MINUTES SUPREME COURT ADVISORY COMMITTEE

November 1 and 2, 1985

The Advisory Committee of the Supreme Court of Texas met on November 1, 1985, at 10:00 a.m. pursuant to call of the Chairman.

Members of the committee in attendance were Honorable Luther H. Soules III, Chairman, Gilbert T. Adams, Jr., Pat Beard, Mr. David J. Beck, Clifford Brown, Professor Newell Blakely, Frank L. Branson, Honorable Hume Cofer, Professor William V. Dorsaneo III, Chief Justice John Hill, Franklin Jones, Jr., Ray Judice, Gilbert I. Low, Steve McConnico, Russell McMains, Charles Morris, Mr. John M. O'Quinn, Mr. Tom L. Ragland, Harry M. Reasoner, Sam D. Sparks, Sam Sparks, Broadus A. Spivey, Harry Tindall, Honorable Bert H. Tunks, Professor Orville C. Walker, Justice James P. Wallace, L.N.D. Wells, Jr. and Honorable Allen Wood.

Welcoming remarks were received from Chief Justice John L. Hill.

Upon motion by Franklin Jones, Jr., seconded by Gilbert Low, the minutes from May 31, 1985, were approved.

The Chairman made a report on his application to David Beck and the Texas Bar Foundation for $25,000.00 for travel, printing and distribution expenses of the Committee. The request was denied. David Beck suggested re-application for direct expenses of transcript and distribution costs. The Chairman will make a re-application in the amount of $5,000.00-$8,000.00.

Chief Justice Hill spoke to the Committee concerning House Bill 1658. He commented that the working draft of the rules were coming out shortly and urged the Committee to take a "wait and see" attitude. He stated that they have worked to make the Rules Committee a balanced committee through use of volunteers and inclusion of GADC and Foundation attorneys.

Professor Blakely then addressed the Committee and circulated a handout entitled "Report on Standing Subcommittee on Rules of Evidence." On May 31, 1985, his committee met and eleven changes were proposed to the Rules of Evidence and were tentatively voted on with approval of nine and rejection of two of the changes. Professor Blakely moved that the Advisory Committee generally endorse the action of his committee in rejecting the two and approving the nine. The motion was

seconded and was unanimously approved. The number of rules covered by that affirmative vote were 509(d)(4), 509(d)(5), 510(d)(5), 601(a)(2), insertion of a new 610 and changing the numbering sequence accordingly; 610(c), 803(6), 902(d), 902(10)(b) and 1007, with rejection of the change in 611(2) and the change in 801(e)(1).

Professor Dorsaneo suggested that the Committee direct their attention to Rules 1001 and 1003.

Professor Blakely then set forth two alternative changes proposed on two Rules of Evidence, 801 and 804, and Rule 207 of the Rules of Civil Procedure. Alternative No. 1, which was drafted by Sam Spark's Committee, was Professor Blakely's choice. After discussion by the Committee, motion was made, seconded and unanimously carried by voice vote that Alternative No. 1 as amended by discussion and suggestion of Mr. Reasoner, be approved and recommended for adoption to the Supreme Court.

It was unanimously decided that Alternative No. 2 had been resolved by earlier discussions.

It was moved, seconded and unanimously carried by voice vote that Rule 11 be amended to provide provisionary language at its beginning "unless otherwise provided in these Rules" and otherwise leave it intact.

Motion was made and seconded that changes suggested by Judge Douthitt to Rule 18(a) be rejected. The Committee voted 21-2 to reject the changes.

The Chairman commented that a part of the Committee's report will be to call to the Court's attention that Article 200A is going to be renumbered in the new statutory code.

Next on the agenda was a discussion of Rule 27, a new rule. Recommendations by the Council of Administrative Judges were discussed. It was moved, seconded and carried 20-2 that 27(a), (b), and (c) be tabled until such time as the Supreme Court Task Force concludes its objectives.

After a short discussion, it was moved and seconded that proposed Rule 45(e) regarding putting all pleadings on 8 1/2" by 11" size paper recommended to the Supreme Court for adoption. Those in favor by show of hands were 11; there were 3 opposed.

By voice vote, it was moved, seconded and unanimously carried that the two proposals to Rule 46 from Richard Evans be rejected.

One proposal from James Weber and one proposal from James Kronzer, Hubert Green, and Bert Davis for Rule 47 were put before

the Committee. It was moved, seconded and unanimously carried that both proposals be rejected.

Proposed Rule 57(a), from Patricia Hill, was rejected unanimously by voice vote.

Proposed Rule 85(a) was rejected unanimously by voice vote.

Rule 87 came under extensive discussion with the Chairman finally exercising his perogative to refer it for further study back to committee. Professor Dorsaneo, Mr. McMains, and Mr. Morris volunteered to participate in the study.

It was recorded that the Committee agreed with the Supreme Court in its order of December 19, 1984, adopting Rule 92.

Clifford Brown and Judge Hume Cofer from Austin were welcomed and requested to speak about the appellate rules from the point of view of the Court of Criminal Appeals.

Mr. Brown stated that the Advisory Committee has presented to the Court of Criminal Appeals their proposal of the new post-trial and Appellate Rules of Procedure. He proposed that it might be necessary for a joint conference committee from both the civil and criminal committees to get together to integrate the rules between the two as much as possible.

Judge Cofer reported to the Committee concerning the statutory deadline of the Court of Criminal Appeals in taking over rule-making authority. The Court of Criminal Appeals has already taken action in view of their deadline and are not going to be able to get back to the Committee until the end of the year.

Judge Cofer stated he saw only two or three substantive variances from the criminal point of view as far as the Committee's draft. He commented that a joint conference committee would be most advisable.

The Committee then discussed the harmonization of Appellate Rules in civil and criminal cases.

Professor Dorsaneo then reported on the Joint Report on Standing Subcommittee on Court of Civil Appeals Rules and Supreme Court Rules.

By voice vote, current Rule 355 (Committee's proposed Rule 30(a)(3)(b) and (e)) was unanimously voted to be recommended for adoption by the Supreme Court as amended.

At Mr. Reasoner's request, action on Rule 364(a) was deferred until the next meeting.

It was moved and seconded that Rule 42(b) as proposed be changed by deleting the first sentence and the first word of the second sentence and Rule of Evidence 103(a)(2) be changed by deletion of a phrase. After discussion, a hand vote was taken with the result of eight in favor and nine opposed. Professor Blakely will draft final versions of the Rules as approved.

At Professor Dorsaneo's suggestion, the Committee then turned to the table of contents of the proposed rules whereupon he listed the new rules or substantial modifications of old rules as 4, 5, 18, 19, 30, 32, 63, 84, 85 and 100.

Mr. McMains pointed out that Rule 85 would be of special interest to Plaintiff's personal injury attorneys and asked for discussion and guidance in philosophy for the drafting of his proposal. The Committee then discussed same.

The Committee then proceeded to Franklin Jones' committee for a report on their activities concerning Rules 277 and 279. Mr. Jones' committee is recommending five changes in submission of jury issues in Texas. He moved the Committee to approve the changes; to approve the rules in substance and to recommend their adoption by the Supreme Court. After extensive discussion, the Chairman asked the Committee whether the court should have the power to instruct the jury on the effect of the jury's answers. After motion was seconded, there was a hand vote of 7 for and 10 opposed to permitting the Court to so instruct.

After further discussion, the question of whether the trial court should have discretion to predicate the damage issue on affirmative findings of liability in a proper case was put to a vote with 18 for and 1 opposed.

Additional discussion ensued, with the result that a motion was made that the Committee direct the subcommittee to draft a rule, using the existing federal rules as a basis, regarding the court's submission of the case to a jury. There was a hand vote 15-5 in favor of charging the subcommittee with such a duty.

Committee meeting adjourned, to be reconvened at 9:30 a.m. on November 2, 1985.

Upon reconvening, the Chairman welcomed Judge Clinton and Judge Cofer to the meeting.

The Committee again took up the Joint Report of the Standing Subcommittee on Court of Civil Appeals Rules and Supreme Court Rules.

It was moved, seconded, and unanimously carried by voice vote that the language in proposed Rule 32 by Professor Dorsaneo

be either included in the whole package as proposed Rule 32 or as a replacement of current Rule 385.

The Committee then discussed whether or not to combine the current rules on damages for delay, Rule 438 and part of Rule 435, into one Rule 84. On a show of hands, 9 felt that the dual standard of "delay only" and "frivolous" should be retained and 4 felt that the proposed Rule 84 standard should be used instead. Where the award that's been addressed by the Appellate Court is not a money damage award, 6 felt the court should be permitted to only assess "just damages," and 9 felt that an approach of "some multiple of costs" should be used. 10 members felt that there should be a multiple of not to exceed ten times and 1 member felt there should be no ceiling on the multiple. The Committee then discussed the last sentence of the proposed rule and voted 6-3 to change the word "authorizing" to "requiring". The Chairman then asked the Committee to vote on whether Mr. McMains has proposed the proper approach and the Committee voted 14-1 that he had. It was decided, 11-1 that the rule would be redrafted and recommended for adoption by the Supreme Court.

Motion was made and seconded that the suggested change to current Rule 440 and proposed Rule 85(b) be made. The Committee voted 8-4 that it should be made.

The Chairman then requested vote on how many were in favor of including a voluntary remittitur paragraph to proposed Rule 85. The Committee voted unanimously in favor of such a paragraph.

The Committee voted 9-1 against proposed paragraph (f) of proposed Rule 100.

Professor Dorsaneo then proceeded to explain the structure of the proposed appellate rules and the course his committee took in drafting the combined rules.

Rule 4 was approved by show of hands.

Justice Clinton then addressed the Committee concerning his court's having been given a deadline of January 1 by the Legislature to adopt what the Legislature calls a comprehensive body of rules of procedure and post-trial appellate and review at the same time his Court has the authority to adopt rule of evidence in criminal cases. If they have not done so by January 1, they lose the authority to do it and lose the power of repealing certain articles in the Code of Criminal Procedure.

He also pointed out that the same situation exists on Rules of Evidence.

Rule 5 was returned to committee for further discussion.

The Chairman then requested a show of hands on whether the Committee felt that the rules with incorporated changes would be ready for recommendation to the Supreme Court for adoption. By show of hands, the Committee was unanimous in support of the proposals.

Sam Sparks then addressed the Committee on his committee's rules.

The Chairman requested a show of hands on whether language in Rule 101 should be changed. It was voted 6-2 against changing the language.

The Chairman requested a show of hands on whether language in Rule 101 concerning the employment of an attorney should be added. It was voted 6-4 that there should be a reference to an attorney in the Rule.

It was moved and seconded that proposed Rule 103 by Don Baker should be approved and was unanimously carried by a show of hands.

The Chairman requested a show of hands concerning a proposed change to Rule 106 by Jeffrey Jones and Ellen Elkins Grimes and it was unanimously carried.

Concerning Rule 162, proposed by Judge Putnam Kaye Reiter, the Committee was unanimously opposed to the suggestion that a condition of dismissal or non-suit should be the actual payment of costs. The Committee unanimously approved the suggestion that costs should automatically be taxed against the dismissing party at the time of the dismissal.

After discussion, the Chairman referred Rules 162, 163, and 164 back to committee for further study.

It was moved and seconded that Rule 166c by Charles Haworth be approved and was so approved by a unanimous voice vote.

After discussion, it was unanimously approved by voice vote that proposed Rule 204, proposed by Charles Haworth, Judge Barrow, Luther Soules, Daniel Hyde, J. Harris Morgan and many other attorneys, with discussed changes, be adopted.

It was moved, seconded, and unanimously approved by voice vote that the unnumbered rule after Rule 188a, proposed by Mark Walker, entitled "New Proposed Rule" be rejected.

It was moved, seconded, and approved by show of hands to reject proposed Rule 166(a), proposed by Judge David Hittner.

It was moved, seconded, and unanimously approved by voice vote to adopt proposed Rule 166(b), proposed by John O'Quinn.

It was moved, seconded, and unanimously approved by voice vote to reject proposed Rule 200(2)(a), proposed by Richard Kelsey.

The Committee discussed the amendment to proposed Rule 215(a), proposed by Justice Killgarlin, extensively. It was unanimously recommended that the first sentence of the suggestion be incorporated. As for the second sentence, on a show of hands, it was decided 5-3 against adding same.

By a show of hands, 5-1, a change to Rule 208, proposed by Judge Barrow was approved.

After discussion, the Chairman stated that reservations expressed at the meeting regarding Rule 207(1)(a) and new (2)(b) should be studied further.

The meeting was adjourned until 10:00 a.m. on March 7, 1986, subject to call by the court for interim meeting.

TABLE OF CONTENTS

RULE 11. Agreements to be in Writing

Unless otherwise provided in these rules, no agreement between the attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with papers as part of the record, or unless made in open court and entered of record.

Approved November 1985.

RULE 11 AGREEMENTS TO BE IN WRITING

Unless otherwise provided in these rules, no agreement between the attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with papers as part of the record, or unless made in open court and entered of record.

COMMENT: Attorney Charles B. Haworth made this recommendation so that his recommended Rule 116c would be in keeping with Rule 11.

~~Adopt~~
Approved November 1985

Supreme Court Advisory Committee
Rule 15--216 Subcommittee
Proposed Amendment
11-01-85

Rule 16--Shall Indorse All Process

Every officer shall indorse on all process and precepts coming to his hand the day and hour on which he received them, the manner in which he executed them, and the time and place the process was served ~~as well as the distance actually traveled in serving such process~~, and shall sign the returns officially.

COMMENT: Article 3926a, effective September 1, 1981, authorizes the commissioner's court of each county to set a "reasonable" fee for service of process; mileage is no longer an authorized expense for serving process.

Approved _____ Approved with Modifications _____

Disapproved _____ Deferred _____

Tom Ragland, Waco

RULE 18a: RECUSAL OR DISQUALIFICATION OF JUDGES

(a) At least ten days before the date set for trial or other hearing , or prior to any pretrial conference or preliminary hearing, in any court other than a Court of Appeals or the Supreme Court, any party may file with the clerk of the court a motion stating grounds why the judge before whom the case is pending should not sit in the case. The grounds may include any disability of the judge to sit in the case. The motion shall specifically state facts that, if true, support the legal grounds for recusal. The grounds may include personal interest of the judge in the outcome of the case, the relationship of the judge to parties in the case, the judge has been involved in the case as counsel for either side, or any other ground as provided by law. The motion must be made under oath. Any motion filed that is not in proper form may be summarily denied, without a hearing, by the trial judge whose recusal is sought.

(b) On the day the motion is filed, copies shall be served on all other parties or their counsel of record, together with a notice that movant expects the motion to be presented to the judge three days after the filing of such motion unless otherwise ordered by the judge. Any other party may file with the clerk an opposing or concurring statement at any time before the motion is heard.

(c) Prior to any further proceedings in the case, the judge shall either recuse himself or request the presiding judge of the administrative judicial district to assign a judge to hear such motion. If the judge recuses himself, he shall enter an order of recusal and request the presiding judge of the administrative judicial district to assign another judge to sit, and shall make no further orders and shall take no further action in the case except for good cause stated in the order in which such action is taken.

(d) If a judge declines to recuse himself, he shall forward to the presiding judge of the administrative judicial district, in either original form or certified copy, an order of referral, the motion, and all opposing and concurring statements. Except for good cause stated in the order in which further action is taken, the judge shall make no further orders and shall take no further action in the case after filing of the motion and prior to a hearing on the motion. The presiding judge of the administrative judicial district shall immediately set a hearing before himself or some other judge designated by him, shall cause notice of such hearing to be given to all parties or their counsel, and shall make such other orders including orders on interim or ancillary relief in the pending cause as justice may require.

(e) If within ten days of the date set for trial or other hearing a judge is assigned to a case, the motion shall

be filed at the earliest practicable time prior to the commencement of the trial or other hearing.

(f) If the motion is denied, it may reviewed for abuse of discretion on appeal from the final judgment. If the motion is granted, the order shall not be reviewable, and the presiding judge shall assign another judge to sit in the case. If the trial judge summarily refuses the motion, the motion may be immediately transmitted to the presiding judge of the administrative district, who shall instruct the trial judge not to proceed in the case if the presiding judge of the administrative district believes that, on the face of the motion, a cause for recusal has been stated.

(g) The Chief Justice of the Supreme Court may also appoint and assign judges in conformity with this rule and pursuant to Article 200a.

COMMENT: Judge Frank J. Douthitt of the 97th Judicial District made the above suggestions. The above suggestions are proposed to eliminate the problem of recusal sought late in the proceedings, after trial is set. The suggestions are designed to promote economy in the administration of courts by allowing judges to determine the merits of a motion for recusal prior to the establishment of the trial court's docket.

REJECTED November 1985

RULE 18a. Recusal or Disqualification of Judges

(h) Each party is limited to one motion for recusal for each judge.

or

(h) In the event a party files more than one motion to recuse under this rule and it is determined by the presiding judge that the motion to recuse is frivolous, brought in bad faith or for the purpose of delay, the presiding judge may impose any sanction as authorized by Rule 215 (2)(b).

COMMENT. Attorney Bruce Pauley of Mesquite, Texas, recommends this change to limit the possibility of delay and abuse under the current rule.

Supreme Court Advisory Committee
Rule 15--216 Subcommittee
Proposed Amendment
11-01-85

Rule 21c--Extension of Time on Appeal

Repeal.

COMMENT: This rule applies only to appeals and should be included under Rule 386, Section 3, Proceedings In The Courts of Appeals.

Approved _____ Approved with Modifications _____

Disapproved _____ Deferred _____

TOM RAGLAND, WACO

RULE 27a (new): FILING OF CASES; RANDOM ASSIGNMENT

Except as provided in this rule, all cases filed in counties having two or more district courts shall be filed in random order, in a manner prescribed by the judges of those courts. Each garnishment action shall be assigned to the court in which the principal suit is pending, and should transfer occur, both cases shall be transferred. Every suit in the nature of a bill of review or other action seeking to attach, avoid or set aside a judgment or other court order shall be assigned to the court which rendered such decree. Every motion for consolidation or joint hearing under Rule 174 (a) shall be heard in the court in which the first case filed is pending. Upon motion granted, the cases being consolidated shall be transferred to the granting court.

COMMENT: This proposal recommended by Council of Administrative Judges.

Tabled November 1985

RULE 27b (new). TRANSFER OF CASES

Whenever any pending case is so related to another case pending in or dismissed by another court that a transfer of the case to such court would facilitate orderly and efficient disposition of the litigation, the judge of the court in which either case is or was pending may, upon motion and notice (including his own motion) transfer the case to the court in which the earlier case was filed. Such cases may include but are not limited to:

1. Any case arising out of the same transaction or occurrence as did an earlier case, particularly if the earlier case was disimissed for want of prosecution or voluntarily dismissed by plaintiff at any time before final judgment;

2. Any case involving one or more of the same parties in an earlier case and requiring determination of any of the same questions of fact or law as those involved in the earlier case;

3. Any case involving a plea that a judgment in the earlier case is conclusive of any of the issues of the later case by way of res judicata or estoppel by judgment, or any pleading that requires a construction of the earlier judgment or a determination of its effect;

4. Any suit for a declaration concerning the alleged duty of an insurer to provide a defense for a party to another suit; or

5. Any suit concerning which the duty of an insurer to defend was involved in another suit.

COMMENT: This proposal recommended by Council of Administrative Judges.

Tabled November 1985

RULE 27c (new). TEMPORARY ORDERS

Except in emergencies when the clerk's office is closed, no application for immediate or temporary relief shall be presented to a judge until a case has been filed and assigned to a court according to these rules. If the judge of the court to which a case is assigned is absent, cannot be contacted or is occupied, emergency application may be made to either a judge appointed to hear such matters, or in his absence, any judge of the same jurisdiction, who may sit for the judge of the court in which the case is pending, and who shall make all orders, writs, and process returnable to the court in which the case is pending. Any case not initally filed with the clerk before temporary hearing shall be filed, docketed and assigned to a court under normal filing procedures at the earliest practicable time. All writs and process shall be returnable to that court.

COMMENT: This proposal recommended by Council of Administrative Judges.

Tabled November 1985

Be approximately 8 1/2 by 11 inches in size.

COMMENT: Attorney Clyde Jackson, III, recommends that the size of pleadings be consistent with the pleadings in Federal Court and compatible with "trial notebooks".

Approved November 1985

RULE 46 PETITION AND ANSWER; EACH ONE INSTRUMENT OF WRITING

The original petition, first supplemental petition, second supplemental petition, and every other, shall each be contained in one instrument of writing, and so with the original answer and each of the supplemental answers. General allegations of acts of the parties shall be ineffective and ignored by the courts.

COMMENT: Attorney Richard Evans recommends this rule change to eliminate litigation expense.

Rejected November 1985

RULE 47: CLAIM FOR RELIEF

OPTION ONE:

An original pleading [which] that sets forth a claim for relief, whether an original petition, counterclaim, cross-claim, or third party claim shall contain

(a) a short statement of the cause of action sufficient to give fair notice of the claim involved, and

[(b) in all claims for unliquidated damages only the statement that the damages sought exceed the minimum jurisdictional limits of the court, and]

[(c)](b) a demand for judgment for all the other relief to which the party deems himself entitled.

Relief in the alternative or of several different types may be demanded. [; provided, further, that upon special exception the court shall require the pleader to amend so as to specify the maximum amount claimed.]

COMMENT: Attorney James Weber has recommended this rule as he believes that there is much wasted attorneys' time in specially excepting to the general pleadings of damages, having a court hearing and obtaining an order to require specific damages to be pleaded.

Rejected November 1985

RULE 47: CLAIM FOR RELIEF

OPTION TWO:

An original pleading [which] that sets forth a claim for relief, whether an original petition, counterclaim, cross-claim or third party claim, shall contain

(a) a short statement of the cause of action sufficient to give fair notice of the claim involved,

(b) in all claims for unliquidated damages only the statement that the damages sought exceed the minimum jurisdictional limits of the court, and

(c) a demand for judgment for all the other relief to which the party deems himself entitled. Relief in the alternative or of several different types may be demanded; provided, further, that upon special exception the court shall require the pleader to [amend so as to] specify in writing the maximum amount claimed.

If any party fails to comply with the provisions of paragraph (b), the court in which the action is pending may, after notice and hearing, make such orders as authorized by Rule 215. The court may, additionally, instruct the offending counsel not to inform the jury of the amount of damages pleaded, except in rebuttal argument.

COMMENT: Attorneys Jim Kronzer, Hubert Green and Bert Davis have made separate requests for the modification of Rule 47. Additionally (but not included in this proposal) was the suggestion to incorporate a suggestion that failure to comply with the rule would be considered "unethical conduct", but this suggestion has not been formalized in this proposal.

Rejected November 1985

RULE 57a - (new)

The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

COMMENT: Representative Patricia Hill recommends the addition of the Federal Rule 11 requirements to our state practice. The propossl as drawn would include both plaintiff's and defendant's pleadings.

Rejected november 1985

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 [~~all parties~~] or his [~~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.

Comment: The proposed amendment restores the rule to the pre-1984 version. The current version is illogical in that it requires service of a pleading or motion on all parties only if it is not required by law or the rules to be served on the adverse party. If a particular pleading or motion is required by law or the rules to be served on the adverse party, then under the terms of Rule 72 it need not be served on the nonadverse parties. It would seem that nonadverse parties would have at least as much interest -- if not more -- in a pleading or motion expressly required by law or rule to be served on the adverse party, as a pleading or motion that is not required to be served on an adverse party or any party. The current version of the rule is also troublesome in that it first prescribes the circumstance under which a pleading or motion must be served on all parties, but the remainder of the rule addresses specific procedural details of service only as regards adverse parties.

Jeremy C. Wicker

RULE 85 a

The following defenses may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter, [(2) lack of jurisdiction over the person, (3) improper venue,] (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 239. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. [If a pleading sets forth a claim for relief to which the adverse party does not require to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief] If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 166 A, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 166 A.

COMMENT: Representative Patricia Hill recommends the adoption of the Federal Rule 12 regarding motions to dismiss.

Rejected November 1985

6. Multiple Parties. In the event the court determines that a motion to transfer venue to a county of mandatory venue should be sustained as to one party, the court shall transfer the entire case and shall not sever the causes of action asserted against the several parties if such causes of action arose from the same transaction or occurrence or series of transactions or occurrences and there are common questions of law and/or fact common to all the parties. Provided, however, if the causes of action asserted be severable as to a particular party or liability sought is joint liability only, the court shall then sever those causes of action and shall transfer the case as to that particular party notwithstanding whether the party is proceeding under mandatory or permissive venue. In the event that the court determines that a motion to transfer venue to a county of permissive venue should be sustained and also determines that venue is proper as against a primary defendant or defendants, and if the causes of action alleged arose from the same transaction or occurrence or series of transactions or occurrences and involve common questions of fact and/or law, the court shall overrule the motion for change of venue and shall not transfer the case.

COMMENT: Justice Wallace and Bill Dorsaneo point out that the current rules only touch the periphery of difficulties that

arise when there are multiple defendants in a case and not all of the defendants seek a transfer of venue. This "rough" proposal is designed to merely initiate discussion as to any proposed rule change. Mr. Dorsaneo's recommendations are incorporated in the rule in his effort to promote judicial economy.

Referred to subcommittee Dorsaneo
McMains
Morris

RULE 87: DETERMINATION OF MOTION TO TRANSFER

OPTION ONE:

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

. . . . .

5. [No Rehearing.] No Additional Motions. If venue has been sustained as against a motion to transfer, or if an action has been transferred to a proper county in response to a motion to transfer, then no [further] additional motions to transfer by a movant who was a party when the prior motion to transfer was ruled upon shall be considered [regardless of whether the movant was a party to the prior proceedings or was added as a party subsquent to the venue proceedings,] unless the motion to transfer is based on the grounds that an impartial trial cannot be had under Rules 257-259 or on the ground of mandatory venue, provided that such claim was previously not available to the movant or to the other movant or movants. In addition, if venue has been sustained as against a motion to transfer, or if an action has been transfered to a proper county in response to a motion to transfer, then a motion to transfer by a party added subsequent to the ruling on another party's motion to transfer may be filed as a prerequisite to an appeal, but it shall be considered as overruled by operation of law upon filing, unless the motion to transfer is based on the grounds that an impartial trial cannot be had under Rules 257-259 or on the ground of mandatory venue, provided that such claim was not made by the other movant or movants.

Parties who are added subsequently to an action and are precluded by this rule from having a motion to transfer considered may raise the propriety of venue on appeal, provided that the party has timely filed a motion to transfer.

COMMENT: Attorney Doak Bishop has suggested this rule change to "clarify" the rule.

Referred to subcommittee Dorsaneo McMains Morris

OPTION TWO:

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

cause of action, or a part thereof, accrued shall be required to support his motion by prima facie proof as provided in paragraph 3 of this rule.

. . . . .

5. [No Rehearing.] No Additional Motions. If venue has been sustained as against a motion to transfer, or if an action has been transferred to a proper county in response to a motion to transfer, then no [further] additional motions to transfer by a movant who was a party to the prior proceedings shall be considered, [regardless of whether the movant was a party to the prior proceedings or was added as a party subsequent to the venue proceedings,] unless the motion to transfer is based on the grounds that an impartial trial cannot be had under Rules 257-259 or on the ground of mandatory venue, provided that such claim was previously not available to the movant or to the other movant or movants. In addition, if venue has been sustained as against a motion to transfer, or if an action has been transferred to a proper county in response to a motion to transfer, then a motion to transfer by a party added subsequent to the venue proceedings may be filed but not considered, unless the motion to transfer is based on the grounds that an impartial trial cannot be had under Rules 257-259 or on the ground of mandatory venue, provided that such claim was not made by the other movant or movants.

Parties who are added subsequently to an action and are precluded by this rule from having a motion to transfer considered may raise the propriety of venue on appeal, provided that the party has timely filed a motion to transfer.

COMMENT: Attorney Doak Bishop has suggested this rule change to "clarify" the rule.

Referred to subcommittee Dorsaneo McMahon Morris

OPTION THREE:

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

where the cause of action, or a part thereof, accrued shall be required to support his motion by prima facie proof as provided in paragraph 3 of this rule.

5. [No Rehearing.] No Additional Motions. If a motion to transfer is overruled and the suit retained in the county of suit or if a motion to transfer is sustained and the suit is transferred to another county, no additional motion to transfer may be made by a party whose motion was overruled or sustained except on grounds that an impartial trial cannot be had under Rules 257-259.

No motion to transfer may be granted a party who is joined subsequent to the ruling on a motion or motions to transfer, unless based on the ground that an impartial trial cannot be had under Rules 257-259 or upon a mandatory venue exception, and a subsequently-joined party may not file a motion to transfer based upon venue grounds previously raised by another party, but such subsequently-joined party may complain on appeal of improper venue based upon grounds previously raised in the motion to transfer of another party.

Nothing in this rule shall prevent the trial court from reconsidering an order overruling a motion to transfer.

5. [No Rehearing. If venue has been sustained as against a motion to transfer, or if an action has been transferred to a proper county in response to a motion to transfer, then no

further motions to transfer shall be considered regardless of whether the movant was a party to the prior proceedings or was added as a party subsequent to the venue proceedings, unless the motion to transfer is based on the grounds that an impartial trial cannot be had under Rules 257-259 or on the ground of mandatory venue, provided that such claim was not available to the other movant or movants.

Parties who are added subsequently to an action and are precluded by this rule from having a motion to transfer considered may raise the propriety of venue on appeal, provided that the party has timely filed a motion to transfer.]

COMMENT: Attorney Doak Bishop has suggested this rule change to "clarify" the rule.

The Administration of Justice Committee has approved this recommendation.

Referred to subcommittee Dorsaneo McMains Moore

RULE 92

. . . . .

When a counterclaim or cross-claim is served upon a party who has made an appearance in the action, the party so served, in the absence of a responsive pleading, shall be deemed to have pleaded a general denial of the counterlcaim or cross-claim, but the party shall not be deemed to have waived any special appearance or [plea of privilege] motion to transfer venue. In all other respects the rules prescribed for pleadings of defensive matters are applicable to answers to counterclaims and cross-claims.

COMMENT: This amendment merely brings the rule up-to-date with the adoption of "motions to transfer venue" under Rule 86.

Previously approved

RULE 101 Requisites

The citation shall be styled "The State of Texas" and shall be directed to the defendant and shall command [him] the defendant to appear by filing a written plaintiff's petition at or before 10:00 a.m. o after the expiration of twenty days after th of the citation and petition upon the defe stating the place of holding the court] shall state the location of the court, the date of the filing of the petition, its file number and the style of the case, and the date and issuance of the citation [,]. It shall be signed and sealed by the clerk, and shall be accompanied by a copy of plaintiff's petition. The citation shall further direct that if it is not served within ninety days after the date of issuance, it shall be returned unserved.

printed as final rather than rough draft

The citation shall include a simple statement to the defendant to inform the defendant that he hs been sued, he may employ an attorney, and that, if a written answer is not filed with the appropriate court within twenty days after service of citation and petition, a default judgment may be taken against the defendant.

Approved November 1985

RULE 103

All process may be served by the sheriff or any constable of any county in which the party to be served is found, or, if by mail, either of the county in which the case is pending or of the county in which the party to be served is found; provided that no officer who is a party to or interested in the outcome of a suit shall serve any process therein. Service by registered or certified mail and citation by publication [may] shall, if requested, be made by the clerk of the court in which the case is pending.

COMMENT: Attorney Don Baker has suggested this change. It appears that many clerks' offices will decline to accomplish service by registered or certified mail and this amendment is to remove from those clerks such discretion and require the clerks to accomplish this service if requested.

Approved November 1985

RULE 106 SERVICE OF CITATION

(a) Unless the citation or an order of the court otherwise directs, the citation shall be served by an officer authorized by Rule 103 by

(1) delivering to the defendant, in person, a true copy of the citation with the date of delivery endorsed thereon with a copy of the petition attached thereto, or

(2) mailing to the defendant by registered or certified mail, with delivery restricted to addressee only, return receipt requested, a true copy of the citation with a copy of the petition attached thereto

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

(1) by any disinterested adult in the manner provided in section (a)(1) of this Rule, or

[(1)] (2) where service has been attempted under either (a)(1)or (a)(2), but has not been successful, by an officer or by any disinterested adult named in the court's order

by leaving a true copy of the citation, with a copy of the petition attached, with anyone over sixteen years of age at the location specified in such affidavit, or

[(2)] (3) in any manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit.

COMMENT: Attorneys Jeffrey Jones and Ellen Elkins Grimes have made this suggestion to allow service of citation by any disinterested adult by order of court upon the showing of good cause.

Approved November 1985

RULE 103. Officer Who May Serve

[All process may be served by the sheriff or any constable of any county in which the party to be served is found, or, if by mail, either of the county in which the case is pending or of the county in which the party is to be served is found; provided no officer who is a party to or interested in the outcome of a suit shall serve any process therein. Service by registered or certified mail and citation by publication may be made by the clerk of the court in which the case is pending.] Anyone who is of the age of eighteen and over and competent to testify and is not a party to the suit is allowed to serve civil process. A private party or process serving company can be appointed by motion and order to serve civil process within the State of Texas.

COMMENT. This proposed rule change is made by Guillermo Vega, an attorney in Brownsville and other attorneys and process serving companies. It is their suggestion that Rule 103 and Rule 106 read identically or to eliminate one of the rules.

RULE 103. Officer Who May Serve

All process may be served by the sheriff or any constable of any county in which the party to be served is found or, to a person specially appointed to serve it, or, if by mail, either of the county in which the case is a party to or interested in the outcome of a suit shall serve any process therein. Service by registered or certified mail and citation by publication may be made by the clerk of the court in which the case is pending.

RULE 106. Service of Citation

(a) Unless the citation or an order of the court otherwise directs, the citation shall be served by any officer authorized by Rule 103 or by a private party or a process serving company by motion and order to serve citation by. . .

COMMENT. Judge Herb Marsh of El Paso and several process serving companies have requested this change. Rule 106 and Rule 103 were modified in November of 1985.

RULE 103. OFFICER WHO MAY SERVE.

All process may be served by the sheriff or any constable of any county in which the party to be served is found [or it may be by mail, either of the county in which the case is pending or of the county in which the party to be served is found]; provided that no officer who is a party to or interested in the outcome of a suit shall serve any process therein. [Service by registered or certified mail and citation by publication may be made by the clerk of the court in which the case is pending.] Service by citation by publication may be made by the clerk of the court in which the case is pending and service by mail as contemplated by Rule 106(a)(2) may be made by the clerk of the court in which the case is pending or may be made by the party, or the attorney of the party who is seeking service.

RULE 106. SERVICE OF CITATION

(a) Unless the citation or an order of the court otherwise directs, the citation shall be served by any officer or person authorized by Rule 103 by

...

(2) [mailing to the defendant by registered or certified mail, with delivery restricted to addressee only, return receipt requested, a true copy of the citation with a copy of the petition attached thereto;]

(2) mailing a copy of the citation, with a copy of the petition attached thereto, (by first class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to the form hereinafter set out and a return envelope, postage prepaid and addressed to the sender. If no acknowledgment of service under this subdivision of this Rule is received by the sender within twenty (20) days after the date of mailing, service of such citation and petition shall be made by some other form of service provided in this rule. However, unless good cause is shown for not doing so, the court may order the payment of costs of other methods of personal service by the person served if such person does not complete and return the notice and acknowledgment of receipt within twenty (20) days after mailing. The notice and acknowledgment of receipt of citation and petition shall each be executed under oath.

The notice and acknowledgment shall conform substantially to the following form.

A. B., Plaintiff)	)	(IN THE DISTRICT
V.	)NO.	(COURT OF
C. D., DEFENDANT)	)	(COUNTY, TEXAS

TO: (Name and address of person to be served)

The enclosed citation and petition are served pursuant to Rule 106 of the Texas Rules of Civil Procedure.

You must complete the acknowledgment part of this form and return one copy of the completed form to the sender within twenty (20) days.

You must sign and date the acknowledgment. If you are served on behalf of a corporation, partnership, or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within twenty (20) days, you, (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a citation and petition in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the petition as required by the provisions of the citation. If you fail to do so, judgment by default may be taken against you for the relief sought in the petition.

This notice and acknowledgment of receipt of citation and petition will have been mailed on (insert date).

_____
Signature

Date of Signature

SWORN TO BEFORE ME by the said (Signing party) this ____ day of _____, 19__.

_____
Notary Public, State of
(_____)
My commission expires:

ACKNOWLEDGMENT OF RECEIPT OF CITATION AND PETITION

I received a copy of the citation and of the petition in the above captioned matter on the ____ day _____, 19__.

_____
Signature

_____
(Relationship to entity or authority to receive service of process.

_____
Date of Signature

SWORN TO BEFORE ME by the said (Signing party) on this ____ day of _____, 19__.

_____
Notary Public, State of
(_____)
My commission expires:

RULE 107. RETURN OF CITATION.

The return of the officer executing the citation shall be endorsed on or attached to the same; it shall state when the citation was served and the manner of service and be signed by the officer officially. When the officer has not served the citation, the return shall show the diligence used by the officer to execute the same and the cause of failure to execute it, and where the defendant is to be found, if he can ascertain. [~~When the citation was served by registered or certified mail as authorized by Rule 106, the return by the officer must also contain the return receipt with the addressee's signature.~~] When the citation was served by mail as authorized in Rule 106(a)(2), the officer or person who has secured such service shall return to the clerk of the court in which the case is pending, the sworn notice and acknowledgment of receipt of the citation and petition. Such returned receipt shall be attached to the original citation issued by the clerk and the return of such citation shall be completed by the clerk of the court in which the case is pending in a manner to correctly reflect completion of service by mail.

...

RULE 107

....

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

COMMENT: Representative Patricia Hill questioned the reason for the ten day requirement. Deletion of this portion of the rule will enable default judgments to be taken after the period for answer expires, regardless of the number of days the proof of service was on file with the clerk of the court.

RULE 107 RETURN OF CITATION

The return of the officer executing the citation shall be endorsed on or attached to the same; it shall state when the citation was served and the manner of service and be signed by the officer officially. When the citation was served by registered or certified mail as authorized by Rule 106, the return by the officer must also contain the return receipt with the addressee's signature. When the officer has not served the citation the return shall show the diligence used by the officer to execute the same and the cause of failure to execute it, and where the defendant is to be found, if he can ascertain.

Where citation is executed by an alternative method as authorized by Rule 106, proof of service shall be made in the manner [ordered by the court.] provided above or in any such manner as may be ordered by the court.

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

COMMENT: Attorney Jeffrey Jones recommends this proposal to provide for returns on citations where service is by a disinterested adult pursuant to his recommended rule change in Rule 106.

RULE 117a. Citation in Suits for Delinquent Ad Valorem Taxes

3. Service by publication: Nonresident, Absent from State, Transient, Name Unknown, Residence Unknown, Owner Unknown, Heirs Unknown, Corporate Officers, Trustees, Receivers or Stockholders Unknown, Any Other Unknown Persons Owing or Claiming or Having an Interest:

Where any defendant in a tax suit . . .

An Affidavit which complies . . .

Such citation by publication shall be directed . . .

The citation shall be published in the English language one time a week . . .[A] The maximum fee [of two cents per word for the first insertion and one cent per word for the second insertion may be taxed] for publishing the citation shall be [but in no event shall the fee exceed] the lowest published word or line rate of that newspaper for [like classes of] classified advertising . . .

COMMENT. This proposal is requested by attorney Mary Jo Carroll of Austin, Texas. Ms. Carroll brings to the attention the practical problem that no newspaper will publish for the rate specified in the rule and attempts to conform the rule to Article 29.

RULE 142. Security for Costs

The clerk may require from the plaintiff security for costs before issuing any process, but shall file the petition and enter the same on the docket. [No attorney or other officer of the court shall be surety in any cause pending in the court, except upon special leave of court.]

COMMENT: Attorney Wendell Loomis of Houston suggests that the last sentence in Rule 142 is "archaic and should be dispensed with". He believes this limitation imposes a substantial burden to the bar and to clients and should be eliminated.

RULE 162 Dismissal

At any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case upon the filing of a notice of dismissal, which shall be entered in the minutes. A copy of the notice shall be served in accordance with Rule 21a on any party who has answered or has been served with process. Any dismissal pursuant to this rule shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief or the payment of all costs taxed by the clerk. A dismissal under this rule shall have no effect for any pending motion for sanctions at the time of the dismissal or for either attorneys' fees or other costs, or both, as determined by the court. Any dismissal pursuant to this rule which terminates the case shall authorize the clerk to tax court costs against dismissing party unless otherwise ordered by the court.

4. Cases on File for Two or More Years. Except as provided in this rule, each civil case on file for two or more years which does not meet one of the exceptions herein provided, shall be dismissed for want of prosectuion by the court unless set for hearing on written motion to retain submitted by counsel or set by the court within thirty days of receipt of notice of intent to dismiss which shall be sent by the court to all attorneys in charge and pro se litigants. Dismissal for want of prosectuion shall occur at least once a year on the first Monday of April, and may occur at any time in accordance with section 1. of this rule.

Upon receipt of a motion to retain, the court shall notify the parties of the hearing date. At the hearing, if the parties request trial, the court shall either set the case for final pretrial conference to insure prompt completion of discovery, or, if the court finds the case is ready for trial, shall set the case for trial not less than 30 days from the date of hearing on retention. Cases shall be exempt from dismissal for want of prosecution if at the time of eligibility their status is one or more of the following:

(1) set for trial;

(2) one or more of the parties announces ready for trial subsequent to the issuance of the notice of intent to dismiss;

(3) under Bankruptcy Stay order;

(4) having legal or other impediments which the court shall determine as justifiable grounds for retaining the case from dismissal.

Judicial districts previously by local rule having eligibility for dismissal for want of prosectution set at less than two years may retain their dismissal age criteria at less than two years; jurisdictions previously having eligibility for dismissal for want of prosecution set at over two years from the date of filing shall set dismissal for want of prosectuion at three years maximum from the date of filing.

COMMENT: This is recommended by the Council of Administrative Judges.

RULE 165a (2) REINSTATEMENT.

2. Reinstatement. A motion to reinstate shall [set forth the grounds] show good cause therefor and be verified by the movant or his attorney.

. . . . .

COMMENT: Judge Keith Nelson recommends the insertion of "good cause" in Rule 165a (2) and that is the only change in this recommendation.

Rule 165a. Dismissal for Want of Prosecution

. . .

3. Cumulative Remedies. . . . The same reinstatement procedure and timetable <u>are</u> [~~is~~] applicable to all dismissals for want of prosecution including cases which are dismissed pursuant to the court's inherent power, whether or not a motion to dismiss has been filed.

Comment: Grammatical correction.

Jeremy C. Wicker

(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. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response. Issues, <u>including legal and factual sufficiency of the pleadings, motion or supporting summary judgment evidence,</u> not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal. A summary judgment may be based on uncontroverted testimonial

evidence of an interested witness, or of an expert witness as to the subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

COMMENT: Judge David Hittner recommends this change to "close a loophole" in summary judgment practice relative to the requirement that responses must be filed to motions for summary judgment.

Rejected November 1985

(3)(d) with the exception of discoverable communications prepared by or for experts, photographs and other discoverable documents, any communication passing between agents or representatives or the employees of any party to the action or communications between any party and his agents, representatives or their employees, where made subsequent to the occurrence or transaction upon which the suit is based, and made in connection with the prosecution, investigation or defense of the claim or the investigation of the occurrence or transaction out of which the claim has arisen; and

COMMENT: Attorney John O'Quinn is concerned with a Court of Appeals opinion that photographs are not discoverable. The purpose of his recommendation is to make photographs discoverable under the rule.

Approved November 1985

RULE 166b

Nothing in [paragraph 3] either paragraph 2 or 3 shall be construed to render non-discoverable the identity and location of any potential party, any person having knowledge of the relevant facts, any expert who is expected to be called as a witness in the action, or of any consulting expert whose opinions or impressions have been relied upon the testifying expert.

COMMENT: Professor Edgar desires to make the rule "clear" that all persons having knowledge of relevant facts are proper subjects of discovery in that merely the designation of "consulting expert" cannot be used to hide the identity of persons having such knowledge.

RULE 166c STIPULATIONS REGARDING DISCOVERY PROCEDURE

Unless the court orders otherwise, the parties may by written agreement (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery. An agreement affecting a deposition upon oral examination is enforceable if the agreement is recorded in the transcript of deposition.

COMMENT: Attorney Charles Haworth recommends this change for obvious reasons.

Approved November 1985

RULE 166f ORAL HEARINGS; RULINGS ON SUBMISSIONS

The judge of the court in which a case is pending will hear all matters regarding cases either by submission without oral hearing or by oral hearing where such is requested in writing.

1. Form of the Motion. Motions shall be in writing, shall state the grounds therefor, and may include or be accompanied by authority for the motion. Motions shall set a date of submission, and shall be accompanied by a proposed order granting the relief sought. The proposed order shall be a separate instrument.

2. Service. Motions and responses shall be served in accordance with Rule 21 on all attorneys in charge and shall contain a certificate of service.

3. Submission Date. Motions shall bear a submission date at least ten (10) days from the date of filing. The motion will be submitted to the court on the specified day or as soon after as is practical.

4. Response. Responses by opposing parties shall be in writing, shall advise the court whether the motion is opposed or unopposed and may be accompanied by authority for opposition. Failure to file a response shall be a representation of no oppposition.

5. Supporting Material. If the motion or response to motion requires consideration of facts not appearing of record,

proof will be by affidavit or other documentary evidence which shall be filed with the motion or response.

6. Oral Argument. The motion or response shall include a request for hearing oral argument if either party views argument as necessary, which the court shall grant in the form of an oral hearing or by telephone conference. The court may order oral argument.

7. Attorneys Attending. Counsel attending a hearing shall be the attorney who expects to try the case, or who shall be fully authorized to state his party's position on the law and facts, make stipulations, and enter into any proceeding in behalf of the party. If the court finds counsel unqualified, the court may take any actions specified in this rule.

8. Failure to Appear. Where hearing is set and counsel fails to appear, the court may rule on motions and exceptions timely submitted, shorten or extend time periods, request or permit additional authorities or supporting material, award the prevailing party its costs, attorneys fees, or make other orders as justice requires.

COMMENT: This is suggested by the Council of Administrative Judges.

RULE 184 DETERMINATION OF LAW OF OTHER STATES.

The judge upon its own or the motion of either party shall take judicial notice of the common law, public statutes, rules, regulations, and ordinances and court decisions of every other state, territory, or jurisdiction of the United States. Any party requesting that judicial notice be taken of such matters shall furnish the judge sufficient information to enable him properly to comply with the request, and shall give each adverse party such notice [, if any, as the judge may deem] necessary [,] to enable the adverse party fairly to prepare to meet the request. The rulings of the judge on such matter shall be subject to review.

COMMENT: Newell Blakely recommends these changes to make Rules 184 and 184a consistent with Rules 202 and 203 of the Rules of Evidence. His alternative recommendation is to repeal Rules 184 and 184a of the Texas Rules of Civil Procedure.

RULE 188a (New) DEPOSITIONS AND INTERROGATORIES FROM FOREIGN JURISDICTIONS.

Whenever there is presented to a district court a certified copy of any mandate, writ or commission, issuing from any other state, territory, district or foreign jurisdiction, requiring the testimony or response of any person in this state, the judge of such district court shall issue any orders necessary to effectuate the taking of such testimony or the obtaining of such response. The filing of the certified copy of the mandate, writ or commission shall be considered equivalent to the filing of an original petition for the purpose of compelling the appearance and testimony or response of any person within this state.

COMMENT: Attorney Mark Walker made this suggestion so that the rules would embody Texas Revised Civil Statute Annotated Article 3769a. There are no clear procedures in the rules for the presentation of such requests to the appropriate district courts as set out in the statute.

RULE 200(2)(a)

Reasonable notice must be served in writing by the party, or his attorney, proposing to take a deposition upon oral examination, to every other party or his attorney of record. Reasonable notice is presumed if the notice is served within (blank) days of the deposition. The notice shall state the name of the deponent, the time and place of the taking of his deposition, and if the production of documents or tangible things in accordance with rule 201 is desired, a designation of the items to be produced by the deponent either by individual item or by category and which describes each item and category with reasonable particularity.

COMMENT: Attorney Richard Kelsey wants a presumption of reasonableness defined in a number of days.

Rejected November 1985

RULE 201 (3)

When the deponent is a party, [after the filing of a pleading in the party's behalf by an attorney of record,] service of the notice upon the party or his attorney shall have the same effect as subpoena served on the party. If the deponent is an agent or employee who is subject to the control of a party, notice to take the deposition which is served upon the party or the party's attorney of record shall have the same effect as a subpoena served on the deponent.

COMMENT: Attorney Don Baker recommends this change to eliminate costs of litigation.

RULE 201. Compelling Appearance; Production of Documents and Things; Deposition of Organization

4. Organizations. When the deponent named in the subpoena or notice is a public or private corporation, a partnership, association or governmental entity, the subpoena or notice shall direct the [organization] deponent named to designate the person or persons to testify in the [its] deponent's behalf, and, if [it] deponent so desires, the matters on which each person designated by the deponent will testify and the notice shall further direct that the person or persons designated by the deponent appear before the officer at the time and place stated in the subpoena or notice for the purpose of giving their testimony.

COMMENT. Attorney John Wright of Grand Prairie, Texas suggests this change to clarify the rule.

RULE 204 (4) Objections to Testimony

The officer taking an oral deposition shall not sustain objections made to any of the testimony or fail to record the testimony of the witness because an objection is made by any of the parties or attorneys engaged in taking the testimony. Any objections made when the deposition is taken shall be recorded with the testimony and reserved for the action of the court in which the cause is pending. [Except in the case of] Absent express agreement recorded in the deposition to the contrary:

(a) Objections to the form of questions or the non-responsiveness of the answers [, which objections] are waived if not made at the taking of an oral deposition.

(b) The Court shall not otherwise be confined to objections made at the taking of the testimony.

Approved November 1985

4. Objections to Testimony. The officer taking an oral deposition shall not sustain objections made to any of the testimony or fail to record the testimony of the witness because an objection is made by any of the parties or attorneys engaged in taking the testimony. Any objections made when the deposition is taken shall be recorded with the testimony and reserved for the action of the court in which the cause is pending. Except in the case of objections to the form of questions or the nonresponsiveness of answers, which objections are waived if not made at the taking of an oral deposition unless otherwise agreed between the parties or attorneys by agreement recorded by the officer, the court shall not be confined to objections made at the taking of the testimony.

COMMENT: Attorney Charles Haworth is recommending this change so that his recommendation on Rule 166b is in keeping with Rule 204.

RULE 204(4) OBJECTIONS TO TESTIMONY.

The officer taking an oral deposition shall not sustain objections made to any of the testimony or fail to record the testimony of the witness because an objection is made by any of the parties or attorneys engaged in the taking of testimony. Any objections made when the deposition is taken shall be recorded with the testimony and reserved for the action of the court in which the cause is pending. [Except in the case of objections to the form of questions or the non-responsiveness of answers, which objections are waived if not made at the taking of an oral depositions.] The court shall not be confined to objections made at the taking of the testimony.

COMMENT: Attorney J. Harris Morgan desires to completely eliminate the portion of the rule declaring waiver.

Supreme Court Advisory Committee
Rule 15--216 Subcommittee
Proposed Amendment
11-01-85

Rule 204--Examination, Cross-examination and Objections

1. Written Cross-Questions on Oral Examination. (No change)

2. Oath. (No change)

3. Examination. (No change)

4. Objections to Testimony. The officer taking an oral deposition shall not sustain objections made to any of the testimony or fail to record the testimony of the witness because an objection is made by any of the parties or attorneys engaged in taking the testimony. Any objections made when the deposition is taken shall be recorded with the testimony and reserved for the action of the court in which the cause is pending. ~~-Except-in-the case-of--objections--to--the--form--of--questions-or--the-nonrespon=-siveness-of-answers,--which-objections-are-waived-if--not--made-at-the-taking-of-an-oral-deposition,~~ However, the court shall not be confined to objections made at the taking of the testimony.

COMMENTS: The requirement of objecting to the form of questions or nonresponsiveness of answers serves no useful purpose. It often lengthens the deposition and increases the cost.

Tom Ragland, Waco

Furthermore, this requirement places the burden on the non-deposing attorney to help the deposing attorney get his questions in admissible form by objecting or waiving the objection.

See also (1) Justice Barrow memo dated March 6, 1984; (2) Daniel Hyde letter dated June 20, 1984; (3) Harris Morgan letter dated January 9, 1984.

If the making of objections, of any character, is desirable and fair to all parties to the case, they may enter into such agreements as suits their needs under Rule 11, Agreements To Be in Writing (stipulations).

Approved _____ Approved with Modifications _____

Disapproved _____ Deferred _____

RULE 205 SUBMISSION TO WITNESS; CHANGES, SIGNING

When the testimony is fully transcribed, the deposition officer shall submit the [deposition] transcript and correction sheets to the witness or if the witness is a party with an attorney of record, to the attorney of record, for examination and signature, unless [such] examination and signature are waived by the witness and the parties.

[Any changes in form or substance] Changes in testimony [which] that the witness desires to make shall [be entered upon the deposition by the officer with the statement of the reasons given by the witness for making such changes.] be entered upon the correction sheet by the witness with a statement of the reason for the change. [The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill and cannot be found or refuses to sign.] The transcript and correction sheet shall then be signed by the witness before any officer authorized to administer oaths unless signature before an authorized officer is waived by the witness and the parties. [If the witness does not sign and return the deposition within twenty days of its submission to him or his counsel of record, the officer shall sign it and state on the record the fact of the waiver and examination and signature or

of the illness or absence of the witness or the fact of the refusal together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed; unless on motion to supress, made as provided in Rule 207, the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.] When the transcript and correction sheets return, the deposition officer shall advise all parties of suggested changes. If the transcript and correction sheet does not return within twenty days, the deposition officer shall certify the failure to return or the refusal to sign and the reason(s), if any, given and shall furnish copies of such certificate to all parties. Thereafter, the deposition officer shall file the original transcript with the clerk of the court in which such cause is pending.

COMMENT: Attorney Charles Matthews and court reporter G. H. Hickman have made this suggestion with the purpose of facilitating the work of court reporters. The Administration of Justice Committee turned down this proposal.

RULE 205. Submission to Witness; Changes; Signing

When the testimony is fully transcribed, the deposition officer shall submit the original deposition transcript to the witness or if the witness is a party with an attorney of record, to the attorney of record, for examination and signature by the witness before any officer authorized to administer an oath, unless such examination and signature are waived by the witness and by the parties. No erasures or obliterations of any kind are to be made to the original testimony as transcribed by the deposition officer. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the deposition officer with the statement of the reasons given by the witness for making such changes. The deposition shall then be signed by the witness before any officer authorized to administer an oath, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the witness does not sign and return the original deposition transcript within twenty days of its submission to him or his counsel of record, the deposition officer shall sign [it] a true copy of the transcript and state on the record the fact of waiver of examination and signature or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed; unless

on motion to suppress, made as provided in Rule 207, the Court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

COMMENT: Attorney Charles Matthews of Houston along with court reporter George Hickman have requested this change in Rule 205. The proposers believe this will simplify the process of obtaining signatures, clear up some of the questions on the procedures and allow for a witness out of state (or out of pocket) to complete the deposition without "inconveniencing" the court reporter.

RULE 206 CERTIFICATION AND FILING BY OFFICER; EXHIBITS; COPIES; NOTICE OF FILING

1. Certification and Filing by Officer. The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. The officer shall include the amount of his charges for the preparation of the completed deposition in the certification. The clerk of the court where such deposition is filed shall tax as costs the charges for preparing the original copy of the deposition. Unless otherwise ordered by the court, he shall then securely seal the deposition in an envelope endorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

COMMENT: Judge (Dean) Barrow and attorney Thomas Pollan recommend this change to authorize the clerk to tax the deposition charge as cost.

1. Use of Depositions in Same Proceeding.

a. Availability of Deponent as a Witness does not Preclude Admissibility of a Deposition taken and Used in the Same Proceeding. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition taken in the same proceeding, insofar as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used by any [person] party for any purpose against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof. Unavailability of deponent is not a requirement for admissibility.

b. Included Within meaning of "Same proceeding". Substitution of parties pursuant to these rules does not affect the right to use depositions previously taken; and, when a suit has been brought in a court of the United States or of this or any other state [has been dismissed] and another [suit] action involving the same subject matter is brought between the same parties or their representatives or successors in interest, all depositions lawfully taken [and duly filed in the former suit may be used in the latter as if originally taken therefore] in each suit may be used in each suit as if originally taken therein.

2. Use of Depositions Taken in Different Proceeding. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition taken in a different proceeding, insofar as admissibile under the rules of evidence applied as though the witness were then present and testifying, may be used subject to the provisions and requirements of rules 804(a) and 804(b)(1), Texas Rules of Evidence.

3. Motion to Supress. When a deposition shall have been filed in the court and notice given at least one entire day before the day on which the case is called for trial, errors and irregularities in the notice, and errors in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed or otherwise dealt with by the deposition officer under Rules 205 and 206 are waived, unless a motion to suppress the deposition or some part therof is made and notice of the written objections made in the motion is given to every other party before the trial commences.

COMMENT. Adopted in November meeting as proposed by Newell Blakely and modified by Charles Barrow.

PACKAGE A - DEPOSITIONS

TEXAS RULES OF CIVIL PROCEDURE
Rule 207. Use of Depositions in Court Proceedings.

1. Use of Depositions. Depositions shall include the original or any certified copy thereof. Depositions are admissible in evidence subject to the Texas Rules of Evidence. Further, the Rules of Evidence shall be applied to each question and answer as though the witness were then present and testifying. A deposition taken in compliance with law shall have the status of a deposition whether offered in the proceeding in which taken or in another proceeding. Unavailability of deponent is not a prerequisite for admissibility. [~~At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, insofar as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used by any person for any purpose against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof.~~

~~2. Substitution of parties pursuant to these rules does not affect the right to use depositions previously taken, and, when a suit in a court of the United States or of this or any other state has been dismissed and another suit involving the same subject matter is brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former suit may be used in the latter as if originally taken therefor.~~

~~3.~~] 2 Motion to Suppress. When a deposition shall have been filed in the court and notice given at least one entire day before the day on which the case is called for trial, errors and irregularities in the notice, and errors in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed or otherwise dealt with by the deposition officer under Rules 205 and 206 are waived, unless a motion to suppress the deposition or some part thereof is made and notice of the written objections made in the motion is given to every other party before the trial commences.

TEXAS RULES OF EVIDENCE.
Rule 801. Definitions.
The following definitions apply under this article:
(a). . .
(e) Statements which are not hearsay. A statement is not hearsay if --
(1) . . .

(2) . . .

(3) Depositions. It is a deposition taken in compliance with law in the course of the same or another proceeding:

(i) if the party against whom the deposition is now offered, or his predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination, or

(ii) if the party against whom the deposition is now offered has an interest similar to that of a party described in (i), and has had since becoming a party a reasonable opportunity to redepose deponent, and has failed to exercise that opportunity.

Unavailability of deponent is not a prerequisite to admissibility. ~~It is a deposition taken and offered in accordance with the Texas Rules of Civil Procedure.~~

Rule 804. Hearsay Exceptions; Declarant Unavailable.

(a). . .

(b) Hearsay exceptions. The following are not excluded if the declarant is unavailable as a witness--

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, [~~or in a deposition taken in the course of the same or another proceeding~~] if the party against whom the testimony is now offered, or his predecessor in interest, [~~or a person with a similar interest~~] had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Discussion of Package A

Package A eliminates distinctions between use of depositions in the same proceeding in which taken and use in different proceedings. There is no longer a need for procedure rule 207 to define "same" proceeding. Since unavailability of deponent is no longer a requisite, there is no longer a need for evidence rule 804(b)(1) to deal with depositions.

A party against whom a deposition is offered gets his protection from unfairness through the wording of 801(e)(3). The deposition is admissible against a person with a similar interest who was not a party when the deposition was taken if his interest was "represented." He can redepose if he cares to. But if he has no reasonable opportunity to redepose, the deposition is not admissible against him.

PACKAGE B -- DEPOSITIONS

TEXAS RULES OF CIVIL PROCEDURE.
Rule 207. Use of Depositions in Court Proceedings.

1. Use of Depositions in Same Proceeding.

a. Availability of Deponent as a Witness does not Preclude Admissibility of Deposition Taken and Used in the Same Proceeding. Depositions shall include the original or any certified copy thereof. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition taken in the same proceeding, insofar as admissible under the rules of evidence [~~applied as though the witness were then present and testifying~~], may be used by any person for any purpose against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof. Further, the evidence rules shall be applied to each question and answer as though the witness were then present and testifying. Unavailability of deponent is not a requirement for admissibility.

b. Included Within Meaning of "Same Proceeding." Substitution of parties pursuant to these rules does not affect the right to use depositions previously taken, and, when a suit has been brought in a court of the United States or of this or any other state [~~has been dismissed~~] and another suit involving the same subject matter is brought between the same parties or their representatives or successors in interest, all depositions lawfully taken [~~and duly filed~~] in each [~~the former~~] suit may be used in the other suit(s) [~~latter~~] as if originally taken therefor.

c. If one becomes a party after the deposition is taken and has an interest similar to that of any party described in (a) or (b) above, the deposition is admissible against him only if he has had a reasonable opportunity, after becoming a party, to redepose deponent, and has failed to exercise that opportunity.

2. Use of Depositions Taken in Different Proceeding. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition taken in a different proceeding may be used subject to the provisions and requirements of the Texas Rules of Evidence. Further, the evidence rules shall be applied to each question and answer as though the witness were then present and testifying.

3. Motion to Suppress. When a deposition shall have been filed in the court and notice given at least one entire day before the day on which the case is called for trial, errors and

irregularities in the notice, and errors in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed or otherwise dealt with by the deposition officer under Rules 205 and 206 are waived, unless a motion to suppress the deposition or some part thereof is made and notice of the written objections made in the motion is given to every other party before the trial commences.

TEXAS RULES OF EVIDENCE
Rule 801. Definitions.
The following definitions apply under this article:
(a). . .
. . . .
(e) Statements which are not hearsay. A statement is not hearsay if --
(1). . .
(2). . .
(3) Depositions. It is a deposition [~~taken and offered in accordance with the Texas Rules of Civil Procedure~~] taken in the same proceeding, as same proceeding is defined in Rule 207, Texas Rules of Civil Procedure. Unavailability of deponent is not a requirement for admissibility.

Rule 804. HEARSAY EXCEPTIONS. DECLARANT UNAVAILABLE.
(a). . .
(b) Hearsay exceptions. The following are not excluded if the declarant is unavailable as a witness --

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in the course of [~~the same or~~] another proceeding, if the party against whom the testimony is now offered, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Comment. A deposition in some circumstances may be admissible without regard to unavailability of the deponent. See rule 801(e)(3), Texas Rules of Evidence, and Rule 207, Texas Rules of Civil Procedure.

Discussion of Package B

Package B is based on "Alternative #1" presented and discussed at the November 1-2, 1985 meeting. It melds in the wording suggested at that meeting and seeks to solve the late-on-the-scene party. It maintains the former distinction between depositions offered in the same proceeding and offered in a different proceeding. It makes clear the meaning of same proceeding.

RULE 208 DEPOSITIONS UPON WRITTEN QUESTIONS

1. Serving Questions; Notice. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. Leave of court, granted with or without notice, must be obtained only if a party seeks to take a deposition prior to the appearance day of any defendant. The attendance of witnesses and the production of designated items may be compelled as provided in Rule 201.

. . . . .

COMMENT: Judge (Dean) Barrow recommended that the limitation in Rule 200 regarding oral deposition be placed in Rule 208 regarding deposition upon written questions.

Approved November 1985

Supreme Court Advisory Committee
Rule 15--216 Subcommittee
Proposed Amendment
11-01-85

Rule 209--Disposal of Depositions (New Rule)

1. Depositions filed with the clerk of the court may be disposed of one hundred eighty days after a judgment final as to all parties has been entered in the case.

2. The Court shall, by order entered upon the minutes of the Court, specify the method of disposal of such depositions and the proceeds therefrom, if any, shall be accounted for according to law.

3. The Court may require such advance notice of the disposal of depositions under this rule as it deems appropriate under the circumstances and, for good cause shown, may order certain depositions retained by the clerk or returned to the parties, their attorney, or the witness.

COMMENT: The Rules have required that depositions be filed with the clerk for many years, but there has been no authority for disposal of depositions by the clerk. This has created a storage problem, especially in the larger cities.

Scrap paper is a marketable commodity.

Paragraph 2 will discourage a clerk, or deputy, from going into the scrap paper business.

Pararaph 3 will allow the trail judge to order special handling of depositions which may be of a sensitive nature, such as divorce cases, depositions dealing with trade secrets, or any deposition subject to a protective order under Rule 166b.4.

Approved _____ Approved with Modifications _____

Disapproved _____ Deferred _____

Tom Ragland, Waco

5. Failure to Make Supplementation of Discovery Response in Compliance with Rule 166b. A party who fails to supplement seasonably his response to a request for discovery in accordance with paragraph 5 of Rule 166b shall not be entitled to present evidence which the party was under a duty to provide in a supplemental response to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter when the information required for Rule 166b concerning the witness has not been disclosed, unless the trial court finds that good cause sufficient to require admission exists. The burden of establishing good cause is upon the offeror of the evidence and good cause must be shown in the record.

216

NEW RULE PROPOSED STIPULATIONS REGARDING DISCOVERY PROCEDURE

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery.

COMMENT: Attorney Charles Haworth proposes this rule, in part, to establish Federal Rule 29 in the state practice. The purpose of this new rule would be to permit the greatest degree of flexibility to Texas lawyers in stipulating the procedure of discovery as has been our historic practice.

Rejected November 1985

Rule 239a. Notice of Default Judgment

At or immediately prior to the time an interlocutory or final default judgment is rendered, the party taking the same or his attorney shall certify to the clerk in writing the last known mailing address of the party against whom the judgment is taken, which certificate shall be filed among the papers in the cause. Immediately upon the signing of the judgment, the clerk shall mail by first-class mail ~~[a-pose-card]~~ notice thereof to the party against whom the judgment was rendered at the address shown in the certificate, and note the fact of such mailing on the docket. The notice shall state the number and style of the case, the court in which the case is pending, the names of the parties in whose favor and against whom the judgment was rendered, and the date of the signing of the judgment. ~~[Failure-to-comply-with-the-provisions-of-this-rule-shall-not-affect the-finality-of-the-judgment.]~~

Comment: The proposed amendment conforms the rule to the 1984 amendment to Rule 306a, which requires notice by first-class mail. The last sentence of the rule is deleted to conform to the 1984 amendment to Rule 306a, which provides for up to a ninety-day extension of the date on which the time period for perfecting an appeal begins to run, if the appellant proves he has failed to receive notice of the judgment.

Jeremy C. Wicker

RULE 306 a (3): NOTICE OF JUDGMENT.

When the final judgment or other appealable order is signed, the clerk of the court shall immediately give notice to the parties or their attorneys of record by [first class mail] registered or certified mail, return receipt requested, advising that the judgment or order was signed. Failure to comply with the provisions of this rule shall not affect the periods mentioned in paragraph (1) of this rule, except as provided in paragraph (4) of this rule and Rule 21 (c).

COMMENT: This proposal is submitted by Charles M. Jordan and I. Nelson Heggen to help alleviate the possibility of counsel not obtaining appropriate notice of an appealable order or a judgment within the time frame allowed and to expressly state that the "forgiveness" of time as set out in Rule 21 (c) applies to Rules 306 a (3) and 458.

Supreme Court Advisory Committee
Rule 15--216 Subcommittee
Proposed Amendment
11-01-85

Rule 167- Discovery and Production of Documents and Things for Inspection, Copying or Photographing

1. Procedure. (No change)

2. Time. No REQUEST may be served on a party until that party has filed a pleading or time therefor has elapsed. Thereafter, the REQUEST shall be ~~filed with the Clerk and~~ served upon every party to the action. The RESPONSE to any REQUEST made under this rule and objections, if any, shall be served within thirty days after service of the REQUEST. The time for making a RESPONSE may be shortened or lengthened by the court upon a showing of good cause.

3. Order. If objection is made to a REQUEST or to a RESPONSE, either party may request a hearing by filing a motion setting forth separately each REQUEST and RESPONSE in controversy. The court may order or deny production within the scope of discovery as provided in Rule 166b in accordance with paragraph 1 of Rule 215. If production is ordered, the order shall specify the time, place, manner and other conditions for making the inspection, measurement or survey, and taking copies and photographs and may prescribe such terms and conditions as are just.

4. Nonparties. (No change)

5. Certificate Filed In Lieu of Documents. A party serving a REQUEST or RESPONSE under this rule shall not file such REQUEST or RESPONSE with the clerk of the court. A party may, however, file with the clerk a certificate, not to exceed one (1) typewritten page, describing such REQUEST or RESPONSE, and showing the date, manner and upon whom service was made and such other facts deemed necessary to make proof of service.

The court may, upon motion and for good cause, permit the filing of such REQUEST or RESPONSE.

COMMENT: The phrase "filed with the Clerk and" has been deleted from paragraph 2.

Paragraph 5 has been added.

The purpose of this proposed amendment is to eliminate the requirement that discovery matters must be filed with the clerk. The present filing requirement is a waste of time and effort and takes up valuable file space in the clerk's office and otherwise clutters up the file.

Paragraph 5 allows, but does not require, a certificate to be filed if the attorney feels a need to establish a record of the action taken.

Paragraph 5 also allows the court to exercise its discretion, in exceptional cases, and permit the filing of discovery instruments prepared under this rule.

Approved _____ Approved with Modifications _____

Disapproved _____. Deferred _____

Supreme Court Advisory Committee
Rule 15--216 Subcommittee
Proposed Amendment
11-01-85

Rule 168- Interrogatories to Parties

1. (No change)

2. (No change)

3. (No change)

4. (No change)

5. Number of Interrogatories. The number of questions including subsections in a set of interrogatories shall be limited so as not to require more than thirty (30) answers. No more than two sets of interrogatories may be served by a party to any other party, except by agreement or as may be permitted by the court after hearing upon the showing of good cause. The court may, after hearing, reduce or enlarge the number of interrogatories or sets of interrogatories if justice so requires. The provisions of Rule 166b are applicable for the protection of the parties from whom answers to interrogatories are sought under this rule.

The interrogatory shall be answered separately and fully in writing under oath. Answers to interrogatories shall be preceeded by the question or interrogatory to which the answer pertains. The answers shall be signed and verified by persons making them and the provisions of Rule 14 shall not apply. True copies of the interrogatories, and objections thereto, and

answers shall be served on all parties or their attorneys at the time that any interrogatories, objections, or answers are served. ~~and a true copy of each shall be promptly filed with the clerks office together with proof of service.~~

6. Objections (No change)

7. Certificate filed in lieu of documents. A party serving interrogatories, answers or objections under this rule shall not file such interrogatories, answers or objections with the clerk of the court. A party may, however, file with the clerk a certificate, not to exceed one (1) typewritten page, describing such interrogatories, answers or objections and showing the date, manner and upon whom service was made and such other facts deemed necessary to make proof of service.

The court may, upon motion and for good cause, permit the filing of such interrogatories, answers or objections.

Either party may present to the court any objections to interrogatories by filing a written motion distinctly setting forth the interrogatory in question followed by the objection thereto and request a hearing as to such objection at the earliest possible time.

COMMENT: The purpose of this proposed amendment is to eliminate the requirement that discovery matters must be filed with the clerk. Paragraph 7 allows, but does not

require, a certificate to be filed if the attorney feels a need to establish a record of the action taken.

Paragraph 7 also allows the court to exercise its discretion, in exceptional cases, and permit the filing of discovery instruments prepared under this rule.

Approved _____ Approved with Modifications _____

Disapproved _____. Deferred _____

Supreme Court Advisory Committee
Rule 15--216 Subcommittee
Proposed Amendment
11-01-85

Rule 169- Admission of Facts and of Genuineness of Documents

1. Request for Admission. At any time after the defendant has made appearance in the cause, or time therefor has elapsed, a party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 166b set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of the documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Whenever a party is represented by an attorney of record, service of a request for admissions shall be made on his attorney unless service on the party himself is ordered by the court. ~~A true copy of a request for admission or of a written answer or objection, together with proof of the service thereof as provided in Rule 21a, shall be filed promptly in the clerk's office by the party making it.~~

2. Effect of Admission. (No change)

3. Certificate Filed In Lieu of Documents. A party serving a REQUEST or RESPONSE under this rule shall not file such REQUEST or RESPONSE with the clerk of the court. A party may, however,

file with the clerk a certificate, not to exceed one (1) typewritten page, describing such REQUEST or RESPONSE, and showing the date, manner and upon whom service was made and such other facts deemed necessary to make proof of service.

The court may, upon motion and for good cause, permit the filing of such REQUEST or RESPONSE.

Any motion for relief under these rules dealing with the form or substance of any REQUEST or RESPONSE made under this rule shall separately set forth each such REQUEST followed by the RESPONSE thereto and state the nature of the complaint, objection or matter in controversy.

COMMENT: Paragraph 1 is unchanged except for the deletion of the last sentence referring to Rule 21a.

Paragraph 3 has been added.

The purpose of this proposed amendment is to eliminate the requirement that discovery matters must be filed with the clerk. The present filing requirement is a waste of time and effort and takes up valuable file space in the clerk's office and otherwise clutters up the file.

Paragraph 3 allows, but does not require, a certificate to be filed if the attorney feels a need to establish a record of the action taken.

Paragraph 3 also allows the court to exercise its discretion, in exceptional cases, and permit the filing of discovery instruments prepared under this rule.

Approved _____ Approved with Modifications _____

Disapproved _____ Deferred _____

Supreme Court Advisory Committee
Rule 15--216 Subcommittee
Proposed Amendment
11-01-85

Rule 206- Certification and Filing by Officer; Exhibits; Copies; Notice of Filing

1. Certification and Filing by Officer.

a. The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. ~~The officer shall include the amount of his charges for the preparation of the completed deposition in the certification. Unless otherwise ordered by the court, he shall then securely seal the deposition in an envelope endorsed with the title of the action and marked "deposition of (here insert name of witness)" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.~~

b. The officer shall deliver the deposition to the attorney requesting it and shall file with the clerk a certificate bearing the cause number, style of the case and captioned with the name of the witness and certifying the date and to whom such deposition was delivered. Such certificate shall include the manner of delivery of the deposition and the officer's charges for the preparation of the completed deposition. A copy of such certificate shall be attached to each copy of such deposition.

If delivery of the deposition be by Certified Mail or common carrier, the official's certificate shall include thereon the certified mail receipt number or the waybill number of the common carrier which made the delivery.

c. The deposition shall be retained by the attorney taking delivery thereof, subject to being examined by the witness or any party to the suit, until one hundred eighty days after a judgment final as to all parties has been entered in said cause, after which time the attorney in possession of such deposition may either return it to the witness or destroy such deposition, subject to any protective order which may have been entered in the case.

d. The court may, upon motion and for good cause shown, permit the filing of the original or a true copy of any such deposition with the clerk of the court.

2. Exhibits. (No change.)

3. Copies. (No change)

~~4. Notice of Filing. The person filing the deposition shall give prompt notice of its filing to all parties.~~

~~5. Inspection of Filed Deposition. After it is filed, the deposition shall remain on file and be available for the purpose of being inspected by the deponent or any party and the deposition may be opened by the clerk or justice at the request of the deponent or any party, unless otherwise ordered by the court.~~

COMMENT: The requirement that depositions be "filed" with the clerk appears to be a holdover from the days when it was necessary to have the clerk issue a commission to take a deposition. Present day practice makes the filing of depositions, for the most part, a useless requirement.

Discovery materials are not filed with the clerk in the federal courts except as specifically provided by local rules. See Rule 5.2, United States District Court, Northern District; Rule 10F, United States District Court, Southern District; Rule 300-1, United States District Court, Western District.

Approved _____ Approved with Modifications _____

Disapproved _____ Deferred _____

NO. _____

Paul Plaintiff	§	_____ the District
	§	
V.	§	Court of _____
	§	
David Defendant	§	County, Texas

CERTIFICATE OF DELIVERY OF DEPOSITION
OF
(Name of Witness)

To The Clerk of the Court:

Pursuant to Rule 206, Texas Rules of Civil Procedure, I certify as follows:

(1) The (oral deposition) (deposition on written questions) of the above witness was delivered to (attorney's name and address on (date).

(2) Method of delivery (1) Personal delivery _____

(2) Certified Mail No. _____

(3) Other (Federal Express, United Parcel Service, etc) way bill No. _____

(3) The charges for preparation of this deposition are $_____

SIGNED this _____ day of _____ 19___.

Signature
(Typed Name) CSR No. _____
Expiration Date:
Address
Phone No.

Tom Ragland, Waco

Supreme Court Advisory Committee
Rule 15--216 Subcommittee
Proposed Amendment
11-01-85

Rule 207- Use of Depositions in Court Proceedings

1. Use of Depositions. (No change)

2. Substitution of parties pursuant to these rules does not affect the right to use depositions previously taken; and, when a suit in a court of the United States or of this or any other state has been dismissed and another suit involving the same subject matter is brought between the same parties or their representatives or successors in interest, all depositions lawfully taken ~~and duly filed~~ in the former suit may be used in the latter as if originally taken therefor.

3. Motion to Suppress. When a deposition shall have been ~~filed in the court~~ delivered in accordance with Rule 206 and notice given at least one entire day before the day on which the case is called for trial, errors and irregularities in the notice, and errors in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, ~~filed,~~ delivered, or otherwise dealt with by the

deposition officer under Rules 205 and 206 are waived, unless a motion to suppress the deposition or some part thereof is made and notice of the written objections made in the motion is given to every other party before the trial commences.

COMMENT: Changes made to conform with proposed changes in Rules 167, 168, 169, 204 and 206.

Approved _____ Approved with Modifications _____

Disapproved _____ Deferred _____

Tom Ragland, WACO

Supreme Court Advisory Committee
Rule 15--216 Subcommittee
Proposed Amendment
11-01-85

Rule 208--Depositions Upon Written Questions

1. Serving Questions; Notice. (No change)

2. Notice by Publication. (No change)

3. Cross-Questions, Redirect Questions, Recross Questions and Formal Qbjections. (No change)

4. Deposition Officer; Interpreter. (No change)

5. Officer to take Responses and Prepare Record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly to administer an oath to the witness in the manner provided in paragraph 2 of Rule 204, to take the testimony of the witness in response to the questions in the manner provided in paragraph 3 of Rule 204 and to prepare, certify, and ~~file or mail~~ deliver the deposition, in the manner provided by Rules 205 and 206, attaching thereto the copy of the notice and questions received by him.

~~The person filing the deposition shall give prompt notice of its filing to all parties.~~

~~After it is filed, the deposition shall remain on file and be available for the purpose of being inspected by the witness or deponent or any party and the deposition may be opened by the clerk or justice at the request of the witness or deponent or any party, unless otherwise ordered by the court.~~

COMMENTS:

Approved _____ Approved with Modifications _____

Disapproved _____ Deferred _____

Tom Ragland, Waco

Supreme Court Advisory Committee
Rule 15--216 Subcommittee
Proposed Amendment
11-01-85

Rule 209--Disposal of Depositions (New Rule)

1. Depositions filed with the clerk of the court may be disposed of one hundred eighty days after a judgment final as to all parties has been entered in the case.

2. The Court shall, by order entered upon the minutes of the Court, specify the method of disposal of such depositions and the proceeds therefrom, if any, shall be accounted for according to law.

3. The Court may require such advance notice of the disposal of depositions under this rule as it deems appropriate under the circumstances and, for good cause shown, may order certain depositions retained by the clerk or returned to the parties, their attorney, or the witness.

COMMENT: The Rules have required that depositions be filed with the clerk for many years, but there has been no authority for disposal of depositions by the clerk. This has created a storage problem, especially in the larger cities.

Scrap paper is a marketable commodity.

Paragraph 2 will discourage a clerk, or deputy, from going into the scrap paper business.

Pararaph 3 will allow the trail judge to order special handling of depositions which may be of a sensitive nature, such as divorce cases, depositions dealing with trade secrets, or any deposition subject to a protective order under Rule 166b.4.

Approved _____ Approved with Modifications _____

Disapproved _____ Deferred _____

Rule 18a. Recusal or Disqualification of Judges

In subdivision (g), delete "Article 200a" and substitute:

sections 74.034 and 74.035 of the Texas Government Code

Rule 30. Parties to Suits

Delete "title of the Revised Civil Statutes of Texas, 1925, dealing with Bills and Notes" and substitute:

Texas Business and Commerce Code

Delete "Articles 1986 and 1987 of such statutes" and substitute:

section 17.001 of the Texas Civil Practice and Remedies Code

Jeremy C. Wicker

Rule 87. Determination of Motion to Transfer

In subdivision (a) of paragraph 2:

Delete "Section 1" and substitute:

section 15.001

Delete "Section 2" and substitute:

sections 15.011-15.017

Delete "Section 3" and substitute:

sections 15.031-15.040

Delete "Subsections (a) and (b) of Section 4" and substitute:

sections 15.061 and 15.062

Delete "Article 1995" and substitute:

the Texas Civil Practice and Remedies Code

Rule 111. Citation by Publication in Actions Against Unknown Heirs or Stockholders of Defunct Corporations

Delete "Art. 2040 of the Revised Civil Statutes of Texas, 1925," and substitute:

section 17.004 of the Texas Civil Practice and Remedies Code

Rule 112. Parties to Actions Against Unknown Owners or Claimants of Interest in Land

Delete "Acts 1931, 42nd Leg., p. 369, ch. 216" and substitute:

section 17.005 of the Texas Civil Practice and Remedies Code

Rule 113. Citation by Publication in Actions Against Unknown Owners or Claimants of Interest in Land

Delete "If the plaintiff in an action authorized under Acts 1931, 42nd Leg., p. 369, ch. 216" and substitute:

In suits authorized by section 17.005 of the Texas Civil Practice and Remedies Code, the plaintiff,

Rule 161. Where Some Defendants Not Served

Delete "Art. 2088 of the Texas Revised Civil Statutes" and substitute:

"section 17.001 of the Texas Civil Practice and Remedies Code"

Rule 163. Dismissal as to Parties Served, Etc.

Delete "Art. 2088 of the Revised Civil Statutes of Texas" and substitute:

section 17.001 of the Texas Civil Practice and Remedies Code.

Rule 188. Depositions in Foreign Jurisdictions

In paragraph 2, delete "Article 3746 of the Revised Civil Statutes of Texas" and substitute:

section 20.001 of the Texas Civil Practice and Remedies Code

Rule 385a. Court Unable to Take Immediate Action

Delete "Article 1819 of the Revised Civil Statutes, as amended" and substitute:

section 22.220(b) of the Texas Government Code

Rule 182a. Court Shall Instruct Jury on Effect of Article 3716

In the caption of the rule, delete "Article 3716" and substitute:

Evidence Rule 601(b)

Comment: Article 3716 was repealed, effective September 1, 1983. The caption of the rule is amended to conform to Evidence Rule 601(b).

Jeremy C. Wicker

Rule 469. Requisites of Application

In line 4 of subdivision (d), delete "Subdivision 2 of Article 1728" and substitute:

subsection (a)(2) of section 22.001 of the Texas Government Code

In lines 6 and 7 of subdivision (d), delete "subdivision of Article 1728" and substitute:

subsection of section 22.001 of the Texas Government Code

In lines 8 and 9 of subdivision (d), delete "Subdivision 6 of Article 1728" and substitute:

subsection (a)(6) of section 22.001 of the Texas Government Code

Rule 483. Orders on Application for Writ of Error, Petition for Mandamus and Prohibition

In the second paragraph, delete "subdivision 2 of Art. 1728 of the Revised Civil Statutes of Texas, as amended" and substitute:

subsection (a)(2) of section 22.001 of the Texas Government Code

Rule 499a. Direct Appeals

In the first paragraph, delete "Article 1738a" and substitute:

section 22.001(c) of the Texas Government Code

Rule 621a. Discovery in Aid of Enforcement of Judgment

Delete "Article 3773, V.A.T.S." and substitute:

section 34.001 of the Texas Civil Practice and Remedies Code

Rule 657. Judgment Final for Garnishment

Delete "subdivision 3 of Article 4076 of the Revised Civil Statutes of Texas, 1925" and substitute:

subsection 3 of section 63.001 of the Texas Civil Practice and Remedies Code

111

Rule 696. Application for Writ of Sequestration and Order

In the second paragraph, delete "Article 6840, Revised Civil Statutes" and substitute:

sections 62.044 and 62.045 of the Texas Civil Practice and Remedies Code

Rule 741. Requisites of Complaint

Delete "Articles 3973, 3974 and 3975, Revised Civil Statutes" and substitute:

sections 24.001-24.004 of the Texas Property Code

Rule 746. Only Issue

Delete "Articles 3973-3994, Revised Civil Statutes" and substitute:

sections 24.001-24.008 of the Texas Property Code

Rule 772. Procedure

Delete "Art. 6101 of the Revised Civil Statutes of Texas, 1925," and substitute:

section 23.001 of the Texas Property Code

Rule 806. Claim for Improvements

Delete "Articles 7393-7401, Revised Civil Statutes" and substitute:

sections 22.021-22.024 of the Texas Property Code

Rule 807. Judgment When Claim for Improvement is Made

In lines 2 and 3, delete "Articles 7393-7401, Revised Civil Statutes" and substitute:

sections 22.021-22.042 of the Texas Property Code

In line 7, delete "Articles 7397-7399, Revised Civil Statutes" and substitute:

sections 22.022 and 22.023 of the Texas Property Code

Rule 806. These Rules Shall Not Govern When

Delete "Articles 7364-7401A, Revised Civil Statutes," and substitute:

sections 22.001-22.045 of the Texas Property Code

Rule 810. Requisites of Pleadings

Delete "Article 1975, Revised Civil Statutes," and substitute:

section 17.003 of the Texas Civil Practice and Remedies Code

Rule 811. Service by Publication in Actions Under Article 1975

In the caption delete "Article 1975" and substitute:

section 17.003 of the Texas Civil Practice and Remedies Code

In line 1, delete "Article 1975, Revised Civil Statutes" and substitute:

section 17.003 of the Texas Civil Practice and Remedies Code