings. The change prevents giving notice on Friday of a Monday hearing. Notice of a Monday hearing must be given on Wednesday unless a court orders otherwise. The subcommittee has also added the language from TRAP proposed Rule 5(a) regarding a closed or inaccessible clerk's office. The other change, "which" to "that," is merely grammatical.*

The Subcommittee also recommends that the TRCP contain a general rule for filed papers similar to TRAP 4 as reported out of the Appellate Rules Subcommittee that would contain the provisions of at least TRCP 4, 5, 21, 57, 74, 75, and 57.

SCAC Action: *accepted subcommittee recommendation. General rule for filed papers to be drafted with chairmen of other affected subcommittees.*

Subcommittee Recommendation: *delete plural as noted*

Rule 5. Enlargement of Time.

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

If any document is sent to the proper clerk by first-class United States mail or by registered or certified mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail on or before the last day for filing same, the same, if received by the clerk not more than ten days after the last day for filing, shall be filed by the clerk and be deemed filed in time. A legible postmark affixed by the United States Postal Service, a receipt for registered or certified mail, or a certificate of mailing by the United States Postal Service shall be accepted as conclusive proof of mailing, but *in the absence of such proof*, other proof may be considered.

Comment: This rule does not require clerks to keep envelopes or wrappers.

Subcommittee Recommendation: *Changes are to make TRCP consistent with TRAP 4(b). The subcommittee has added the italicized language "in the absence of such proof" in the last line for clarity, and suggests that the change be made to TRAP 4(b) as well.*

