

TRCE 703. Bases of Opinion Testimony

The facts or data in the particular case upon which an expert bases an ~~his~~ opinion or inference may be those perceived by or ~~made known to~~ [reviewed by the expert] ~~him~~ at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

[COMMENT TO 1990 CHANGE: This amendment conforms this rule of evidence to the rules of discovery in utilizing the term "reviewed by the expert." See also comment to Rule 166b.]

CANTEY & HANGER  
ATTORNEYS AT LAW  
2100 FIRST REPUBLIC BANK TOWER  
801 CHERRY STREET  
FORT WORTH, TEXAS 76102  
817/877-2800

ERNEST REYNOLDS III

November 21, 1989

Honorable Justice Nathan Hecht  
P. O. Box 12248  
Austin, Texas 78711

Dear Justice Hecht:

Regarding the proposed change for evidence rule 703, I am strongly of the opinion that it should not be made. Apparently, somebody has decided that this needs to be made in order to bring language of evidence rule 703 into some semblance of conformity with proposed changes to certain procedural rules dealing with discovery. There is a difference of purpose and scope between the discovery rules and the evidence rules. Things are often discoverable, yet not admissible. Broadening, or narrowing, the scope of discovery is often done for purposes that have nothing to do with the considerations made when determining what proper evidentiary rules will be applied in a trial court with regard to preferred evidence (whether testimonial or tangible). Furthermore, in adopting the proposed change to evidence rule 703 there is the possibility of subsequent re-interpretation of the rule in ways that I would wager were never intended: by doing away with the language "made known to" the door is opened to an argument about whether or not hypothetical questions may be used; on the other hand, if the language "made known to" is retained, it is clearly broad enough to include any information "reviewed by the expert". I would strongly urge that the proposed changes to evidence rule 703 should not be adopted.

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~~614~~  
271-279  
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TRC 614  
**TRC 703**

METRO LINE 429-381  
TELEX 75-8631  
TELECOPY 817/877-2852  
ATTORNEY'S DIRECT DIAL  
877-2852

SUBCOMMITTEE REPORT  
RULES 1-14  
TEXAS RULES OF CIVIL PROCEDURE

Rule 6: There were comments from some of the constables who objected to not being able to serve process on Sunday. Again, since this had not been dealt with previously by the committee as a whole, we reserve for future action.

Respectfully,

*Kenneth D. Fuller*  
58

Kenneth D. Fuller



OFFICE OF  
WALTER H. RANKIN, CONSTABLE  
PRECINCT NO. 1, HARRIS COUNTY  
HOUSTON, TEXAS

November 28, 1989

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Rule 6. Suits commenced on Sunday

No civil suit shall be commenced nor process issued or served on Sundays,...

COMMENT: Although this rule is not on the agenda for a proposed amendment, I would like to offer one suggestion. At your first opportunity I would appreciate your consideration on an amendment to Rule 6 of the Texas Rules of Court. Rule 6 presently prohibits service of civil citations on Sundays. Our society has changed greatly to a progressive, mobile one. Law enforcement operates on a 24 hour, 7 day a week schedule. The service of all civil process on Sunday would be one more step toward expediting the civil process system.

00596

SUBCOMMITTEE REPORT  
RULES 1-14  
TEXAS RULES OF CIVIL PROCEDURE

Rule 13: This rule, dealing with frivolous pleadings, drew several very strong comments from judges and others. However, this was of such a volatile nature that we felt further consideration by this sub-committee and the committee as a whole when not under the present time constraints would be advisable.

Respectfully,

*Kenneth D. Fuller*  
58

Kenneth D. Fuller

**GUY JONES**

DISTRICT JUDGE  
202ND JUDICIAL DISTRICT



BI-STATE JUSTICE BUILDING

100 NORTH STATE LINE

TEXARKANA, TEXAS 75501

PHONE (214) 798-3004

December 13, 1989

TRCP 13

Honorable Nathan Hecht  
Associate Justice  
Supreme Court of Texas  
Supreme Court Building  
P. O. Box 12248  
Austin, Texas 78711

Dear Justice Hecht:

I sincerely appreciate the privilege of appearing before the Supreme Court to express my view regarding the revision of Rule 13. I applaud the Court for conducting the hearings and trust that it will be helpful in your rule revision process.

I, again, strongly urge the Court to amend Rule 13 so that the trial judges of this state can have an effective tool to deal with frivolous cases and slipshod law practice. It is our duty to do everything in our power to restore in the legal profession higher standards so that it once again will have the respect it deserves.

Sincerely,

A handwritten signature in black ink, appearing to read "Guy Jones", written over the typed name.

Guy Jones

GJ/cfc

cc: Hon. Thomas R. Phillips  
Hon. Franklin S. Spears  
Hon. C. L. Ray  
Hon. Raul A. Gonzalez  
Hon. Oscar H. Mauzy  
Hon. Eugene A. Cook  
Hon. Jack Hightower  
Hon. Lloyd Doggett

00598

RULE 13 - PROPOSED SUBSTITUTION

The signatures of attorneys or parties constitute by them that they have read the pleading, motion, or other paper and that to the best of their knowledge, information and belief, formed after reasonable inquiry, the instrument is not groundless, brought in bad faith, or for the purpose of harassment or delay. Attorneys or parties who shall bring a fictitious suit, or file a fictitious pleading, motion, or other paper, and/or file any paper for experiment, or for harassment, or who shall make any statement in pleadings or other papers knowing same to be false, groundless, frivolous, or file any instrument for the purpose of delay or harassment, or who shall file any instrument without having first made reasonable inquiry as to the accuracy thereof, may be adjudged guilty of contempt. Any attorney or party found, after hearing, to have violated this Rule may be sanctioned as provided under Rule 215-2b, and additionally, any other sanctions the Court may wish to impose as may reasonably be necessary to do equity to an offended party.

No sanctions under this Rule may be imposed except upon hearing after notice, and any sanctions imposed shall be subject to Appellate Review.

A general denial or request for damages does not offend this Rule.

W. HUGH HARRELL  
ATTORNEY AND COUNSELOR AT LAW  
1708 METRO TOWER, 1220 BROADWAY AVENUE  
LUBBOCK, TEXAS 79401

RES. (806) 795-1825

OFFICE (806) 763-4411

November 22, 1989

Justice Nathan L. Hecht  
Box 12248  
Austin, Texas-78711

Dear Judge Hecht:

As per the request of the Texas Supreme Court, I would like to offer the following suggestions concerning the Rules.

1. Rescind ALL local rules and do not permit local Courts to trap the practicing attorney by making Rules.
2. Require a party taking the deposition or a party or witness to furnish the other attorney a copy of the deposition at the expense of the one taking the deposition.
3. Require the Appellant to deliver the copy of the Transcript and the Statement of Facts to the Appellee's attorney the day of or after the Appellant's Brief is mailed to the Court of Appeals; and, thereafter the Appellee's attorney will file same with the Clerk of the trial Court.
4. Remove, rescind, delete ALL sanctions by opposing counsel for alleged bad faith or frivolous law suits, because opposing counsel NOT having any counter-claim or cross-action is using these allegations alone to intimidate and coerce the opposing side. These allegations have become just as abusive as the party allegedly bringing a bad faith law suit. IF, retained in any manner, let JUST the trial Judge file a Motion and a hearing, and if a fact issue to be tried by a jury.
5. Require that a Judge NOT discuss any matter concerning the case with one attorney when the other attorney is NOT present, where there are opposing counsel. And, you might ought to say an attorney will not discuss matters with the Court unless the other attorney is present.
6. A Rule which would follow due process would require that NO order or judgment of the Court would be rendered or entered unless a hearing is set and notice served on all parties. This business of Courts just signing orders and/or judgments without opposing counsel being afforded an opportunity to be heard is for the birds. This would not apply as to a default judgment and this might be clarified as to default judgments and say no motion need be served upon the defaulting party. Other jurisdictions require a Motion asking for a default judgment, and that it be served and a date, time and palce set for a hearing thereon.
7. A Rule that any appeal from an administrative agency will in fact be trial de novo and not test an Administrative Order under the substantial evidence rule.

Yours very truly,  
WHH:wh cc: Ret.

Hugh Harrell

00601

Local Rules Sub  
20 to  
TRCP 13  
305

TRCP 13

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FULBRIGHT JAWORSKI &  
REAVIS McGRATH  
NEW YORK  
LOS ANGELES

January 11, 1990

TO: SUPREME COURT ADVISORY COMMITTEE

FROM: Subcommittee on Rules 15 to 165

At our subcommittee meeting held on January 8, 1990, we considered (i) the various comments made at the public hearing held on November 30, 1989 addressing the proposed changes in the Texas Rules of Civil Procedure, (ii) the written suggestions and comments of attorneys forwarded to our subcommittee, and (iii) additional proposals for rule changes. The persons participating in the meeting were David Beck, Pat Beard, and Elaine Carlson. The conclusions reached at the meeting were as follows:

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9. Rule 20. The existing rule deals with the minutes of the court. The concern expressed is that "a special judge" is required to sign the minutes of proceedings that were had before him. However, the current practice apparently is that visiting judges never sign the minutes. The subcommittee believes that the concern expressed raises the more basic question of whether rule 20 is an anachronism. The subcommittee therefore believes that, unless there is some unknown reason why this rule should exist, repeal should be considered. In the alternative, the subcommittee recommends that the last sentence of the rule be deleted.

RECOMMENDED NEW RULE  
RELATIVE TO READING AND SIGNING MINUTES

**Rule 20. Minutes Read and Signed**

On the last day of the session, the minutes shall be read, corrected and signed in open court by the judge. [~~Each special judge shall sign the minutes of such proceedings as were had by him.~~]

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hjh  
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JUDGE B. F. (BILL) COKER

3823 Calculus Drive  
Dallas, Texas 75244  
(214) 247-8974

December 30, 1989

V/A  
HJH

VT-4-30  
87

① SCAC Suo Cof  
Rule 47, 47a,  
242, 20, 140a,  
216, 241, 243)  
② ~~SCAC Agenda~~  
③ J. Hecht.

Mr. Luther H. Soules  
Chairman, Rules Advisory Committee  
175 E. Houston Street  
San Antonio, Texas 78205-2230

Re: Suggested rule changes

Dear Mr. Soules:

Enclosed are recommended changes and additions to the Texas Rules of Civil Procedure. Additions to existing rules and new rules are designated by underlined text of the rule. Portions of existing rules which are deleted are enclosed in brackets and lined through. Please submit these suggestions to your committee for consideration.

**Reading and Signing Minutes:**

My recommendation relative to Rule 20, Texas Rules of Civil Procedure, is a pragmatic recommendation.

Rule 20, as it now exists, requires each judge who acts on behalf of a court to sign the minutes of that court at the end of each session. As a visiting judge, I frequently serve a large number of different courts in different areas of the state. I have never been offered an opportunity to sign the minutes of any court at any time in the three years I have been serving as a visiting judge.

The most direct method of remedying this logistic problem is to eliminate it. Therefore, I recommend requiring the judge of the court to sign for all who have served the court. This is accomplished by deleting the last sentence of Rule 20.

A copy of my proposed change to Rules 20 is attached to this letter.

Rule 45. Definition and System

Pleadings in the district and county courts shall

(a) (No change.)

(b) (No change.)

(c) (No change.)

(d) be in writing, on paper measuring approximately 8 1/2 inches by 11 inches, signed by the party or his attorney, and the signed original or copy of said original be filed with the court.

(e) When a copy of the signed original is tendered for filing, the party or his attorney filing such copy is required to maintain the signed original for inspection by the court or any party incident to the suit, should a question be raised as to its authenticity.

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FULBRIGHT JAWORSKI &  
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NEW YORK  
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January 11, 1990

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FROM: Subcommittee on Rules 15 to 165

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10. Rules 45 and 57, and 74. The proposed suggestion is that the existing rule be amended to require that the signed original or a copy thereof be filed with the clerk. The proposal also suggests that when a copy is filed, the party should be required to maintain the signed original in the event the authenticity of the writing is questioned. The suggested change in Rule 57 would expressly permit the filing of a copy of the original signed pleading.

Rule 74. The suggested change in this rule would make the same amendment as in Rules 45 and 57. The subcommittee does not recommend any of these changes.

00605

Rule 45

- (d) be in writing, on paper measuring approximately 8 1/2 inches by 11 inches. Signed by the party or his attorney,
- \* and the signed original or copy of said original be filed with the clerk.
  - \* When a copy of the signed original is tendered for filing, the party or his attorney filing such copy is required to maintain the signed original for inspection by the court or any party incident to the suit, should a question be raised as to its authenticity.

Rule 57

- \* A copy of the original signed pleading is acceptable for filing with the clerk or court.

\* STAR INDICATES ADDITIONAL TEXT

*W/17*  
*HWA, Scott*  
*COA Equities*  
*COA James Hecht*  
*James Hecht*

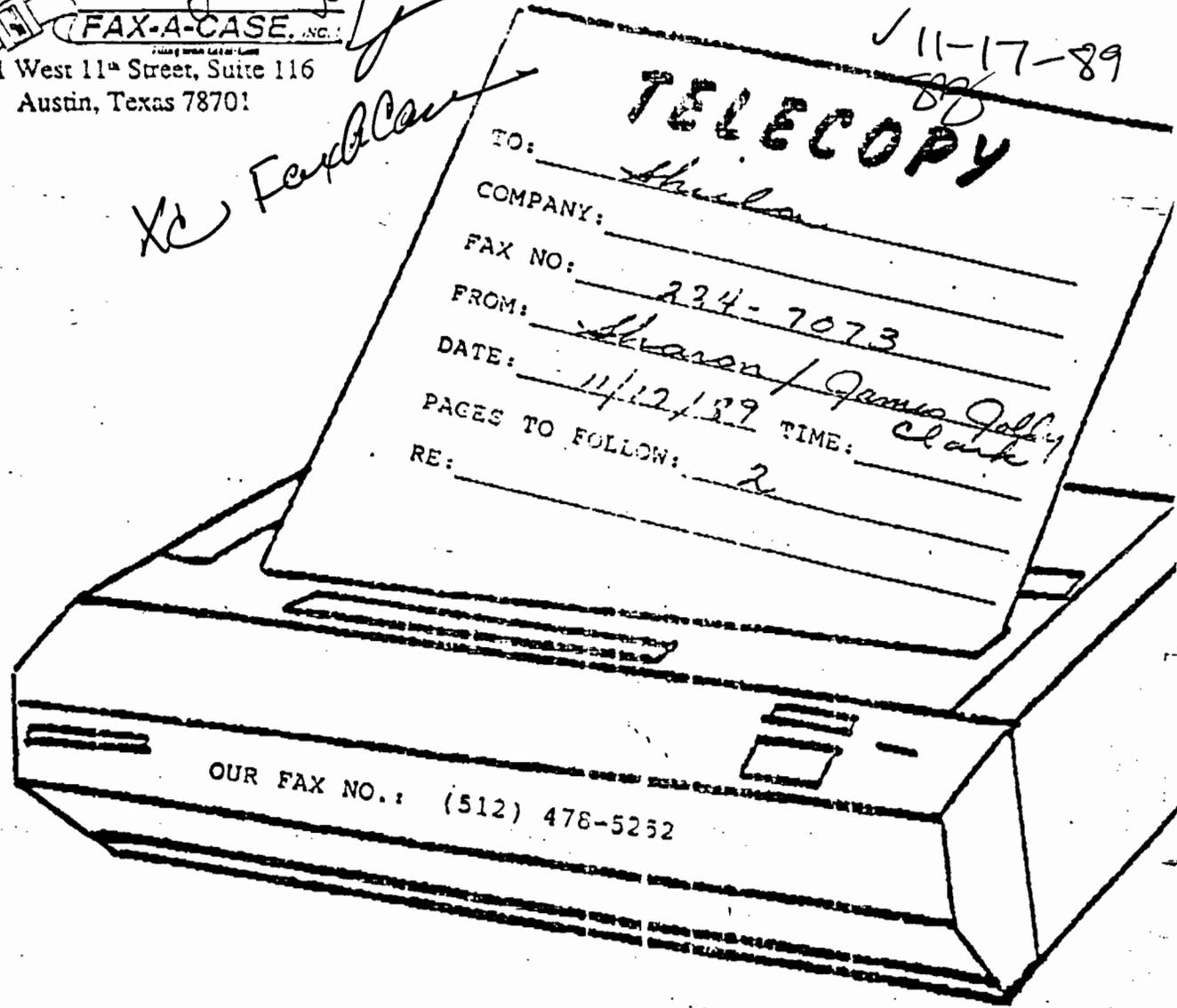
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**FAX-A-CASE, INC.**  
601 West 11<sup>th</sup> Street, Suite 116  
Austin, Texas 78701

*XC Fax/Case*

*✓ 11-17-89*  
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If you do not receive all pages, or if mechanical problems develop, please call (512) 478-4131.

SPECIAL INSTRUCTIONS: *If Mr. Hecht has any questions, please have him call my Clark 9502. Thanks*  
*Sharon*

**Rule 47. Claims for Relief**

An original pleading which 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 are within ~~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 the maximum amount claimed].

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11. Rule 47. The suggested change would have the effect of requiring that a party allege that a claim for unliquidated damages "are within" the jurisdictional limits of the court. The existing rule requires that a party allege that the damages sought "exceed" the "minimum jurisdictional limits" of the court. The subcommittee recommends this change.



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hyh  
LIV

JUDGE B. F. (BILL) COKER

3823 Calculus Drive  
Dallas, Texas 75244  
(214) 247-8974

December 30, 1989

V  
HJH  
VT-4-50  
87

TRCP 47

Mr. Luther H. Soules  
Chairman, Rules Advisory Committee  
175 E. Houston Street  
San Antonio, Texas 78205-2230

① SCAC Sudo Co for  
Rule 47, 47a,  
242, 20, 140a,  
216, 241, 243)  
~~242~~ ~~241~~  
② SCAC agenda -  
③ J. Hecht.

Re: Suggested rule changes

Dear Mr. Soules:

Enclosed are recommended changes and additions to the Texas Rules of Civil Procedure. Additions to existing rules and new rules are designated by underlined text of the rule. Portions of existing rules which are deleted are enclosed in brackets and lined through. Please submit these suggestions to your committee for consideration.

My recommendations relate to changes in the rules relative to:

1. claims for damages;
2. reading and signing minutes;
3. assessment of costs associated with service of process and other notices; and
4. requests and fees for a jury trial.

Each area of recommended change is addressed separately.

**Claims for Damages:**

My recommended changes which are associated with claims for damages relate to pleading jurisdictional amounts and granting judgments on default.

Rule 47, Texas Rules of Civil Procedure, as it now exists, significantly increases the cost of litigation and wastes

valuable judicial resources. This rule makes it impossible to plead a claim for unliquidated damages without being required to re-plead the same claim. The rule requires a statement that only advises the opposing party that the claim exceeds the jurisdictional limits of the court. Further, the rule invites the opposing party to except to the lack of a specific amount claimed, and follows that with a mandate that the trial court sustain the special exception and require the pleader to re-plead with more specifics. On the other hand, if the pleader anticipates the special exception and pleads a specific, a trial would be required to sustain a special exception that claimed the pleader failed to follow Rule 47. Basically, this creates a "Catch 22" because a litigant seeking damages cannot plead in such a way as to avoid the necessity of re-pleading.

As a housekeeping matter, I also recommend sub-part (b) of Rule 47 be amended to require the assertion that the claim is within the jurisdictional limits rather than above the minimum limit. The rule, as now written, prevents affirmatively stating a claim within the limits of a limited-jurisdiction court.

In addition to the above recommendations relative to Rule 47, I recommend repealing Rules 241 and 243, enacting two new rules (which will be referred to as Rules 47a and 242).

Rule 47a requires each damages claimant to advise the person from whom damages is sought the amount of damages which will be requested from the court in the event no answer is filed in response to the suit. Such a rule provides information from which a defendant can assess maximum risk and make a business decision relative to the desirability of contesting the claim.

Rule 242 replaces the current Rules 241 and 243.

Rules 241 and 243 speak to a dichotomy the law has created relative to liquidated and unliquidated claims. This dichotomy serves very little, if any, purpose. In limited circumstances, it permits the law to indulge in a presumption upon default. However, in my view, that presumption is not consistent with reality.

In suits involving unliquidated claims, we presume that a defaulting party admits liability due to fault, but that same defaulting party does not admit the amount of damages caused by the admitted fault.

I believe my experiences would be similar to those of other judges across the state. Letters I have received from defendants frequently admit they had no money to pay damages, but they deny they did anything wrong. Human nature is such that people

cannot admit failure, but they can and do admit a debt. People will admit a debt, even an unliquidated debt. Our presumption is wrong.

It is also my belief that defaulting defendants do not rely on the Court to conduct hearings for the presentment of evidence of unliquidated debts.

With those basic beliefs, I recommend that the rules be amended to provide trial courts with an option of hearing evidence or granting judgment without hearing evidence in those cases where the claimant has advised the opposing party of the amount to be sought on default.

These proposed new Rules 241 and 243 will permit trial courts which have computer support to automatically process default judgments if the Court is satisfied with the reasonableness of the amounts claimed. The Court will also have the option of requiring evidence if a claim appears to be out of the ordinary.

By changing these rules to permit automated judgments, valuable Court resources and time can be devoted to contested issues.

A copy of my proposed changes to Rules 47, 47a, 241, 242, and 243 is attached to this letter.

Rule 47a.            Claims on Default

Each original pleading which seeks damages, with or without a claim for attorney fees, shall contain a statement sufficient to give fair notice to a defendant of the amount, or amounts, which will be requested if default judgment is granted against that defendant.

FULBRIGHT & JAWORSKI

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January 11, 1990

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12. Rule 47a. The suggested change would require that each original pleading which seeks damages give "fair notice" of the amount which will be requested in the event of a default judgment.

The subcommittee does *not* recommend such change.

00614



4543.001

hyh  
llw

JUDGE B. F. (BILL) COKER  
3823 Calculus Drive  
Dallas, Texas 75244  
(214) 247-8974

1/4

1-4-90

December 30, 1989

HJH

87

TRCP 47a

① SCAC sub C for  
Rule 47, 47a,  
242, 20, 140a,  
216, 241, 243)  
~~SCAC~~ ~~SCAC~~  
② SCAC agenda -  
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A copy of my proposed changes to Rules 47, 47a, 241, 242, and 243 is attached to this letter.

Rule 57. Signing of Pleadings

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, with his State Bar of Texas identification number, address and telephone number. A party not represented by an attorney shall sign his pleadings, state his address and telephone number. A copy of the original signed pleading is acceptable for filing with the clerk or court.

# FULBRIGHT & JAWORSKI

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00619

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Rule 57

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\* STAR INDICATES ADDITIONAL TEXT

11-17-89 10:45  
 W/17  
 HSA, Corp  
 80th Ave  
 COA  
 James Hecht  
 4543.001

high  
 inv  
 ✓ 11-17-89  
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**FAX-A-CASE, INC.**  
 601 West 11th Street, Suite 116  
 Austin, Texas 78701

Xc Fax/Case

**TELECOPY**

TO: Shula  
 COMPANY: \_\_\_\_\_  
 FAX NO: 234-7073  
 FROM: Sharon / James Hecht  
 DATE: 11/12/89 TIME: Clark  
 PAGES TO FOLLOW: 2  
 RE: \_\_\_\_\_

OUR FAX NO.: (512) 478-5252

If you do not receive all pages, or if mechanical problems develop  
 please call (512) 478-4131.

SPECIAL INSTRUCTIONS: If my Shula has  
any questions, please have him  
call my Clark 95819. Thanks

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✓ 1-29-90

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†BOARD CERTIFIED, CIVIL TRIAL LAW  
TEXAS BOARD OF LEGAL SPECIALIZATION

January 25, 1990

TRCP 63

Justice Nathan L. Hecht  
Supreme Court of Texas  
P.O. Box 12248  
Austin, Texas 78711

RE: Proposed Rule Changes

II. Change Rule 63

- A. Change Rule 63 from 7 days prior to trial to 30 Days Prior to trial.
- B. Modify the Rules of Pleading, Rules 63 & 67, to provide that the pleadings shall not be amended within 30 days of trial absent leave of court, further providing that the Court shall have discretion to permit leave to file the amended pleadings but that the burden is on the MOVANT SEEKING LEAVE TO SHOW THAT SURPRISE IS NOT SHOWN OR THAT "GOOD CAUSE" OTHERWISE EXISTS TO PERMIT LEAVE TO BE FILED.

Judge, the reasons for the above rules are many, but I will give you only a few.

PLEADINGS.

The Texas time periods of 7 days (pleadings) and 30 days (experts etc.) are ridiculous for anyone who has ever engaged in any serious lawsuits at all. The notion that a mere 7 days before trial after 75 depositions and 3 years of preparation a party can "amend" their pleadings and that such "amendment" will be granted "absent a showing of surprise" can only be viewed as absurd from the point of view of "streamlining" or "fairness or efficiency". We have all of this discovery, all these "rules", and we are AUTHORIZED, should I say invited!, to wait until 7 days prior to trial to "amend".

We know to a certainty that lawyers wait to amend and put off doing until 7 days what they could and should do earlier. At the minimum, NO AMENDMENT TO THE PLEADINGS WITHIN 30 DAYS OF TRIAL.

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ums

✓ 1-29-90

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TEXAS BOARD OF LEGAL SPECIALIZATION

January 25, 1990

TRCP 67

Justice Nathan L. Hecht  
Supreme Court of Texas  
P.O. Box 12248  
Austin, Texas 78711

RE: Proposed Rule Changes

II. Change Rule 63

- A. Change Rule 63 from 7 days prior to trial to 30 Days Prior to trial.
- B. Modify the Rules of Pleading, Rules 63 & 67, to provide that the pleadings shall not be amended within 30 days of trial absent leave of court, further providing that the Court shall have discretion to permit leave to file the amended pleadings but that the burden is on the MOVANT SEEKING LEAVE TO SHOW THAT SURPRISE IS NOT SHOWN OR THAT "GOOD CAUSE" OTHERWISE EXISTS TO PERMIT LEAVE TO BE FILED.

Judge, the reasons for the above rules are many, but I will give you only a few.

PLEADINGS.

The Texas time periods of 7 days (pleadings) and 30 days (experts etc.) are ridiculous for anyone who has ever engaged in any serious lawsuits at all. The notion that a mere 7 days before trial after 75 depositions and 3 years of preparation a party can "amend" their pleadings and that such "amendment" will be granted "absent a showing of surprise" can only be viewed as absurd from the point of view of "streamlining" or "fairness or efficiency".

We have all of this discovery, all these "rules", and we are AUTHORIZED, should I say invited!, to wait until 7 days prior to trial to "amend".

We know to a certainty that lawyers wait to amend and put off doing until 7 days what they could and should do earlier. At the minimum, NO AMENDMENT TO THE PLEADINGS WITHIN 30 DAYS OF TRIAL.

Rule 74. Filing With the Court Defined

The filing of pleadings, other papers and exhibits as required by these rules shall be made by filing the original or a copy of the signed original ~~them~~ with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall not thereon the filing date and time and forthwith transmit them to the office of the clerk. When a copy of the signed original is tendered for filing, the party of his attorney filing such copy is required to maintain the signed original for inspection by the court or any party incident to the suit, should a question be raised as to its authenticity.

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January 11, 1990

TO: SUPREME COURT ADVISORY COMMITTEE  
FROM: Subcommittee on Rules 15 to 165

At our subcommittee meeting held on January 8, 1990, we considered (i) the various comments made at the public hearing held on November 30, 1989 addressing the proposed changes in the Texas Rules of Civil Procedure, (ii) the written suggestions and comments of attorneys forwarded to our subcommittee, and (iii) additional proposals for rule changes. The persons participating in the meeting were David Beck, Pat Beard, and Elaine Carlson. The conclusions reached at the meeting were as follows:

10. Rules 45 and 57, and 74. The proposed suggestion is that the existing rule be amended to require that the signed original or a copy thereof be filed with the clerk. The proposal also suggests that when a copy is filed, the party should be required to maintain the signed original in the event the authenticity of the writing is questioned. The suggested change in Rule 57 would expressly permit the filing of a copy of the original signed pleading.

Rule 74. The suggested change in this rule would make the same amendment as in Rules 45 and 57. The subcommittee does not recommend any of these changes.

00625

**Rule 74** FILING WITH THE COURT DEFINED

The filing of pleadings, other papers and exhibits as required by these rules shall be made by filing

- \* the original or a copy of the signed original  
with the clerk of the court, except that the judge may permit the papers to be filed with him in which event he shall note thereon the filing date and time and forthwith transmit them to the office of the clerk.
- \* When a copy of the signed original is tendered for filing, the party or his attorney filing such copy is required to maintain the signed original for inspection by the court or any party incident to the suit, should a question be raised as to its authenticity.
- \* STAR INDICATES ADDITIONAL TEXT



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WRITER'S DIRECT DIAL NUMBER:

December 26, 1989

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

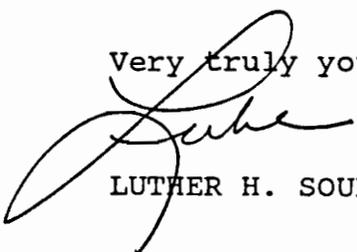
Re: Proposed Changes to Rules 21a, 45, 57 and 74  
Texas Rules of Civil Procedure

Dear Mr. Beck:

Enclosed herewith please find a copies of letters sent to me by James Jolly Clark, Paul R. Clevenger, John F. Campbell, and Judge J. David Phillips regarding proposed changes to the above captioned rules. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

  
LUTHER H. SOULES III

LHSIII/hjh  
Enclosure

cc: Justice Nathan L. Hecht  
Honorable David Peoples  
Honorable J. David Phillips  
Mr. Reagan M. Martin  
Mr. John F. Campbell  
Mr. James Jolly Clark

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00628  
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*TRCP*  
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November 26, 1989

*TRCP 21 a*  
*TRCP 237 c*  
*TRCP 41, 202, 210*  
*57(a)(1)*  
*12*  
*74*  
*41(a)(1)*  
*54(a)*  
*(2)(d)*

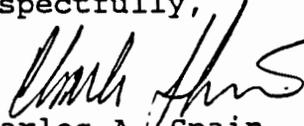
The Honorable Nathan L. Hecht, Justice  
The Supreme Court of Texas  
Post Office Box 12248  
Capitol Station  
Austin, Texas 78711

Dear Judge Hecht:

6. The following proposed amendments use the word "nonjury": Texas Rules of Appellate Procedure 41(a)(1) and 54(a). The following proposed amendments use the word "non-jury": Texas Rules of Appellate Procedure 41 comment, 52(d), 52 comment, and 54 comment. The court may wish to standardize the terminology. The term "non-jury" currently appears in Texas Rules of Civil Procedure 90, 156, 216(1), 249, 307, and 542. The term "nonjury" currently appears in Texas Rule of Civil Procedure 324(a) and Texas Rule of Judicial Administration 6(b)(2).

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,



Charles A. Spain, Jr.

4662.001

ny  
lms

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TRCP 98a

January 29, 1990

*HHH*  
*Sub*  
*x Asmels*

The Honorable David Peeples  
San Antonio Court of Appeals  
500 County Courthouse  
San Antonio, Texas 78205

Re: Proposal for Texas Rule for Offer of Judgment

Dear Judge Peeples:

I enclose a copy of a letter from Hugh E. Hackney of Fulbright & Jaworski regarding the above referenced matter.

Sincerely yours,



Charles R. Haworth

270/lfk  
Enclosure

cc: Members of the Committee  
on the Administration of Justice (w/encls.)

00630

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January 26, 1990

VIA FAX

Charles R. Haworth, Esq.  
Andrews & Kurth  
4400 Thanksgiving Tower  
Dallas, Texas 75201

RE: Proposal for Texas Rule for Offer of Judgment

Dear Charles:

Thank you very much for sending me the draft memorandum regarding the proposal for a Texas offer of judgment rule. I have reviewed both the memorandum and the proposed rule, and offer the following comments.

While the rule is very well drafted, I would suggest several changes or additions to further achieve the ends sought. For example, I feel that the defendant should be given the option of a dismissal with prejudice or entry of a judgment; this procedure would enable the defendant, if he or she so chooses, to avoid the potential preclusive effects of a judgment. The proposed rule also provides (in subsection [b]) that the offer shall remain open for thirty days unless withdrawn by writing served on the offeree before it is accepted. It may be wise to include in this section a provision (similar to Texas Rule 11 regarding agreements between counsel) that the offer may also be withdrawn "in open court" (i.e., on the record during a hearing or in a deposition). This approach would enable the party who has made an outstanding offer to revoke it during an evidentiary hearing or deposition in which particularly helpful testimony is

Charles R. Haworth, Esq.  
January 26, 1990  
Page 2

elicited which may induce him to withdraw the offer. The proposed rule does not require that an acceptance be in writing, so it may also be wise to include a provision for acceptance in writing or "on the record".

Section (f) of the proposed rule outlines the post-judgment procedure for seeking sanctions for rejection of an offer. It may be advisable to include in this section a provision governing the time limits for the filing of such a motion; however, the general rules regarding the plenary power of the court after final adjudication may provide this time limit.

It is interesting to note that the proposed rule consistently refers to sanctions being imposed "on the offeree, or his attorney, or both." This conforms to the current practice regarding discovery sanctions, which also may be imposed on the party or his attorney or both. The primary drawback to this phraseology is that the court will be called upon to determine who is responsible for the rejection of the offer. Obviously, this may require the disclosure of attorney/client communications, particularly if the sanctions imposed are severe. While the rules of privilege clearly provide an exception for situations involving a breach of duty between attorney and client, the prospects of an appeal of the judgment and subsequent new trial require that any abrogation of the privilege be undertaken only after careful consideration by the trial court. Perhaps the issues of responsibility for sanctions could be deferred until such time as appeals of the judgment are exhausted or are time-barred.

Section (f) also provides that, when the judgment finally entered is less favorable to the offeree than the rejected offer, the offeree (or his attorney, or both) "shall pay the offeror \_\_\_\_\_ times the cost incurred" after the offer was made. In keeping with the proposed rule's intent to provide the trial court discretion in setting the amount of sanctions, the legislature (or rules committee) may wish to include a range of multiples (i.e., between two and four times the costs incurred) in the rule, and leave the multiple chosen in the discretion of the court.

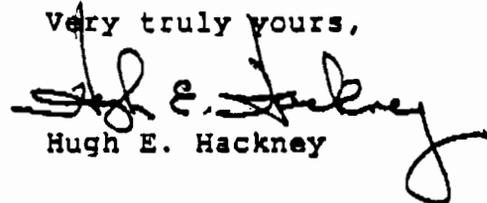
Finally, the provision permitting an award of sanctions for filing a frivolous motion to reduce the sanctions imposed for rejection of the offer is particularly interesting. It appears to be an attempt to incorporate into the Texas rules some of the "bite" of Rule 11 of the Federal Rules. It may seem a bit odd, in the context of the other Texas rules, to impose sanctions for the frivolous filing of a motion under this rule only. However, I like it because, if

Charles R. Haworth, Esq.  
January 26, 1990  
Page 3

accepted, application of such a rule may ultimately lead to a general rule prohibiting the filing of frivolous motions.

I hope you find these comments helpful. Again I, appreciate your giving me the opportunity to provide some input on this matter. As you know, I have pushed for the adoption of such a rule for some time, and would be very interested to hear from you regarding how this proposal is received.

Very truly yours,



Hugh E. Hackney

HEH:ds

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NEW YORK  
LOS ANGELES

January 11, 1990

TO: SUPREME COURT ADVISORY COMMITTEE

FROM: Subcommittee on Rules 15 to 165

At our subcommittee meeting held on January 8, 1990, we considered (i) the various comments made at the public hearing held on November 30, 1989 addressing the proposed changes in the Texas Rules of Civil Procedure, (ii) the written suggestions and comments of attorneys forwarded to our subcommittee, and (iii) additional proposals for rule changes. The persons participating in the meeting were David Beck, Pat Beard, and Elaine Carlson. The conclusions reached at the meeting were as follows:

14. Rule 103. The suggested change, requested by the Constables, is that the existing rule be amended to require in writing a motion showing "good cause" before "any person authorized by law or by written order of the court who is not less than 18 years of age" be authorized to serve citation and other notices.

The subcommittee does *not* recommend this change,



**PARKER COUNTY**  
Weatherford, Texas 76086

November 29, 1989

Honorable Nathan L. Hecht  
Texas Supreme Court  
Austin, Texas 78711

Re: Proposed Amendments to Texas Rules of Civil Procedure

Dear Justice Hecht:

We would like to take this opportunity to comment on three proposed amendments to the Texas Rules of Civil Procedure.

We would like to restate our opposition to Rule 103 here. Firstly, and foremost from a county financial prospective, utilization of private process servers cost the county taxpayers money. Sheriffs and constables are mandated by the Constitution; they have a wide variety of duties other than the service of civil process, all of which are an expense to the taxpayers. In the case of civil process served in private lawsuits by sheriffs and constables, the county is authorized to charge a fee. These fees help offset the cost to the county of maintaining the offices. Private process servers take only the revenue-generating work and leave all the nonrevenue-generating work for the counties, which obviously hurts the taxpayer.

Secondly, from the Justice of the Peace standpoint, there is the question of the validity of default judgments based on service of citation by a private individual over whom the court has no control. Currently, the judge of a justice court has control over private service of process and can verify the integrity of the person who is going to serve the citation prior to authorizing the person to do so. We believe this is the much better system.

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RECOMMENDED NEW RULE  
RELATIVE TO ASSESSMENT OF COSTS  
OF SERVICE OF PROCESS AND OTHER NOTICES

Rule 140a.      Costs of Service of Process and Other Notices

The amount of fee charged by a person authorized by court order for service of citation or other notice pursuant to Rule 103 in excess of the maximum fee authorized to be charged by any sheriff or constable shall not be taxed in the bill of costs.

00636

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January 11, 1990

TO: SUPREME COURT ADVISORY COMMITTEE  
FROM: Subcommittee on Rules 15 to 165

At our subcommittee meeting held on January 8, 1990, we considered (i) the various comments made at the public hearing held on November 30, 1989 addressing the proposed changes in the Texas Rules of Civil Procedure, (ii) the written suggestions and comments of attorneys forwarded to our subcommittee, and (iii) additional proposals for rule changes. The persons participating in the meeting were David Beck, Pat Beard, and Elaine Carlson. The conclusions reached at the meeting were as follows:

---

15. New Rule 140a. The suggested change is that the fees of persons authorized by court order to serve process or other notices that exceed the maximum fee charged by any sheriff or constable should not be taxed as court costs. The subcommittee believes that our rules should not place any arbitrary limitations on fees. In any event, Rule 141 indicates that the court "may, for good cause, adjudge the costs otherwise than as provided by law or these rules." Accordingly, if a court believes that service fees are excessive, the court can deny the motion to tax the fees or a part thereof as costs.



4543.001

WJH  
LW

JUDGE B. F. (BILL) COKER

3823 Calculus Drive  
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(214) 247-8974

December 30, 1989

1/4  
HJH  
11-4-89

① SCAC Sub C of A  
Rule 47, 47a,  
242, 20, 140a,  
216, 241, 243)  
~~242~~ ~~241~~  
② SCAC Agenda -  
③ J. Hecht.

Mr. Luther H. Soules  
Chairman, Rules Advisory Committee  
175 E. Houston Street  
San Antonio, Texas 78205-2230

Re: Suggested rule changes

Dear Mr. Soules:

Enclosed are recommended changes and additions to the Texas Rules of Civil Procedure. Additions to existing rules and new rules are designated by underlined text of the rule. Portions of existing rules which are deleted are enclosed in brackets and lined through. Please submit these suggestions to your committee for consideration.

**Assessment of Costs Associated With Service of Process and Other Notices:**

My recommendation relative to the assessment of costs associated with service of citations and other notices flows from a recognition that there are no limitations on the fees that may be charged by private process servers.

Those service fees should be costs recoverable as in other actions, but the party using private process services should not be able to unilaterally dictate the amount of risk to which the other party will be subjected. I am not aware of any abuses which now exist, but the inclusion of a new rule limiting the amount of private process fees which can be taxed as costs would prevent any possible future abuse.

I propose a new rule which I refer to as Rule 140a.

A copy of my proposed Rule 140a is attached to this letter.



TRCP 166b.

5. Protective Orders. On motion specifying the grounds and made by any person against or from whom discovery is sought under these rules, the court may make any order in the interest of justice necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights. Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents. Specifically, the court's authority as to such orders extends to, although it is not necessarily limited by, any of the following:

- a. (No change.)
- b. (No change.)
- c. (No change.)

[d. A trial court shall have continuing jurisdiction beyond its plenary power over the merits of a case to rule on motions by any party or non-party to a case seeking to rescind an order sealing discovery.]

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chs  
✓ 1-29-90

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TEXAS BOARD OF LEGAL SPECIALIZATION

January 25, 1990

Justice Nathan L. Hecht  
Supreme Court of Texas  
P.O. Box 12248  
Austin, Texas 78711

RE: Proposed Rule Changes

I. Change Rule 166b(6)(b)

- A. Change the Rule 166b(6)(b) from 30 days to, at a minimum, 60 days.

Judge, the reasons for the above rules are many, but I will give you only a few.

THE THIRTY DAY RULE

Further, I talked to a great lawyer a few days ago. This lawyer is one of the best in this state in my opinion. His statement: "my whole life revolves around the 30 day rule. I stay up at night worrying about the 30 day rule".

Judge, if this is true, why not make it 60 days and not 30. The fact is, and all lawyers with any experience now know it, is that the exclusionary provisions of Rule 166b and the cases interpreting it (i.e. excluding experts or witnesses for failure to supplement or supplementation within the "30 day rule") have drastically changed our practice. The Courts are saying: you can NOT wait any more to disclose experts or witnesses. This did not use to be the real Texas practice. I can remember the "old days" when a trial judge would grant a continuance and permit a party to "supplement" as late as the day of trial and even in major cases.

We have moved far away from this, and properly so. But I submit that the time is now to make a realistic decision to get to a realistic number: not 30 days, but a minimum of 60 days prior to trial.

30 days prior to trial is not enough time. If a party does bring in a new expert, the depositions can not be set up, the other party wants new experts etc. The case is put off. Depositions are noticed. Lawyers are unhappy. Rambo tactics become more common within the last "30 days". All of this "pressure" is not necessary. Just back the dates back to, at a minimum, 60 days.

00641

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(512) 476-7086

November 28, 1989

Honorable Nathan L. Hecht  
P.O. Box 12248  
Austin, TX 78711

RE: Comment on Proposed Rules Changes Regarding Discovery

Dear Justice Hecht:

Other matters: Rule 166c. I believe new Rule 166c should be clarified. The last part of the rule discusses agreement in non-deposition discovery. The question is whether or not Rule 166c, if read in conjunction with Rule 11, requires that such an agreement be in writing, signed by the parties, and filed with the court? I believe this should be clarified by the new rules.

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166a  
166(b)  
166(c)  
167a  
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✓ 1-29-90

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January 25, 1990

Justice Nathan L. Hecht  
Supreme Court of Texas  
P.O. Box 12248  
Austin, Texas 78711

RE: Proposed Rule Changes

IV. New Rule

- A. Finally, I would create a new Rule, let us say "Rule 166c".
- B. This rule would say in essence:
  - 1. A Lawyer files a Motion "Pursuant to Rule 166c" for Discovery.
  - 2. That is about all that the "Rule 166c Motion" would say.
  - 3. When a lawyer received a "Rule 166c Motion", the content of his/her response would be governed by Rule 166c.
  - 4. Rule 166c would provide that, within 30 days after receipt of a Rule 166c Motion, the respondent would provide the following information:

Suggested Content of Statement Required by Rule 166c

Within 30 days after receipt of a Rule 166c Request, all parties shall each serve on each other, and all other involved counsel a document styled as "Rule 166c Pre-trial Statement of Witnesses, Experts and Documents".

Such statement shall designate and contain the following information:

- a. The name, address and telephone number of all persons who have knowledge of relevant facts. The statement shall designate from this list of people identified those persons that a party "will probably call" if the lawyer, in the exercise of good faith, knows that he/she will, in all probability, call that person as a witness at the time of trial.

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b. The name, address and telephone number of all experts which the party filing the statement may call at the time of the trial.

c. The name, address and telephone number of every expert used for consultation who is not expected to be called as a witness at trial, if the consulting expert's opinions or impressions have been reviewed by a testifying expert.

d. As to each such expert identified pursuant to either paragraph b or c above the following information shall be stated in detail:

(1) the subject matter on which the witness is expected to testify;

(2) the mental impressions and opinions held by the expert;

(3) a statement of whether the expert has prepared any report or summary of his opinions or mental impressions;

(4) identification of any document prepared by the expert or used by the expert on which the expert may rely for any opinions at the time of hearing or trial.

e. Identify all documents or tangible items which the party filing the statement believes at this time that it intends to introduce at the time of trial or documents which the party filing the statement believes supports his/her/its claim or defense. All documents shall be designated which the lawyer believes that he/she will probably use at trial, that is, any document that the lawyer, in the exercise of good faith, believes that he/she will, in all probability, introduce the document at the time of trial.

By the term "identify", it is intended that a party shall identify a document by giving the date of the document, a general description of the contents of the document and the source of the document where applicable.

By the term "identify", it is intended that a party shall identify a tangible item by giving a reasonably specific description of the item so that the Court or opposing counsel can be put on notice of the character of the tangible item.

f. As to any tangible item which is not a document, the party identifying the tangible item shall have the duty of notifying all counsel and unrepresented parties that a tangible item has been identified but not produced and shall set a reasonable time and place for the examination and inspection of the tangible item.

g. EACH Rule 166c PRE-TRIAL STATEMENT SHALL BE SIGNED BY COUNSEL. THIS PROCEDURE SHALL BE CONSIDERED IN LIEU OF INTERROGATORIES AND REQUEST FOR PRODUCTION INQUIRING AS TO (A) WITNESSES WITH KNOWLEDGE OF RELEVANT FACTS; (B) EXPERTS WHO MAY BE CALLED; (C) EXPERTS FOR CONSULTATION WHO WILL NOT BE CALLED BUT WHO MAY BE RELIED ON BY AN EXPERT WHO MAY BE CALLED; AND (D) IDENTIFICATION AND PRODUCTION AS TO RELEVANT DOCUMENTS. COUNSEL NEED NOT OBTAIN THE SIGNATURES OF THE CLIENTS ON THE PRE-TRIAL STATEMENTS.

On or before 60 days prior to any trial setting in the cause, this Rule 166c Pre-Trial Statement shall be supplemented.

All parties shall file in the papers of the cause and serve on counsel this supplementation of the pre-trial statement. This supplementation shall cover each and every item required in the pre-trial statement, including persons with knowledge of relevant facts, experts, identification and production of documents. This first supplementation of this pre-trial statement should be made as soon as practical, but in no event later than 60 days prior to trial. In this supplementation, there is no need or requirement to list again experts, documents or witnesses who were previously named by the party.

No witness or expert shall be permitted to testify or document be introduced unless said witness, expert, or document is properly identified in timely filed pre-trial statements filed on or before 60 days prior to trial as described in this Order except on leave of Court and unless the Court finds that good cause exists for permitting or requiring supplementation not in compliance with the timetable contained in this Rule.<sup>2</sup>

This Rule 166c Motion and Pre-Statement shall not relieve any party from any duty of disclosure or supplementation which is not specifically addressed, controlled or imposed otherwise by the Court or by these Rules.

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The purpose here is to conform to the supplementation requirements of 166b. I have not tracked the language exactly, but that is the general intent. Refinements would have to include making it conform to Rule 166b and to make "Rule 166c" and Rule 166b work together.

Judge, the reasons for the above rules are many, but I will give you only a few.

My New Rule 166c

I am also admitted into the bar of the State of Colorado. That state passed a Rule which is similar, though even broader, than the Rule 166c which I am suggesting.

I do not have the time in this letter to argue at length why such a rule would be helpful. However, I am convinced that it would be of immense help for the Supreme Court to tell every lawyer in this state that within 30 days after getting a "Rule 166c" Motion, a "statement" from the lawyer giving the information which I have set out about would be required and that the content of that response was something that the lawyers were definite about and knew exactly what was coming.

If you are at all interested in following up on this suggestion, I would be willing to do whatever you think is appropriate to flush out my reasons for this suggestion, the Colorado experience, a survey of the literature on it etc.

In conclusion, these suggestions are probably not totally new at all. But I am completely convinced that our Texas practice as it now stands has much going for it. But we need to get utterly realistic, and I strongly believe that our current practice of amending pleading 7 days prior to a trial date and designation of expert 30 days prior to trial is absurd given the realities of practice in 1990.

The unpleasant truth is: when a lawyer has to designate experts and HIRE THEM, and when a lawyer has to finally and truly amend pleadings, then and sometimes only then do many of us think about settlement, getting very realistic with our clients about the cost and probable outcome of this vast litigation process that we have been involved with.

**RULE 167. DISCOVERY AND PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION, COPYING OR PHOTOGRAPHING**

1. **Procedure.** Any party may serve on any other party a REQUEST:

a. to produce and permit the party making the REQUEST, or someone acting on his behalf, to inspect, sample, test, photograph and/or copy, any designated documents or tangible things which constitute or contain matters within the scope of Rule 166b which are in the possession, custody or control of the party upon whom the request is served; or

b. to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon within the scope of Rule 166b.

c. The REQUEST shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The REQUEST shall specify a reasonable time, place and manner for making the inspection and performing the related acts.

d. The party upon whom the REQUEST is served shall serve a written RESPONSE which shall state, with respect to each item or category of items, that inspection or other requested action will be permitted as requested, and he shall thereafter comply with the REQUEST, except only to the extent that he makes objections in writing to particular items, or categories of items, stating specific reasons why such discovery should not be allowed.

RESPONSES, including any objections, shall be preceded by the REQUEST to which the RESPONSE or objection pertains.

e. All parties to the action shall be served with copies of each REQUEST and RESPONSE.

f. A party who produces documents for inspection shall produce them as they are kept in the usual course of business, or shall organize and label them to correspond with the categories in the request.

g. Testing or examination shall not extend to destruction or material alteration of an article without notice, hearing, and prior approval by the court.

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✓ 9-11-89  
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900 NATIONAL BANK OF COMMERCE BUILDING  
SAN ANTONIO, TEXAS 78205  
AREA CODE 512-225-3121

9/11  
September 8, 1989

HJM  
COAS  
SOAC SubC  
SOAC Agmt  
Re John Younger  
Justice Heck  
✓ 9-12-89  
MS

Mr. Luke Soules  
Law Offices of Luther Soules, III  
175 E. Houston Street, 10th Floor  
San Antonio, Texas 78205

Re: Proposed Amendment of Texas Rules of Civil Procedure

Dear Luke:

This letter is written to you in your capacity as a member of the Supreme Court Advisory Committee for the Texas Rules of Civil Procedure.

Recently, I have had an occasion to notice and appreciate a significant difference in procedural response between Rule 168, T.R.C.P. (Interrogatories to parties) on the one hand, and Rule 167, T.R.C.P. (Discovery and Production of Documents and Things for Inspection, Copying or Photographing) and Rule 169, T.R.C.P. (Requests for Admission), on the other.

Rule 168 (Interrogatories), in an unnumbered paragraph included under Rule 168.5, provides "Answers to interrogatories shall be preceded by the question or interrogatory to which the answer pertains." Much to my surprise, I have discovered that there is no similar provision in Rule 167 (Discovery and Production) or Rule 169 (Admissions).

The subject provision contained in Rule 168 regarding interrogatories is good and makes the record clear. In most circumstances, unless there has been amended or supplemental answers or responses filed, the attorneys have to handle only one document relating to interrogatories and responses. That document contains both the questions and the answers and/or objections. Because there is no similar provision in the rules providing for responses to requests for production (Rule 167) or for requests for admissions (Rule 169), unless the attorney, as a matter of courtesy, has copied the particular requests for production or requests for admission in order that they precede the response or objection thereto (which I have made it my practice to do), then the attorneys are having to constantly flip back and forth between the requests for production or requests for admission and the responses.

Mr. Luke Soules  
Law Offices of Luther Soules, III  
Page Two

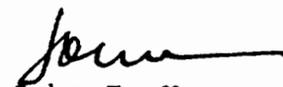
It seems to me that for the sake of consistency and for clarity of the record, a provision similar to that quoted and found in Rule 168 should be incorporated in Rules 167 and 169. I have included for your reference copies of Rules 167, 168 and 169, along with the language which I propose should be added to Rules 167 and 169 to make them consistent with Rule 168 and which I believe will ultimately simplify the process. It may require a bit more of the secretaries or paralegals in copying the requests for production or requests for admission that precede the response or objection, but clarity for the record would be greatly enhanced. It is further my contention that such a procedure would not unduly overload the filing capacity of the District Clerks, who seem to not file much of anything anymore anyway.

If there is some reason why the language and change in format I have suggested for Rules 167 and 169 was not included purposefully, then I would like to know that reason. If it was merely oversight, then I believe the language and the slight change in format which I have suggested should be added to those rules would ultimately save time and simplify the process. Ultimately, it would save money, as well.

Please let me hear from you in this regard.

Very truly yours,

TINSMAN & HOUSER, INC.

  
John F. Younger, Jr.

JFYjr/mlh

Enclosures

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LONDON  
ZURICH

FULBRIGHT JAWORSKI &  
REAVIS MCGRATH  
NEW YORK  
LOS ANGELES

December 8, 1989

Re: Comments Regarding Proposed Amendments  
to Texas Court Rules

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TRCP 166b (4)  
TRCP 167  
TRCP 168  
TRCP 169  
TRCP 201

Justice Nathan L. Hecht  
P. O. Box 12248  
Austin, Texas 78711

Dear Justice Hecht:

Please consider the following as my personal comments on the proposed amendments to the Texas Rules of Civil Procedure and are not to be construed as the comments of this firm or any of its attorneys:

Rules 167, 168 and 169. The proposed change to Rule 169 gives a Defendant fifty (50) days after service of the citation and petition to respond to requests for admission. However, Rules 167 and 168 allow a defendant fifty (50) days to respond to requests for production and interrogatories only if such discovery requests accompany the citation. I have recently been party to a situation where after the citation is served, the plaintiff has issued discovery requests upon the defendant prior to the time the party appears but after the citation is issued. In such a situation, the defendant may only have thirty (30) days to respond to the discovery request since the request did not accompany the citation.

I would suggest that Rules 167, 168 and 169 be re-drafted so that they are consistent in allowing a defendant fifty (50) days after service of the citation to respond to any discovery requests. In other words, the defendant should not need to respond to any discovery requests for fifty (50) days after citation has been served upon him.

I hope these suggestions are of some benefit.

Yours very truly,

  
/Keith S. Dubanevich

167 ←  
TRCP 168  
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ERNEST L. SAMPLE  
ATTORNEY AT LAW  
POST OFFICE BOX 553  
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TELEPHONE  
(409) 899-2515

December 11, 1989

OFFICE LOCATION  
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SUITE "I"

Texas Supreme Court  
Rules Committee  
P. O. Box 12248  
Austin, Tx 78711

In Re: Recent Discovery Rules Changes

Gentlemen:

I respectfully recommend changes in discovery rules as follows:

1. Limit written interrogatories to 10 single questions, except upon leave of court. (Rule 168(5))
2. Followup or clarification interrogatories: 2 each for any interrogatory imperfectly answered, to which the answer is not understood, or needs clarifying.
3. File discovery papers. Presently rules dispense with filing. This results in disorder and irresponsibility. Anything important enough to consume a lawyer's time should be kept on record, (including opinions of the Court of Appeals).
4. Limit depositions to one each per attorney per witness, except upon leave of court.
5. Provide for the party taking the depositions to make a deposit to cover time and expense of witness and the attorney representing the witness if the deposition requires more than one day. This should be a requirement in all multiple party or extended depositions where a client and his lawyer are held in a vice grip for several days for a long, long, deposition. Particularly where the witness is a party-witness, and his lawyer's expenses are mounting uncontrollably anyway.
6. Go back to the requirement that the deposition be taken in the county where the witness resides, except by agreement or special leave of court. Should apply to party witnesses as well as others. This is not an unreasonable requirement.
7. Require the party giving notice to take the deposition to also give notice of the subject matter or zone of inquiry, and require the same thing of the opposite attorney if he intends to pursue an independent line of questioning. Allow "free for all" depositions only on leave of court, if at all, and with

limitations. Each deposition notice, whether for oral depositions or interrogatories, should contain the name of the individual court reporter, and the phone number of the court reporter.

8. Require 10 days notice when the witness is required to produce documentary material. "Reasonable notice" is probably adequate in other situations.

Yours very truly,

  
Ernest L. Sample

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lms

✓ 9-18-89

DB



THE SUPREME COURT OF TEXAS

CHIEF JUSTICE  
THOMAS R. PHILLIPS

P.O. BOX 12248      CAPITOL STATION  
AUSTIN, TEXAS 78711  
(512) 463-1312

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JOHN T. ADAMS

EXECUTIVE ASS'T.  
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.  
MARY ANN DEFIBAUGH

JUSTICES  
FRANKLIN S. SPEARS  
C. L. RAY  
RAUL A. GONZALEZ  
OSCAR H. MAUZY  
EUGENE A. COOK  
JACK HIGHTOWER  
NATHAN L. HECHT  
LLOYD DOGGETT

September 14, 1989

*9/16*  
ASH,  
SAC SAC  
CO AD  
SAC Ogden  
vs Justice Hecht  
Charles Griggs

Mr. Luther H. Soules III  
Soules and Wallace  
Tenth Floor  
Republic of Texas Plaza  
175 East Houston Street  
San Antonio, Texas 78205-2230

Dear Luke:

I enclose a copy of a letter from Charles Griggs of Sweetwater to Justice Cook regarding Texas Rules of Civil Procedure 168 and 169. The letter raises the question of how to treat the filing of an instrument which contains both interrogatories and requests for admission, and the responsive instrument.

Please schedule this subject for discussion by the Committee.

Sincerely,

Nathan L. Hecht  
Justice

NLH:sm



THE SUPREME COURT OF TEXAS

CHIEF JUSTICE  
THOMAS R. PHILLIPS

P.O. BOX 12248      CAPITOL STATION  
AUSTIN, TEXAS 78711  
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JACK HIGHTOWER  
NATHAN L. HECHT  
LLOYD DOGGETT

September 14, 1989

Mr. Charles R. Griggs  
Nunn, Griggs, Jones & Sheridan  
P. O. Box 488  
Sweetwater, Texas 79556-0488

Dear Mr. Griggs:

Justice Cook has referred to me your letter to him regarding Texas Rules of Civil Procedure 168 and 169. As the Court's liaison to the Rules Advisory Committee, I have sent a copy of your letter to the chairman, Luther H. Soules of San Antonio, for consideration by the Committee.

You have raised a legitimate issue. The Court appreciates your interest in the rules.

Sincerely,

Nathan L. Hecht  
Justice

NLH:sm

00654

NUNN, GRIGGS, JONES & SHERIDAN

LAWYERS

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PETER F. SHERIDAN

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TELECOPIER  
AREA CODE 915  
235-9928

August 28, 1989

The Honorable Eugene A. Cook, Justice  
The Supreme Court of Texas  
P. O. Box 12248, Capitol Station  
Austin, Texas 78711

Dear Justice Cook:

There is a matter arising out of the discovery process that is causing some confusion at the trial court level. I would bring this to your attention with the thought that the Court may want to clarify discovery rules in order to eliminate this problem.

Sometime ago, the Court put an end to the filing of depositions with the District or County Clerks, probably in the interest of saving storage space. About that time, Rules 168 and 169 were rewritten. Rule 168 contemplates the serving of interrogatories and responses to interrogatories directly upon the parties or their attorneys. The Rule does not forbid the filing of interrogatories or responses with the Clerk but it does not contemplate the filing of copies in that office. Rule 169 specifically provides that requests for admissions and responses to requests for admissions will "be filed promptly in the Clerk's office...."

It is not unusual for an attorney to prepare a discovery document which incorporates both interrogatories and requests for admissions of fact; in fact, this vehicle can be quite useful and can result in increased clarity and efficiency of the discovery process.

However, Clerks in my part of the country are beginning to refuse to file a discovery document that has the characteristics of interrogatories and of requests for admissions.

I hope the Court will consider an amendment to Rule 169 to eliminate the requirement of a filing with the Clerk in order

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that the discovery process may have a bit more flexibility than it has under the current state of affairs.

Sincerely,

NUNN, GRIGGS, JONES & SHERIDAN

By: 

CRG:cw

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## RULE 168. INTERROGATORIES TO PARTIES

Any party may serve upon any other party written interrogatories to be answered by the party served, or, if the party served is a public or private corporation or a partnership or association, or governmental agency, by an officer or agent who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after the service of the citation and petition upon that party.

1. **Service.** When a party is represented by an attorney, service of interrogatories and answers to interrogatories shall be made on the attorney unless service upon the party himself is ordered by the court.

2. **Scope.** Interrogatories may relate to any matters which can be inquired into under Rule 166b, but the answers, subject to any objections as to admissibility, may be used only against the party answering the interrogatories. Where the answer to an interrogatory may be derived or ascertained from:

- a. public records; or
- b. from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served;

it is sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and, if applicable, to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. The specification of records provided shall include sufficient detail to permit the interrogating party to locate and to identify as readily as can the party served, the records from which the answers may be ascertained.

3. **Procedure.** Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice requires.

4. **Time to Answer.** The party upon whom the interrogatories have been served shall serve answers on the party submitting the interrogatories within the time specified by the party serving the interrogatories, which specified time shall not be less than thirty days after the service of the interrogatories, except that, if the request accompanies citation, a defendant may serve answers within 50 days after service of the citation and petition upon that defendant. The court, on motion and notice for good cause shown, may enlarge or shorten the time for serving answers or objections.

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 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 a 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 party from whom answers to interrogatories are sought under this rule.

The interrogatories shall be answered separately and fully in writing under oath. Answers to interrogatories shall be preceded by the question or interrogatory to which the answer pertains. True copies of the interrogatories, and answers and objections thereto, shall be served on all parties or their attorneys, and copies thereof shall be provided to any additional parties upon request. The answers shall be signed and verified by the person making them and the provisions of Rule 14 shall not apply.

6. **Objections.** On or prior to the date on which answers are to be served, a party may serve written objections to specific interrogatories or portions thereof. Objections served after the date on which

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LHS

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LAW OFFICES OF  
TINSMAN & HOUSER, INC.

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JOHN F. YOUNGER, JR.  
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REY PEREZ

900 NATIONAL BANK OF COMMERCE BUILDING  
SAN ANTONIO, TEXAS 78205  
AREA CODE 512-225-3121

9/11  
September 8, 1989

HJM  
COAS  
SOAC SubC  
SOAC Agend  
Xc John Younger  
Justice He.  
✓9-15-89

Mr. Luke Soules  
Law Offices of Luther Soules, III  
175 E. Houston Street, 10th Floor  
San Antonio, Texas 78205

Re: Proposed Amendment of Texas Rules of Civil Procedure

Dear Luke:

This letter is written to you in your capacity as a member of the Supreme Court Advisory Committee for the Texas Rules of Civil Procedure.

Recently, I have had an occasion to notice and appreciate a significant difference in procedural response between Rule 168, T.R.C.P. (Interrogatories to parties) on the one hand, and Rule 167, T.R.C.P. (Discovery and Production of Documents and Things for Inspection, Copying or Photographing) and Rule 169, T.R.C.P. (Requests for Admission), on the other.

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Mr. Luke Soules  
Law Offices of Luther Soules, III  
Page Two

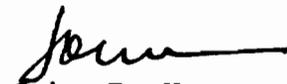
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Please let me hear from you in this regard.

Very truly yours,

TINSMAN & HOUSER, INC.

  
John F. Younger, Jr.

JFYjr/mlh

Enclosures

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✓ 9-18-89  
DD

THE SUPREME COURT OF TEXAS

CHIEF JUSTICE  
THOMAS R. PHILLIPS

P.O. BOX 12248      CAPITOL STATION  
AUSTIN, TEXAS 78711  
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EUGENE A. COOK  
JACK HIGHTOWER  
NATHAN L. HECHT  
LLOYD DOGGETT

September 14, 1989

*9/15*  
*ASH,*  
*SAAC subc*  
*COAD*  
*SAAC Ogden*  
*re Justice Hecht*  
*Charles Griggs*

Mr. Luther H. Soules III  
Soules and Wallace  
Tenth Floor  
Republic of Texas Plaza  
175 East Houston Street  
San Antonio, Texas 78205-2230

Dear Luke:

I enclose a copy of a letter from Charles Griggs of Sweetwater to Justice Cook regarding Texas Rules of Civil Procedure 168 and 169. The letter raises the question of how to treat the filing of an instrument which contains both interrogatories and requests for admission, and the responsive instrument.

Please schedule this subject for discussion by the Committee.

Sincerely,

*Nathan L. Hecht*  
Nathan L. Hecht  
Justice

NLH:sm

00660



THE SUPREME COURT OF TEXAS

CHIEF JUSTICE  
THOMAS R. PHILLIPS

P.O. BOX 12248      CAPITOL STATION  
AUSTIN, TEXAS 78711  
(512) 463-1312

CLERK  
JOHN T. ADAMS

JUSTICES  
FRANKLIN S. SPEARS  
C. L. RAY  
RAUL A. GONZALEZ  
OSCAR H. MAUZY  
EUGENE A. COOK  
JACK HIGHTOWER  
NATHAN L. HECHT  
LLOYD DOGGETT

EXECUTIVE ASS'T.  
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T.  
MARY ANN DEFIBAUGH

September 14, 1989

Mr. Charles R. Griggs  
Nunn, Griggs, Jones & Sheridan  
P. O. Box 488  
Sweetwater, Texas 79556-0488

Dear Mr. Griggs:

Justice Cook has referred to me your letter to him regarding Texas Rules of Civil Procedure 168 and 169. As the Court's liaison to the Rules Advisory Committee, I have sent a copy of your letter to the chairman, Luther H. Soules of San Antonio, for consideration by the Committee.

You have raised a legitimate issue. The Court appreciates your interest in the rules.

Sincerely,

Nathan L. Hecht  
Justice

NLH:sm

00661

NUNN, GRIGGS, JONES & SHERIDAN

LAWYERS

CHAS. L. NUNN (1913-1986)  
CHAS. R. GRIGGS  
C. E. JONES  
PETER F. SHERIDAN

DOSCHER BUILDING  
POST OFFICE BOX 488  
SWEETWATER, TEXAS 79556-0488  
915-236-6647

TELECOPIER  
AREA CODE 915  
235-9928

August 28, 1989

The Honorable Eugene A. Cook, Justice  
The Supreme Court of Texas  
P. O. Box 12248, Capitol Station  
Austin, Texas 78711

Dear Justice Cook:

There is a matter arising out of the discovery process that is causing some confusion at the trial court level. I would bring this to your attention with the thought that the Court may want to clarify discovery rules in order to eliminate this problem.

Sometime ago, the Court put an end to the filing of depositions with the District or County Clerks, probably in the interest of saving storage space. About that time, Rules 168 and 169 were rewritten. Rule 168 contemplates the serving of interrogatories and responses to interrogatories directly upon the parties or their attorneys. The Rule does not forbid the filing of interrogatories or responses with the Clerk but it does not contemplate the filing of copies in that office. Rule 169 specifically provides that requests for admissions and responses to requests for admissions will "be filed promptly in the Clerk's office..."

It is not unusual for an attorney to prepare a discovery document which incorporates both interrogatories and requests for admissions of fact; in fact, this vehicle can be quite useful and can result in increased clarity and efficiency of the discovery process.

However, Clerks in my part of the country are beginning to refuse to file a discovery document that has the characteristics of interrogatories and of requests for admissions.

I hope the Court will consider an amendment to Rule 169 to eliminate the requirement of a filing with the Clerk in order

00662

that the discovery process may have a bit more flexibility than it has under the current state of affairs.

Sincerely,

NUNN, GRIGGS, JONES & SHERIDAN

By:

A handwritten signature in black ink, appearing to be 'M. B. Jones', written over the printed name 'NUNN, GRIGGS, JONES & SHERIDAN'.

CRG:cw

00663

SIMON, ANISMAN, DOBY, WILSON & SKILLERN

A PROFESSIONAL CORPORATION  
ATTORNEYS AND COUNSELORS

P O BOX 17047

300 PROFESSIONAL BUILDING

303 WEST TENTH

FORT WORTH, TEXAS 76102-7071

RICHARD U SIMON (1907-1975)  
HENRY W SIMON (1910-1980)

(817) 335-6133  
METRO 429-3245

HAROLD D. HAMMETT, P.C.  
OF COUNSEL TO THE FIRM

TELEFAX NO  
METRO (817) 429-5390

June 27, 1989

Luther H. Soules, III, Esq., Chairman  
Supreme Court Advisory Committee  
175 E. Houston, 10th Floor  
Two RepublicBank Plaza  
San Antonio, TX 78205-2230

Re: 1990 Rules- Tex. R. Civ. P. Rule 169

Dear Luke:

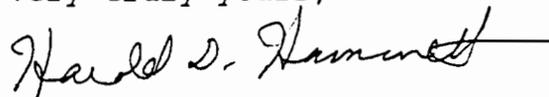
This is to request that the Committee amend Rule 169 to restore the pre-1984 requirement of a sworn statement when the party receiving a request for admissions either denies a request or states that he cannot truthfully admit or deny the matters requested. Also, the signature and oath should be by the party signing the denial or statement, not by its attorney of record.

It seems that the requirement of a sworn statement or denial was deleted in the 1984 amendments. Cf. Reyes v. International Metals Supply Company, 666 S.W.2d 622, 624 (Tex. App.- Hous. 1st 1984, no writ).

It appears incongruous to me that the standard of reliability for responding to requests for admissions should be less strict than for interrogatories. Rule 168, paragraph 5, requires the answers to be in writing, under oath, signed and verified by the person making them, not by the attorney. The same standard should apply to responding to requests for admissions, unless the request is admitted.

Thank you for your consideration of these comments. Also, please know of my gratitude to Holly Halfacre in your office for her gracious and prompt response to my telephone inquiry about this.

Very truly yours,



Harold D. Hammett

HDH:cjr

✓cc: Holly Halfacre

30564

LAW OFFICES

SOULES & WALLACE

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

TELEFAX

SAN ANTONIO

(512) 224-7073

AUSTIN

(512) 327-4105

KEITH M. BAKER  
RICHARD M. BUTLER  
W. CHARLES CAMPBELL  
CHRISTOPHER CLARK  
HERBERT GORDON DAVIS  
SARAH B. DUNCAN  
MARY S. FENLON  
GEORGE ANN HARPOLE  
LAURA D. HEARD  
ELIZABETH P. HOLBERT  
RONALD J. JOHNSON

REBA BENNETT KENNEDY  
PHIL STEVEN KOSUB  
GARY W. MAYTON  
J. KEN NUNLEY  
SUSAN SHANK PATTERSON  
SAVANNAH L. ROBINSON  
JUDITH RAMSEY SALDAÑA  
MARC J. SCHNALL \*  
LUTHER H. SOULES III †  
WILLIAM T. SULLIVAN  
JAMES P. WALLACE ‡

WRITER'S DIRECT DIAL NUMBER:

December 26, 1989

Mr. Steve McConnico  
Scott, Douglass & Keeton  
12th Floor, First City Bank Building  
Austin, Texas 78701-2494

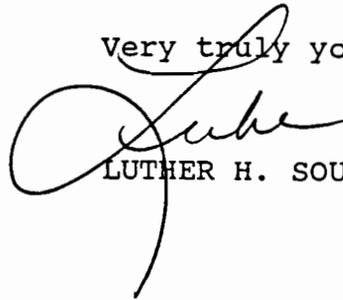
Re: Proposed Changes to Texas Rules of Civil Procedure  
167, 168, 169, 188, and 206

Dear Steve:

Enclosed herewith please find a copies of letters sent to me by Harold D. Hammett, Jess W. Young, Charles Griggs and John F. Younger, Jr. regarding proposed changes to the above captioned rules. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,



LUTHER H. SOULES III

LHSIII/hjh  
Enclosure

cc: Justice Nathan L. Hecht  
Honorable David Peoples  
Mr. John F. Younger, Jr.  
Mr. Charles Griggs  
Mr. Jess W. Young  
Mr. Harold D. Hammett

00665

## RULE 169. REQUESTS FOR ADMISSION

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.

Responses, including any objections, shall be preceded by the request for admission to which the response or objection pertains.

← 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.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted without necessity of a court order unless, within thirty (30) days after service of the request, or within such time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of forty-five (45) days after service of the citation and petition upon him. If objection is made, the reason therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons that the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or easily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission is requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of paragraph 3 of Rule 215, deny the matter or set forth reasons why he cannot admit or deny it.

2. **Effect of Admission.** Any matter admitted under this rule is conclusively established as to the party making the admission unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 166

4543.001

HJM  
LHS

✓9-11-89  
3B

LAW OFFICES OF  
TINSMAN & HOUSER, INC.

RICHARD TINSMAN  
FRANKLIN D. HOUSER  
JOHN F. YOUNGER, JR.  
MARGARET M. MAISEL  
DAVID G. JAYNE  
ROBERT SCOTT  
BRUCE M. MILLER  
DANIEL J. T. SCIANO  
MICHELE PETTY  
W. D. SEYFRIED, III  
SHARON COOK  
REY PEREZ

900 NATIONAL BANK OF COMMERCE BUILDING  
SAN ANTONIO, TEXAS 78205

AREA CODE 512-225-3121

9/11  
September 8, 1989

HJM  
COAS  
SOAC Sub C  
SOAC Agend  
Xc John Younger  
Justice Hecht  
✓9-12-89  
03

Mr. Luke Soules  
Law Offices of Luther Soules, III  
175 E. Houston Street, 10th Floor  
San Antonio, Texas 78205

Re: Proposed Amendment of Texas Rules of Civil Procedure

Dear Luke:

This letter is written to you in your capacity as a member of the Supreme Court Advisory Committee for the Texas Rules of Civil Procedure.

Recently, I have had an occasion to notice and appreciate a significant difference in procedural response between Rule 168, T.R.C.P. (Interrogatories to parties) on the one hand, and Rule 167, T.R.C.P. (Discovery and Production of Documents and Things for Inspection, Copying or Photographing) and Rule 169, T.R.C.P. (Requests for Admission), on the other.

Rule 168 (Interrogatories), in an unnumbered paragraph included under Rule 168.5, provides "Answers to interrogatories shall be preceded by the question or interrogatory to which the answer pertains." Much to my surprise, I have discovered that there is no similar provision in Rule 167 (Discovery and Production) or Rule 169 (Admissions).

The subject provision contained in Rule 168 regarding interrogatories is good and makes the record clear. In most circumstances, unless there has been amended or supplemental answers or responses filed, the attorneys have to handle only one document relating to interrogatories and responses. That document contains both the questions and the answers and/or objections. Because there is no similar provision in the rules providing for responses to requests for production (Rule 167) or for requests for admissions (Rule 169), unless the attorney, as a matter of courtesy, has copied the particular requests for production or requests for admission in order that they precede the response or objection thereto (which I have made it my practice to do), then the attorneys are having to constantly flip back and forth between the requests for production or requests for admission and the responses.

Mr. Luke Soules.  
Law Offices of Luther Soules, III  
Page Two

It seems to me that for the sake of consistency and for clarity of the record, a provision similar to that quoted and found in Rule 168 should be incorporated in Rules 167 and 169. I have included for your reference copies of Rules 167, 168 and 169, along with the language which I propose should be added to Rules 167 and 169 to make them consistent with Rule 168 and which I believe will ultimately simplify the process. It may require a bit more of the secretaries or paralegals in copying the requests for production or requests for admission that precede the response or objection, but clarity for the record would be greatly enhanced. It is further my contention that such a procedure would not unduly overload the filing capacity of the District Clerks, who seem to not file much of anything anymore anyway.

If there is some reason why the language and change in format I have suggested for Rules 167 and 169 was not included purposefully, then I would like to know that reason. If it was merely oversight, then I believe the language and the slight change in format which I have suggested should be added to those rules would ultimately save time and simplify the process. Ultimately, it would save money, as well.

Please let me hear from you in this regard.

Very truly yours,

TINSMAN & HOUSER, INC.

  
John F. Younger, Jr.

JFYjr/mlh

Enclosures

00668

2/1  
HJH  
R176 Sub C  
Agenda  
J. Hecht

Art 24.011  
Code Crim. Procedure

By Melton  
Glasgow

Suggested by Judge  
John Spiccia  
B. No. 69A  
225th Dist. Ct.

A BILL TO BE ENTITLED

AN ACT

1  
2 relating to the use of subpoenas to obtain the testimony of  
3 children in criminal cases.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

5 SECTION 1. Chapter 24, Code of Criminal Procedure, is  
6 amended by adding Article 24.011 to read as follows:

7 Art. 24.011. SUBPOENAS; CHILD WITNESSES. (a) If a witness  
8 is younger than 18 years, the court may issue a subpoena directing  
9 a person having custody, care, or control of the child to produce  
10 the child in court.

11 (b) If a person, without legal cause, fails to produce the  
12 child in court as directed by a subpoena issued under this article,  
13 the court may impose on the person penalties for contempt provided  
14 by this chapter. The court may also issue a writ of attachment for  
15 the person and the child, in the same manner as other writs of  
16 attachment are issued under this chapter.

17 SECTION 2. The importance of this legislation and the  
18 crowded condition of the calendars in both houses create an  
19 emergency and an imperative public necessity that the  
20 constitutional rule requiring bills to be read on three several  
21 days in each house be suspended, and this rule is hereby suspended,  
22 and that this Act take effect and be in force from and after its  
23 passage, and it is so enacted.

TRCP 188

4543.001

high  
Uno

JESS W. YOUNG, INC.  
LAWYER  
P. O. Box 15948  
SAN ANTONIO, TEXAS 78212  
TELEPHONE (512) 490-5299  
October 12, 1989

✓ 10-16-89

SB

RONALD S. SCHMIDT  
OF COUNSEL

Jess W. Young

W/H,  
SCAC Sub  
Agenda  
COA & Tex  
Yo Justin Hecht

Mr. Luke Soules, III  
c/o Soules & Wallace  
Republic of Texas Plaza Bldg.  
175 E. Houston Street  
San Antonio, TX 78205

Dear Luke:

Confirming my conversation with you of the hiatus between Rules 188 (Foreign Jurisdiction Depositions) and 206 (Domestic Depositions and Return) please note the highlighted portions.

As I explained to you, I had reason to take out-of-state depositions in my daughter's divorce case, and this led to the problem of the court reporter in the foreign jurisdiction adhering to Rule 188 and returning the depositions and bill of costs back to our District Clerk. On such occasion, they were returned to the court reporter in the foreign jurisdiction, both deposition and cost bill.

Rule 206 states that the lawyer that asks the first question gets the honor of being the custodian, and of course when you send it out to a foreign jurisdiction you never know who's going to ask the first question. It would occur to me that it would be better stated to cause the return of the foreign deposition to the party who caused the issuance of the same, without regard to who asks the first question. The bill of costs should be filed with the Clerk of the proper Court to be compiled as part of the costs of court.

The foreign court reporters in reading Rule 188 have seized upon the unnumbered second paragraph of paragraph number 2 of Rule 188 and returned the depositions to the Clerk. The Clerk then, pursuant to Rule 206, 2, returns it to them as he takes the position, and properly, that he is not the custodian.

In short, it seems to me that the two Rules conflict to some degree, or in any event are confusing to foreign court reporters and clarification, simple if at all possible, should be made when the new Rules are promulgated.

Kindest regards,

JESS W. YOUNG, INC.

  
Jess  
JY/vh

00670

"interrogatories", and a sentence has been added permitting the time and place of taking the deposition to be stated in the order or by means of notice.

Change by amendment effective February 1, 1973: The first sentence of paragraph 4 has been rewritten to make it clear that the taking of a deposition to perpetuate testimony is to be authorized only when the court is satisfied that a failure or delay of justice may be prevented thereby.

### **RULE 188. DEPOSITIONS IN FOREIGN JURISDICTIONS**

1. Whenever the deposition, written or oral, of any person is to be taken in a sister state or a foreign country, or in any other jurisdiction, foreign or domestic, for use in this state, such deposition may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the State of Texas, or (2) before a person commissioned by the court in which the action is pending, and such person shall have the power, by virtue of such person's commission, to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory or a letter of request, or (4) pursuant to the means and terms of any applicable treaty or convention.

A commission, a letter rogatory, or a letter of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission, a letter rogatory or a letter of request that the taking of the deposition in any other manner is impracticable or inconvenient; and a commission, a letter rogatory or a letter of request may all be issued in proper cases.

2. Upon the granting of a commission to take the oral deposition of a person under paragraph 1 above, the clerk of the court in which the action is pending shall immediately issue a commission to take the deposition of the person named in the application at the time and place set out in the application for the commission. The commission issued by the clerk shall be styled: "The State of Texas." The commission shall be dated and attested as other process; and the commission shall be addressed to the several officers authorized to take depositions as set forth in Section 20.001, Civil Practice and Remedies Code. The commission shall authorize and require the officer or officers to whom the commission is addressed immediately to issue and cause to be served upon the person to be deposed a subpoena directing that person to appear before said officer or officers at the time and place named in the commission for the purpose of giving that person's deposition.

Upon the granting of a commission to take the deposition of a person on written questions under paragraph 1 above, the clerk of the court in which the action is pending shall, after the service of the

notice of filing the interrogatories has been completed, issue a commission to take the deposition of the person named in the notice. Such commission shall be styled, addressed, dated and attested as provided for in the case of an oral deposition and shall authorize and require the officer or officers to whom the same is addressed to summon the person to be deposed before the officer or officers forthwith and to take that person's answers under oath to the direct and cross interrogatories, if any, a copy of which shall be attached to such commission, and to return without delay the commission, the interrogatories and the answers of the person there- to to the clerk of the proper court, giving his official title and post office address.

3. Upon the granting of a letter rogatory under paragraph 1 above, the clerk of the court in which the action is pending shall issue a letter rogatory to take the deposition of the person named in the application at the time and place set out in the application for the letter rogatory. The letter rogatory issued by the clerk shall be styled, dated and attested as provided for in the case of a commission. The letter rogatory shall be addressed: "To the Appropriate Authority in [here name the state, territory or country]". The letter rogatory shall authorize and request the appropriate authority to summon the person to be deposed before the authority forthwith and to take that person's answers under oath to the oral or written questions which are addressed to that person; the letter rogatory shall also authorize and request that the appropriate authority cause the deposition of the person to be reduced to writing, annexing to the writing any items marked as exhibits and to cause the written deposition, with all exhibits, to be returned to the clerk of the proper court under cover duly sealed and addressed.

4. Upon the granting of a letter of request, or any other device pursuant to the means and terms of any other applicable treaty or convention, to take the deposition, written or oral, of any person under paragraph 1 above, the clerk of the court in which the action is pending shall issue a letter of request or other device to take the deposition of the person named in the application at the time and place set out in the application for the letter of request or other device. The letter of request or other device shall be styled in the form prescribed by the treaty or convention under which the deposition is to be taken, such form to be presented to the clerk by the party seeking the deposition. Any error in the form of the letter of request or other device shall be waived unless objection thereto is filed and served on or before the time fixed in the order granting the letter of request or other device.

5. Evidence obtained in response to a letter rogatory or a letter of request need not be excluded

Eddie Morris Court Reporters, Inc.

6243 N.W. Expressway, Suite 430  
San Antonio, Texas 78201  
(512) 734-5396

1/31/90

HSH, JRP  
SOAC Sub C 206  
& Agenda

TELECOPIER TRANSMITTAL SHEET

DATE: 1/30/90

TO: Luke Soules

FROM: EDDIE MORRIS

SENDING TO TELECOPIER NUMBER: 224-7073

NUMBER OF PAGES (INCLUDING THIS PAGE) \_\_\_\_\_

IF ALL PAGES ARE NOT RECEIVED, PLEASE CALL 512-734-5396 AND ASK FOR \_\_\_\_\_

MESSAGE

Luke, This is a letter from Tinsman + Houser substantiating my discussion with you earlier that Rule 206.2 will increase the costs of original depositions + interrogatories. The court reporting community cannot survive this type of situation. Thanks - EDDIE.

OUR TELECOPIER NUMBER IS: 734-7962

THE LAW OFFICES OF  
**TINSMAN & HOUSER**  
INCORPORATED

FRANKLIN D. HOUSER  
MARGARET M. MAISEL  
BRUCE M. MILLER  
DANIEL J. T. SCIANO  
ROBERT SCOTT  
RICHARD TINSMAN  
JOHN F. YOUNGER, JR.

ONE RIVERWALK PLACE, 14TH FLOOR  
700 NORTH ST. MARY'S STREET  
SAN ANTONIO, TEXAS 78205  
(512) 222-3121

SHARON COOK  
BERNARD W. FISCHMAN  
REY PEREZ  
NICHELE PETTY  
W. D. SEYFRIED, III

January 29, 1990

DAVID G. JAYNE  
OF COUNSEL

Mr. G. Thomas Coghlan  
LANG, LADON, GREEN,  
COGHLAN & FISHER  
1700 NCNB Plaza  
San Antonio, Texas 78205

Re: Cause No. 89-CI-09116  
Universal Underwriters Insurance  
Company vs. Constant C. Laskowski

Dear Mr. Coghlan:

Enclosed with regard to the referenced cause is a copy of  
Cross-Questions we are submitting to the Custodian of Records  
for:

Dr. James Strauch

Dr. Barry Beller

In addition, pursuant to Rule 206.2, Texas Rules of Civil Pro-  
cedure, request is hereby made that you produce for inspection  
and photocopying the original deposition transcripts, including  
all exhibits attached thereto, of these records as soon as the  
same are received by your office.

Please call my secretary, Mrs. Sylvia Escobedo, and let her  
know when these transcripts can be picked up. We will photocopy  
them and return them to you immediately.

Very truly yours,

TINSMAN & HOUSER, INC.

*Rey Perez*  
Rey Perez

RP/sse  
Enclosure

cc: Mr. Constant Laskowski  
Eddie Morris Court Reporters ✓

TRCP 206

Jess W. Young

JESS W. YOUNG, INC.  
LAWYER  
P. O. Box 15948  
SAN ANTONIO, TEXAS 78212  
TELEPHONE (512) 490-5299  
October 12, 1989

4543.001

high  
Uno

✓ 10-16-89

SS

RONALD S. SCHMIDT  
OF COUNSEL

ANH,  
SCAC Sube  
Agenda  
COA & Tex  
Yo Justice Hecht

Mr. Luke Soules, III  
c/o Soules & Wallace  
Republic of Texas Plaza Bldg.  
175 E. Houston Street  
San Antonio, TX 78205

Dear Luke:

Confirming my conversation with you of the hiatus between Rules 188 (Foreign Jurisdiction Depositions) and 206 (Domestic Depositions and Return) please note the highlighted portions.

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In short, it seems to me that the two Rules conflict to some degree, or in any event are confusing to foreign court reporters and clarification, simple if at all possible, should be made when the new Rules are promulgated.

Kindest regards,

JESS W. YOUNG, INC.

Jess  
JY/vh

00674

together with a statement of the reasons given by the witness for making such changes. The changes and the statement of the reasons for the changes shall be attached to the deposition by the deposition officer. The deposition transcript and any changes shall then be subscribed by the witness under oath, 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 a true copy of the transcript and state on the record the fact of the 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. The copy of the deposition transcript may then be used as fully as though signed, unless on motion to suppress, made as provided in Rule 207, the Court determines that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(Added Dec. 5, 1983, eff. April 1, 1984; amended July 15, 1987, eff. Jan. 1, 1988.)

This is a new rule effective April 1, 1984. Former Rule 205 is incorporated into Rule 204. This new rule is former Rule 209 with modification. The modification gives the court reporter authority to file an unsigned deposition for both party and non-party witnesses.

Comment to 1988 Change: The amendments to this rule are to update the rule to conform to the usual practices used in finalizing the deposition.

**RULE 206. CERTIFICATION BY OFFICER; EXHIBITS; COPIES; NOTICE OF DELIVERY**

1. Certification. The officer shall attach as part of the deposition transcript a certificate duly sworn by such officer which shall state the following:

- (i) that the witness was duly sworn by the officer;
- (ii) that the transcript is a true record of the testimony given by the witness;
- (iii) the amount of charges for the officer's preparation of the completed deposition transcript and any copies of exhibits;
- (iv) that the deposition transcript was submitted on a specified date to the witness or to the attorney of record for a party who was the witness for examination, signature and return to the officer by a specified date;
- (v) that changes, if any made by the witness, in the transcript and otherwise are attached thereto or incorporated therein;

(vi) that the witness returned or did not return the transcript;

(vii) that the original deposition transcript, or a copy thereof in event the original was not returned to the officer, together with copies of all exhibits, was delivered or mailed in a postpaid properly addressed wrapper, certified with return receipt requested, to the attorney or party who asked the first question appearing in the transcript for safe-keeping and use at trial;

(viii) that a copy of the certificate was served on all parties pursuant to Tex.R.Civ.P. 21a.

The officer shall file with the court in which the cause is pending a copy of said certificate, and the clerk of the court where such certification is filed shall tax as costs the charges for preparing the original deposition transcript and making and attaching copies of all exhibits to the original deposition.

2. Delivery. Unless otherwise requested or agreed to by the parties on the record in the deposition transcript, the officer, after certification, shall securely seal the original deposition transcript, or a copy thereof in the event the original is not returned to the officer, and copies of all exhibits in a wrapper endorsed with the title of the action and marked "Deposition of (here insert name of witness)," and shall thereafter deliver, or mail in a postpaid, properly addressed wrapper, certified with return receipt requested, such deposition transcript and copies of all exhibits to the attorney or party who asked the first question appearing in the transcript, and shall give notice of delivery to all parties. The custodial attorney shall, upon reasonable request, make the original deposition transcript available for inspection or photocopying by any other party to the suit.

3. Exhibits. Original documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to the deposition transcript and may be inspected and copied by any party, except that the person producing the materials may (a) offer copies to be marked for identification and annexed to the deposition transcript and to serve thereafter as originals if he affords to all parties fair opportunity at the deposition to verify the copies by comparison with the originals, or (b) offer the originals to be marked for identification, in which event the materials may then be used in the same manner as if annexed to the deposition transcript. In the event that original exhibits rather than copies are marked for identification, the deposition officer shall make copies of all original exhibits to be annexed to the original deposition transcript for delivery, and shall thereafter return the originals of the exhibits to the witness or

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MEMORANDUM

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Agenda

TO: Sub-Committee on Rules 166-216

FROM: Steve McConnico

IN RE: Report to Supreme Court Advisory Committee on February 9 and 10.

DATE: January 30, 1990

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On Friday January 26, the subcommittee discussed the proposals for Rules 166-216. Bill Dorsaneo and Gilbert Adams attended the meeting in Dallas. Steve McConnico participated by telephone. Prior to the meeting, Anthony Sadberry provided written comments. Due to the small number of participants in this discussion, I encourage each of you to send comments you may have prior to the February 9 and 10 meeting. We plan to make the following recommendations concerning Rules 166-216 to the Supreme Court Advisory Committee. Our suggested additions are underlined twice, our suggested deletions are stricken through with a hyphen. The Rules cited are the proposals which appeared in the November, 1989, Texas Bar Journal.

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As to TRCP 215, Phillip Gilbert of Dallas recommends specific limitations on those cases where extreme sanctions may be applied. Others have also suggested that there should be some limitation on the use of extreme sanctions. We believe this matter should be submitted to the COAJ for study.

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WILLIAM IKARD  
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PATRICIA L. SESSA

September 15, 1989

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WILLIAM W. KILGARLIN  
OF COURSE  
221-279

The Honorable Thomas R. Phillips  
Chief Justice, Supreme Court of Texas  
P.O. Box 12248  
Austin, Texas 78711

RE: Proposed amendments, Texas Rules of Civil Procedure

Dear Mr. Chief Justice:

Several people have spoken to me about the proposed rules. Accordingly, I am taking this opportunity to furnish the court with my unsolicited advice. Perhaps this will elevate me to your "advisory" committee, for as our mutual friend, Tom Stovall, once said, "I am one of the Governor's advisors. He told me, 'Stovall, if I want your advice, I'll ask for it'." In any event, what follows are my comments on various proposals.

- 6. TRCP 215. I could find no proposed changes for this rule. I share the court's concern that there has been abuse of this rule, with people seeking sanctions on the slightest pretext. I think the court might consider going back to the rule that before sanctions can be assessed there must be a violation of a court order. Alternatively, there needs to be a strengthening of the rule in respect to frivolous initiating motions for sanctions.

Sincerely,

William W. Kilgarlin

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November 28, 1989

Honorable Nathan L. Hecht  
P.O. Box 12248  
Austin, TX 78711

RE: Comment on Proposed Rules Changes Regarding Discovery

Dear Justice Hecht:

Rules 166b(6) and 215(5) = "Good Cause" Exception. With respect to the "good cause" exception to admit untimely disclosed evidence, Rule 166b(6) states that supplementation is required not less than 30 days before trial "unless the court finds that a good cause exists for permitting or requiring later supplementation," and Rule 215(5) states that late-supplemented evidence is excluded "unless the trial court finds that good cause sufficient to require admission exists." First, these two rules should be made to read exactly the same, or confusion will arise. I prefer the wording in Rule 215(5). Second, and more importantly, the wording in the present rules has caused several recent cases to expressly or impliedly hold that the "good cause" which must be shown only encompasses evidence related to whether the late-supplemented evidence should be or is required to be admitted into evidence. Most courts, including the Supreme Court, have expressly or impliedly held, and I believe correctly, that the "good cause" which must be shown must relate to why the discovery request was not timely supplemented. But, the rules are not clear on this point. I suggest clarifying the issue by the following amendments. Amend Rule 166b(6) to read as follows:

A party. . . unless the court finds good cause exists for the late supplementation and that good cause exists for requiring late supplementation.

Then, amends Rule 215(5) to read as follows:

A party . . . unless the court finds good cause exists for the failure to initially respond or for late supplementation and that good cause exists for requiring the admission of the undisclosed, improperly disclosed or untimely disclosed evidence.

Thus, the rules will read more like each other, and the "good cause" exception would expressly apply to (1) why the evidence was not properly/timely disclosed and (2) why such evidence is required to be admitted. This should settle any conflicting case law.

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Riddle & Brown

Phillip W. Gilbert  
Board Certified — Civil Trial Law  
Texas Board of Legal Specialization

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November 22, 1989

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Justice Nathan L. Hecht  
P. O. Box 12248  
Austin, Texas 78711

Re: Proposed Amendments to Texas Court Rules

Dear Justice Hecht:

I am writing in connection with the proposed amendments to the Texas Court Rules. I have been practicing law in Texas since 1961. I am Board Certified in Civil Trial Law and in Civil Appellate Law by the Texas Board of Legal Specialization. As chairman of a litigation section in our law firm, I have become increasingly aware of a regressive tendency among Texas state courts to decide cases on the basis of "sanctions" rather than upon their merits.

As a victim of discovery delays and obstacles, I applaud the use of sanctions for discovery violations. However, use of the most extreme sanctions (stricken pleadings, default or dismissal) completely changes the course of an entire case and prevents the case from being decided on its merits. These extreme sanctions provide tremendous temptations to procure victory by a plaintiff or a defendant based upon the most inconsequential discovery mistakes by their opponent. At times, even when there was no violation, attorneys are able to convince trial courts that there was a violation, by the clever use of pure rhetoric combined with a measure of deception. Current review standards leave these miscarriages of justice largely unchecked.

The dangers to the judicial process in diverting a case from a trial on the merits are compounded by leaving the choice of sanctions completely in the hands of one person --the trial judge. The Federal system has recognized this jeopardy to the judicial system by requiring certain standards to be met before permitting these ultimate sanctions.

I would propose that Rule 215, Tex. R. Civ. P. be amended to provide, in a new paragraph 2d, as follows:

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Justice Nathan L. Hecht  
November 22, 1989  
Page 2

d. Standards for Extreme Sanctions. Before a trial court may make an order under paragraphs (3), (4) or (5) of paragraph 2b of this rule, the trial court must (1) base such sanctions on evidence of a contumacious refusal to provide discovery; (2) explain how lesser sanctions have been considered and why they are inadequate; (3) identify a nexus between the misconduct and any prejudice to the opponent; and (4) determine that the fault rests, at least partly, with the client rather than their attorney.

Unless corrected, the problem of improperly applied sanctions will act like a cancer on our state's jurisprudence. The federal courts have already recognized this problem and are dealing with it by court decision. It would be a great boon to our profession to have adequate standards appear in our rules of procedure. A system of cost awards and "fines" will police most discovery abuses without victimizing innocent plaintiffs and defendants. The ability to win cases by sanction has made our state trial courts battlegrounds for "Discovery Wars" and has diverted the trial courts from their primary task -- to try cases on their merits.

Some of the federal cases dealing with standards for extreme sanctions are as follows: John v. State of Louisiana, 828 F.2d 1129, 1132 (5th Cir. 1987); Marshall v. Segona, 821 F.2d 763, 768 (5th Cir. 1980); M.E.N. Co. v. Control Fluidics, Inc., 834 F.2d 869, 873 (10th Cir. 1987); Shea v. Donohoe Construction Co., 795 F.2d 1071, 1075 (D.C. Cir. 1986); Fjelstad v. American Honda Motor Co., 762 F.2d 1334, 1338 (9th Cir. 1985); Halaco Engineering v. Costle, 843 F.2d 376, 381 (9th Cir. 1988); Dove v. Codesco, 569 F.2d 807, 810 (4th Cir. 1978). The above proposal combines principles expressly set forth in Halaco and John, supra.

I understand that Justice Kilgarlin has proposed some similar moderation to the extreme sanctions itemized in Rule 215. Although he and I have virtually opposite views in many areas, we apparently agree that the current Texas sanctions system is seriously defective.

RECOMMENDED NEW RULE  
RELATIVE TO REQUEST AND FEE FOR A JURY TRIAL

Rule 216. Request and Fee for Jury Trial

1. Request. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than thirty days after the service of the last pleading directed to such issue, or not less than thirty days in advance of the date set for trial of the cause on the non-jury docket, whichever is earlier. Such demand may be endorsed upon a pleading of the party. [~~No jury trial shall be had in any civil suit, unless a written request for a jury trial is filed with the clerk of the court a reasonable time before the date set for trial of the cause on the non jury docket, but not less than thirty days in advance.~~]

2. Jury Fee. A fee of ten dollars if in the district court and five dollars if in the county court must be deposited with the clerk of the court within the time for making a written request for a jury trial. The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.

3. By the Court. Issues not demanded for trial by jury as provided by paragraph 1 herein, shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion, upon motion and payment of the proper fee, may order a trial by a jury of any or all issues.

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FULBRIGHT JAWORSKI &  
REAVIS MCGRATH  
NEW YORK  
LOS ANGELES

January 11, 1990

TO: SUPREME COURT ADVISORY COMMITTEE  
FROM: Subcommittee on Rules 15 to 165

At our subcommittee meeting held on January 8, 1990, we considered (i) the various comments made at the public hearing held on November 30, 1989 addressing the proposed changes in the Texas Rules of Civil Procedure, (ii) the written suggestions and comments of attorneys forwarded to our subcommittee, and (iii) additional proposals for rule changes. The persons participating in the meeting were David Beck, Pat Beard, and Elaine Carlson. The conclusions reached at the meeting were as follows:

16. Rule 216. The proposed change here seeks to make the request for a jury trial consistent with the practice in federal court in which a party must make a demand for trial within a prescribed period of time after the filing of the first pleading. The subcommittee is of the view that the rule was only recently amended, effective January 1, 1988, and that there is *no* compelling reason for change at the present time.

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JUDGE B. F. (BILL) COKER

3823 Calculus Drive  
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December 30, 1989

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Mr. Luther H. Soules  
Chairman, Rules Advisory Committee  
175 E. Houston Street  
San Antonio, Texas 78205-2230

① SCAC sub C of  
Rule 47, 47a,  
242, 20, 140a,  
216, 241, 243)  
~~242~~ ~~241~~  
② SCAC agenda -  
③ J. Hecht.

Re: Suggested rule changes

Dear Mr. Soules:

Enclosed are recommended changes and additions to the Texas Rules of Civil Procedure. Additions to existing rules and new rules are designated by underlined text of the rule. Portions of existing rules which are deleted are enclosed in brackets and lined through. Please submit these suggestions to your committee for consideration.

**Request and Fees for a Jury Trial:**

I recommend that Texas adopt a modified version of Rules 38(b) and 39(b), Federal Rules of Civil Procedure.

Texas courts are being subjected to greater and greater scrutiny relative to their efficiency. Many people accept the idea that our judicial system was not intended to be efficient. I am one of those people. However, it is reasonable to incorporate efficiencies where those efficiencies do not detract from the judiciary's obligation to provide a proper forum for the resolution of disputes.

Frequently, the court's ability to schedule and manage its docket is hampered, if not frustrated, by late requests for cases to be decided by a jury. Many times these late requests are part of a trial strategy intended to frustrate the opposing party. Many times attorneys come to expect judges to overlook the attorneys' failure to make a timely request for a jury.

Better discipline in the timeliness of requesting a jury has the potential to help attorneys, clients, and courts.

My recommendation is to require jury requests to be made within thirty days after the service of the live trial pleadings, or not later than thirty days before trial date, whichever is earlier.

Such a requirement will permit court personnel to provide better management over the business aspects of the court without significantly reducing any party's right to a jury trial.

A copy of my proposed change to Rules 216 is attached to this letter.

00683

Rule 241 [Repealed].

Rule 242. Evidence needed for Default Judgment

(a) Discretion of the Court. Where the plaintiff has given notice of the amount, or the amounts, to be requested against the defendant, or all of several defendants, the court in its discretion, may require evidence as to plaintiff's claim, or claims, or any part thereof.

(b) Where Evidence is Required by the Court. As to any portion of plaintiff's claim for which the court has elected to require evidence pursuant to sub-paragraph (a), the court shall hear evidence as to damages and shall render judgment therefore.

(c) Where Evidence not Required by the Court. As to every portion of plaintiff's claim for which the court has not elected to require evidence pursuant to sub-paragraph (a), the court shall enter judgment in the amount, or the amounts, requested pursuant to Rule 47a.

Rule 243. [Repealed].



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December 30, 1989

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1-4-90

TRCP 241

Mr. Luther H. Soules  
Chairman, Rules Advisory Committee  
175 E. Houston Street  
San Antonio, Texas 78205-2230

① SCAC Sub C of A  
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My recommendations relate to changes in the rules relative to:

1. claims for damages;
2. reading and signing minutes;
3. assessment of costs associated with service of process and other notices; and
4. requests and fees for a jury trial.

Each area of recommended change is addressed separately.

**Claims for Damages:**

My recommended changes which are associated with claims for damages relate to pleading jurisdictional amounts and granting judgments on default.

Rule 47, Texas Rules of Civil Procedure, as it now exists, significantly increases the cost of litigation and wastes

valuable judicial resources. This rule makes it impossible to plead a claim for unliquidated damages without being required to re-plead the same claim. The rule requires a statement that only advises the opposing party that the claim exceeds the jurisdictional limits of the court. Further, the rule invites the opposing party to except to the lack of a specific amount claimed, and follows that with a mandate that the trial court sustain the special exception and require the pleader to re-plead with more specifics. On the other hand, if the pleader anticipates the special exception and pleads a specific, a trial would be required to sustain a special exception that claimed the pleader failed to follow Rule 47. Basically, this creates a "Catch 22" because a litigant seeking damages cannot plead in such a way as to avoid the necessity of re-pleading.

As a housekeeping matter, I also recommend sub-part (b) of Rule 47 be amended to require the assertion that the claim is within the jurisdictional limits rather than above the minimum limit. The rule, as now written, prevents affirmatively stating a claim within the limits of a limited-jurisdiction court.

In addition to the above recommendations relative to Rule 47, I recommend repealing Rules 241 and 243, enacting two new rules (which will be referred to as Rules 47a and 242).

Rule 47a requires each damages claimant to advise the person from whom damages is sought the amount of damages which will be requested from the court in the event no answer is filed in response to the suit. Such a rule provides information from which a defendant can assess maximum risk and make a business decision relative to the desirability of contesting the claim.

Rule 242 replaces the current Rules 241 and 243.

Rules 241 and 243 speak to a dichotomy the law has created relative to liquidated and unliquidated claims. This dichotomy serves very little, if any, purpose. In limited circumstances, it permits the law to indulge in a presumption upon default. However, in my view, that presumption is not consistent with reality.

In suits involving unliquidated claims, we presume that a defaulting party admits liability due to fault, but that same defaulting party does not admit the amount of damages caused by the admitted fault.

I believe my experiences would be similar to those of other judges across the state. Letters I have received from defendants frequently admit they had no money to pay damages, but they deny they did anything wrong. Human nature is such that people

cannot admit failure, but they can and do admit a debt. People will admit a debt, even an unliquidated debt. Our presumption is wrong.

It is also my belief that defaulting defendants do not rely on the Court to conduct hearings for the presentment of evidence of unliquidated debts.

With those basic beliefs, I recommend that the rules be amended to provide trial courts with an option of hearing evidence or granting judgment without hearing evidence in those cases where the claimant has advised the opposing party of the amount to be sought on default.

These proposed new Rules 241 and 243 will permit trial courts which have computer support to automatically process default judgments if the Court is satisfied with the reasonableness of the amounts claimed. The Court will also have the option of requiring evidence if a claim appears to be out of the ordinary.

By changing these rules to permit automated judgments, valuable Court resources and time can be devoted to contested issues.

A copy of my proposed changes to Rules 47, 47a, 241, 242, and 243 is attached to this letter.

Rule 241 [Repealed].

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December 30, 1989

TRCP 242

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hyh  
LW

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December 30, 1989

TRCP 243

V/A  
H/A

VI-4-50  
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Mr. Luther H. Soules  
Chairman, Rules Advisory Committee  
175 E. Houston Street  
San Antonio, Texas 78205-2230

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Rule 47, Texas Rules of Civil Procedure, as it now exists, significantly increases the cost of litigation and wastes

valuable judicial resources. This rule makes it impossible to plead a claim for unliquidated damages without being required to re-plead the same claim. The rule requires a statement that only advises the opposing party that the claim exceeds the jurisdictional limits of the court. Further, the rule invites the opposing party to except to the lack of a specific amount claimed, and follows that with a mandate that the trial court sustain the special exception and require the pleader to re-plead with more specifics. On the other hand, if the pleader anticipates the special exception and pleads a specific, a trial would be required to sustain a special exception that claimed the pleader failed to follow Rule 47. Basically, this creates a "Catch 22" because a litigant seeking damages cannot plead in such a way as to avoid the necessity of re-pleading.

As a housekeeping matter, I also recommend sub-part (b) of Rule 47 be amended to require the assertion that the claim is within the jurisdictional limits rather than above the minimum limit. The rule, as now written, prevents affirmatively stating a claim within the limits of a limited-jurisdiction court.

In addition to the above recommendations relative to Rule 47, I recommend repealing Rules 241 and 243, enacting two new rules (which will be referred to as Rules 47a and 242).

Rule 47a requires each damages claimant to advise the person from whom damages is sought the amount of damages which will be requested from the court in the event no answer is filed in response to the suit. Such a rule provides information from which a defendant can assess maximum risk and make a business decision relative to the desirability of contesting the claim.

Rule 242 replaces the current Rules 241 and 243.

Rules 241 and 243 speak to a dichotomy the law has created relative to liquidated and unliquidated claims. This dichotomy serves very little, if any, purpose. In limited circumstances, it permits the law to indulge in a presumption upon default. However, in my view, that presumption is not consistent with reality.

In suits involving unliquidated claims, we presume that a defaulting party admits liability due to fault, but that same defaulting party does not admit the amount of damages caused by the admitted fault.

I believe my experiences would be similar to those of other judges across the state. Letters I have received from defendants frequently admit they had no money to pay damages, but they deny they did anything wrong. Human nature is such that people

cannot admit failure, but they can and do admit a debt. People will admit a debt, even an unliquidated debt. Our presumption is wrong.

It is also my belief that defaulting defendants do not rely on the Court to conduct hearings for the presentment of evidence of unliquidated debts.

With those basic beliefs, I recommend that the rules be amended to provide trial courts with an option of hearing evidence or granting judgment without hearing evidence in those cases where the claimant has advised the opposing party of the amount to be sought on default.

These proposed new Rules 241 and 243 will permit trial courts which have computer support to automatically process default judgments if the Court is satisfied with the reasonableness of the amounts claimed. The Court will also have the option of requiring evidence if a claim appears to be out of the ordinary.

By changing these rules to permit automated judgments, valuable Court resources and time can be devoted to contested issues.

A copy of my proposed changes to Rules 47, 47a, 241, 242, and 243 is attached to this letter.

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✓ 1-29-90

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TEXAS BOARD OF LEGAL SPECIALIZATION

January 25, 1990

Justice Nathan L. Hecht  
Supreme Court of Texas  
P.O. Box 12248  
Austin, Texas 78711

RE: Proposed Rule Changes

III. New Rule Regarding Motions in Limine

- A. Create a new rule which provides that all Motions in Limine of all parties in a jury trial case shall be filed in the papers of the cause at least 7 days before trial.
- B. The new rule would further provide that in the event the Motion was not timely filed, the Court would have the discretion to consider a late filed Motion in Limine if the Court found that the opponent was not prejudiced because of the late filing or that justice required consideration of the contents of the Motion. In short, give the trial court discretion, but state that the trial court should not hear the late filed Motion in general, but it would have discretion to consider is the merits of the trial required consideration.
- C. Further, the trial court would be told that it could consider what sanctions, if any, in its discretion would be appropriate if a party wanted to urge an untimely Motion and the Court found that justice required a consideration and even granting of the Motion. In short, some message to the trial court that it has the power to prevent lawyers from "late filing" even though a particular trial required a that a late motion to be considered.

Judge, the reasons for the above rules are many, but I will give you only a few.

### MOTIONS IN LIMINE

Nothing in our rules, to my knowledge, even mentions Motions in Limine. But they are a vital part of a trial jury practice, a technique for the trial court to get involved early in what the case is really about. Also, it is way to alert the lawyers about evidentiary issues of vital importance.

All experienced trial lawyers have had the experience of handling in the Motion stage the decisive issues in the case: whether "other accident" would be admitted; whether the plaintiffs drinking would come in etc. The list could go on and on. I am sure that you have had many cases that turned on the ruling at the Motion stage.

Why not provide a simple rule that the lawyer must file these critical motions 7 days before trial. Why wait? Why put off? Why leave uncertain? Why leave it to local rules and local "practice"?

*TRCP*  
90  
156  
216(c)  
249  
307

CHARLES A. SPAIN, JR.  
(512) 480-5609

542  
324(a)

GRAVES, DOUGHERTY, HEARON & MOODY  
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IRELAND GRAVES (1883-1968)  
BEN F. VAUGHAN, III, P.C.  
OF COUNSEL

TELECOPY NUMBER:  
(512) 478-1976

*Red Rule Sec*

November 26, 1989

*TRCP 41 a*  
*TRCP 237 c*  
*TRCP 41, 202, 240*  
*✓ 57(a)(1)*  
*✓ 12*  
*✓ 74*  
*✓ 41(a)(1)*  
*✓ 54(a)*  
*(2(d))*

The Honorable Nathan L. Hecht, Justice  
The Supreme Court of Texas  
Post Office Box 12248  
Capitol Station  
Austin, Texas 78711

Dear Judge Hecht:

6. The following proposed amendments use the word "nonjury": Texas Rules of Appellate Procedure 41(a)(1) and 54(a). The following proposed amendments use the word "non-jury": Texas Rules of Appellate Procedure 41 comment, 52(d), 52 comment, and 54 comment. The court may wish to standardize the terminology. The term "non-jury" currently appears in Texas Rules of Civil Procedure 90, 156, 216(1), 249, 307, and 542. The term "nonjury" currently appears in Texas Rule of Civil Procedure 324(a) and Texas Rule of Judicial Administration 6(b)(2).

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,



Charles A. Spain, Jr.

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November 26, 1989

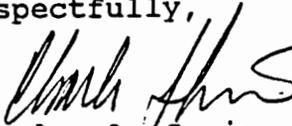
The Honorable Nathan L. Hecht, Justice  
The Supreme Court of Texas  
Post Office Box 12248  
Capitol Station  
Austin, Texas 78711

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Charles A. Spain, Jr.

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*Handwritten notes:*  
90  
156  
216(1)  
249  
307  
542  
324(a)

*Handwritten notes:*  
TRCP 41(a)  
TRCP 237C  
TRCP 41, 202, 210  
57(a)(1)  
12  
74  
41(a)(1)  
54(a)  
(2)(d)



4543.001

Wjh  
LW

**Court of Appeals  
Eighth Judicial District**

✓ 1-11-90  
SJC

CHIEF JUSTICE  
MAX N. OSBORN

500 CITY-COUNTY BUILDING  
EL PASO, TEXAS

CLERK  
BARBARA B. DORRIS

JUSTICES  
LARRY FULLER  
JERRY WOODARD  
WARD L. KOEHLER

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915 546-2240

DEPUTY CLERK  
DENISE PACHECO

January 9, 1990

STAFF ATTORNEY  
JAMES T. CARTER

1/10

Mr. Luther H. Soules III  
Soules & Wallace  
10th Floor, Republic of Texas Plaza  
175 East Houston Street  
San Antonio, Texas, 78205

HJH.  
~~PCP 324~~ Sell  
Agenda  
COAS  
J

Re: Amendments to TPAP & TRCP

Dear Mr. Soules:

For some time I have been concerned about consideration of "no evidence" points of error when that issue had not been raised in an objection or motion in the trial court. As I read Tex. R. Civ. P. 324 a "no evidence" point need not be raised in a motion for new trial. We have know since the holdings in J. Weingarten, Inc. v. Razy, 426 S.W.2d 538 (Tex. 1968) that a no evidence point could get a reversal, if not a rendition, where the proper complaint had not been made for a rendition.

In the enclosed opinion in First American Title Company v. Prata I have attempted to raise the issue in a footnote. It seems to me the courts holding in Aero Energy clearly conflicts with the present language in Rule 324. I also realize that at the time that opinion was written it was consistent with the language then in the rule. But it seems the Courts of Appeals and perhaps the Supreme Court also are still following the Aero Enery holding after the rule change removed the language about "a complaint which had not otherwise been ruled upon."

Of course if a "no evidence" point is not required to be raised by Rule 324, and was not raised by the four procedures Justice Calvert wrote about in Texas Law Review, then are we not back to "resurrecting the rejected fundamental error rule" Justice Pope mentioned in Litton Industrial Products, Inc. v. Gammage, 668 S.W.2d 319 at 324 (Tex. 1984)?

I have no idea who on your committee reviews screwball issues an appellate judges raise for the first time in dictum in a footnote. A copy goes forward to a couple of people who may review these nutty questions.

cc: Justice Nathan Hecht  
Prof. Wm. Dorsaneo III

Sincerely,  
*Max N. Osborn*  
Max N. Osborn

COURT OF APPEALS  
EIGHTH DISTRICT OF TEXAS  
EL PASO, TEXAS

FIRST AMERICAN TITLE COMPANY )  
OF EL PASO AND CORONADO )  
STATE BANK, )

Appellants, )

v. )

SYLVIA V. PRATA, )

Appellee. )

No. 08-88-00235-CV

Appeal from 243rd District Court of  
El Paso County, Texas. (TC# 86-4066)

O P I N I O N

This suit was filed by the owner of a house who lost a possible sale when the prospective buyer learned of pending condemnation proceedings which had been filed prior to the owner's purchase of the property from the Bank. The owner sued the Bank for damages under the Deceptive Trade Practices Act and the company which issued the title policy under the Texas Insurance Code. Based upon a favorable jury verdict, judgment was entered for the owner of the house. We reverse and remand the judgment against the Title Company and reverse and render judgment for the Bank.

On February 7, 1984, Coronado State Bank purchased a house which had been owned by Sylvia Prata's mother and stepfather at a sheriff's sale. The day before the foreclosure sale, El Paso Community College had filed a condemnation statement to obtain the same property. No lis pendens notice was filed and notice of the proceedings was not served upon the owner. Without any notice of the condemnation proceedings, the Bank sold the house to Sylvia Prata for \$56,000.00 on May 18, 1984, and conveyed title to her by a special

warranty deed. The closing was handled by First American Title Company of El Paso which issued a title commitment and a title insurance policy. The title commitment made no reference to condemnation proceedings, but the title insurance policy had an exclusion as to condemnation proceedings. The College did not serve anyone as owner of the property until Sylvia Prata was served on May 21, 1987, more than three years after the condemnation statement had been filed.

Sylvia Prata testified that the attorney for the Bank represented to her that she would receive "free and clear title" or "clear title" to the house. She said, at the closing, representatives of the Title Company represented that she was getting free and clear title to the property.

In November 1984, Prata entered into a contract to sell the house to Tito Gonzalez, a realtor who was acting as trustee for William Abraham, for \$250,000.00. That contract had a proviso that it was "subject to inspection and approval of property within 20 working days." The property was never inspected for any type of approval and no sale was consummated because of the pending condemnation proceedings.

In answer to questions submitted, the jury found: (1) that the Title Company engaged in a false, misleading or deceptive act or practice or made misrepresentations in connection with the purchase of the property or in the issuance of the title policy on the property, (2) that such conduct was a producing cause of damages to Prata, (3) that the Title Company and Prata entered into an agreement based upon the title commitment instrument, (4) that the Title Company breached that agreement, (4A) that such breach was a proximate cause

of damages to Prata, (5) that Prata sustained damages of \$39,000.00 for loss of a sale, \$5,850.00 for loss of rental value, \$2,000.00 for loss of credit reputation in the past, \$9,500.00 attorney's fees in the condemnation proceeding, \$2,000.00 for travel expenses and that \$39,000.00 was the difference in the value of the property as received and the value it would have had if it had been as represented, \$2,000.00 for inconvenience, \$1,000.00 for physical pain in the past and \$2,500.00 for mental anguish in the past.

With regard to the Bank, the jury found: (6) that the Bank engaged in a false, misleading or deceptive act or practice in the sale of the house, (7) that such conduct was a producing cause of any damages of Prata, (8) damages identical to those found as to the Title Company except they increased the attorney's fees for condemnation proceeding to \$9,713.75, and (9) failed to find that the Bank knowingly committed the false, misleading acts or practices. The jury found Prata's reasonable attorney's fees for trial to be \$19,213.75, with additional attorney's fees of \$16,750.00 depending on appellate proceedings. They failed to find Prata's suit against the Bank and against the Title Company was groundless and brought in bad faith or for harassment.

Under the statute then in effect, the court trebled the damages against the Title Company and with prejudgment interest awarded a recovery of \$192,685.63, and awarded a recovery of \$79,735.63 against the Bank. In addition, the judgment awarded attorney's fees as found by the jury, plus interest and costs.

Initially, a contention is made that the trial court lacked subject matter jurisdiction and that it erred in overruling a plea in abatement. The argument presented is that there was no justiciable

issue ripe for adjudication because all issues were contingent upon the condemnation case which had not been decided at the time this case was tried. The assertion is made that only an advisory judgment could be entered prior to disposition of the exercise of any right of condemnation. Appellants rely upon *City of Garland v. Louton*, 691 S.W.2d 603 (Tex. 1985) and *California Products, Inc. v. Puretex Lemon Juice, Inc.*, 160 Tex. 586, 334 S.W.2d 780 (1960). To be an advisory decision, the judicial determination must be based upon some hypothetical or contingent situation. *Freeport Operators, Inc. v. Home Insurance Company*, 666 S.W.2d 566 (Tex.App.--Houston [14th Dist.] 1984, no writ). The facts in this case were established at the time of trial and the pleadings were based upon prior conduct involving these parties and a third party condemnor. Whether the condemnation case proceeded to its final disposition would not affect the claims asserted in this case since the condemnor had not been joined as a party defendant. The Bank's Points of Error Nos. One and Two and the Title Company's Point of Error No. Fifteen are all overruled.

Turning to the merits of the case, the controlling issue is not whether the Title Company or the Bank committed the acts found by the jury, but whether such conduct was a producing cause of the damages found by the jury. For the sake of discussion only, we assume that both Appellants committed the various acts found by the jury. With that assumption, did the Title Company's acts or misrepresentations in connection with the purchase of the property by Sylvia Prata or the issuance of the title insurance policy produce damages to her, all of which arose out of her failure to sell such property to William Abraham?

The Title Company asserts, in its third point of error, that

there was no evidence or insufficient evidence to support the jury finding of causation. The argument is made that the filing of the condemnation suit was the only producing cause of any damages sustained by Sylvia Prata. The Title Company argues that even assuming that there was a misrepresentation about the title at the time of the loan closing, the title which Prata received had absolutely nothing to do with her failure to complete the sale to William Abraham. We agree and note that the contention in this point of error perhaps should have been directed to the jury's answer to question number two as well as number five particularly since the reference to the motion for new trial relates to the answer to issue two as well as five. In any event, it is the contentions under the points and not the points themselves which are controlling. *O'Neil v. Mack Trucks, Inc.*, 542 S.W.2d 112 (Tex. 1976).

The testimony with regard to the question of causation is set out verbatim from those persons who were involved in the sale. First, Sylvia Prata, the owner and prospective vendor, testified as follows:

Q (BY MR. STEWART) Did you actually, yourself, attend at some point in December, any kind of meeting concerning this property?

A Yes; I did.

. . .

Q And what was your understanding of that meeting?

. . .

THE WITNESS: They showed us the condemnation paper and said that the house had been condemned and I had to tell Mr. Gonzalez and I lost the sale.

Q (BY MR. STEWART) Did you -- were you aware of

any other reason the sale was lost?

A Because of the condemnation.

Q Were you aware of any other reason?

A No.

Next, Mr. William Abraham, the prospective purchaser, testified as follows:

Q Okay. Did those problems have anything to do with the house or solely to do with this proceeding that came to your attention?

A Well, to be honest with you I didn't. I don't think we ever got to the -- to the inspection and approval stage. I think that shortly after submittal it had come to our attention or come not to my attention but to Mr. Gonzalez' attention in that there was some problem as far as condemnation that was down the road.

Q Were you interested in buying a property or was this condemnation proceeding it?

A No, sir.

Finally, Tito Gonzalez, the realtor who represented Mr. Abraham and had signed the purchase agreement in his capacity as trustee testified as follows:

Q And what happened with the contract?

A Well, the contract -- one thing that I asked Sylvia was to make sure it wasn't, you know, being condemned and she made sure and found out the opposite. It was being condemned. So that killed the contract.

There is no evidence the sale was not completed because Sylvia Prata had a defective title to the property, or her title insurance policy was not as represented to her or that she could not deliver clear title to the property. The only reason the sale fell

through was because a condemnation suit had been filed, a matter totally unrelated to any representations or misrepresentations made by the Title Company at the time of the closing of the sale by the Bank to Sylvia Prata.

In order to recover damages for any deceptive acts under Tex. Ins. Code Ann. art. 21.21 (Vernon 1981), it was necessary to prove that the conduct inquired about in question number one was a producing cause of any damages sustained by Sylvia Prata. *Weitzel v. Barnes*, 691 S.W.2d 598 (Tex. 1985); *Chambless v. Barry Robinson Farm Supply, Inc.* 667 S.W.2d 598 (Tex. App.--Dallas 1984, writ ref'd n.r.e.). A producing cause is "an efficient, exciting or contributing cause, . . . ." *Rourke v. Garza*, 530 S.W.2d 794 (Tex. 1975); *Dubow v. Dragon*, 746 S.W.2d 857 (Tex. App.-- Dallas 1988, no writ). Neither reliance nor foreseeability are necessary elements of recovery. *Weitzel v. Barnes*; *Hycel, Inc. v. Wittstruck*, 690 S.W.2d 914 (Tex. App.--Waco 1985, writ dismiss'd). But, the proof must establish that the damages alleged were factually caused by the defendant's conduct. *Dubow v. Dragon*; *Rotello v. Ring Around Products, Inc.*, 614 S.W.2d 455 (Tex. Civ. App.--Houston [14th Dist.] 1981, writ ref'd n.r.e.). Where the evidence does not establish that the alleged false, misleading or deceptive act or practice was a producing cause of the plaintiff's actual damages, there is no cause of action. *MacDonald v. Texaco, Inc.*, 713 S.W.2d 203 (Tex. App.--Corpus Christi 1986, no writ).

In passing on a no evidence point, the reviewing court considers only that evidence and reasonable inferences therefrom viewed in its most favorable light and reject all evidence and reasonable inferences to the contrary. *Glover v. Texas General*

Indemnity Company, 619 S.W.2d 400 (Tex. 1981). We have found no evidence which suggests that the lost sale resulted from anything other than the condemnation suit. That conclusion is supported by the acknowledgment in Appellee's brief which, when analyzing the testimony of Mr. William Abraham, says "[h]e testified the reason he did not proceed further with the contract was that a pending condemnation came up." The loss of the proposed sale was not factually caused by any conduct of the Title Company and there is no evidence to support the jury finding of producing cause of any damages.

In passing on the insufficient evidence point, we consider all of the evidence, including that which is contrary to the verdict. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). In this case, there is no testimony from either of the parties to the proposed sale that the sale was not completed because Sylvia Prata did not have a good, merchantable title to the house in question. All of the evidence is that the sale could not be completed because the Community College had pending a condemnation suit. That controlling evidence which we consider on this point has been set out verbatim. We sustain the insufficient evidence argument also. Point of Error No. Three is sustained.

Since this point is directed only to the overruling of a motion for new trial, may we reverse and render when we sustain a no evidence contention? Under the holding in J. Weingarten, Inc. v. Razey, 426 S.W.2d 538 (Tex. 1968), we could not. In Bluebonnet Express, Inc. v. Employers Insurance of Wausau, 651 S.W.2d 345 (Tex.App.--Houston [14th Dist.] 1983, no writ), the Court, on motion for rehearing, 655 S.W.2d 327 (1983), with one judge dissenting, concluded that the holding in Razey was no longer applicable. That

case was tried to the court without a jury. More recently, in *City of Garland v. Vasquez*, 734 S.W.2d 92 (Tex.App.--Dallas 1987, writ ref'd n.r.e.), the Court concluded that where a no evidence point is first raised by assignment in a motion for new trial, the assignment is sufficient to obtain a remand for a new trial, but is not sufficient to obtain a rendition of judgment. That case was tried to a jury. See also *Commercial Insurance Company of Newark, New Jersey v. Puente*, 535 S.W.2d 948 (Tex.Civ.App.--Corpus Christi 1976, writ ref'd n.r.e.). We conclude, as did Justice Calvert, when he wrote on this issue nearly thirty years ago and said:

The controlling consideration with an appellate court in passing on a point of error directed at the state of the evidence is not whether the point uses the preferable, or even the proper, terminology, but is whether the point is based upon and related to a particular procedural step in the trial and appellate process and is a proper predicate for the relief sought.

Robert W. Calvert, "No Evidence" and "Insufficient Evidence" Points of Error, 38 Texas L.Rev. 361 at 361-62 (1960). See also Robert W. Calvert, How an Errorless Judgment Can Become Erroneous, 20 St. Mary's L.J. 229 (1989). Having raised the sufficiency issue in only a motion for new trial and having raised a point of error complaining of the trial court's action on the motion for new trial, we can only grant a new trial when we sustain that particular point of error.<sup>1</sup>

---

1. A somewhat related problem arises from any current application of the holding in *Aero Energy, Inc. v. Circle C Drilling Company*, 699 S.W.2d 821 (Tex. 1985), that a no evidence point must be raised through one of five procedural steps, the last one of the five being a motion for new trial. We assume that case was tried under the 1978 language in Rule 324 which required a motion for new trial in order to present a complaint which had not otherwise been ruled upon. See *Litton Industrial Products, Inc. v. Gammage*, 668 S.W.2d 319 (Tex.

In a motion for judgment non obstante veredicto, the Bank asserted that it was entitled to judgment because there was no evidence that it had engaged in any false, misleading or deceptive act and it had not violated the Deceptive Trade Practices Act. The controlling issue revolves around the testimony of Sylvia Prata that the Bank's attorney represented to her that following the foreclosure sale, the Bank would transfer to her clear title to the property in question. She testified he told her "the reason he was doing it this way was to guarantee us we would have clear title to whatever we were purchasing." She also said "after Coronado Bank already owned the property that was going to get free and clear title."

The Bank in fact transferred the property by a special warranty deed. There has been no breach of warranty and it was undisputed at the time of oral argument that Sylvia Prata owned fee title to the property in question. Accepting Sylvia Prata's testimony as true, we find no misrepresentation as to what she said she was told. The terms "good title" and "clear title" are synonymous, and mean that the land should be free from litigation, palatable defects and grave doubts and should consist of both legal and equitable title.

---

1984). The court restated its holding in *Steves Sash & Door Company, Inc. v. Ceco Corporation*, 751 S.W.2d 473 (Tex. 1988), in a case apparently tried several months after the April 1, 1984 amendment to Rule 324 which deleted the language about presenting a complaint which had not otherwise been ruled upon. We find nothing in Rule 324 which requires a complaint about "no evidence" in a motion for new trial as a prerequisite to a complaint on appeal. We are unable to determine if *Security Savings Association v. Clifton*, 755 S.W.2d 925 (Tex.App.--Dallas 1988, no writ) and *Tribble & Stephens Co. v. Consolidated Services, Inc.*, 744 S.W.2d 945 (Tex.App.--San Antonio 1987, writ denied), were tried before or after April 1, 1984. If Tex.R.App.P. 52(a) is the basis for such requirement, and no court has said so, does that rule conflict with Tex.R.Civ.P. 324(a)?

Veselka v. Forres, 283 S.W. 303 (Tex.Civ.App.--Austin 1926, no writ). Likewise, merchantable, marketable title means a title free and clear from reasonable doubt as to matters of law and fact and is one not clouded by any outstanding contract, covenant, interest, lien or mortgage sufficient to form a basis of litigation. Lieb v. Roman Development Company, 716 S.W.2d 653 (Tex.App.--Corpus Christi 1986, writ ref'd n.r.e.). In this connection, it should be noted that condemnation does not involve the question of title to land. Thompson v. Janes, 245 S.W.2d 718 (Tex.Civ.App.--Austin), aff'd, 251 S.W.2d 953 (Tex. 1952); 32 Tex.Jur. 3d, Eminent Domain, sec. 177).

In Lansburgh v. Market St. Ry. Co., 220 P.2d 423 (Cal.App.Div. 1950), 21 A.L.R. 2d 785, the Court considered an issue involving a proposed condemnation and an agreement to sell land in San Francisco. In that case, there was a rescission after the purchaser learned of the proposed condemnation, but prior to the proceedings actually being commenced. Suit was filed to recover a deposit paid on the contract to purchase. Recovery was denied. The Court noted that at the time for performance, no right existed because of the contemplated future condemnation. It noted the condemning authority had no more than the same inchoate right of eminent domain which they had in all other properties within their boundaries, "a right which clearly is not an encumbrance or defect of title." The Court went on to note that in California, the first step with regard to condemnation "is the issuance of summons, . . ." A similar rule applies in Texas. In Rayburn on Condemnation, sec. 13.08 (1989), the author states:

It is now settled law in Texas, that until the statutory provisions as to service and return of notice have been complied with, that there is no jurisdiction that can be exercised over the land, or real estate in question, . . . .

This is the clear holding in *City of Houston v. Kunze*, 153 Tex. 42, 262 S.W.2d 947 (1953); *Parker v. Ft. Worth & D. C. Ry. Co.*, 84 Tex. 333, 19 S.W. 518 (1892); *Rotello v. Brazos County Water Control & Improvement District*, 574 S.W.2d 208 (Tex. Civ. App.-- Houston [1st Dist.] 1978, no writ). In the latter case, Chief Justice Coleman noted that condemnation proceedings must be conducted in strict compliance with the statute authorizing the procedure. The Court concluded that where the condemnation proceedings which are pending in the county court are void for want of power or jurisdiction, such proceedings may be enjoined. See also 32 Tex. Jur.3d, Eminent Domain, sec. 216. We can only conclude that where the proceedings are void and the court has no jurisdiction, the petition for condemnation could just as well have been posted on the public square or the back of a cow barn for all the effect it would have. The Bank, having delivered to Sylvia Prata good, clear title to the land in question, was not guilty of any false, misleading or deceptive practice and did not violate the Deceptive Trade Practices Act. If the filing of a condemnation proceeding without proper notice to Sylvia Prata resulted in a loss of sale, the resulting damages arose from the conduct of the Community College and not the Bank. Points of Error Nos. Four and Five are sustained.

That part of the judgment of the trial court awarding damages against First American Title Company of El Paso is reversed and the cause remanded for a new trial and that part of the judgment

awarding damages against Coronado State Bank is reversed and rendered that plaintiff have and recover nothing from the Bank, and the suit as against the two defendants is severed.

December 27, 1989

/s/Max N. Osborn  
MAX N. OSBORN, Chief Justice

Before Panel No. 3  
Osborn, C.J., Fuller and Woodard, JJ.

(Publish)

Court of Appeals  
Eighth Judicial District

500 CITY-COUNTY BUILDING  
EL PASO, TEXAS

79901 - 2490  
915 546-2240

November 22, 1989

CHIEF JUSTICE  
MAX N. OSBORN

JUSTICES  
LARRY FULLER  
JERRY WOODARD  
WARD L. KOEHLER

324  
TRAP 5  
90(h)  
✓  
CLERK  
BARBARA B. DORF

✓  
DEPUTY CLERK  
DENISE PACHECO

✓  
STAFF ATTORNEY  
JAMES T. CARTER

Justice Nathan L. Hecht  
P. O. Box 12248  
Austin, Texas, 78711

Dear Justice Hecht:

I take this opportunity to write concerning the proposed changes in the Texas Appellate Practice Rules as set forth in the November issue of the Texas Bar Journal.

With the present Rule 324 a motion for new trial is required in only limited instances and most often is filed to assert insufficiency of the evidence. Even in a complicated case with numerous issues, that can be done in 10 days. In about 90% of the cases where a motion for new trial is filed it is overruled by operation of law and there is no hearing and no order entered by the trial judge. Yet, we allow 75 days for this to happen. That is a waste of time in the appellate procedure and one which can be reduced without adversely affecting substantial appellate rights. If the Court is interested in reducing delay I would urge that all motions for new trial be filed and amended within 20 days after the signing of the judgment and acted upon or overruled 30 days later. That would reduce the time table by 25 days from the current standards. Requiring the filing of a bond within another 10 days would mean the show would be on the road 60 days after judgment and not 90 days under the present rules. This saving of 30 days on the 8,905 appeals filed last fiscal year would have reduced the appellate time table for disposition of those cases by a time equal to 742 years. That is not a small item.

Having spent 18 years as an appellate lawyer I would not want to see changes that would adversely affect the appellate rights of any litigant. But, after 16 years as an appellate judge, I believe we are wasting lots of time on motions for new trial that will never be heard and the proposal will still allow for motions that should be heard and duly considered by a trial judge.

For the sake of argument I must agree that conformity is good, but for the sake of appellate review I cannot agree that more delay is good.

Sincerely,

*Max N. Osborn*

Max N. Osborn

TRCP  
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GRAVES, DOUGHERTY, HEARON & MOODY  
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TELEPHONE: (512) 480-5600

IRELAND GRAVES 11885-10681  
BEN F. VAUGHAN, III, P.C.  
OF COUNSEL

CHARLES A. SPAIN, JR.  
(512) 480-5609

324(a)

*Red rules Sec*

TELECOPY NUMBER:  
(512) 478-1976

November 26, 1989

TRCP 21 a  
TRCP 23 7 C  
TRCP 41, 202, 240  
✓ 57(a)(1)  
✓ 12  
✓ 74  
✓ 41(a)(1)  
✓ 54(a)  
(2)(d)

The Honorable Nathan L. Hecht, Justice  
The Supreme Court of Texas  
Post Office Box 12248  
Capitol Station  
Austin, Texas 78711

Dear Judge Hecht:

6. The following proposed amendments use the word "nonjury": Texas Rules of Appellate Procedure 41(a)(1) and 54(a). The following proposed amendments use the word "non-jury": Texas Rules of Appellate Procedure 41 comment, 52(d), 52 comment, and 54 comment. The court may wish to standardize the terminology. The term "non-jury" currently appears in Texas Rules of Civil Procedure 90, 156, 216(1), 249, 307, and 542. The term "nonjury" currently appears in Texas Rule of Civil Procedure 324(a) and Texas Rule of Judicial Administration 6(b)(2).

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,  
*Charles A. Spain, Jr.*  
Charles A. Spain, Jr.

PAUL HEATH TILL  
JUSTICE OF THE PEACE  
PRECINCT 5, POSITION 1  
6000 CHIMNEY ROCK, SUITE 102  
HOUSTON, HARRIS COUNTY, TEXAS 77081  
TELEPHONE: 713/661-2276

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November 28, 1989

The Honorable Justice Nathan L. Hecht  
Texas Supreme Court  
Rules Advisory Committee  
P. O. Box 12248  
Austin, Texas 78711

RE: PROPOSED AMENDMENTS TO TEXAS COURT RULES

Dear Justice Hecht:

In response to the proposed changes in the Texas Rules of Civil Procedure, as published in the November issue of the State Bar Journal, I respectfully request that the Rules Advisory Committee consider the following comments.

Further, I request that the Rules Advisory Committee consider changing Rule 533 by changing the following language which states in part: "Every writ or process from the justice courts shall be issued by the justice, shall be in writing and signed by him officially." to read: "Every writ or process from the justice courts shall be in writing and signed by the justice officially or issued and signed by the clerk under seal of the court."

In addition, I request that the Rules Advisory Committee consider recommending to the Supreme Court the enlargement of the membership of the Rules Advisory Committee to include a representative from the Justice of the Peace Section of the State Bar. Such representation on the Rules Advisory Committee would help to coordinate the unique rules governing the justice court with the rules of the district and county courts.

Thank you for the opportunity to make these comments.

Sincerely,



Paul Heath Till  
Justice of the Peace  
Precinct 5, Position 1  
6000 Chimney Rock, Suite 102  
Houston, Harris County, Texas 77081  
Telephone: 713/661-2276  
Past Chairman  
Justice of the Peace Section  
State Bar of Texas  
Bar No. 20020500

00716

By \_\_\_\_\_

\_\_B. No. \_\_\_\_

A BILL TO BE ENTITLED

AN ACT

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relating to a seal for justice courts.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subchapter C, Chapter 27, Government Code, is amended by adding Section 27.058 to read as follows:

Sec. 27.058. JUSTICE OF THE PEACE SEAL. (a) Each justice of the peace shall be provided with a seal that has a star with five points engraved in the center. The seal must also have "Justice Court Precinct \_\_\_\_\_, \_\_\_\_\_ County, Texas" engraved on it.

(b) The impress of the seal shall be attached to all process other than subpoenas issued out of the justice court and shall be used to authenticate the official acts of the justice clerk and the justice of the peace.

SECTION 2: This Act takes effect April 1, 1990.

SECTION 3. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

*TRCP*  
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CHARLES A. SPAIN, JR.  
(512) 480-5600

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324(a)

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IRELAND GRAVES (1885-1969)

BEN F. VAUGHAN, III, P.C.  
OF COUNSEL

TELECOPY NUMBER:  
(512) 478-1978

*Red hula Sue*

November 26, 1989

*TRCP 21a*  
*TRCP 237c*  
*TRCP 41, 202, 210*  
*✓ 57(a)(1)*  
*✓ 12*  
*✓ 74*  
*✓ 41(a)(1)*  
*✓ 54(a)*  
*(2(d))*

The Honorable Nathan L. Hecht, Justice  
The Supreme Court of Texas  
Post Office Box 12248  
Capitol Station  
Austin, Texas 78711

Dear Judge Hecht:

6. The following proposed amendments use the word "nonjury": Texas Rules of Appellate Procedure 41(a)(1) and 54(a). The following proposed amendments use the word "non-jury": Texas Rules of Appellate Procedure 41 comment, 52(d), 52 comment, and 54 comment. The court may wish to standardize the terminology. The term "non-jury" currently appears in Texas Rules of Civil Procedure 90, 156, 216(1), 249, 307, and 542. The term "nonjury" currently appears in Texas Rule of Civil Procedure 324(a) and Texas Rule of Judicial Administration 6(b)(2).

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,



Charles A. Spain, Jr.

00718

PAUL HEATH TILL  
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HOUSTON, HARRIS COUNTY, TEXAS 77081  
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November 28, 1989

The Honorable Justice Nathan L. Hecht  
Texas Supreme Court  
Rules Advisory Committee  
P. O. Box 12248  
Austin, Texas 78711

RE: PROPOSED AMENDMENTS TO TEXAS COURT RULES

Dear Justice Hecht:

In response to the proposed changes in the Texas Rules of Civil Procedure, as published in the November issue of the State Bar Journal, I respectfully request that the Rules Advisory Committee consider the following comments.

PROPOSED CHANGE TO TRCP RULE 4 - COMPUTATION OF TIME

The proposal to exclude Saturday, Sunday and holidays from any time period of five days or less would have a direct and, at times, a negative impact upon the time frame of the procedures in justice court and in the Forcible Entry and Detainer section of the Rules of Civil Procedure.

As an example, the proposed change in Rule 4 would have a definite impact upon the court procedure in complying with Rule 567 New Trials, which states in part: "The justice, within ten days after the rendition of a judgment in any suit tried before him, may grant a new trial therein on motion in writing showing that justice has not been done in the trial of the cause." While the proposed change to Rule 4 would not change the time in Rule 567, it would change the time in Rule 569 to file motion for new trial. It could put the court in the unfortunate predicament of having the time to file the motion for new trial, plus the notice to the opposing party, equal to the time the court has to rule upon the motion.

I respectfully request that the Rules Advisory Committee recommend that the proposed changes in Rule 4 not be applied to Part V. Rules of Practice in Justice Court.

PAUL HEATH TILL  
JUSTICE OF THE PEACE  
PRECINCT 5, POSITION 1  
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November 28, 1989

The Honorable Justice Nathan L. Hecht  
Texas Supreme Court  
Rules Advisory Committee  
P. O. Box 12248  
Austin, Texas 78711

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Dear Justice Hecht:

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I respectfully request that the Rules Advisory Committee recommend that the proposed changes in Rule 4 not be applied to Part V. Rules of Practice in Justice Court.

The Honorable Justice Nathan L. Hecht  
Proposed Amendments to Texas Court Rules  
November 28, 1989  
Page 2

In the Forcible Entry and Detainer section of the rules, in Rule 744 the defendant has five days to request a jury trial from the date of service. This would be changed under the proposed revision of Rule 4. Under Rule 739, court is instructed to have the defendant appear not more than 10 days nor less than six days from date of service. This would not be effected by the proposed change in Rule 4, but would place the court in the dilemma of the defendant being able to request a jury trial on the day of trial and negate purpose and effect of the revision of Rule 744, effective January 1, 1988.

I respectfully request that the Rules Advisory Committee recommend that the proposed changes in Rule 4 not be applied to Part VII. Rules Relating to Special Proceedings, Section 2. Forcible Entry and Detainer.

The following is a listing of other rules with the five-day time frame that would also be effected. Specifically they are: Rules 569, 571, and 572 in the section of the Rules of Practice in Justice Court, and Rules 739, 740, 748, 749a, and 749b in the section of the rules for Forcible Entry and Detainer. Due to the press of time, no attempt has been made to analyze the effect that Rule 4 will have on these rules in relation to the other rules within their respective sections.

MOORE, PAYNE & CLEM  
ATTORNEYS AT LAW  
FIRST NATIONAL BANK BUILDING  
SUITE 300  
PARIS, TEXAS 75460  
(214) 784-4393

TRCP 696

W.F. MOORE (1868-1956)  
HARDY MOORE  
BILL PAYNE  
A. W. CLEM\*

BOARD CERTIFIED  
"RESIDENTIAL REAL ESTATE LAW"

April 10, 1989

Chairman of the Committee  
on Administration of Justice  
State Bar of Texas  
P.O. Box 12487  
Capitol Station  
Austin, Texas 78711

Dear Sir:

It seems to me our sequestration procedure should be clarified.

The amount of the bond for sequestration is set by the court and also, in the same order, the amount of defendant's replevy bond, "...which shall be in an amount equivalent to the value of the property sequestered or to the amount of plaintiff's claim and one year's accrual of interest if allowed by law on the claim, whichever is the lesser amount, and the estimated costs of court." (Rule 696). If the plaintiff replevies his replevy bond is to be "...in a sum of money not less than the amount fixed by the court's order." (Rule 708). The plaintiff's sequestration bond may also serve as a replevy bond, if properly conditioned, "...in the amount fixed by the court's order." (Rule 698).

The bond for sequestration is not infrequently fairly nominal. What should be the amount of its penalty if combined with a replevy bond? For example, you sue in trespass to try title to a ranch worth \$1,000,000.00. The rule says the defendant's replevy bond must be in the amount of the value of the property. The plaintiff does not need a \$1,000,000.00 bond for his protection and it would not be unusual if the defendant could not afford the bond premium, probably about \$10,000.00, if he could arrange to be bonded. Will the plaintiff's replevy bond also be \$1,000,000.00? If so, he is faced with the same problems as the defendant. And if the amount of plaintiff's replevy bond is in the court's discretion, it would appear the defendant is being denied equal protection of the law. (So what does the rule refer when it says "...not less than the amount fixed by the court's order"?)

Perhaps I am missing something, and if so, I would like to know what it is. If not, I think the Rules should be changed to specify the replevy bonds are to be in the amount the court estimates will fairly protect the adverse party's interests and likewise if a combination sequestration and replevy bond is tendered by the plaintiff.

Yours very truly,

HARDY MOORE

HM:orc

00727

MOORE, PAYNE & CLEM  
ATTORNEYS AT LAW  
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PARIS, TEXAS 75460  
(214) 784-4393

TRCP 698

W. F. MOORE (1868-1956)  
HARDY MOORE  
BILL PAYNE  
A. W. CLEM\*

BOARD CERTIFIED  
RESIDENTIAL REAL ESTATE LAW

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State Bar of Texas  
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Yours very truly,

HARDY MOORE

HM:orc

00723

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TRCP 708

W.F. MOORE (1868-1956)  
HARDY MOORE  
BILL PAYNE  
A. W. CLEM\*

BOARD CERTIFIED  
RESIDENTIAL REAL ESTATE LAW

April 10, 1989

Chairman of the Committee  
on Administration of Justice  
State Bar of Texas  
P.O. Box 12487  
Capitol Station  
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Yours very truly,

HARDY MOORE

HM:orc

00724

PAUL HEATH TILL  
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November 28, 1989

The Honorable Justice Nathan L. Hecht  
Texas Supreme Court  
Rules Advisory Committee  
P. O. Box 12248  
Austin, Texas 78711

RE: PROPOSED AMENDMENTS TO TEXAS COURT RULES

Dear Justice Hecht:

In response to the proposed changes in the Texas Rules of Civil Procedure, as published in the November issue of the State Bar Journal, I respectfully request that the Rules Advisory Committee consider the following comments.

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I respectfully request that the Rules Advisory Committee recommend that the proposed changes in Rule 4 not be applied to Part VII. Rules Relating to Special Proceedings, Section 2. Forcible Entry and Detainer.

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00725

PAUL HEATH TILL  
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November 28, 1989

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Rules Advisory Committee  
P. O. Box 12248  
Austin, Texas 78711

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SUBCOMMITTEE REPORT/TRCP 737-813

The subcommittee reviewed written comments as well as testimony before the Texas Supreme Court in its hearing on November 30, 1989 concerning proposed rule amendments as published in the Texas Bar Journal in November, 1989. We recommend the following changes be considered by the full committee at its next regularly scheduled meeting.

1. Rules 748, 749, 749a, 749b, 749c

Comments support that suggested amendments to Rule 4 TRCP [to exclude Saturday, Sunday, and legal holidays from time computation of five days or less]; would serve to enlarge the times relative to forcible entry and detainer actions and appeals therefrom. Suggestions from justices of the peace and practicing attorneys support that these types of actions should be excluded from the application of the enlargement of time as proposed in Rule 4. We endorse the recommendation set forth by the subcommittee charged with reviewing and recommending revisions of TRCP 1-14, that is that Rule 4 be further amended as proposed to include this sentence following the word transfer, Saturdays, Sundays and legal holidays shall be counted for purposes of the five day periods provided under Rule 748, 749, 749a, 749b, and 749c.

HOOVER, BAX & SHEARER  
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

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REPLY TO  
P O BOX 4547  
HOUSTON, TEXAS 77210

JOE G. BAX, P.C.  
PARTNER

BOARD CERTIFIED-COMMERCIAL REAL ESTATE LAW  
BOARD CERTIFIED-RESIDENTIAL REAL ESTATE LAW  
TEXAS BOARD OF LEGAL SPECIALIZATION

748  
749c

November 28, 1989

Justice Nathan L. Hecht  
Supreme Court of Texas  
Supreme Court Building  
Austin, Texas 78711

VIA FEDERAL EXPRESS  
AIRBILL #5000353945

RE: Objections of the Houston Apartment Association to  
changes in TRCP 4.

Dear Justice Hecht,

Our firm is counsel to the Houston Apartment Association, a trade association representing over 350,000 apartment units in the Houston area. We have discussed the proposed changes to TRCP Rule with Larry Niemann, counsel for both the Texas Building Owners and Managers Association, and the Texas Apartment Association. We must concur with Larry's comments and we share the same objections expressed to you by Mr. Niemann.

Simply stated, Texas landlords are in the business of collecting rent for the shelters that they provide; they are not in the business of evicting tenants. As you know the vast majority of evictions are filed for nonpayment of rent. By the time that eviction has been filed the average tenant, who knew the date the rent was due in the first place, has received a late notice, various forms of informal request for payment, a notice to vacate, and a copy of the Plaintiff's eviction petition. If the lease required some opportunity to cure there would have been an additional written notice furnished that resident. It goes without saying that at any point along that process, the resident has the opportunity of curing the default and tendering payment to the landlord, who in most cases would gladly accept the payment.

The proposed change in the rules would simply elongate the delay in returning the apartment to production.

The joinder of a claim for the delinquent rent with the eviction petition has not been effective. Most tenants are judgment proof and therefore the landlords do not have a practical remedy to gain back the lost rent. For this reason it is extremely important that the eviction process continue to be an

00728

Justice Nathan L. Hecht  
November 28, 1989  
Page 2

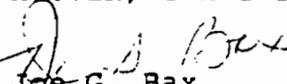
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expedited one designed to return an unproductive asset back to an income producing apartment unit.

Candidly, we have heard no objection from any of the Constables or Justices of the Peace regarding the current rules. In fact, we have heard no real request for a modification of those rules. Accordingly, we would urge the court to make an exception to the proposed Rule TRCP 4 for the five day time periods involved in TRCP 748 through 749c regarding the waiting period for writs of possession and eviction appeals.

Respectfully submitted,

HOOVER, BAX & SHEARER

  
Joe G. Bax  
Attorney for the  
Houston Apartment Association

JGB:df

cc: Mr. Paul Heiberger

00729

SUBCOMMITTEE REPORT/TRCP 737-813

The subcommittee reviewed written comments as well as testimony before the Texas Supreme Court in its hearing on November 30, 1989 concerning proposed rule amendments as published in the Texas Bar Journal in November, 1989. We recommend the following changes be considered by the full committee at its next regularly scheduled meeting.

3. Rule TRCP 792

Payments received concerning 1987 amendments to Rule 792, expressed concern that the rule is then amended does not no longer precisely coordinate with Rule 793. That is, Rule 793 prescribes the form of abstract of title and has loaned it the description of written instruments or documents. Rule 792 is amended, permits the court after notice and hearing, prior to the beginning of trial, to order that no evidence of the claim or title of a party who failed to file an abstract of title be given at the trial. The amended Rule 792 does not facially limited to written instruments. Accordingly, the following change might be made to Rule 792, to wit.

RULE 792. TIME TO FILE ABSTRACT

Such abstract of title shall be filed with the papers of the cause that within thirty days after the service of the notice, or within such further time that the court on good cause shown may grant; and in default thereof, the court may, after notice and hearing prior to the beginning of trial, order that no written instruments which are evidence of the claim or title of such opposite party be given on trial.  
Subcommittee notation: this is a textual change only.

TRCP 792  
798 ←

DE LANGE, HUDSPETH AND PITMAN

LAW OFFICES  
3100 SUMMIT TOWER  
ELEVEN GREENWAY PLAZA  
HOUSTON, TEXAS 77046

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December 12, 1989

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CHARLES E. FITCH  
PAUL J. MCCONNELL, III  
MICHAEL R. TIBBETS  
DONALD W. MILLS  
DEBORAH B. YAHNER  
BEN A. BARING, JR.  
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CYNTHIA S. WINZENRIED  
S. BRADLEY TODDS

The Supreme Court of Texas  
Supreme Court Building  
P. O. Box 12248  
Austin, Texas 78711

Gentlemen:

This letter is written pursuant to the verbal invitation of the Chief Justice in his recent speech to the Trial Section of the Houston Bar Association, concerning the proposed revision of the Texas Rules of Civil Procedure.

In Section 7 of the Rules relating to special proceedings (Trespass to Try Title), Rule 792 was amended July 15, 1987, to add a provision permitting the Court after notice and hearing, prior to the beginning of trial, to order that no evidence of the claim or title of a party who failed to file an Abstract of Title could be given on trial.

Rule 793 prescribes the form an Abstract of Title should take, and is limited to description of written instruments or documents. Rule 794, which provides for an Amended Abstract, still provides that:

"But in all cases the documentary evidence of title shall at the trial be confined to the matters contained in the Abstract of Title" (emphasis ours).

Prior to the July 15, 1987 amendment of Rule 792, the Courts had, with fair consistency, held that only written instruments supporting the claim of title were precluded from evidence by a failure to file an Abstract of Title. Evidence of possession (both prior uninterrupted possession and adverse possession) was admissible, even in absence of filing a requested Abstract of Title.

The language of the addition to Rule 792 casts doubt upon a continuation of this construction, but instead indicates that no evidence of any character can be introduced, showing a claim or title, in the absence of filing a requested Abstract of Title. We

The Supreme Court of Texas  
December 12, 1989  
Page 2

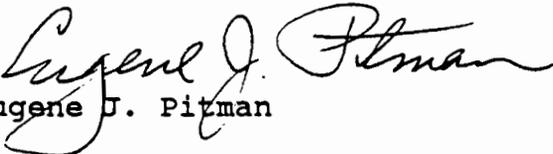
do not believe that this was the intention of that amendment and would request that another amendment to Rule 792 clarify the intention to preclude only written instruments which are evidence of the claim or title.

Also, in Rule 798, relating to common source of title, the third sentence, reading "before any such certified copies shall be read in evidence, they shall be filed with the papers of the suit three days before the trial and the adverse party served with notice of such filing as in other cases", seems outdated.

When adopted, the evidence statutes required such filing and notice of certified copies, as a prerequisite to their introduction in evidence. Those statutes have now been repealed, however, and replaced by the Texas Rules of Civil Evidence, including Rule 803(14) and Rule 902(4), neither of which require such notice and filing.

We would request that this requirement be removed from Rule 798.

Sincerely,

  
Eugene J. Pitman

EJP/bjw

00732

FULBRIGHT & JAWORSKI

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SAN ANTONIO  
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LONDON  
ZURICH  
FULBRIGHT JAWORSKI &  
REAVIS McGRATH  
NEW YORK  
LOS ANGELES

January 11, 1990

TO: SUPREME COURT ADVISORY COMMITTEE  
FROM: Subcommittee on Rules 15 to 165

At our subcommittee meeting held on January 8, 1990, we considered (i) the various comments made at the public hearing held on November 30, 1989 addressing the proposed changes in the Texas Rules of Civil Procedure, (ii) the written suggestions and comments of attorneys forwarded to our subcommittee, and (iii) additional proposals for rule changes. The persons participating in the meeting were David Beck, Pat Beard, and Elaine Carlson. The conclusions reached at the meeting were as follows:

17. Section 51.803(a) of the Government Code. This rule says that the "Supreme Court shall adopt rules and regulations to regulate the use of electronic copying devices for filing in the courts." The subcommittee is of the unanimous view that filing with courts by electronic means should *not* be adopted at the present time. The rationale is that we should wait to determine the experience of electronic filings between lawyers to determine the extent, if any, of the problems. Also, courts are not yet presently equipped to handle such filings.

CHIEF JUSTICE  
PAUL W. NYE

JUSTICES

NORMAN L. UTTER  
NOAH KENNEDY  
ROBERT J. SEERDEN  
FORTUNATO P. BENAVIDES  
J. BONNER DORSEY

**Court of Appeals**  
Thirteenth Supreme Judicial District  
TENTH FLOOR  
NUECES COUNTY COURTHOUSE  
CORPUS CHRISTI, TEXAS 78401

CLERK  
BETH A. GRAY

DEPUTY CLERK  
CATHY WILBORN

512-888-0416

January 2, 1990

MISC. TRAP

Hon. Nathan L. Hecht  
Justice, Supreme Court of Texas  
P. O. Box 12248  
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

In addition to the above rules, we would like to suggest that the higher Courts adopt a rule regarding filings made by fax machine. For your reference, we have enclosed our internal rule regarding this Court's policy on fax filings.

Also, what about bankruptcy cases? A rule requiring the Court of Appeals to abate the appeal if any party to the appeal files a petition for bankruptcy might be helpful. Our present procedure is to abate the entire appeal for administrative purposes and allow reinstatement of the whole appeal when the stay has been lifted. We find that abating the entire case has worked much better than a piecemeal abatement as to one or two parties only.

In addition, we would like to see the Court of Criminal Appeals adopt rules regarding appeals by the State. I.e., timetables, etc.

Also any procedural rules presently contained in the Code of Criminal Procedure should be written as rules in the Rules of Appellate Procedure. I.e. 44.45(d)9.

00734

Webb, Kinser & Luce

A Professional Corporation  
Attorneys and Counselors at Law

4543.001

hjh  
lws

✓ 10-4-89  
88

Brian L. Webb  
Board Certified - Family Law  
Texas Board of Legal Specialization  
Katherine A. Kinser  
Buddy Luce

4620 RENAISSANCE TOWER  
1201 ELM STREET  
DALLAS, TEXAS 75270  
TELEPHONE (214) 744-4620

October 2, 1989

Mr. Luther H. Soules  
Chairman, Supreme Court Advisory  
Committee  
10th Floor, NCNB Texas Plaza  
175 East Houston  
San Antonio, Texas 78205

HJH,  
SCAC TRAP Subc  
✓ agenda  
COAS  
Justice  
Tuf

Dear Mr. Soules:

Over the last few months, I have had several discussions with Justice Linda Thomas concerning the need for Rules of Civil Procedure which address sanctionable behavior at the Court of Appeals and Supreme Court level. Specifically, I believe there is a need for Rules which would permit motions for sanctions to be filed either at the Court of Appeals and Supreme Court level or at the trial court level while appeals are pending to address behavior such as parties and/or attorneys communicating directly with the Courts without notice to the opposing side. It is my understanding that, at this point, there are no rules which permit motions for sanctions to be filed in the appellate courts, nor does this trial court have the power to hear such a motion while an appeal is pending. Speaking from personal experience, this situation is not only frustrating, but certainly is difficult to explain to a client who believes their case is being harmed by behavior of an opposing party, which simply would not be tolerated at the trial court level.

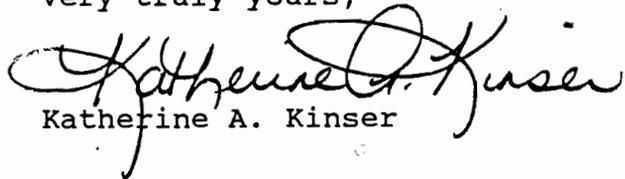
I have spoken with several attorneys who practice family law in the Dallas County area and everyone I have spoken to believes that this is a problem that needs to be addressed. I would appreciate any consideration you and your Committee may be able to give to this matter and am certainly willing to volunteer my time to work on Rule amendments directed towards this issue.

Mr. Luther H. Soules  
October 2, 1989

Page Two

Thank you very much for your cooperation.

Very truly yours,

  
Katherine A. Kinser

KAK/sa

cc: Honorable Linda Thomas  
Mr. Kenneth Fuller  
Mr. Harry Tindall

00736

FRANK G. EVANS

Chief Justice  
First Court of Appeals  
1307 San Jacinto  
Houston, Texas 77002

4/3 HJH.  
COAJ  
SCAC SubC TRAP  
SCAC Agenda.

September 8, 1989

Hon. Thomas R. Phillips  
Chief Justice  
Texas Supreme Court  
P.O. Box 12248  
Austin, TX 78711

Xo Justice Hecht  
C.J. Evans

Dear Chief Justice Phillips:

I have discussed with Justice Murry Cohen several subjects that might be considered by the panels at the meeting of the appellate section at the Judicial Conference.

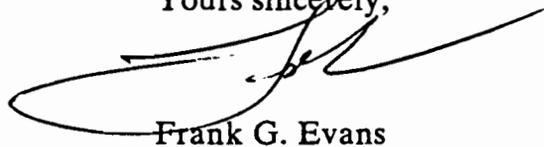
1. I feel sure that you and the members of your court are as concerned as the justices on the intermediate appellate courts about the impact of mandamus and other extraordinary proceedings. I respectfully suggest, therefore, that this subject be considered as an item for discussion by the panels at our section meeting. Mr. Roger Townsend, the current President of the Appellate Section of the State Bar, has indicated that his section would be glad to assist you and the judiciary in trying to find some solutions for this growing problem.

2. Another problem of less magnitude, but one which continues to plague us, is the publication (or non-publication) of opinions. I know that many justices feel we should be able to develop a better system for Texas, so that unpublished opinions might be of greater benefit to the bar and the judiciary.

Third, but certainly not last in importance, is the matter of compensating our permanent legal staff. Thanks to you and your leadership, the legislature provided substantial increases in the salaries of the judges and the briefing attorneys. Our permanent staff did not, however, receive similar benefits. Particularly, our research attorneys are sorely underpaid, and our entire permanent legal staff are entitled to some increase in their salaries. I would hope that this could be a high item of priority in the 1991 Legislative Session.

I would appreciate your panel's consideration of these matters, if time permits.

Yours sincerely,



Frank G. Evans

FGE:cc

00737

CHIEF JUSTICE  
PAUL W. NYE

JUSTICES  
NORMAN L. UTTER  
NOAH KENNEDY  
ROBERT J. SEERDEN  
FORTUNATO P. BENAVIDES  
J. BONNER DORSEY

**Court of Appeals**  
Thirteenth Supreme Judicial District  
TENTH FLOOR  
NUECES COUNTY COURTHOUSE  
CORPUS CHRISTI, TEXAS 78401

CLERK  
BETH A. GRAY  
DEPUTY CLERK  
CATHY WILBORN  
512-888-0416

January 2, 1990

Hon. Nathan L. Hecht  
Justice, Supreme Court of Texas  
P. O. Box 12248  
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

*TRAP*

Rule 3(b). Since appeals are now allowed by the State, the parties should be referred to as the appellant and the appellee, not appellant and the State.

00738

CHIEF JUSTICE  
PAUL W. NYE

JUSTICES  
NORMAN L. UTTER  
NOAH KENNEDY  
ROBERT J. SEERDEN  
FORTUNATO P. BENAVIDES  
J. BONNER DORSEY

**Court of Appeals**  
Thirteenth Supreme Judicial District  
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CORPUS CHRISTI, TEXAS 78401

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BETH A. GRAY  
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CATHY WILBORN  
512-888-0416

January 2, 1990

Hon. Nathan L. Hecht  
Justice, Supreme Court of Texas  
P. O. Box 12248  
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

*TRAP*

Rule 4(c). The number of copies should be uniform for the Supreme Court and the Court of Criminal Appeals, that is, an original and 11 copies or no original and 12 copies. (This should be done in parts 2 and 3 of this rule.)

00739

CHIEF JUSTICE  
PAUL W. NYE

JUSTICES  
NORMAN L. UTTER  
NOAH KENNEDY  
ROBERT J. SEERDEN  
FORTUNATO P. BENAVIDES  
J. BONNER DORSEY

**Court of Appeals**  
Thirteenth Supreme Judicial District  
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CORPUS CHRISTI, TEXAS 78401

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CATHY WILBORN  
512-888-0416

January 2, 1990

Hon. Nathan L. Hecht  
Justice, Supreme Court of Texas  
P. O. Box 12248  
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

~~TRAP~~  
Rule 5(b)(5). This rule should specifically state that a finding by the trial judge is required (as to the date on which notice was first required) after proof in the trial court on sworn motion has been made. This would benefit the clerks in checking in the transcript. An order signed by a trial judge stating the date upon which the appellate timetable begins would be most helpful.

00740

CHIEF JUSTICE  
PAUL W. NYE

JUSTICES  
NORMAN L. UTTER  
NOAH KENNEDY  
ROBERT J. SEERDEN  
FORTUNATO P. BENAVIDES  
J. BONNER DORSEY

**Court of Appeals**  
**Thirteenth Supreme Judicial District**  
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CORPUS CHRISTI, TEXAS 78401

CLERK  
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DEPUTY CLERK  
CATHY WILBORN

512-888-0416

January 2, 1990

Hon. Nathan L. Hecht  
Justice, Supreme Court of Texas  
P. O. Box 12248  
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

*TRAP*  
Rule 11. Often we receive questions about whose duty it is to prepare the exhibits for transmission to the appellant court -- the court reporter or the trial court clerk. This would be cleared up by a specific rule.

00741

CHIEF JUSTICE  
PAUL W. NYE

JUSTICES  
NORMAN L. UTTER  
NOAH KENNEDY  
ROBERT J. SEERDEN  
FORTUNATO P. BENAVIDES  
J. BONNER DORSEY

**Court of Appeals**  
Thirteenth Supreme Judicial District  
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NUECES COUNTY COURTHOUSE  
CORPUS CHRISTI, TEXAS 78401

CLERK  
BETH A. GRAY

DEPUTY CLERK  
CATHY WILBORN

512-888-0416

January 2, 1990

Hon. Nathan L. Hecht  
Justice, Supreme Court of Texas  
P. O. Box 12248  
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

**TRAP**

Rule 12. References in this rule should be to the district not Supreme Judicial District.

00742

CHIEF JUSTICE  
PAUL W. NYE

JUSTICES  
NORMAN L. UTTER  
NOAH KENNEDY  
ROBERT J. SEERDEN  
FORTUNATO P. BENAVIDES  
J. BONNER DORSEY

**Court of Appeals**  
Thirteenth Supreme Judicial District  
TENTH FLOOR  
NUECES COUNTY COURTHOUSE  
CORPUS CHRISTI, TEXAS 78401

CLERK  
BETH A. GRAY

DEPUTY CLERK  
CATHY WILBORN

512-888-0416

January 2, 1990

Hon. Nathan L. Hecht  
Justice, Supreme Court of Texas  
P. O. Box 12248  
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP  
Rule 13(i). The clerk should be able to decline to file the record, etc. AND (not or) the Court should be able to dismiss.

00743

CHIEF JUSTICE  
PAUL W. NYE

JUSTICES

NORMAN L. UTTER  
NOAH KENNEDY  
ROBERT J. SEERDEN  
FORTUNATO P. BENAVIDES  
J. BONNER DORSEY

# Court of Appeals

Thirteenth Supreme Judicial District

TENTH FLOOR  
NUECES COUNTY COURTHOUSE  
CORPUS CHRISTI, TEXAS 78401

CLERK  
BETH A. GRAY

DEPUTY CLERK  
CATHY WILBORN

512-888-0416

January 2, 1990

Hon. Nathan L. Hecht  
Justice, Supreme Court of Texas  
P. O. Box 12248  
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 16. This rule allows for a cause requiring immediate action to be taken to the nearest court of appeals. However, once a cause is taken to the nearest court, does that court have any power to issue a writ to a judge outside its district?

Is the nearest court of appeals acting as itself or as the original court of appeals?

The only appendix attached to the rules pursuant to R51(c) and 53(h) governs criminal cases only. More and more, we are receiving requests about the proper way to prepare a transcript and statement of facts in a civil case. When the Supreme Court repealed the predecessor rules to 51(c) and 53(h), it was unclear whether the orders issued pursuant to those rules were also repealed. Upon inquiry to the Supreme Court about the situation, we were told new orders would issue. As of yet, we have not been informed as to the decision by the Supreme Court.

00744

CHIEF JUSTICE  
PAUL W. NYE

JUSTICES  
NORMAN L. UTTER  
NOAH KENNEDY  
ROBERT J. SEERDEN  
FORTUNATO P. BENAVIDES  
J. BONNER DORSEY

**Court of Appeals**  
Thirteenth Supreme Judicial District  
TENTH FLOOR  
NUECES COUNTY COURTHOUSE  
CORPUS CHRISTI, TEXAS 78401

CLERK  
BETH A. GRAY  
DEPUTY CLERK  
CATHY WILBORN  
512-888-0416

January 2, 1990

Hon. Nathan L. Hecht  
Justice, Supreme Court of Texas  
P. O. Box 12248  
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

*TRAP*

- Rule 40(a)(3)(B). This rule should clarify the time for paying costs when improper notice has been given. I.e., otherwise, he shall not be entitled to prosecute the appeal without paying the costs or giving security therefor within the time limit allowed by rule 41.
- Rule 40(a)(3)(E). The last sentence should read: "If no written signed order is made on the contest . . . ."
- Rule 40(a)(3)(F). This rule should read: ". . . he shall be required to make such payment or give such security (one or both) to the extent of his ability within the time limit provided by rule 41(a)."
- Rule 40(b)(1). Was this rule meant to change 44.02 proviso? Rule 40(b)(1) not consistent with art. 26.13(a)(3). Should 40(b)(1) apply only to felonies? If 40(b)(1) applies only to felonies, is 26.13 in conflict with non-proviso 44.02?

00745

CHIEF JUSTICE  
PAUL W. NYE

JUSTICES  
NORMAN L. UTTER  
NOAH KENNEDY  
ROBERT J. SEERDEN  
FORTUNATO P. BENAVIDES  
J. BONNER DORSEY

Court of Appeals  
Thirteenth Supreme Judicial District  
TENTH FLOOR  
NUECES COUNTY COURTHOUSE  
CORPUS CHRISTI, TEXAS 78401

CLERK  
BETH A. GRAY

DEPUTY CLERK  
CATHY WILBORN

512-888-0416

January 2, 1990

Hon. Nathan L. Hecht  
Justice, Supreme Court of Texas  
P. O. Box 12248  
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

*TRAP*  
Rule 41(a)(2). This rule should read: "If a timely contest to an affidavit in lieu of bond is timely sustained . . . ." Also, the rule should provide what the consequences are, if the trial court finds and recites that the affidavit is not filed in good faith.

00746

*TRCP*  
90  
156  
216(c)  
249  
307  
542  
324(a)

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IRELAND GRAVES (1885-1988)  
BEN F. VAUGHAN, III, P.C.  
OF COUNSEL

CHARLES A. SPAIN, JR.  
(512) 480-5609

TELECOPY NUMBER:  
(512) 478-1976

November 26, 1989

*Ord rules Sec*

*TRCP 21 a*  
*TRCP 237 C*  
**TRCP 41**  
*202, 210*  
*57(a)(1)*

The Honorable Nathan L. Hecht, Justice  
The Supreme Court of Texas  
Post Office Box 12248  
Capitol Station  
Austin, Texas 78711

*✓ 12*  
*✓ 74*  
*✓ 41(a)(1)*  
*✓ 54(a)*  
*52(d)*

Dear Judge Hecht:

4. The court may wish to consider adopting the amendments to Texas Rules of Appellate Procedure 41, 202, and 210 as adopted by the court of criminal appeals on June 5, 1989. See *Order Adopting Amendments to Texas Rules of Appellate Procedure*, 52 Tex. B.J. 893 (1989).

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,

*Charles A. Spain, Jr.*  
Charles A. Spain, Jr.

00747

# Order Adopting Amendments To Texas Rules of Appellate Procedure

Effective July 1, 1989

BE IT ORDERED by the Court of Criminal Appeals that the following appended amendments to Texas Rules of Appellate Procedure are hereby adopted and promulgated to govern criminal cases and criminal law matters [Article V, §5 and Article 4.04, C.C.P.], under authority of and in conformity with Acts 1985, 69th Leg., Ch. 685, p. 5136, §§1-4, and Articles 44.33 and 44.45, Code of Criminal Procedure. Intended and designed to be interim measures to treat specific situations, these amended rules shall govern posttrial, appellate and review procedures only in criminal cases and criminal law matters. This order does not amend any existing rule, promulgate any new rule nor repeal any rule in the Texas Rules of Civil Procedure. No rule amended by this order shall be applicable to any civil case ["actions of a civil nature" (Rule 2, T.R.Civ. P.)] unless and until it has been promulgated by the Supreme Court of Texas.

BE IT FURTHER ORDERED that the Texas Rules of Appellate Procedure be and they are hereby made applicable to appeals by the State taken pursuant to Acts 1987, 70th Leg., Ch. 382, p. 1884, codified as Article 44.01, Code of Criminal Procedure.

BE IT FURTHER ORDERED that the Clerk of this Court shall file with the Secretary of State of the State of Texas, for and in behalf and as the act of this Court, a duplicate original copy of this order and Rule 54(b), and the Clerk shall cause them to be published in the Texas Register and the Texas Bar Journal, as provided by the above Act.

BE IT FURTHER ORDERED that these amended rules become effective July 1, 1989, and remain in effect unless and until disapproved, modified or changed by the Legislature or unless and until supplemented or amended by this Court pursuant to the above Act.

BE IT FURTHER ORDERED that this order and these rules shall be recorded in the minutes of this Court, and that the original of this order signed by the members of this Court and of these rules shall be preserved by the Clerk of this Court as a permanent record of this Court.

SIGNED and ENTERED in duplicate originals this 5th day of June, 1989.

/S/  
\_\_\_\_\_  
Michael J. McCormick  
Presiding Judge

/S/  
\_\_\_\_\_  
W.C. Davis, Judge

/S/  
\_\_\_\_\_  
Sam Houston Clinton, Judge

/S/  
\_\_\_\_\_  
Marvin O. Teague, Judge

/S/  
\_\_\_\_\_  
Chuck Miller, Judge

/S/  
\_\_\_\_\_  
Charles F. (Chuck) Campbell,  
Judge

/S/  
\_\_\_\_\_  
Bill White, Judge

/S/  
\_\_\_\_\_  
M. P. Duncan, III, Judge

/S/  
\_\_\_\_\_  
David Berchermann, Jr., Judge

**Rule 41. Ordinary Appeal—When Perfected.**

- (a) [Appeals in Civil Cases.] (No Change)
- (b) Appeals in Criminal Cases.

(1) *Time to Perfect Appeal.* Appeal is perfected when notice of appeal is filed within thirty (*fifteen by the state*) days after the day sentence is imposed or suspended in open court or the day an appealable order is signed by the trial judge; except, if a motion for new trial is timely filed, notice of appeal shall be filed within ninety days after the sentence is imposed or suspended in open court.

- (2) [Extension of Time.] (No Change)
- (c) [Prematurely Filed Documents.] (No Change)

**Rule 202. Discretionary Review With Petition.**

- (a) (No Change)
- (b) (No Change)
- (c) (No Change)
- (d) (No Change)
- (1) [Index.] through (6) [Prayer for Relief.] (No Change)
- (7) *Appendix.* A copy of any opinions delivered upon rendering the judgment by the court of appeals whose decision is sought to be reviewed shall be included.
- (8) [7] (Renumbered, otherwise no change)
- (9) [8] (Renumbered, otherwise no change)

**Rule 210. Direct Appeals in Death Penalty Cases.**

- (a) [Record.] (No Change)
- (b) Briefs. Appropriate provisions of Rule 74 govern preparation and filing of briefs in a case in which the death penalty has been assessed, except that a brief may exceed fifty pages and an original and ten copies of it shall be filed.

00748

CHIEF JUSTICE  
PAUL W. NYE

JUSTICES  
NORMAN L. UTTER  
NOAH KENNEDY  
ROBERT J. SEERDEN  
FORTUNATO P. BENAVIDES  
J. BONNER DORSEY

**Court of Appeals**  
**Thirteenth Supreme Judicial District**  
TENTH FLOOR  
NUECES COUNTY COURTHOUSE  
CORPUS CHRISTI, TEXAS 78401

CLERK  
BETH A. GRAY  
DEPUTY CLERK  
CATHY WILBORN  
512-888-0416

January 2, 1990

Hon. Nathan L. Hecht  
Justice, Supreme Court of Texas  
P. O. Box 12248  
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

*TRAP*  
Rule 42(a)(3). This rule should specifically state whether the time limit required in ordinary appeals to file a motion for extension of time to file a perfecting instrument or the record is required to be followed in this rule.

CHIEF JUSTICE  
PAUL W. NYE

JUSTICES  
NORMAN L. UTTER  
NOAH KENNEDY  
ROBERT J. SEERDEN  
FORTUNATO P. BENAVIDES  
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**Court of Appeals**  
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512-888-0416

January 2, 1990

Hon. Nathan L. Hecht  
Justice, Supreme Court of Texas  
P. O. Box 12248  
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

**TRAP**

Rule 43(g). Does this rule really mean that an appellate court may modify its decision after issuing a mandate, other than to correct clerical errors?

00750

CHIEF JUSTICE  
PAUL W. NYE

JUSTICES  
NORMAN L. UTTER  
NOAH KENNEDY  
ROBERT J. SEERDEN  
FORTUNATO P. BENAVIDES  
J. BONNER DORSEY

**Court of Appeals**  
**Thirteenth Supreme Judicial District**  
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January 2, 1990

Hon. Nathan L. Hecht  
Justice, Supreme Court of Texas  
P. O. Box 12248  
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

**TRAP**

Rule 44. This rule does not provide a time limit as to when a notice of appeal is due to be filed. In addition, the rule states that the deadline for filing the record runs from the date the notice of appeal is filed. The rule could be amended to conform with the time limits set forth in civil accelerated appeals. That is, the notice of appeal could be due 20 days from the date of the signed order, the record due 30 days from the date of the signed order, the appellant's brief due 20 days after the record, and the appellee's brief due 20 days after the filing of the appellant's brief. Of course, the rule should continue to provide the court with broad flexibility as does rule 42 in civil cases. Here, as in rule 42, it should be clarified if the extensions of time are governed as in ordinary appeals.

00751

CHIEF JUSTICE  
PAUL W. NYE

JUSTICES  
NORMAN L. UTTER  
NOAH KENNEDY  
ROBERT J. SEERDEN  
FORTUNATO P. BENAVIDES  
J. BONNER DORSEY

**Court of Appeals**  
Thirteenth Supreme Judicial District  
TENTH FLOOR  
NUECES COUNTY COURTHOUSE  
CORPUS CHRISTI, TEXAS 78401

CLERK  
BETH A. GRAY  
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CATHY WILBORN  
512-888-0416

January 2, 1990

Hon. Nathan L. Hecht  
Justice, Supreme Court of Texas  
P. O. Box 12248  
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

*TRAP*  
Rule 46(e). This rule should also include making arrangements for payments to the trial clerks.

00752

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M. P. SMEAD, JR.  
BOB ANDERSON  
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MICHAEL L. DUNN  
KYLE KUTCH  
PETER L. BREWER

November 30, 1989

Justice Nathan L. Hecht  
Supreme Court of Texas  
Rules Advisory Committee  
P.O. Box 12248  
Austin, Texas 78711

48

Re: Tex. R. App. P. 48

To The Committee:

In response to the Court's invitation in the November, 1989 issue of the Texas Bar Journal, the following suggestion regarding the Rules of Appellate Procedure is presented. Rule 48 of the Texas Rules of Appellate Procedure allows an Appellant to "deposit cash or a negotiable obligation of the government of the United States of America or any agency thereof" in lieu of filing a cost bond. This portion of the Rule is commendable and should be retained. However, the rule goes on to state that "with leave of Court" an Appellant may "deposit a negotiable obligation of any bank or savings and loan association chartered by the government of the United States of America or any state thereof . . . ."

My question is: Why is it necessary to obtain leave of court in this instance? The trial courts of this state have better things to do than to worry about whether party's check is going to bounce or whether their bank is solvent at the moment. Further, it is most inconvenient for an Appellant to file this motion and obtain an order granting same when something which is as good as cash, such as a cashiers check, is presented.

I submit that there are better ways to protect the trial court's interest in being reimbursed for its costs. For example, if the negotiable obligation tendered for some reason fails, the Appellant could be given 10 days in which to tender a new obligation or face dismissal of his appeal with prejudice. Such a provision could be applied for

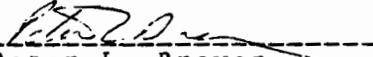
00753

Justice Nathan L. Hecht  
Page Two  
November 30, 1989

any obligation, and such would greatly shorten Rule 48. For that matter, Rule 48 could be conveniently made a part of Rule 46(a) regarding the cost bond thereby furthering the Court's mission of simplifying the Rules.

Sincerely,

SMEAD, ANDERSON, WILCOX AND DUNN

BY:   
Peter L. Brewer  
Former Briefing Attorney,  
Texas Supreme Court  
1987-88 term

dl

00754



4543.001

hjh  
LWS

✓ 9-22-89  
90

TRAP 49

CARL A. PARKER  
President Pro Tempore  
DISTRICT 4

The Senate of  
The State of Texas

Committees:

- EDUCATION, Chairman
- Administration
- Finance
- Jurisprudence

CAPITOL OFFICE:  
Post Office Box 12068  
Austin, Texas 78711  
512/463-0104

DISTRICT OFFICE:  
One Plaza Square  
Port Arthur, Texas 77642  
409/985-2591

September 18, 1989

Mr. Luther H. Soules III  
Soules and Wallace  
10th Floor  
Republic of Texas Plaza  
175 East Houston Street  
San Antonio, Texas 78205-2230

Dear Luke:

I appreciated you giving me the opportunity to comment on your proposed rules to implement the provisions of SB 134. While I believe that your draft accurately captures the intent of the law with regard to the subject of the change made in the burden required of a defendant to obtain a reduced bond requirement, I offer the following additional comments.

The draft you sent me fails to incorporate the change made in Sec. 52.004 of the bill, which reinstates statutorily the old, pre-amendment Rule 49(b), "Excessiveness". As you may be aware, this provision was dropped by the Supreme Court Advisory Committee when the rules were rewritten in the spring and summer of 1987, and took effect January 1, 1988. The new rules allowed for a review for "Sufficiency" (Rule 49(a)), but dropped excessiveness.

The Joint Committee heard testimony from Professor Elaine Carlson, who chaired the subcommittee of the Advisory Committee which proposed the rules, that discretion still existed for excessiveness review. The Joint Committee in this instance, however, believed that because a positive action had been taken (the deletion of an existing rule), that the rule would need to be readopted or statutorily imposed to be effective. Thus the passage of Sec. 52.004 of SB 134.

Mr. Luther H. Soules III  
Page 2  
September 18, 1989

I would suggest that appropriate language for a rule to implement this change read as follows:

Rule 49(d). In a manner similar to appellate review under this rule of the sufficiency of the amount set by a trial court, an appellate court may review for excessiveness the amount of security set by a trial court under Tex. Civ. Prac. & Rem. Code Section 52.002, or under these rules if security is not set under Section 52.002. If the appellate court finds that the amount of security is excessive, the appellate court may reduce the amount.

I hope you will consider an additional area where there seemed to be some confusion as to the ability of a trial court to accept some type (form) of security other than a bond or cash deposit to suspend enforcement of a civil money judgment pending appeal. The Joing Special Committee was informed by Professor Carlson that the language of Rule 47(b), as written by the Advisory Committee and adopted by the Court, allowed such discretion. The Joint Committee, relying on and referencing Professor Carlson's analysis, recommended clarifying the trial court's additional flexibility in setting the type of security but hoped this could be clarified by the Court in any changes to the rules. I do suggest, therefore, that the Advisory Committee make 47(b) more clear (as it is for other types of judgments) to more clearly reflect that amount and type of bond or deposit are discretionary with the court, within the guidelines set otherwise by rule or statute.

I am appreciative of the work being done by you and the committee on these rules and your responsiveness to the concerns of and actions by the legislature. Should you undertake to write a rule dealing with the lien portions of the bill, I'll be glad to share with you my comments on that section also.

Thanks for your interest.

Sincerely,

  
Carl A. Parker

CAP/pl

cc: Justice Nathan L. Hecht  
Senator Kent Caperton  
Senator Bob Glasgow  
Senator Cyndi Krier  
Senator Carl Parker  
Representative Patricia Hill  
Representative Senfronia Thompson

00756

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MARC J. SCHNALL \*  
LUTHER H. SOULES III \*\*  
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WRITER'S DIRECT DIAL NUMBER:

December 26, 1989

Professor William V. Dorsaneo III  
Southern Methodist University  
Dallas, Texas 75275

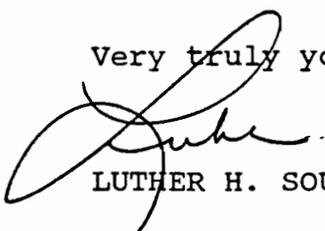
Re: Proposed Changes to Texas Rules of Civil Procedure

Dear Bill:

Enclosed herewith please find a copies of letters sent to me by Katherine A. Kinser, Justice Murray D. Cohen, Chief Justice Frank G. Evans, and Senator Carl A. Parker regarding proposed changes to the above captioned rules. Please be prepared to report on this matter at our next SCAC meeting. I will include the matter on our next agenda.

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

Very truly yours,

  
LUTHER H. SOULES III

LHSIII/hjh  
Enclosure

cc: Justice Nathan L. Hecht  
Honorable David Peeples  
Honorable Murray D. Cohen  
Honorable Frank G. Evans  
Senator Carl A. Parker  
Ms. Katherine A. Kinser

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

TEXAS BOARD OF LEGAL SPECIALIZATION  
† BOARD CERTIFIED CIVIL TRIAL LAW  
‡ BOARD CERTIFIED CIVIL APPELLATE LAW  
\* BOARD CERTIFIED COMMERCIAL AND  
RESIDENTIAL REAL ESTATE LAW

00757

CHIEF JUSTICE  
PAUL W. NYE

JUSTICES  
NORMAN L. UTTER  
NOAH KENNEDY  
ROBERT J. SEERDEN  
FORTUNATO P. BENAVIDES  
J. BONNER DORSEY

**Court of Appeals**  
Thirteenth Supreme Judicial District  
TENTH FLOOR  
NUECES COUNTY COURTHOUSE  
CORPUS CHRISTI, TEXAS 78401

CLERK  
BETH A. GRAY

DEPUTY CLERK  
CATHY WILBORN

512-888-0416

January 2, 1990

Hon. Nathan L. Hecht  
Justice, Supreme Court of Texas  
P. O. Box 12248  
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

*TRAP*

Rule 51(c). In criminal cases, the clerk is required to retain a duplicate of the transcript for use by the parties with permission of the court. The rule should specify which court. I.e. trial court or appellate court.

00758

*Xc Frank Baker*

September 27, 1989

Page - 2

My second recommendation is that rules of appellate procedure 53(k) and 54 (c) be changed to provide that it is the court reporter's duty, not the appellant's duty, to file the statement of facts in the Court of Appeals and to obtain extensions of time for late filing. The present rules place this duty upon the appellant, which causes considerable inconvenience to lawyers in dealing with the many court reporters and substitute court reporters who are often involved in different parts of the case. Our rules should recognize that the court reporter is an officer of the court, and usually a full-time employee, who is well paid to perform this sole function. It is unreasonable to impose on a lawyer, who in most criminal cases will be working for a court-appointed fee, the duty of going to the court reporter's home or office, picking up the record, and transporting it downtown to the Court of Appeals.

Likewise, I can imagine no good reason for requiring the lawyer to obtain an extension of time for filing the statement of facts. The lawyer has no control over the statement of facts and makes no money from producing it. This burdensome responsibility should be placed upon the court reporter because the court reporter has sole control of the statement of facts and is the only one who makes money from producing it.

I recommend that appellate rule 53(k) read as follows:

(k) **Duty of Appellant Court Reporter to File** It is the appellant's court reporter's duty to cause the statement of facts to be filed with the Clerk of the Court of Appeals.

Similarly, rule 54(c) should be changed to read as follows:

(c) **Extension of Time** An extension of time may be granted for late filing in a court of appeals of a transcript or statement of facts, if a motion reasonably explaining the need therefor is filed, by appellant in the case of the late transcript and by the court reporter in the case of a late statement of facts, with the court of appeals not later than 15 days after the last date for filing the record. Such motion shall also reasonably explain any delay in the request required Rule 53(a).

*Any consequences to the appellant if the court reporter fails to file or extend?*

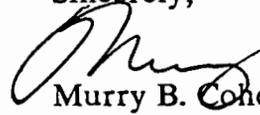
00759

September 27, 1989

Page - 3

Please let me know if there is any other information I can furnish concerning these suggestions. I would be happy to discuss these suggestions with you or your committee or any other interested committees at any time.

Sincerely,

  
Murry B. Cohen

FRANK G. EVANS  
CHIEF JUSTICE

JAMES F. WARREN  
SAM BASS  
LEE DUGGAN, JR.  
MURRY B. COHEN  
D. CAMILLE DUNN  
MARGARET G. MIRABAL  
JON N. HUGHES  
MICHOLO'CONNOR  
JUSTICES

4543.001  
**Court of Appeals**  
First Supreme Judicial District  
1307 San Jacinto, 10th Floor  
Houston, Texas 77002



KATHRYN COX  
CLERK

LYNNE LIBERATO  
CHIEF STAFF ATTORNEY

PHONE 713-655-2700

njh  
LAD  
19-29  
JB

September 27, 1989

Luther Soules, Attorney at Law  
175 E. Houston  
10th Floor  
San Antonio, Texas

Re: Amendments to Texas Rules of Appellate Procedure

Dear Luke:

I have two proposals for changing our rules of appellate procedure. These changes have been discussed at a meeting of the Houston Bar Association Committee on the Appellate Judiciary and among various appellate judges, and I believe both proposals have considerable support.

First, I suggest that Rule 80(c) be amended to authorize the Court of Appeals to abate an appeal and remand the case to the District Court to conduct a hearing on any issue the Court of Appeals deems necessary in order to decide the appeal appropriately. This authority exists and is often used in the federal system and in many other states. It is arguable that such a procedure is already permissible under the existing rule that allows the court to make "any other appropriate order, as the law and the nature of the case may require." Nevertheless, there has been significant discussion in several recent cases of the need for such a rule. See Read v. State, 768 S.W.2d 919 (Tex. App.-Beaumont 1989), where Justice Brookshire advocated such a rule, and Mitchell v. State, 762 S.W.2d 916 (Tex. App.--San Antonio 1988, pet. ref'd), where the court used such a procedure, over the dissent of Justice Butts. Similar approaches have been used in Murphy v. State, 663 S.W.2d 604 (Tex. App.--Houston [1st Dist.] 1983, no writ), and Guillory, 638 S.W.2d 73 (Tex. App.--Houston [1st Dist.] 1982, no writ), both decided before the rules were enacted.

I propose that rule 80(c) provide:

In addition, the court of appeals may make any other appropriate order as the law and the nature of the case may require, including abating the appeal and remanding the cause to the trial court for a hearing on any issue.

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SCAC agenda.  
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CHIEF JUSTICE  
PAUL W. NYE

JUSTICES  
NORMAN L. UTTER  
NOAH KENNEDY  
ROBERT J. SEERDEN  
FORTUNATO P. BENAVIDES  
J. BONNER DORSEY

**Court of Appeals**  
Thirteenth Supreme Judicial District  
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CORPUS CHRISTI, TEXAS 78401

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512-888-0416

January 2, 1990

Hon. Nathan L. Hecht  
Justice, Supreme Court of Texas  
P. O. Box 12248  
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

**TRAP**  
Rule 54(c). This rule should also include a requirement to reasonably explain any delay in the request required by rule 51(b).

00762

The Court discusses a line of cases decided by the U.S. Supreme Court that deal with the validity of factual warrantless administrative inspection cases. The Court finds that the Supreme Court has held that except in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant, *Camera v. Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967).

The Court notes that the Supreme Court held that the same rule applies where commercial property is involved. See *v. City of Seattle*, 387 U.S. 541 (1967).

The Court finds that the liquor industry has long been one of the most heavily regulated industries and that Congress has granted federal agents power to make warrantless searches and seizures of parties under the liquor laws. The Court notes that in *Colonnade Catering Corp. v. United States*, the Supreme Court held that "[w]here Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply."

The Court holds that in the context of a regulatory inspection system of business premises that is carefully limited in time, place and scope, the legality of the search depends not on consent, but on the authority of a valid statute. The Court concludes that "where, as here, regulatory inspections further [an] urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute."

The Court finds that by accepting a liquor license or permit, an individual agrees not to engage in or permit conduct on the premises that is lewd or immoral, or that constitutes an offense of public decency, including, but not limited to, possession of a narcotic or any equipment used or designed for the administering of a narcotic or permitting a person on the premises to use a narcotic.

The Court holds that the overwhelming and undisputed evidence reveals that the agents went to the defendant's club to determine whether intoxicated persons were actually being allowed to remain on the premises and to make a general regulatory liquor license inspection. The Court finds that there is no credible evidence that would cause one to conclude that the only and main purpose of the agents' visit to the club was to search for controlled substances.

The Court notes that the agent's discovery of the drugs was inadvertent and that the drugs were in plain view, thus an arrest, search or seizure based on testimony concerning an informant who allegedly reported narcotics violations in the defendant's club is not applicable when agents or peace officers are acting pursuant to §101.04 and are on licensed premises solely to make an inspection to determine compliance with the statute.

The Court finds that although the agents might have had a hunch that narcotics could be found somewhere on the premises, when they entered

the club, it was only to make a general, but thorough, inspection for violations of the Alcoholic Beverage Code.

"In this instance, the inspection that was conducted was done by individuals who are commissioned to make just the kind of inspection that was made in this cause. Therefore, the administrative inspection, that resulted in the finding of the cocaine, which inspection was made pursuant to T.A.B.C. §101.04 in this cause, did not violate [the defendant's] rights under the Fourth and Fourteenth Amendments to the United States Constitution, nor did it violate his rights under Art. I, §9 of the Texas Constitution."

**OPINION:** Teague, J.; Duncan, J. concurring; White, J. not participating.

**CONCURRENCE:** Berchelmann, J.; McCormick, P.J. and Campbell, J. joining. The concurrence finds that the U.S. Supreme Court enunciated three criteria for measuring the constitutional validity of statutes which provide for warrantless searches of closely regulated businesses in *New York v. Burger*, 107 S.Ct. 2636 (1987): (1) there must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made; (2) the warrantless inspections must be necessary to further the regulatory scheme; and (3) the inspection program, in terms of certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant.

The concurrence would hold that §101.04 clearly meets the first two criteria set forth in *Burger* and would hold that the operative sections of the Alcoholic Beverage Code meet the third criteria by providing an adequate substitute for a warrant.

**DISSENT:** Clinton, J.; Miller, J. joining. The dissent states that the majority failed to demonstrate that §101.04 meets the criteria enunciated in *Burger*.

**ATTORNEYS:** Ken J. McLean, Houston, for the defendant; Criminal District Attorney George J. Filley III and Assistant DA Lorretta Owen, Victoria County, for the State.

**TRIAL COURT:** Clarence N. Stevenson; 24th District, Victoria County.

Appeal  
Statement of Facts  
copy to Appeals  
Amendment  
Supplement

WJW - see agenda & Suba (AP 54)  
D. Heck & others

## Texas Appeals Courts Civil Cases

Rule 2

### Appellate Procedure

#### MOTION FOR REHEARING/ TRANSCRIPT REQUESTS/ MOTION FOR LEAVE TO SUPPLEMENT RECORD

- Where there is an untimely request for a statement of facts, a motion for extension of time with a reasonable explanation for delay is necessary.
- Where a timely motion for new trial has been filed, a party must perfect his appeal within 90 days after the final judgment or order is signed.
- A timely request for a statement of facts can be

made up to the final day appeal could have been perfected, even though the appeal has actually been perfected at some date prior to the deadline.

- An untimely request for a statement of facts can be made without a motion and reasonable explanation if the statement of facts will be filed before the 60-day deadline under T.R.App.P. 54(a), but if the statement of facts cannot be filed by that time, then a motion for an extension must be filed within 15 days after the last date for filing the record in accordance with Rule 54(c).

*Rodriguez v. American General Fire & Casualty Co.*, No. 08-89-00153-CV (El Paso), 11/27/89, 4 pp.

**FACTS:** The final order of judgment dismissing this case was signed on Feb. 24, 1989. A motion for rehearing was heard and denied March 17. An appellate bond for costs was subsequently filed with the district clerk on March 23. The insured requested a transcript of the hearing March 31, but did not request a statement of facts of the March 17 hearing until May 17.

The insured filed his brief on May 24, and thereafter, on June 19, the insurance company filed its brief. On July 11, the insured filed his motion for leave to supplement the record. Attached to that motion was an affidavit from the court's reporter, not giving any explanation for the late preparation or filing, but asserting rather that there was no evidentiary hearing on March 17 and implying that there had been no evidentiary hearing at any other time.

The insurance company filed a response, requesting that the insured's motion be denied and that the statement of facts not be filed. The insured's motion for leave to supplement the record was granted and the insurance company moved for rehearing.

**HOLDING:** Prior order granting the insured leave to supplement the record is set aside and motion for leave to supplement denied.

"Where a timely motion for new trial has been filed, [a party] must perfect his appeal within ninety days after the final judgment or order is signed." The Court holds that in this case, the insured had until May 25 to file his bond and thereby perfect his appeal. The Court notes that the insured filed his bond March 23, therefore it was timely filed.

The Court holds that if the insured's motion for leave to supplement the record, supported by his oral argument, is to be taken at face value as an effort to amend or supplement the record on appeal under T.R.App.P. 55(b), then it must fail because that rule applies only where a statement of facts had previously been timely filed with the court of appeals.

"Where no statement of facts had been filed, as in the instant case, the rules for amendment and supplementation of the record are inapplicable."

The Court finds that if the insured's motion could be construed as a motion to extend the time for filing a statement of facts under T.R.App.P. 54(c), it still must fail. "For one thing, no explanation, reasonable or otherwise, was offered in the motion or accompanying affidavit for the late filing request.

For another, the motion was filed beyond the fifteen day time period after the last date for filing the record, as allowed by 54(c)."

The Court holds that the last day for filing would have been 125 days from Feb. 24, or June 24. The Court finds that the last day for filing the motion for extension of time would have been July 10, because the 15th day was a Sunday. The Court notes that the insured filed his motion July 11.

"Under the holding in *Monk v. Dallas Brake and Clutch Service Company, Inc.*, 683 S.W.2d 107 (Tex. App. — Dallas 1984, no writ), a motion for extension of time with a reasonable explanation for delay is necessary where there is an untimely request for a statement of facts under Rule 53(a), which will not be filed within the time prescribed by Rule 54(a)."

The Court notes the 14th Court of Appeals has taken a narrower view of Rule 53(a) and that in *Caldwell & Hurst v. Myers*, 705 S.W.2d 703 (Tex. App. — Houston [14th Dist] 1985, no writ), it held that the request to the court reporter must be made on or before the date prescribed for perfecting the appeal and the time to make such a request cannot be extended beyond that deadline under [Rule] 54(c) even though the statement of facts could be prepared and filed within the time required by Rules 54(a) and (c).

The Court states that language of Rule 53(a) seems to support the *Myers* ruling, although a proposed change in the rule would support the *Monk* interpretation by making it unnecessary to make a timely request for a statement of facts where the statement of facts or supplement will be filed within the time prescribed by Rule 54(a).

The Court holds that a timely request for a statement of facts can be made up to the final day appeal could have perfected, even though the appeal has actually been perfected at some date prior to the deadline.

The Court concludes that an untimely request for a statement of facts can be made without a motion and reasonable explanation if the statement of facts will be filed before the Rule 54(a) deadline, but if the statement of facts cannot be filed by that time, then a motion for an extension must be filed in accordance with Rule 54(c).

**OPINION:** Koehler, J.; panel consisting of Fuller, Woodard and Koehler, JJ.

**ATTORNEYS:** James F. Scherr and Lark H. Fogel, El Paso, for the insured; Karl O. Wyler III with Kemp, Smith, Duncan, & Hammond, El Paso, Brenda J. Norton with Diamond, Rash, Leslie, Smith & Samaniego, El Paso, and Paul Bracken, El Paso, for the insurance company.

**TRIAL COURT:** William E. Moody; 34th District, El Paso County.

## Discovery

**INTERROGATORIES/ AFFIDAVITS/ MOTIONS TO EXTEND TIME/ REQUESTS FOR AD-MISSIONS/ SUMMARY JUDGMENT/**

00764

CHIEF JUSTICE  
PAUL W. NYE

JUSTICES

NORMAN L. UTTER  
NOAH KENNEDY  
ROBERT J. SEERDEN  
FORTUNATO P. BENAVIDES  
J. BONNER DORSEY

**Court of Appeals**  
Thirteenth Supreme Judicial District

TENTH FLOOR  
NUECES COUNTY COURTHOUSE  
CORPUS CHRISTI, TEXAS 78401

CLERK  
BETH A. GRAY

DEPUTY CLERK  
CATHY WILBORN

512-888-0416

January 2, 1990

Hon. Nathan L. Hecht  
Justice, Supreme Court of Texas  
P. O. Box 12248  
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 57(b). This rule should allow the clerk to add additional counsel on request; however, the clerk should be allowed to designate one attorney for each party for the purpose of receiving notice and for the filing of papers, if the attorneys fail to timely designate lead counsel.

00765

CHIEF JUSTICE  
PAUL W. NYE

JUSTICES  
NORMAN L. UTTER  
NOAH KENNEDY  
ROBERT J. SEERDEN  
FORTUNATO P. BENAVIDES  
J. BONNER DORSEY

**Court of Appeals**  
Thirteenth Supreme Judicial District  
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NUECES COUNTY COURTHOUSE  
CORPUS CHRISTI, TEXAS 78401

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512-888-0416

January 2, 1990

Hon. Nathan L. Hecht  
Justice, Supreme Court of Texas  
P. O. Box 12248  
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

**TRAP**  
Rule 59(b). Provides that the clerk of the appellate court forward a duplicate copy of the motion to dismiss the appeal to the clerk of the trial court. This is not necessary since the filing of the motion does not represent any action by the court. The ruling by the appellate court is what is determinative.

00766

CHIEF JUSTICE  
PAUL W. NYE

JUSTICES  
NORMAN L. UTTER  
NOAH KENNEDY  
ROBERT J. SEERDEN  
FORTUNATO P. BENAVIDES  
J. BONNER DORSEY

# Court of Appeals

Thirteenth Supreme Judicial District

TENTH FLOOR  
NUECES COUNTY COURTHOUSE  
CORPUS CHRISTI, TEXAS 78401

CLERK  
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CATHY WILBORN

512-888-0416

January 2, 1990

Hon. Nathan L. Hecht  
Justice, Supreme Court of Texas  
P. O. Box 12248  
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

~~TRAP~~

Rule 61. This rule should provide for the disposition of all papers in all cases, with reference to the appropriate statutes governing disposition of exhibits, etc.

00767

CHIEF JUSTICE  
PAUL W. NYE

JUSTICES  
NORMAN L. UTTER  
NOAH KENNEDY  
ROBERT J. SEERDEN  
FORTUNATO P. BENAVIDES  
J. BONNER DORSEY

**Court of Appeals**  
Thirteenth Supreme Judicial District  
TENTH FLOOR  
NUECES COUNTY COURTHOUSE  
CORPUS CHRISTI, TEXAS 78401

CLERK  
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DEPUTY CLERK  
CATHY WILBORN  
512-888-0416

January 2, 1990

Hon. Nathan L. Hecht  
Justice, Supreme Court of Texas  
P. O. Box 12248  
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

**TRAP**

Rule 72(i). When an extension of time is requested for the filing of the transcript, the facts relied upon to reasonably explain the need for an extension must be supported by the affidavit of the trial clerk. This requirement should be added to this rule.

00768

CHIEF JUSTICE  
PAUL W. NYE

JUSTICES  
NORMAN L. UTTER  
NOAH KENNEDY  
ROBERT J. SEERDEN  
FORTUNATO P. BENAVIDES  
J. BONNER DORSEY

**Court of Appeals**  
Thirteenth Supreme Judicial District  
TENTH FLOOR  
NUECES COUNTY COURTHOUSE  
CORPUS CHRISTI, TEXAS 78401

CLERK  
BETH A. GRAY

DEPUTY CLERK  
CATHY WILBORN

512-888-0416

January 2, 1990

Hon. Nathan L. Hecht  
Justice, Supreme Court of Texas  
P. O. Box 12248  
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

**TRAP**

Rule 74. Should refer to judicial district not Supreme Judicial District.

Rule 74(h). This rule should apply to the length of briefs in both civil and criminal cases.

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CHIEF JUSTICE  
PAUL W. NYE

JUSTICES

NORMAN L. UTTER  
NOAH KENNEDY  
ROBERT J. SEERDEN  
FORTUNATO P. BENAVIDES  
J. BONNER DORSEY

Court of Appeals  
Thirteenth Supreme Judicial District  
TENTH FLOOR  
NUECES COUNTY COURTHOUSE  
CORPUS CHRISTI, TEXAS 78401

CLERK  
BETH A. GRAY

DEPUTY CLERK  
CATHY WILBORN

512-888-0416

January 2, 1990

Hon. Nathan L. Hecht  
Justice, Supreme Court of Texas  
P. O. Box 12248  
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 75(f). A party to the appeal desiring oral argument shall make request therefor at the time he files his brief in the case by noting on the front right-hand corner of his brief that he is requesting oral argument. This addition states the specific place to request the oral argument, as opposed to letters, cards, notes, etc. that are kept in files away from the briefs. Also the court should be able to advance both civil and criminal cases for submission without oral argument where oral argument would not materially aid the court. Also the time limit for notice to the parties should be changed from 21 days to 2 weeks so that the notice provisions concerning argument and no argument cases is the same. See Rule 77.

00770

FRANK G. EVANS  
CHIEF JUSTICE

JAMES F. WARREN  
SAM BASS  
LEE DUGGAN, JR.  
MURRY B. COHEN  
D. CAMILLE DUNN  
MARGARET G. MIRABAL  
JON N. HUGHES  
MICHOLO O'CONNOR  
JUSTICES

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**Court of Appeals**  
First Supreme Judicial District  
1307 San Jacinto, 10th Floor  
Houston, Texas 77002



KATHRYN COX  
CLERK

LYNNE LIBERATO  
CHIEF STAFF ATTORNEY

PHONE 713-655-2700

September 27, 1989

Luther Soules, Attorney at Law  
175 E. Houston  
10th Floor  
San Antonio, Texas

Re: Amendments to Texas Rules of Appellate Procedure

Dear Luke:

I have two proposals for changing our rules of appellate procedure. These changes have been discussed at a meeting of the Houston Bar Association Committee on the Appellate Judiciary and among various appellate judges, and I believe both proposals have considerable support.

First, I suggest that Rule 80(c) be amended to authorize the Court of Appeals to abate an appeal and remand the case to the District Court to conduct a hearing on any issue the Court of Appeals deems necessary in order to decide the appeal appropriately. This authority exists and is often used in the federal system and in many other states. It is arguable that such a procedure is already permissible under the existing rule that allows the court to make "any other appropriate order, as the law and the nature of the case may require." Nevertheless, there has been significant discussion in several recent cases of the need for such a rule. See Read v. State, 768 S.W.2d 919 (Tex. App.-Beaumont 1989), where Justice Brookshire advocated such a rule, and Mitchell v. State, 762 S.W.2d 916 (Tex. App.--San Antonio 1988, pet. ref'd), where the court used such a procedure, over the dissent of Justice Butts. Similar approaches have been used in Murphy v. State, 663 S.W.2d 604 (Tex. App.--Houston [1st Dist.] 1983, no writ), and Guillory, 638 S.W.2d 73 (Tex. App.--Houston [1st Dist.] 1982, no writ), both decided before the rules were enacted.

I propose that rule 80(c) provide:

In addition, the court of appeals may make any other appropriate order as the law and the nature of the case may require, including abating the appeal and remanding the cause to the trial court for a hearing on any issue.

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*Xo Frank Baker*

September 27, 1989

Page - 2

My second recommendation is that rules of appellate procedure 53(k) and 54 (c) be changed to provide that it is the court reporter's duty, not the appellant's duty, to file the statement of facts in the Court of Appeals and to obtain extensions of time for late filing. The present rules place this duty upon the appellant, which causes considerable inconvenience to lawyers in dealing with the many court reporters and substitute court reporters who are often involved in different parts of the case. Our rules should recognize that the court reporter is an officer of the court, and usually a full-time employee, who is well paid to perform this sole function. It is unreasonable to impose on a lawyer, who in most criminal cases will be working for a court-appointed fee, the duty of going to the court reporter's home or office, picking up the record, and transporting it downtown to the Court of Appeals.

Likewise, I can imagine no good reason for requiring the lawyer to obtain an extension of time for filing the statement of facts. The lawyer has no control over the statement of facts and makes no money from producing it. This burdensome responsibility should be placed upon the court reporter because the court reporter has sole control of the statement of facts and is the only one who makes money from producing it.

I recommend that appellate rule 53(k) read as follows:

**(k) Duty of Appellant Court Reporter to File** It is the appellant's court reporter's duty to cause the statement of facts to be filed with the Clerk of the Court of Appeals.

Similarly, rule 54(c) should be changed to read as follows:

**(c) Extension of Time** An extension of time may be granted for late filing in a court of appeals of a transcript or statement of facts, if a motion reasonably explaining the need therefor is filed, by appellant in the case of the late transcript and by the court reporter in the case of a late statement of facts, with the court of appeals not later than 15 days after the last date for filing the record. Such motion shall also reasonably explain any delay in the request required Rule 53(a).

*Any consequences to the appellant if the court reporter fails to file or extend?*

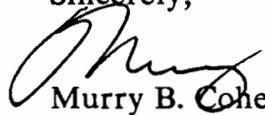
00772

September 27, 1989

Page - 3

Please let me know if there is any other information I can furnish concerning these suggestions. I would be happy to discuss these suggestions with you or your committee or any other interested committees at any time.

Sincerely,



Murry B. Cohen

00773

CHIEF JUSTICE  
PAUL W. NYE

JUSTICES  
NORMAN L. UTTER  
NOAH KENNEDY  
ROBERT J. SEERDEN  
FORTUNATO P. BENAVIDES  
J. BONNER DORSEY

# Court of Appeals

Thirteenth Supreme Judicial District

TENTH FLOOR  
NUECES COUNTY COURTHOUSE  
CORPUS CHRISTI, TEXAS 78401

CLERK  
BETH A. GRAY

DEPUTY CLERK  
CATHY WILBORN

512-888-0416

January 2, 1990

Hon. Nathan L. Hecht  
Justice, Supreme Court of Texas  
P. O. Box 12248  
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

*TRAP*

Rule 86(a)(4). The time limit for issuing a mandate should be increased to allow for the filing deadline of a motion for rehearing in the higher courts to elapse. In most instances within 15 days after receipt by the clerk of the order of the Supreme Court denying writ, we have not yet received the record back from the higher court. Therefore, we should be allowed to wait for the return of the record until we issue our mandate.

Rule 86(e). Once a mandate issues, a court of appeals should not be able to vacate, modify, correct or reform its judgment unless it is to correct a clerical error.

00774

CHIEF JUSTICE  
PAUL W. NYE

JUSTICES  
NORMAN L. UTTER  
NOAH KENNEDY  
ROBERT J. SEERDEN  
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J. BONNER DORSEY

**Court of Appeals**  
**Thirteenth Supreme Judicial District**  
TENTH FLOOR  
NUECES COUNTY COURTHOUSE  
CORPUS CHRISTI, TEXAS 78401

CLERK  
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CATHY WILBORN  
512-888-0416

January 2, 1990

Hon. Nathan L. Hecht  
Justice, Supreme Court of Texas  
P. O. Box 12248  
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 87(b)(1). It is not necessary for the trial clerk to acknowledge receipt of the mandate to this Court. Also it is not necessary for the sheriff to notify us when the mandate has been carried out and executed. We would suggest that this language be deleted.

00775

CHIEF JUSTICE  
PAUL W. NYE

JUSTICES

NORMAN L. UTTER  
NOAH KENNEDY  
ROBERT J. SEERDEN  
FORTUNATO P. BENAVIDES  
J. BONNER DORSEY

# Court of Appeals

Thirteenth Supreme Judicial District

TENTH FLOOR

NUECES COUNTY COURTHOUSE  
CORPUS CHRISTI, TEXAS 78401

CLERK  
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CATHY WILBORN

512-888-0416

January 2, 1990

Hon. Nathan L. Hecht  
Justice, Supreme Court of Texas  
P. O. Box 12248  
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

TRAP

Rule 88. This rule should allow the appellate court to collect costs after issuance of a mandate also.

The appendix should apply to both civil and criminal cases and should delete references to supreme judicial district and to appellant and the state. It should read appellant and appellee since the State is now allowed to appeal. Also the thickness of each volume of the transcript should be set forth.

00776

# THE SUPREME COURT OF TEXAS

Justice Nathan L. Hecht

Court Rules Liaison

## MEMORANDUM

TO: Luther H. Soules, Chairman  
Supreme Court Rules Advisory Committee

January 17, 1990

RE: Rule 100(g), Texas Rules of Appellate Procedure  
Extension of Time to File Motion for Rehearing  
in the Court of Appeals

Before the Texas Rules of Appellate Procedure were adopted, extensions of time for filing motions for rehearing in the court of appeals were governed by Rule 21(c), Texas Rules of Civil Procedure, which stated in pertinent part:

Any order of the court of civil appeals granting or denying a motion for late filing of any such instruments shall be reviewable by the supreme court for arbitrary action or abuse of discretion.

The granting of a motion for extension of time to file a motion for rehearing can be reviewed on application for writ of error. However, if the motion is denied, the procedure is more problematic because denial of a motion for rehearing is a predicate to application for writ of error. The Supreme Court confronted this problem and defined the proper procedures in *Banales v. Jackson*, 610 S.W.2d 732 (Tex. 1980). *Accord Anderson v. Coleman*, 626 S.W.2d 301 (Tex. 1981). (A copy of each of these two cases is attached.)

With the adoption of the Texas Rules of Appellate Procedure, Rule 21 (c) was repealed. Now, extensions of time for filing motions for rehearing in the court of appeals are now governed by Rule 100(g), Texas Rules of Appellate Procedure, which states:

**(g) Extensions of Time.** An extension of time may be granted for a late filing in a court of appeals of a motion or a second motion for rehearing, if a motion reasonably explaining the need therefor is filed with the court of appeals not later than fifteen days after the last date for filing the motion.

The language from Rule 21(c), quoted above, was not carried over into the appellate rules and did not survive in the civil rules. Thus, the procedure for review of a court

00777

of appeals' denial of a motion to extend time for filing a motion for rehearing has been cast into doubt. Several alternatives present themselves, among which are:

1. No review. The court of appeals' denial of a motion to extend time for filing a motion for rehearing ends appeal. I doubt the Supreme Court would seriously entertain this alternative.
2. Review by application for writ of error. The party whose motion for extension is denied files a motion for rehearing of that denial. When that motion for rehearing is denied, the party then applies to the Supreme Court for writ of error on that single ruling. If the party prevails, the case is remanded to the court of appeals for consideration of the late motion for rehearing on the case itself. Any party can then apply again to the Supreme Court for writ of error on the merits of the case.
3. Review by mandamus. This would be treated like any other mandamus, except that the standard of review might be reduced to a simple abuse of discretion rather than the ordinary heightened standard of clear abuse of discretion.
4. Review under *Banales*. This procedure would simply be retained, despite the repeal of Rule 21(c). Also, the appeal would be treated like a motion, as stated in *Anderson*.

There may be other alternatives as well, which should be explored. The language from former Rule 21(c) should perhaps be added to Rule 100(g), and perhaps the applicable procedure should also be spelled out in the rules.

The Court requests the views of the Committee on this matter.

Court of Appeals  
Second Court of Appeals District  
The Courthouse  
Fort Worth, Texas 76196  
817/334-1900

TWRP 120

November 20, 1989

Justice Nathan L. Hecht  
P. O. Box 12248  
Austin, Texas 78711

Dear Judge Hecht:

Please present the following comment regarding a proposed amendment to Texas Rules of Appellate Procedure, Rule 120, to the Supreme Court meeting on November 30, 1989, the present rule and suggested amendments being as follows:

Rule 120 Habeas Corpus in Civil Cases

(d) Action on Petition. If the court is of the tentative opinion that ~~the writ should issue~~ **[relator is entitled to the relief sought,]** the court will **[issue the writ]**, set the amount of bond, order relator released and schedule the petition for oral argument. Otherwise, the court shall deny the writ without further hearing.

(g) Order of Court. If after hearing oral argument, the court determines that ~~the writ should be granted,~~ **[relator should be discharged from custody,]** it shall enter an order to that effect. Otherwise, the court shall remand relator to custody and direct the clerk to issue an order of committment. If relator is not available for return to custody, pursuant to the order of committment, the court may declare the bond to be forfeited.

In most original proceedings in appellate courts, the issuance of the writ is the vehicle by which relief is granted to the relator at the conclusion of the proceedings. In habeas corpus, however, the issuance of the writ must occur as the initial act of the court and prior to the court's hearing the matter upon oral argument and determination if the relator is entitled to be discharged from custody. In fact, the court does not arquire jurisdiction over the person of the relator until it causes the writ to issue or its issuance is waived by the respondent. See Ex parte Alderete, 203 S.W. 763, \_\_\_ (Tex.Crim. App. 1918).

00779

Even a casual inspection of the only substantive statutes defining the writ, prescribing its form, and delineating the court's duties when presented with an application for relief, reveals that the court cannot be of the "tentative opinion that the writ should issue" referred to in Rule 120(d). The court is required to issue the writ without delay or deny the application. See Code of Criminal Procedure, art. 11.01 et seq.

As to Rule 120(g), it is submitted that, after hearing the matter, it is inappropriate for the court to determine "that the writ should be granted" since the writ should already have been granted in order to initiate the proceedings. By definition, the writ is "an order issued by a court or judge . . . directed to any one having a person in his custody . . . commanding him to produce such person . . . and show why he is in custody or under restraint." (C.C.P. art. 11.01)

In summary, the relief requested by the relator in a habeas corpus proceeding is always two-fold, the first part of which prays for the writ to issue to determine lawfulness of custody, and the second part being a prayer for discharge from custody. By comparison, the granting of leave to file petition for writ of mandamus equates to the issuance of the writ of habeas corpus because those acts are necessary to the exercise of jurisdiction. Similarly, after hearing, the issuance or denial of the writ of mandamus equates with the final decision in habeas corpus, either to discharge the relator or to remand him to custody. It is submitted that the amendments above suggested take into account the basic difference in the two types of original proceedings.

Sincerely yours,  
  
Fred Fick  
Chief Staff Attorney

# THE SUPREME COURT OF TEXAS

*Justice Nathan L. Hecht*

*Court Rules Liaison*

## MEMORANDUM

TO: Luther H. Soules, Chairman  
Supreme Court Rules Advisory Committee

RE: Rule 140, Texas Rules of Appellate Procedure  
Direct Appeals

January 17, 1990

The Supreme Court has jurisdiction over direct appeals in certain cases authorized by the Constitution and the Legislature. Article V, section 3-b of the Texas Constitution states:

The Legislature shall have the power to provide by law, for an appeal direct to the Supreme Court of this State from an order of any trial court granting or denying an interlocutory or permanent injunction on the grounds of the constitutionality or unconstitutionality of any statute of this State, or on the validity or invalidity of any administrative order issued by any state agency under any statute of this State.

Section 22.001(c) of the Government Code states:

An appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state. It is the duty of the supreme court to prescribe the necessary rules of procedure to be followed in perfecting the appeal.

The Supreme Court has complied with this mandate by promulgating Rule 140, Texas Rules of Appellate Procedure, which states:

### **Rule 140. Direct Appeals**

In compliance with section 22.001(c) of the Government Code, the following rules of procedure for direct appeals to the Supreme Court are promulgated.

In obedience to an act of the Regular Session of the Forty-eighth Legislature approved February 16, 1943, and entitled "An Act authorizing

appeals in certain cases direct from trial courts to the Supreme Court; authorizing the Supreme Court to prescribe rules of procedure for such appeals; and declaring an emergency," which act was passed by authority of an amendment known as section 3-b of Article 5 of the Constitution, the following procedure is promulgated:

(a) In view of section 3 of Article 5 of the Constitution which confines the appellate jurisdiction of the Supreme Court to questions of law only, this court under the present and later amendment, above cited, and such present and any future legislation under it, has and will take appellate jurisdiction over questions of law only, and in view of sections 3, 6, 8 and 16 of such Article 5, will not take such jurisdiction from any court other than a district or county court.

(b) When a trial court has granted or denied an interlocutory or permanent injunction and its decision is based on the grounds of the constitutionality or unconstitutionality of any statute of this State, the Supreme Court shall have jurisdiction of a direct appeal of the trial court's order when the appeal contests that court's holding regarding the constitutionality or unconstitutionality of the statute.

(c) Such appeal shall be in lieu of an appeal to the court of appeals and shall be upon such question or questions of law only. A statement of facts shall not be brought up except to the extent it is necessary to show that the appellant has an interest in the subject matter of the appeal. If the Supreme Court would be required to determine any contested issue of fact in order to rule on the constitutionality of the statute in question as ruled on by the trial court, the appeal will be dismissed.

(d) The rules governing appeals to the courts of appeals apply to direct appeals to the Supreme Court except when inconsistent with Section 22.001 of the Government Code and with this rule.

Besides being unusually cumbersome relative to the main body of appellate rules, Rule 140 is deficient in at least two respects. First, the procedure for this Court to note jurisdiction of the appeal is not specified. Second, whether the Court's exercise of jurisdiction is mandatory or discretionary is not stated. It is proposed that the existing rule be repealed and the following substituted in its place:

#### **Rule 140. Direct Appeals**

(a) **Application.** This rule governs direct appeals to the

Supreme Court authorized by the Constitution and by statute. The rules governing appeals to the courts of appeals apply to direct appeals to the Supreme Court except when inconsistent with statute or this rule.

**(b) Jurisdiction.** The Supreme Court may not take jurisdiction over a direct appeal from the decision of any court other than a district court or a county court, or of any question of fact. The Supreme Court may decline to exercise jurisdiction over a direct appeal of an interlocutory order if the record is not adequately developed, or if its decision would be advisory, or if the case is not of such importance to the jurisprudence of the state that a direct appeal should be allowed.

**(c) Statement of Jurisdiction.** Appellant shall file with the record in the case a statement fully, clearly and plainly setting out the basis asserted for exercise of the Supreme Court's jurisdiction. Appellee may file a response to appellant's statement of jurisdiction within ten days after such statement is filed.

**(d) Preliminary Ruling on Jurisdiction.** If the Supreme Court notes probable jurisdiction over a direct appeal, the parties shall file briefs as in any other case. If the Supreme Court does not note probable jurisdiction over a direct appeal, the appeal shall be dismissed for want of jurisdiction.

**(e) Direct Appeal Exclusive.** An appellant who has attempted to perfect a direct appeal to the Supreme Court may not, during the pendency of that appeal, pursue an appeal to the court of appeals. A direct appeal dismissed for want of jurisdiction shall not preclude appellant from pursuing any other appeal then available.

The Court requests the Committee's counsel regarding these issues.

cause or the appealable portion thereof without reference to the merits of the appeal.

**Rule 170. Order of Submission**

Causes may be heard and submitted in such order as the Supreme Court may deem to be in the best interest and convenience of the parties or their attorneys. The Supreme Court may determine that causes should be submitted without oral argument.

The Court is considering whether to expand the category of cases in which per curiam opinions should issue to include, particularly, cases in which the issue is so clear, simple and well-defined, and the briefs so thorough, that it is very unlikely that oral argument could in any way influence the outcome of the case. The kind of language the Court may consider is set out below.

The Court requests the counsel of the Committee regarding these matters.

---

## PROPOSED AMENDMENTS

### Rule 133. Orders on Applications for Writ of Error

**(a) Notation on Denial of Application.** In all cases where the judgment of the court of appeals is correct and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation "Refused." In all cases where the Supreme Court is not satisfied that the opinion of the court of appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error of law which requires reversal or which is of such importance to the jurisprudence of the State as to require correction, the court will deny the application with the notation "Writ Denied." In all cases where the Supreme Court is without jurisdiction of the case as presented in the application, it will dismiss the application with the docket notation "Dismissed for Want of Jurisdiction." The Court may accompany the denial of an application with such explanatory remarks as it may consider appropriate.

~~**(b) Conflict in Decisions.** In cases of conflict named in subsection (a)(2) of section 22.001 of the Government Code, the Supreme Court will grant the application for writ of error, unless it is in agreement with the decision of the court of appeals in the case in which the application is filed. In that event said Supreme Court will so state in its order, with such explanatory remarks as may be deemed appropriate. If the decision of the court of appeals is in conflict with an opinion of the Supreme Court, is contrary to the Constitution, the statutes or any rules promulgated by the Supreme Court, the Supreme Court may, upon granting writ of error and without hearing argument in the case, reverse, reform or modify the judgment of the court of appeals, making, at the same time, such further orders as may be appropriate.~~

**(e) (b) Moot Cases.** If a cause or an appealable portion thereof is moot, the Supreme Court may, in its discretion and after notice to the parties, upon granting writ of error and without hearing argument with reference thereto, dismiss such

# THE SUPREME COURT OF TEXAS

*Justice Nathan L. Hecht*

*Court Rules Liaison*

## MEMORANDUM

TO: Luther H. Soules, Chairman  
Supreme Court Rules Advisory Committee

January 15, 1990

RE: Rule 133(b), Texas Rules of Appellate Procedure  
Supreme Court Per Curiam Opinions (3 pages)

When the Supreme Court grants an application, it is not required by the Constitution or statutes to hear oral argument. In certain cases, the Court does not hear oral argument and issues its decisions in per curiam opinions. The Court also sometimes issues a per curiam opinion with the denial of an application.

Although Rule 133(b), Texas Rules of Appellate Procedure, does not refer expressly to per curiam opinions, it purports to state the applicable procedure in the Supreme Court, as follows:

**Conflict in decisions.** In cases of conflict named in subsection (a)(2) of section 22.001 of the Government Code, the Supreme Court will grant the application for writ of error, unless it is in agreement with the decision of the court of appeals in the case in which the application is filed. In that event said Supreme Court will so state in its order, with such explanatory remarks as may be deemed appropriate. If the decision of the court of appeals is in conflict with an opinion of the Supreme Court, is contrary to the Constitution, the statutes or any rules promulgated by the Supreme Court, the Supreme Court may, upon granting writ of error and without hearing argument in the case, reverse, reform or modify the judgment of the court of appeals, making, at the same time, such further orders as may be appropriate.

In effect, the rule is advisory and informational only, and not binding upon the Court. The Court has the power to issue per curiam opinions in cases in which the predicate conflict required by the rule does not exist. Arguably, some might argue that it does so already, although the Court has at least attempted to adhere to the policy stated in the rule. It is less certain that the Court has the power to issue a per curiam opinion when an application is denied.

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AUSTIN, TEXAS 78767  
TELEPHONE: (512) 480-5600

IRELAND GRAVES (1885-1968)  
BEN F. VAUGHAN, III, P.C.  
OF COUNSEL

TELECOPY NUMBER:  
(512) 478-1976

CHARLES A. SPAIN, JR.  
(512) 480-5609

November 26, 1989

The Honorable Nathan L. Hecht, Justice  
The Supreme Court of Texas  
Post Office Box 12248  
Capitol Station  
Austin, Texas 78711

Dear Judge Hecht:

4. The court may wish to consider adopting the amendments to Texas Rules of Appellate Procedure 41, 202, and 210 as adopted by the court of criminal appeals on June 5, 1989. See *Order Adopting Amendments to Texas Rules of Appellate Procedure*, 52 Tex. B.J. 893 (1989).

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,

  
Charles A. Spain, Jr.

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52 (d)

# Order Adopting Amendments To Texas Rules of Appellate Procedure

Effective July 1, 1989

BE IT ORDERED by the Court of Criminal Appeals that the following appended amendments to Texas Rules of Appellate Procedure are hereby adopted and promulgated to govern criminal cases and criminal law matters [Article V, §5 and Article 4.04, C.C.P.], under authority of and in conformity with Acts 1985, 69th Leg., Ch. 685, p. 5136, §§1-4, and Articles 44.33 and 44.45, Code of Criminal Procedure. Intended and designed to be interim measures to treat specific situations, these amended rules shall govern posttrial, appellate and review procedures only in criminal cases and criminal law matters. This order does not amend any existing rule, promulgate any new rule nor repeal any rule in the Texas Rules of Civil Procedure. No rule amended by this order shall be applicable to any civil case ["actions of a civil nature" (Rule 2, T.R.Civ. P.)] unless and until it has been promulgated by the Supreme Court of Texas.

BE IT FURTHER ORDERED that the Texas Rules of Appellate Procedure be and they are hereby made applicable to appeals by the State taken pursuant to Acts 1987, 70th Leg., Ch. 382, p. 1884, codified as Article 44.01, Code of Criminal Procedure.

BE IT FURTHER ORDERED that the Clerk of this Court shall file with the Secretary of State of the State of Texas, for and in behalf and as the act of this Court, a duplicate original copy of this order and Rule 54(b), and the Clerk shall cause them to be published in the Texas Register and the Texas Bar Journal, as provided by the above Act.

BE IT FURTHER ORDERED that these amended rules become effective July 1, 1989, and remain in effect unless and until disapproved, modified or changed by the Legislature or unless and until supplemented or amended by this Court pursuant to the above Act.

BE IT FURTHER ORDERED that this order and these rules shall be recorded in the minutes of this Court, and that the original of this order signed by the members of this Court and of these rules shall be preserved by the Clerk of this Court as a permanent record of this Court.

SIGNED and ENTERED in duplicate originals this 5th day of June, 1989.

/S/  
Michael J. McCormick  
Presiding Judge

/S/  
W.C. Davis, Judge

/S/  
Sam Houston Clinton, Judge

/S/  
Marvin O. Teague, Judge

/S/  
Chuck Miller, Judge

/S/  
Charles F. (Chuck) Campbell,  
Judge

/S/  
Bill White, Judge

/S/  
M. P. Duncan, III, Judge

/S/  
David Berchermann, Jr., Judge

### Rule 41. Ordinary Appeal—When Perfected.

- (a) [Appeals in Civil Cases.] (No Change)
- (b) Appeals in Criminal Cases.

(1) *Time to Perfect Appeal.* Appeal is perfected when notice of appeal is filed within thirty (*fifteen by the state*) days after the day sentence is imposed or suspended in open court or the day an appealable order is signed by the trial judge; except, if a motion for new trial is timely filed, notice of appeal shall be filed within ninety days after the sentence is imposed or suspended in open court.

- (2) [Extension of Time.] (No Change)
- (c) [Prematurely Filed Documents.] (No Change)

### Rule 202. Discretionary Review With Petition.

- (a) (No Change)
- (b) (No Change)
- (c) (No Change)
- (d) (No Change)

(1) [Index.] through (6) [Prayer for Relief.] (No Change)  
(7) *Appendix.* A copy of any opinions delivered upon rendering the judgment by the court of appeals whose decision is sought to be reviewed shall be included.

- (8) [7] (Renumbered, otherwise no change)
- (9) [8] (Renumbered, otherwise no change)

### Rule 210. Direct Appeals in Death Penalty Cases.

- (a) [Record.] (No Change)
- (b) *Briefs.* Appropriate provisions of Rule 74 govern preparation and filing of briefs in a case in which the death penalty has been assessed, except that a brief may exceed fifty pages and an original and ten copies of it shall be filed.

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AUSTIN, TEXAS 78767  
TELEPHONE: (512) 480-5800

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OF COUNSEL

CHARLES A. SPAIN, JR.  
(512) 480-5800

TELECOPY NUMBER:  
(512) 478-1976

November 26, 1989

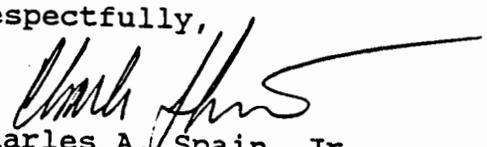
The Honorable Nathan L. Hecht, Justice  
The Supreme Court of Texas  
Post Office Box 12248  
Capitol Station  
Austin, Texas 78711

Dear Judge Hecht:

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Respectfully,

  
Charles A. Spain, Jr.

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BE IT FURTHER ORDERED that this order and these rules shall be recorded in the minutes of this Court, and that the original of this order signed by the members of this Court and of these rules shall be preserved by the Clerk of this Court as a permanent record of this Court.

SIGNED and ENTERED in duplicate originals this 5th day of June, 1989.

/S/  
\_\_\_\_\_  
Michael J. McCormick  
Presiding Judge

/S/  
\_\_\_\_\_  
W.C. Davis, Judge

/S/  
\_\_\_\_\_  
Sam Houston Clinton, Judge

/S/  
\_\_\_\_\_  
Marvin O. Teague, Judge

/S/  
\_\_\_\_\_  
Chuck Miller, Judge

/S/  
\_\_\_\_\_  
Charles F. (Chuck) Campbell,  
Judge

/S/  
\_\_\_\_\_  
Bill White, Judge

/S/  
\_\_\_\_\_  
M. P. Duncan, III, Judge

/S/  
\_\_\_\_\_  
David Berchermann, Jr., Judge

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- (2) [Extension of Time.] (No Change)
- (c) [Prematurely Filed Documents.] (No Change)

**Rule 202. Discretionary Review With Petition.**

- (a) (No Change)
- (b) (No Change)
- (c) (No Change)
- (d) (No Change)

(1) [Index.] through (6) [Prayer for Relief.] (No Change)  
(7) *Appendix.* A copy of any opinions delivered upon rendering the judgment by the court of appeals whose decision is sought to be reviewed shall be included.

- (8) [7] (Renumbered, otherwise no change)
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- (a) [Record.] (No Change)

(b) *Briefs.* Appropriate provisions of Rule 74 govern preparation and filing of briefs in a case in which the death penalty has been assessed, except that a brief may exceed fifty pages and an original and ten copies of it shall be filed.

CHIEF JUSTICE  
PAUL W. NYE

JUSTICES  
NORMAN L. UTTER  
NOAH KENNEDY  
ROBERT J. SEERDEN  
FORTUNATO P. BENAVIDES  
J. BONNER DORSEY

**Court of Appeals**  
**Thirteenth Supreme Judicial District**  
TENTH FLOOR  
NUECES COUNTY COURTHOUSE  
CORPUS CHRISTI, TEXAS 78401

CLERK  
BETH A. GRAY

DEPUTY CLERK  
CATHY WILBORN

512-888-0416

January 2, 1990

Hon. Nathan L. Hecht  
Justice, Supreme Court of Texas  
P. O. Box 12248  
Austin, TX 78711

Dear Justice Hecht:

In addition to the above comments regarding proposed rule amendments, we have the following comments concerning changes we feel should be made to the existing rules and matters which we feel should be addressed in the rules:

**APPENDIX FOR CRIMINAL CASES**

Rule 2. This section of the appendix should be completely deleted. The rule should be that a supplemental transcript shall conform to the rules governing the original transcript. If this rule is kept, then a proper reference to the correct rule should be modified. It now refers to rule 45.

4543.001

2-6-90  
SB

TO: Texas Supreme Court Advisory Committee

FROM: Chuck Herring  
Lefty Morris  
Co-Chairs; Ad Hoc Subcommittee on Sealing of Court Records

DATE: February 9, 1990

RE: Proposed Rule 76a, Sealing Court Records

I. Introduction. The Texas Legislature adopted section 22.010 of the Texas Government Code effective September 1, 1989. Section 22.010 provides as follows:

SEALING OF COURT RECORDS. The Supreme Court shall adopt rules establishing guidelines for the courts of this state to use in determining whether in the interest of justice the records in a civil case, including settlements, should be sealed.

Accordingly, the Texas Supreme Court submitted the issue to the Advisory Committee for recommendation and Chairman Luke Soules appointed a subcommittee to propose a draft rule. The subcommittee conducted two public hearings, on November 18, 1989 and December 15, 1989, and also received substantial input at the Texas Supreme Court's public hearing on November 30, 1989. Twenty-seven participants, including several representatives of public interest and citizen's groups, as well as several media attorneys and representatives, attended and provided valuable input at the hearings. (A list of participants is enclosed as Attachment "I.") The subcommittee accumulated several hundred pages of draft proposals, court decisions, law review commentaries and position statements from many sources.

We have attached as Attachment "A" a draft proposal for a new Rule 76a, concerning sealing of court records. Because most of the subcommittee members were unable to attend all of the committee hearings, this draft is merely the Co-Chairs' effort to consolidate the hard work of many other participants on points that came the closest to a consensus.

Attached hereto as Attachments "B" through "H" are the most current other drafts that we have received from various participants. Attachments "I-1" through "I-16" are selected letter comments received from several sources.

II. Draft Rule. The draft rule attached as Attachment "A" defines the "compelling need" and "protectible interests" standards (paragraphs (A)(1) and (A)(2)) that the moving party must meet to obtain an order sealing "court records," which the rule also defines (paragraph (A)(3)). The draft also provides procedures for the motion to seal (paragraph (B)(2)), notice to the public (paragraph (B)(2)) and the hearing required before court records may be sealed (paragraph (B)(1)). The draft further provides for specific findings (paragraph (B)(4)), sets out the requirements for sealing orders (paragraph (B)(5)), and provides for emergency temporary sealing orders (paragraph (B)(3)). Finally, the draft specifies the trial court's continuing jurisdiction (paragraph (C)) and the parties' appeal rights (paragraph (D)).

A. Compelling Need and Protectible Interests. The "compelling need" standard adopted in paragraph (A)(1) recognizes a strong presumption that court records are open to public scrutiny. The rule also recognizes that the right to inspect and copy court records is not absolute, and that courts have supervisory powers over their own files.

Paragraph (A)(1) requires that the movant satisfy four specified requirements. The "protectible interests" specifically enumerated in paragraph (A)(2) are an attempt to draw attention to special problem areas -- such as family law and tort cases involving sexual abuse of children, and trade secrets cases -- in which sealing is sometimes necessary.

B. "Court Records." In paragraph (A)(3) the draft defines the "court records" that are subject to this rule as materials filed of record in any civil state court, and excludes discovery materials. As noted below, however, the Co-Chairs could not agree on this treatment of discovery materials.

C. Motion, Notice. Paragraph (B)(2) provides the procedure for motion and notice. After filing a motion to seal, the moving party posts a public notice at the location where notices for meetings of county governmental bodies are posted, at least fourteen days before the date set for hearing. The rule also specifies the contents of the notice and requires that a copy be served on the clerk of the Texas Supreme Court, who shall post the notice in a public place.

D. Temporary Sealing Orders. Paragraph (B)(3) provides the procedure for emergency temporary sealing orders in those instances when there is insufficient time to comply with the normal notice and hearing procedure set out in (B)(1) and (B)(2). The procedure is based upon temporary restraining order practice as set out in Rule 680.

E. Sealing Order, Findings. Paragraphs (B)(4) and (B)(5) require specific findings and other matters to be set forth in the sealing order.

F. Continuing Jurisdiction, Appeal. Because a number of challenges to sealing orders have failed on procedural grounds after trial courts have lost plenary jurisdiction, the rule provides for continuing jurisdiction in the trial court and sets out specific procedures for appeal of sealing decisions.

III. Unresolved Issues. Matters on which the Co-Chairs could not agree were:

whether the rule should apply to discovery materials, and thus also whether to amend Rule 166b(5) (which now provides for orders that "for good cause shown results of discovery be sealed or otherwise adequately protected; that its distribution be limited; or that its disclosure be restricted");

whether the rule should apply to settlements that are not filed of record;

whether the showing of "compelling need" should be by a preponderance of the evidence or by clear and convincing evidence;

whether the reference to "trade secrets" as a "protectible interest" should be broadened to apply to other intangible property rights.

IV. Conclusion. The attached draft is the result of hundreds of hours of work and input from many persons, but as with almost any compromise, it is certainly imperfect and in some respects cumbersome. Because the rule inevitably involves a difficult and delicate balance of public access and private interests, the draft reflects many important policy decisions that we want the Advisory Committee to feel free to rethink and rewrite. We will both be present at the Advisory Committee meeting to explain the draft in detail as well as other options that were presented to the subcommittee.

PROPOSED TEXAS RULE OF CIVIL PROCEDURE 76a:  
COURT RECORDS

A. Definitions

1. Compelling Need: "Compelling Need" means the existence of a specific protectible interest which overrides the presumption that all court records are open to the general public. The moving party must establish the following:

- (a) that a specific interest of the person or entity sought to be protected by the sealing of the court records clearly outweighs the interest in open court records and the specific interest will suffer immediate and irreparable harm if the court records are not sealed;
- (b) that no less restrictive alternative will adequately protect the specific interest of the person or entity sought to be protected;
- (c) that sealing will effectively protect the specific interest of the person or entity sought to be protected without being overbroad; and
- (d) that sealing will not restrict public access to information that is detrimental to public health or safety, or to information concerning the administration of public office or the operation of government that violates any law or involves misuse of public funds or public office.

2. Protectible Interests: "Protectible interests" which may be the basis of an order under this rule include, but are not limited to, the following:

- (a) a right of privacy or privilege established by law, including but not limited to, privileges established by these rules or by the Texas Rules of Civil Evidence;
- (b) constitutional rights;
- (c) trade secrets;
- (d) the protection of the identity or privacy of an individual who has been the subject of a sexually related assault or injury.

3. Court Records: For purposes of this rule, the term "court records" shall include all documents and records filed in connection with any matter before any civil court in the State of Texas. This rule shall not apply to discovery materials not filed with a court or to documents filed with a court in camera solely for the purpose of obtaining a ruling on the discoverability of such documents.

B. Unless provided to the contrary by statute or other law, before a judge may seal any court records, the following prerequisites must be satisfied:

1. Hearing: A hearing shall be held in open court, open to the public, at which the parties may present evidence to support or oppose the motion to seal court records; however, the hearing may be conducted in camera upon request by any party, if the court finds from affidavits submitted or other evidence that an open hearing would reveal the information which is sought to be protected. At the hearing the court may consider affidavit evidence if the affiant is present and available for cross examination. Any person, not a party, desiring to support or oppose the sealing of court records, may intervene for the limited purpose of participating in the hearing and in any subsequent proceedings involving the motion to seal or the grant or denial of a sealing order.

2. Notice: The party seeking sealing shall file a written motion in support of the sealing request. After filing the motion, the moving party shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, at least fourteen days before the date set for the hearing, stating that a hearing will be held in open court on a motion to seal court records, stating that any person has an opportunity to appear and be heard concerning the sealing of court records, and stating the specific time and place of the hearing, the general type of case, the style of the case, and the case number. After posting such notice, the moving party shall file a copy of the notice with the clerk of the court in which the matter is pending and shall serve a copy of the notice with the clerk of the Texas Supreme Court, who shall post the notice in a public place.

3. Temporary Sealing Order: A temporary sealing order may be entered without the hearing or public notice provided for in paragraphs (B)(1) and (B)(2) above, upon the filing of a sworn motion showing compelling need and that immediate and irreparable harm will result before notice can be posted and a hearing can be held as otherwise provided herein. Whenever possible, the moving party shall serve the motion upon any other party who has already appeared. Every temporary sealing order granted without posted notice or public hearing shall be filed, shall be endorsed with the date and hour of

issuance, shall contain the findings required by paragraph (B)(5), shall state why the order was granted without notice, and shall expire by its terms no more than fourteen days after its issuance, unless within the time so fixed, for good cause shown, the order is extended for a longer period. The reasons for the extension shall be entered of record. No more than one extension may be granted unless subsequent extensions are unopposed. If a temporary sealing order is granted without public notice and hearing, a motion for sealing order shall be filed, notice provided and a hearing set as elsewhere provided in these rules. On two days' notice to the party who obtained the temporary sealing order or on such shorter notice to that party as the court may prescribe, any person, whether or not a party to the lawsuit, may move dissolution or modification of the order and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

4. Findings: In order to seal court records, the court shall make specific findings demonstrating that a compelling need has been shown, but the findings shall not reveal the information sought to be protected.

5. Sealing Order: A sealing order shall be specific and shall state the case number, the style of the case, the specific findings, the conclusions of law, the time period for which the sealed portions of the court records are to remain sealed, and shall identify those portions of the court records which are to be sealed and those portions which are to remain open. The order shall not reveal the information sought to be protected. The motion to seal and the sealing order shall remain in the open portion of the file.

C. Continuing Jurisdiction: Any person may intervene as a matter of right at any time before or after judgment in connection with any motion to seal or to unseal court records. Notwithstanding the rights of appeal provided in this Rule, a court that enters a sealing order maintains continuing jurisdiction to enforce, alter, or vacate that order.

D. Appeal: Except as to a temporary sealing order under paragraph (B)(3), any sealing order, any sealing provision contained in any judgment, and any order granting or denying a motion to alter, vacate or enforce a sealing order shall be deemed to be a separate and independent final judgment and shall be subject to immediate and independent appeal by any party or intervenor who has requested, supported or opposed any sealing order.

# THE SUPREME COURT OF TEXAS

*Justice Nathan L. Hecht*

*Court Rules Liaison*

## MEMORANDUM

TO: Luther H. Soules, Chairman  
Supreme Court Rules Advisory Committee

January 15, 1990

RE: Canon 3A(9), Code of Judicial Conduct  
Use of Cameras in Courtrooms (1 page)

Your letter of January 10, 1990, inquires whether drafting has been done on the referenced canon, or on related changes in the Texas Rules of Civil Procedure or the Texas Rules of Appellate Procedure, and whether the Committee should consider such changes.

Among the recent amendments to the Code of Judicial Conduct, Canon 3A(9) was renumbered 3A(10), with the following statement:

This renumbered subsection 10 is to be repealed at such time as the Texas Rules of Civil Procedure and the Texas Rules of Appellate Procedure are amended to govern recorded court proceedings and those amendments become effective.

The transfer of this matter to the rules appears to comport with proposed changes in the Draft Revisions of the ABA Code of Judicial Conduct.

The Supreme Court is considering whether to allow cameras at its proceedings, either as a rule, or upon invitation of the Court at specific times, or on the basis of a pilot project. However, no decision has been made, and the Court would welcome the views of the Committee and any specific language for rules changes on these issues, as well as the general matter of cameras in trial and appellate courtrooms. The only suggested language I am aware of to date has been the following, proposed by Justice Doggett for inclusion in the Texas Rules of Appellate Procedure:

Upon the motion of any party or upon its own initiative, the Supreme Court may permit the filming, videotaping or broadcasting of any proceeding pending before it in accordance with such conditions as it deems appropriate.

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KETK-TV  
EAST TEXAS

December 29, 1989

The Honorable Nathan Hecht  
Justice of the Supreme Court of Texas  
Texas Supreme Court  
P. O. Box 12248 Capital Station  
Austin, Texas 78711

Dear Justice Hecht:

I am News Director of KETK-TV Region 56 in Jacksonville, Texas. We serve the communities of Tyler, Longview, and Lufkin-Nacogdoches, among others.

I am writing to add my voice of support to those who favor the re-introduction of cameras into Texas Courtrooms. I have been a Texas News Director for about a dozen years, now. I believe the communities I serve have been missing a vital part of their community life in not witnessing the judicial arm of the government in action.

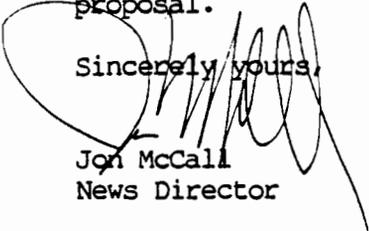
As you know, there has been a movement over the decades of the 70's and 80's to include cameras in many of the courtrooms of the country. I believe this has led to an increased respect and understanding of the courts.

Recently a critical decision was made in a Florida Courtroom on a case which it was feared would split the community into racial factions fighting with one another. Many experts have credited full television coverage of the final phase of the trial for keeping the streets calm by showing the court proceedings, live, all day.

Just three or four weeks ago, I testified with others at a change of venue hearing in a local case which also had potential for splitting the community. My perception was that rumor had caused the community to be split, but that television and newspaper coverage pictures had helped stop those rumors and bring the facts into local conversations. In the same way, pictures (which are critical to any in-depth coverage by television) can help the community to better understand the process of the court in all cases.

It is my understanding that the court is in the process of considering courtroom access by cameras. I strongly urge the court to endorse this proposal.

Sincerely yours,

  
Jon McCall  
News Director

JM:bc

00801

December 19, 1969

Justice Nathan Hecht  
Texas Supreme Court  
P.O. BOX 12278  
Capital Station  
Austin, TX 78711

Dear Justice Hecht:

I encourage you and the your fellow justices to vote to allow television coverage of Court proceedings.

I know many of the arguments against cameras in courtrooms deal with the disruptive nature of cameras and equipment. I worked as a news photographer in Oklahoma where courts allowed local stations to pool coverage by allowing one camera in the courtroom and all other equipment was operated outside the courtroom. Advances in technology since then would make that system even easier and less obtrusive.

I also believe television can educate the public better on the justice system if it is allowed to show exactly what happens in court. By televising cases in the Supreme Court, we could show the judicial process at its highest level, and perhaps by providing the medium's value there, eventually be allowed to show district court proceedings to local viewers.

Please open the Court to television coverage.

Sincerely,

*David Lowell*  
DAVID LOWELL  
NEWS DIRECTOR

00802



2000 N. POLK  
BOX 751  
AMARILLO, TEXAS 79189  
806 / 383-3321



December 19, 1989

The Honorable Nathan Hecht  
c/o Texas Supreme Court  
P.O. Box 12248  
Capital Station  
Austin, Texas 78711

Dear Justice Hecht,

I am pleased to learn the Texas Supreme Court is considering opening proceedings to television camera coverage. This would be a wise move toward keeping judicial proceedings in step with evolving technology of news and information dissemination.

Most citizens today receive most of their news through the electronic media. It is vital that our coverage be accurate, comprehensive and understandable. Opening court proceedings to cameras would help us meet that obligation to the public.

Some early experiments with cameras in the courtroom failed. This occurred in an earlier age of television when neither the media nor the courts entirely understood the potential for disruption, and when television news operations were perhaps less mature and conscientious. Equipment in that era was bulky and obtrusive.

Nowadays, most television news operations are more sophisticated and more sensitive to potential problems caused by the presence of cameras. Today's equipment is smaller, more refined, and less obtrusive. Pool feeds enable several stations to take video from a single camera inside the courtroom.

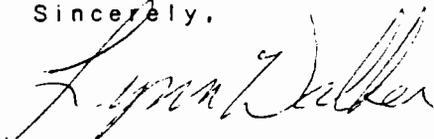
Citizens are more accustomed to the presence of news cameras in their lives. Cameras simply do not stir the curiosity and excitement they once stirred.

The perceived obtrusiveness of the cameras lies at the heart of this issue. If that perceived obtrusiveness is eliminated, courts and television cameras can co-exist peacefully and productively. A notepad in the hand of a newspaper reporter no more guarantees accuracy or safeguards against sensationalism than a camera on the shoulder of a television photographer. The camera is just more visible.

In any arrangement, the court would set the ground rules for television coverage and the television stations, mindful of the fragile nature of the arrangement, would be willing to cooperate.

I hope you will give this matter all due consideration and set an example for other courts in Texas to follow.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lynn Walker".

Lynn Walker  
News Director

**KDAF**

8001 John Carpenter Freeway

Dallas Texas 75247

214 634 8833

Gayle Brammer-Paul  
Vice President General Manager



December 12, 1989

Justice Nathan Hecht  
Texas Supreme Court  
P.O. Box 12248  
Capital Station  
Austin, Texas 78771

Dear Justice Hecht:

I am writing to demonstrate my support of the rule change proposed by Justice Lloyd Doggett allowing television coverage of the Texas Supreme Court.

As general manager of Fox Television in Dallas/Fort Worth, I have witnessed many changes in the telecommunications industry in the recent years. For the most part these changes have benefitted the Texas citizen.

The right to know is inherently married to the right to see as broadcast news is the number one source of information for todays citizen.

Limitations set forth by judges would be adhered to as television stations execute their licensed responsibility to entertain and inform our viewers.

Respectfully,

A handwritten signature in cursive script that reads "Gayle Brammer".

Gayle Brammer  
Vice President  
General Manager

GB/vj

KPRC Television  
Post Office Box 2222  
Houston, Texas 77252  
(713) 771-4831

**2**  **KPRCTVHOUSTON**

December 15, 1989

Justice Nathan Hecht  
Supreme Court of Texas  
P.O. Box 12248  
Austin, Texas 78711

Dear Justice Hecht:

I'm writing in support of the resolution before the court to allow television coverage of the Texas Supreme Court. As a broadcast journalist, an officer in the Houston Chapter of of the Society of Professional Journalists and a concerned citizen, it is my firm belief that the time has come for television to emerge from second-class status and fulfill our public responsibility.

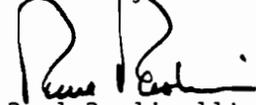
As you know, most Americans have only a superficial knowledge of our court system. While the majority of Americans receive their news from the television medium, this same medium does not enjoy the same ability to cover the court system as do other media. As a result, our society has an image of our court system based on entertainment programming. We believe television can do a great deal in changing this sometimes misleading impression.

I'm sure you're aware of the recent television coverage in Miami of a potentially explosive trial situation involving a police officer accused of murdering two minority victims. Much has been written about the role that television coverage of the trial played in maintaining the peace in Miami during the trial and jury deliberations.

A great majority of the states now allow cameras in the courtroom with most reporting very positive experiences such as the recent Miami situation. Technology has virtually eliminated the court's original objections to television coverage; the size of our equipment is no longer a consideration, our equipment now operates at virtually any light level and electronic cameras operate silently.

We would be more than happy to provide you with a demonstration of any equipment involved in our coverage and discuss operating guidelines that are currently in place in other states. We strongly believe that coverage of the court would enhance the public's understanding of the judicial process.

Sincerely,



Paul Paolicelli  
Vice President, News

cc: Tom Reiff  
Carole Kneeland

30806

WFAA-TV 8

Communications Center  
2016 Young Street  
Dallas, Texas 75202-4810  
214-748-9631  
An ABC Affiliate

Marty Haag  
Vice President &  
Executive News Director

December 13, 1989

Justice Nathan Hecht  
Texas Supreme Court  
P.O. Box 12248  
Capital Station  
Austin, TX 78711

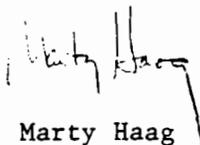
Dear Justice Hecht:

I am writing to urge that the Texas Supreme Court open its proceedings to television cameras. I believe this action would have a beneficial result in informing the public and giving our citizens more confidence in the judicial system.

In truth, 44 other states allow coverage of courts--not just appellate courts but lower civil and criminal courts. Texas is behind the times. The old images of bright lights and large cameras disrupting proceedings just don't apply. Ten years ago, in conjunction with the American Bar Association meeting in Dallas, WFAA-TV produced tapes of both an appellate and criminal proceedings to show how inobtrusive cameras could be. In that year, Florida became the first state to take down the barriers completely. I truly believe that any fair observer could look at coverage of proceedings in such states as Florida and California and conclude that cameras had, in fact, opened the eyes of the public to the courts, not made a mockery of their dignity.

I strongly urge you to make this important decision next month. Please let us join our journalistic colleagues on equal footing.

Sincerely,



Marty Haag  
Exec. News Director

MH:mm

00807

# Supreme Court Loosens Rules on Judges' Campaign Roles

## Code Also Includes Anti-Bias Provision

BY DARLA MORGAN

As judges have much wider leeway in what they can say during political campaigns, but are prohibited from endorsing candidates under amendments to the Code of Judicial Conduct approved by the Texas Supreme Court Dec. 19. Judges can debate the future of the State Bar or describe their feelings about parole under these new rules, said Justice Lloyd Doggett, who headed the court's efforts to revise the rules. "There are no reasons to keep me from appearing at a political rally or telling my

friends I think a certain candidate is best for the job."

But Doggett said judges are explicitly forbidden from making outright public endorsements of a candidate under the new rules.

Under the old Canon 5C(1), a judge soliciting campaign funds could have violated the code, Doggett said. The canon was revised to say specifically the canon does not prohibit a judge or judicial candidate from soliciting money for campaign or officeholder expenses as permitted by state law.

"The change represents a bipartisan effort to conform the code of conduct with reality," he said.

The court also approved a new canon, 3A(9), that calls for a judge to perform judicial duties without bias or prejudice.

Doggett said the canon was prompted by a model anti-discrimination code recommended by the American Bar Association and by public uproar over Dallas Judge Jack Hampton's comment that he gave a 30-year sentence to a convicted killer in part because the victims were homosexual.

Hampton, of the 283rd District, was publicly censured by the State Commission on Judicial Conduct for commenting on a pending case.

The new canon also prohibits staff members, court officials and lawyers from displaying bias or prejudice in a proceeding based on race, sex, religion or national origin.

Other changes include an amendment to Canon 3A(4) to allow judges to confer separately with parties and lawyers in a suit "in an effort to mediate or settle matters" if judges give notice to all parties and refrain from hearing any contested matters without the parties' consent.

The code still prohibits a full-time judge from acting as an arbitrator or mediator for pay outside the judicial system, however.

"This code does not prevent a judge from encouraging settlement," Doggett said. "We think this change will help reduce the flow of litigation in the courts."

Canon 3A(9), which bans the use of cameras in Texas courtrooms, was renumbered, but Doggett said he expects that section to be repealed when the new Texas Rules of Civil Procedure and Texas Rules of Appellate Procedure are adopted later this year. The prohibition on cameras in Texas courtrooms most likely will be included in the new Rules of Civil Procedure.

Doggett has recommended that language be added to the Rules of Appellate Procedure to give the Supreme Court the option of allowing proceedings before the court to be televised or videotaped.

"I hope to take up that proposal sometime in February," Doggett said.

Handwritten initials: JCH PX

# Yarborough Taps from Houston for His Appeal

CONTINUED FROM PRECEDING PAGE

80808

# YARBROUGH, HOWELL AND ANTHONY.

Austin American-Statesman "Yarborough takes court seat as controversy threatens him." Feb 3, 1977



November 30, 1989

My name is Carole Kneeland. I'm the news director at KVUE television station, Channel 24, which is the ABC affiliate here in Austin. I'm here to speak in support of a resolution to allow television cameras inside this courtroom to record the legal proceedings of the Texas Supreme Court - proceedings normally open to the public and covered regularly now by newsreporters without cameras. We feel opening up the Texas Supreme Court would be a tremendous first step toward television coverage of courtroom proceedings at all levels in Texas.

There are several reasons we think that is important.

First, we feel the public's right to a public trial is abridged if cameras are excluded. When that right was protected originally by our forefathers, television cameras hadn't been invented. But today more citizens say they receive their news through television than any other medium. For most people, unless they're directly involved in a trial as an attorney, a juror or a witness, there's no opportunity to watch the courts in action. We could provide that if we could televise the proceedings. We feel if we're to comply with the spirit of that right to a public trial in this day and age, television coverage is important.

Further, we believe if we could televise court proceedings, it would lead to a much more informed public, giving people more confidence in the judicial process. By providing more accurate and complete court coverage, we could contribute to wider public acceptance and understanding of court decisions. Under our form of government, there must be a constant concern for educating and informing people about all three branches of government. There may be no field of governmental activity where people are as poorly informed as the courts. Many of us complain about the apathy of voters in judicial races, but we feel by banning cameras from courtrooms we are closing the windows of information through which they might see and learn.

Beyond what we feel our coverage could do to promote understanding and respect for what's happening in our courtrooms, we feel it would eliminate some of the chaos that sometimes occurs outside the courtrooms now as we must chase people down in the hallways to get the television pictures we need to illustrate our stories. We wouldn't have to do that if we could get our pictures quietly inside the courtroom.

Once Texas was one of only two states that permitted television cameras in courtrooms. As I'm sure you know, it was the notorious 1965 Texas case of Billie Sol Estes that led to a ban of cameras in the courts. But in 1981, the U.S. Supreme Court ruled that the presence of television cameras is not inherently unconstitutional, throwing the issue back into the state courts.

Mailing Address:  
KVUE-TV, INC.  
P.O. Box 9927  
AUSTIN, TX 78766-0927



Street Address:  
3201 STECK AVE.  
AUSTIN, TX 78758-8026  
(512) 459-6521

00809

Since then, 44 other states have allowed cameras access to the courts, and not just the appellate courts, but the lower civil and criminal courts as well. Florida was the state that brought the issue to the U.S. Supreme Court in 1981 and I've brought you a copy of the 1979 Florida ruling the Supreme Court upheld, allowing cameras in the courtroom. It includes the guidelines used in that state to ensure that television cameras are as unobtrusive as possible so as not to prejudice court proceedings in any way.

You'll see their experience has shown that the presence of the cameras in the courtroom has little negative effect on trial participants' perception of the judiciary or the dignity of the proceedings. They've found the cameras disrupt the trial either not at all or only slightly. The ability for jurors and judges to decide the truthfulness of witnesses or concentrate on testimony is unaffected and no one feels self-conscious. In fact, the Florida experience shows the presence of the cameras makes the jurors and witnesses feel slightly more responsible for their actions.

Technical advances have reduced the size, noise and light levels of the electronic equipment so cameras can be used unobtrusively. It only requires one camera stationed in one place throughout the proceeding with video fed out of the courtroom through one cable for pool coverage by several television stations at once. Existing sound systems used by court reporters can be modified to provide sound for the television cameras. WFAA, the ABC affiliate in Dallas, has done a tape of television coverage of some mock trials, both appellate and criminal, that I'm getting sent down here to give you as soon as possible so you can see for yourselves what it involves.

Beyond the technical advantages of the latest equipment, the authority given judges to control their own courtrooms in other states has proven to be very effective. Judges can prevent videotaping of juries, children, victims of sex crimes, some informants and particularly timid witnesses who might be unduly affected by the camera. I think, in most cases, television stations will be more than happy to comply with those kinds of limitations, understanding that we do not want to change the outcome of a trial by our presence.

I only heard about this resolution you're considering very recently, so my testimony was prepared very hurriedly. I know there are other news directors around the state who would welcome the opportunity to discuss this further with you. And I would be happy to answer any questions or try to get any other materials you would like to help you make your decision on this.

We feel it's one of the most significant actions you could take to enhance the public's understanding of the important job you have here.



**KRGV-TV P.O. BOX 5 WESLACO, TEXAS 78596 (512) 968-5555**

December 12, 1989

Hon. Nathan Hecht  
Texas Supreme Court  
P.O. Box 12248  
Capital Station  
Austin, Texas 78711

Dear Mr. Justice Hecht:

In January you will have an opportunity to vote for a rule change which would allow television coverage of the Texas Supreme Court. As a fifth generation Texan and a journalist who has covered Texas courts for twenty years, I strongly urge you to approve this change.

Texans have a constitutional right to know what goes on in their courtrooms. The banning of television, Texan's main source of news and information, in effect keeps the doors of justice closed to most Texans.

Televised proceedings, which 44 states allow, would do more than any other action to educate and inform Texans about their court system. It could also provide a more informed electorate, perhaps decreasing voter apathy in judicial elections.

WFAA, the ABC affiliate in Dallas/Fort Worth, has produced a video tape of a mock trial showing how one noise-free camera, with existing court room light, would cover a trial. Carole Kneeland of Austin ABC station KVUE has made this tape available to you. Please watch it before deciding your vote.

Finally, I want to assure you, this news organization would agree to any reasonable rules the court would establish regarding television coverage.

Respectfully,

Michael Jones  
Executive Producer

MJ/1s

00811

KERA Channel 13/90.1  
7000 Harry Hines Boulevard  
Dallas, Texas 75201  
214 871-1390 Metro 263-3151

4543,001

hjh  
LMS

January 30, 1990

✓2-1-90  
Xc J. Healy  
J. Doggett

**KERA**

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

Dear Mr. Soules:

I am the director of Local Programming at KERA-Channel 13, the public television station in Dallas.

My colleagues and I are pleased to know that the prohibition on television cameras in the courtroom of the Supreme Court has been removed from the Code of Judicial Conduct. We hope that you and the other members of the advisory committee appointed to write the new rules will now allow television journalists to record legal proceedings normally open to the public and previously covered by reporters without cameras.

We believe that by televising court proceedings we can provide more accurate and complete coverage of an area of government often poorly understood by the general public. While the apathy of voters in judicial races can be attributed to many causes, surely one of them is that voters do not see how the courts directly affect their lives. As you are well aware, many people do not have the opportunity to watch the courts in action. Since American citizens today receive the majority of their news from television, we believe that television coverage is essential to maintaining an informed and enlightened public.

We realize that there are concerns about the possibility of cameras sensationalizing the court's proceedings or affecting the participants. The experience of forty-four other states, which allow more television coverage of their courts than Texas, shows that this is not a major problem. Due to technical advances in electronic equipment, we are confident that we can cover the Texas Supreme Court with very little disruption. Only one camera would be placed in the courtroom with video provided to the television stations on a "pool" coverage basis.

We believe that this significant step will enable the public to gain a greater understanding of the important role of the courts in our society. Thank you for your consideration as you write the new guidelines.

Sincerely,

*Sylvia Komatsu*

Sylvia Komatsu  
Director of Local Programming

00812

KERA  
3000 Harry Hines Boulevard  
Dallas, Texas 75201  
214-871-1390 Metro 263-3151

**KERA**

December 11, 1989

Justice Nathan Hecht  
Texas Supreme Court  
P.O. Box 12248 Capitol Station  
Austin, TX 78711

Dear Justice Hecht:

I am the Director of Local Programming at KERA, Channel 13, the public television station for Dallas/Fort Worth/Denton.

I am writing in support of the resolution to allow television cameras inside the Texas Supreme Court to record legal proceedings normally open to the public and covered regularly by reporters without cameras. My colleagues and I at KERA believe that by televising court proceedings we can provide more accurate and complete coverage of an area of government often poorly understood by the general public.

While the apathy of voters in judicial races can be attributed to many causes, surely one of them is that voters do not see how the courts directly affect their lives. As you are well aware, many people do not have the opportunity to watch the courts in action. Since American citizens today receive the majority of their news from television, we believe that television coverage is essential to maintaining an informed and enlightened public.

We realize that you may be concerned about the possibility of cameras sensationalizing the court's proceedings or affecting the participants. The experience of forty-four other states, which allow more television coverage of their courts than Texas, shows that this is not a major problem. Due to technical advances in electronic equipment, we are confident that we can cover the Texas Supreme Court with very little disruption.

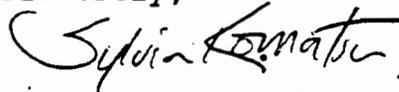
00813

Only one camera would be placed in the courtroom with video provided to the television stations on a "pool" coverage basis.

Some states have also given judges the authority to prevent videotaping when judges feel that witnesses may be unduly affected by the presence of cameras (e.g., cases involving children, sex crimes, informants, etc.). I think you'll find that television stations usually understand these concerns and are willing to comply with restrictions when such sensitive cases are involved. Given these safeguards, we believe the benefits to the public substantially outweigh any possible drawbacks.

Thank you for your consideration. We hope that you will take this very significant step enabling the public to gain a greater understanding of the important role of the courts in our society.

Sincerely,



Sylvia Komatsu  
Director of Local Programming

2900 17th St  
P.O. Box 3257  
Port Arthur, TX 77543-3257

The Golden Triangle  
Port Arthur-Beaumont-Orange  
409-985-5557



December 8, 1989

Honorable Nathan Hecht  
Texas Supreme Court  
P.O. Box 12248  
Capital Station  
Austin, Texas 78711

Your Honor,

My name is Bob Wright, and I am the news director of KJAC-TV, the NBC television affiliate in Beaumont/Port Arthur. I am writing to support a resolution allowing television cameras inside courtrooms to record legal proceedings of the Texas Supreme Court.

There are many reasons I could express to you for why I am so very much in favor of this resolution. I know you have probably heard each one many times before. I know your time is valuable, so I won't go into too much detail on those reasons, but please let me have a moment to offer my views.

As you know, at one time Texas was one of only two states which permitted television and radio into its courtrooms. We in the electronic media lost that right with the 1965 trial of Billie Sol Estes. But times, and technical abilities have changed since then. Earlier this decade the U. S. Supreme court realized those changes, and gave the decision, on whether to open courts to electronic media, back to the state courts. Today Texas is one of only 6 states still denying cameras and microphones access to its courts.

As 44 states have discovered the presence of cameras and microphones in court proceedings has had little negative effect. Technical advances have reduced the size of our equipment. In 1965 noisy film cameras were humming, and grinding away, today, our equipment is silent. Those film cameras required a great deal of light, today, we can shoot in regular room light. I feel you will find most every news director willing to do whatever is necessary to keep our technical problems from ever interfering with the proceedings.

There are many positives to allowing electronic coverage of our court proceedings. I feel it leads to a better informed public. Current coverage often leaves the public confused as to why certain rulings are made, which leads to fear instead of understanding. I can't tell you how many times I have heard someone in my news room say after a verdict... "why did they rule that?" and my reporter answer... "you would understand if you had been there to see it." In fact, the public is so uninformed about our courts, many do not vote in judicial elections.

But, above all the reasons, I feel its part of a persons right to a public trial. To exclude one form of journalism, or hamper its ability to reflect an accurate picture of the proceedings is breaking with the spirit of the constitution's guarantee of a free and public trial.

I thank you for your time and consideration of this matter which I and many news directors feel is of utmost importance to us and the citizens of Texas.

Sincerely,



Bob Wright  
News Director, KJAC-TV



KXAS-TV

P.O. Box 1780  
2900 Barnett Street  
Fort Worth, Texas 76101-1780  
(817) 429-1550

Mike McDonald  
News Director

December 11, 1989

Justice Nathan Hecht  
Texas Supreme Court  
P.O. Box 12248  
Capital Station  
Austin, Texas 78711

Dear Justice Hecht,

The news department at KXAS is gratified the Court is considering allowing television coverage of its public proceedings.

This is an important step and we agree with our colleagues that televised court proceedings would lead to a more informed public and give the citizens of Texas more confidence in the judicial process.

It has been almost twenty-five years since cameras were allowed in Texas courts. In that quarter century technology has developed to the point that the type of television equipment which would be used in court coverage is unobtrusive.

We urge you to approve the proposal now before you.

Sincerely,

Michael H. McDonald

MHM/jh

00817

1 in terms of trying to characterize a defense  
2 that someone is wishing to urge is some kind of  
3 new defense.

4 To impose upon the plaintiff the  
5 burden to define a term that is used in a  
6 question is just unfair, and that is what the  
7 status of our current rules are, is that the  
8 definitions and instructions all have to be  
9 substantially requested, or else it's -- it's  
10 waived. And that doesn't make any sense. There  
11 should be an ability to object to it: "That's  
12 not a defense; that's not a ground of recovery,  
13 or legitimate theory of recovery," so that you  
14 can identify what it is that your complaint is  
15 without having to do the other side's work on  
16 those theories that you are resisting.

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

19 Thank you, Mr. McMains.

20 MR. McMAINS: Thank you, Your Honor.

21 JUSTICE HECHT: Other comments on  
22 this block of rules?

23 We -- with the Court's leave, we  
24 have a couple -- a couple of people to testify  
25 about the use of cameras in the courtroom which

1 have scheduling problems -- who have scheduling  
2 problems, and I know everybody has scheduling  
3 concerns --

4 CHIEF JUSTICE PHILLIPS: Let's save  
5 at least one of those witnesses so that the  
6 press will grace us with their presence.

7 JUSTICE HECHT: We will go ahead and  
8 hear these, unless -- unless there's objection.

9 Mr. George?

10

11

JIM GEORGE,

12

13

14

15

16

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

17

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19

20

21

22

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24

25

MR. GEORGE: I'm Jim George from  
Austin. I represent KTBC-TV and other  
television and broadcast companies on a regular  
basis, and I'm here to support the proposal that  
this court have the authority to allow truly  
open proceedings to occur in this court in hope  
that some day all of the courts in the state of  
Texas will be authorized to have truly open

1 proceedings.

2 As the court is aware, most states  
3 in this country, and I believe over 40, allow  
4 electronic communications to broadcast or  
5 telecast, in some manner, their proceedings.  
6 They -- if you go to Florida or California or  
7 New York or Illinois, or most every place else  
8 in the country, the current technology allows  
9 nonobtrusive, nonobstructive communications by  
10 broadcast medium of what goes on in the courts.

11 And in Texas we have failed to keep  
12 pace with this trend, and it's truly a tragedy  
13 in a state which has a unique -- unique  
14 commitment to both freedom of the press, through  
15 its constitutional provisions, which are at  
16 least as extensive as the United States  
17 Constitution -- under this Court's rulings  
18 probably more so -- and a unique provision or  
19 provisions that do not appear in the  
20 Constitution of the United States guaranteeing  
21 open courts.

22 We, the founders -- the people who  
23 wrote the Constitution of Texas -- made a  
24 commitment in that era that we would truly have  
25 an aggressive press and open courts. And today

1 the medium of television is truly the way that  
2 people of this state can have access to their  
3 courts to see what happens.

4 And I believe -- speaking as a  
5 lawyer who tries cases day in, day out, of all  
6 sorts, as well as representing the  
7 communications industry -- that the public  
8 confidence in the judiciary in the process of  
9 deciding disputes, both criminal and civil --  
10 civil in this particular case -- would be  
11 drastically increased if the public, by and  
12 large, could see how well those obligations are  
13 carried on by the lawyers and the judges. And  
14 this Court, the proposal that's currently before  
15 you, to allow it to be the first to allow public  
16 access, true public access, would enhance its  
17 stature.

18 And in -- in my judgment, in this  
19 era when so many of our public issues are going  
20 to be decided by this Court and other state  
21 courts, it is imperative that we look closely to  
22 our traditions of openness and free press in  
23 this state, unique traditions, and allow --  
24 begin to put our toe in this water that so many  
25 people are freely -- freely swimming in, in the

1 other parts of this country, and see that truly  
2 it is a method allowing the people of the state  
3 of Texas to see how well the judges of this  
4 state perform, to see how well the juries and  
5 lawyers by and large perform, and improve both  
6 the access to the courts and the public's  
7 informational base through a fully-informed,  
8 free press.

9 CHIEF JUSTICE PHILLIPS: You're not  
10 saying that 40 states allow cameras in the  
11 trial --

12 MR. GEORGE: I believe -- and I have  
13 not checked that -- but I believe that there are  
14 approximately 44 states that allow some sort of  
15 broadcast medium in some of their judicial  
16 proceedings, and I had --

17 CHIEF JUSTICE PHILLIPS: Would that  
18 include just the states' appellate courts?

19 MR. GEORGE: In various forms of  
20 things. Now, many -- as the Court knows, many  
21 jurisdictions -- many jurisdictions -- most of  
22 the larger states like Texas; Florida;  
23 California; New York; and Illinois, in some  
24 current cases -- the big states -- most every  
25 one of them allow full access to the trial court

1 proceedings through electronic media. If you go  
2 to Florida or California or New York, or some  
3 place, and turn on the local television, you  
4 will see a trial judge hearing a case broadcast  
5 on television, not unlike C-Span. I mean, they  
6 have -- we have, you know, the -- I believe last  
7 week the British House of Commons allowed  
8 television in for the first time, and the Senate  
9 of the United States. And if the British House  
10 of Commons and the Senate of the United States  
11 can allow television in, it certainly -- the  
12 courts of the state of Texas, particularly this  
13 Court, ought to be able to allow the same medium  
14 to coverage. We see it as -- it is the norm in  
15 most parts of the world, particularly in other  
16 jurisdictions of the United States, and there is  
17 no reason not to do it here.

18 CHIEF JUSTICE PHILLIPS: As you  
19 probably know, twice in this decade this Court  
20 has requested a referendum of the trial  
21 judges -- of all the judges of this state at the  
22 judicial section meeting. In 1981 it was a four  
23 to one margin against cameras. Progress being  
24 made for your position, it was only slightly  
25 more than two to one against it in the most

1 recent --

2 MR. GEORGE: Well, one of the  
3 advantages --

4 CHIEF JUSTICE PHILLIPS: What --  
5 what do you suggest we do to -- if there are  
6 those of us who believe that there is no reason  
7 why the courts should not be open to cameras,  
8 what do we do to convince the -- the trial bench  
9 that this is not something that will impede the  
10 administration of justice in their own  
11 courtrooms?

12 MR. GEORGE: The first -- I think  
13 the solution to that is what is proposed: to  
14 begin with, this Court standing up and allowing  
15 its proceedings to be open to the electronic  
16 media. It has the facilities, it has the  
17 capacity, and it can show the leadership.

18 It is a part of this Court's  
19 responsibility -- not only in revising these  
20 rules, the rules of procedure that we are here  
21 today talking about -- to provide leadership to  
22 both the appellate -- all the appellate courts  
23 and the trial courts, and to provide leadership  
24 in other areas. And this is an area of  
25 leadership by letting it in -- let my clients

1 and others in -- to telecast the proceedings in  
2 this court, and will go a long way.

3 I mean, I doubt that the court will  
4 fault, and I doubt that the administration of  
5 justice will be greatly impeded in this court,  
6 and at least those trial judges will have some  
7 comfort that it -- it can be, and it is not the  
8 end of the world, to allow television in the  
9 courtrooms.

10 JUSTICE DOGGETT: The proposal that  
11 you refer to that I have made is aimed just at  
12 giving discretion to this court.

13 MR. GEORGE: Yes.

14 JUSTICE DOGGETT: We had a  
15 videotaping done during the Edgewood case, which  
16 was then embargoed under the code of conduct,  
17 and this will take the change in the code of  
18 conduct, as well as the -- the rules. But is  
19 there a way in this court that you can have  
20 video for various television stations and not  
21 interrupt and -- the strife from the -- from the  
22 arguments?

23 MR. GEORGE: We're doing it today,  
24 and --

25 JUSTICE DOGGETT: Well, we've got

1 more light in here today than we have had in  
2 recent years.

3 MR. GEORGE: The technology, I'm  
4 sure, can be handled. The providing of  
5 additional lighting to the courtroom shouldn't  
6 be a tremendous problem, but even with the lower  
7 lights, there is technology available. If you  
8 have ever seen the Friday night football game  
9 highlight films, they do manage to videotape the  
10 Bastrop Bears playing the Lockhart Lions, and  
11 the lighting in those stadiums is not great; and  
12 your technology is available to do that. I  
13 think that the quality of the medium would be  
14 improved with a little -- little more light in  
15 the courtroom, but that's not a --

16 JUSTICE RAY: Some think we need  
17 more light, anyway.

18 MR. GEORGE: Both -- both real and  
19 substantive and figuratively.

20 JUSTICE SPEARS: I have another  
21 question which is not new, but I've never heard  
22 a good answer for it. We have had requests of  
23 this same nature for the 11 years I have been on  
24 the Court, and with the two exceptions, we have  
25 declined to authorize them.

1 One of the problems that's been  
2 cited is that the coverage of the television  
3 media necessarily must be very brief because  
4 they are in short segments, and it is  
5 interesting to note in that line that there have  
6 been two television cameras in the courtroom  
7 today, and not until you testified did they jump  
8 up and start filming. I'm sure there will be  
9 excerpts of your testimony that will appear on  
10 news programs, and so forth.

11 The problem that we perceive is that  
12 it's impossible -- and I think that's a fair  
13 word -- to accurately portray to television  
14 viewers the sense of a trial that maybe lasts  
15 over weeks, or even days, in a one-minute  
16 segment, and that it necessarily requires an  
17 editor to selectively choose certain elements of  
18 the testimony or of the evidence that could, in  
19 effect, not give a true picture of what the  
20 trial is all about. And that -- that can be  
21 done by the print media, but it cannot be done  
22 in a one-minute segment for the evening news.

23 JUSTICE GONZALEZ: Thirty-second  
24 bite.

25 MR. GEORGE: There is a -- there's

1 two responses to that. And the nature of the  
2 media is that the electronic medium on  
3 commercial television stations, by and large, is  
4 local news segments in which they try to cover  
5 the events of the world in 30 minutes. By the  
6 nature of that medium, it cannot include a two-  
7 or three-hour proceeding in this court to  
8 determine how the Rules of Civil Procedure are  
9 modified, because you just simply don't have the  
10 methodology to do so.

11 We have, however, experienced  
12 today -- if you will -- if you have cable on  
13 your television, Justice Spears, you will see  
14 that the full proceedings of the Senate of the  
15 United States debating the entire proceeding are  
16 on C-Span. The full proceedings of the House  
17 Committee on the impeachment of a federal  
18 judge -- the Senate trial of the impeachment of  
19 a federal judge was on C-Span, the entire thing.  
20 You get up in the morning, you turn it on.

21 Now, their -- the cable networks  
22 provide outlets for extended coverage. That is  
23 a reality that exists in all sorts of public  
24 forums today. And if you go to other  
25 jurisdictions, you will see the cable systems

1 carry extended coverages. The local news, like  
2 the local paper, contain snippets, because  
3 that's the only way you can, because it's not  
4 the only event happening, to do so. And with  
5 all due respect, the nature -- the nature of the  
6 press is to edit the world for the rest of us,  
7 because we all can't be there, and we all can't  
8 see everything.

9 JUSTICE SPEARS: Some of us find  
10 that, in some senses and in some instances, a  
11 rather arrogant approach.

12 MR. GEORGE: Well, you can't all be  
13 in Czechoslovakia this morning, and we can't all  
14 see what happens there entirely. We have to  
15 depend upon some medium to select for the rest  
16 of us what part of the events happening in  
17 eastern Europe we can see. There's no -- it's  
18 simply the physical limits of the world.

19 The press has always, whether it's  
20 electronic, or print, or otherwise, had to play  
21 editor, because you can't simply recreate the  
22 entire world through a newspaper or a television  
23 or a radio broadcast. It has to be selected.  
24 And our commitment in this state to the freedom  
25 of that selection through our constitutional

1 provisions is dramatic.

2 CHIEF JUSTICE PHILLIPS: Well, just  
3 as an aside, 44 states have a freedom of speech  
4 clause that has some press responsibility  
5 language in it, and 39 states have a  
6 substantially similar open courts provision to  
7 Texas, so --

8 MR. GEORGE: Most of --

9 CHIEF JUSTICE PHILLIPS: It's not --  
10 I mean, we are following the majority of other  
11 states in being different than the federal  
12 constitution on those --

13 MR. GEORGE: That's true. There is  
14 no question about that. But 40 of those states  
15 also allowed broadcast medium in their courts.  
16 Now that suggests that, you know, maybe those  
17 other fellows are reading their constitutions  
18 more openly than we have, and I would suggest  
19 that -- the federal constitution not  
20 particularly a good guide -- the federal courts  
21 have never done it, but they have -- there is no  
22 open court provision in the federal  
23 constitution. There is no -- the free press  
24 provisions of the federal constitution is not --  
25 are not as protective as the state constitutions

1 are.

2 JUSTICE GONZALEZ: Can you summarize  
3 briefly your proposal?

4 MR. GEORGE: My proposal is  
5 essentially the one -- today?

6 JUSTICE GONZALEZ: Yes.

7 MR. GEORGE: Today this Court should  
8 have the discretion to authorize the telecasting  
9 and broadcasting of proceedings it selects. I  
10 think we -- if I was to write on the perfect  
11 world, I would recreate the systems that are in  
12 Florida or California or New York or Rhode  
13 Island, or many of the other jurisdictions. I  
14 don't think the state trial bench is ready for  
15 that.

16 JUSTICE GONZALEZ: But eventually  
17 you would move in the direction that you want  
18 the trial proceedings. You will want to have  
19 access -- you will want the ability to have TV  
20 in your -- you want any -- any barriers that  
21 would prohibit you from being in the trial  
22 courts where the action is -- a majority of the  
23 action -- I mean live action that is sensational  
24 in the nature of a -- that can be seen or shown,  
25 you know, in a 30-minute -- a 30-second sound

1 bite.

2 MR. GEORGE: You would have to  
3 couple it with the technology provisions that  
4 allow -- if you watch television, or your cable  
5 systems have these trials on them here in  
6 Austin, you can watch them. They have  
7 technology requirements that the court has to be  
8 equipped with one camera. There can't be news  
9 people standing around the courtroom, for  
10 example, in these other jurisdictions. Those  
11 kinds of provisions would be included, but the  
12 cameras could be turned on in the preceding  
13 telecast.

14 JUSTICE GONZALEZ: There's some  
15 concern about invasions of privacy, for example,  
16 of showing the jury -- the camera spanning the  
17 jury and the trial bench, and there's some  
18 legitimate concerns about that. Or a  
19 sensational sex trial or rape witness, for  
20 example, invasions of privacy.

21 MR. GEORGE: What is it --

22 JUSTICE DOGGETT: I think those are  
23 the kind of concerns that the Chief mentioned of  
24 the poll we took -- a couple of them that have  
25 been taken -- that there seemed to be strong

1 sentiment of trial judges against doing this  
2 thing, and why this proposal really is narrow  
3 and just simply gives this court and the Court  
4 of Criminal Appeals, if it wants to join in,  
5 the discretion to do this.

6 JUSTICE GONZALEZ: The concern of my  
7 fellow judges is that, you know, as we go, they  
8 will go, you know. And in a --

9 JUSTICE DOGGETT: Well, I guess that  
10 depends on what our experience is. If that  
11 experience is not a favorable one, they are not  
12 likely to do so.

13 JUSTICE HECHT: The U.S. Supreme  
14 Court has considered this. What is the status  
15 of their consideration?

16 MR. GEORGE: As I understand it,  
17 they have considered it. They have never  
18 allowed the live broadcast of their proceedings.  
19 They have had some videotapes made of some of  
20 the oral arguments. The current Chief Justice  
21 has suggested that they consider changing that  
22 rule. I don't know that there is any great  
23 movement afoot in that court to -- to make any  
24 change, although I believe that it is something  
25 that they are actively considering.

1           It is again, as we got -- you know,  
2 we got the Senate to open up to television  
3 last -- two years ago, and the British House of  
4 Commons this week. It seems to me that we're  
5 making small steps.

6           And the Supreme Court of the United  
7 States hopefully will understand the medium as  
8 a -- as a method by the way the people can  
9 really see its court. It is, after all, their  
10 court, as this court is the court of the people  
11 of the state of Texas, and the only true way  
12 that they can ever see it. The only way that  
13 those folks in Houston can ever see what  
14 happens in here is if there is some electronic  
15 medium that allows them to participate via  
16 television.

17           JUSTICE RAY: Jim, let me suggest  
18 that, as one who had a pretty high profile a  
19 couple of years ago, that the hate mail and the  
20 kooks all come out of the woodwork when -- when  
21 your picture gets shown on TV, even from people  
22 that you don't know or never had any contact  
23 with.

24           The folks in the penitentiary start  
25 writing and say, "Uh-huh, that's that judge that

1 must have put me in this institution, or had  
2 something to do with putting me in the  
3 institution," and the letters started coming  
4 saying, "Boy, when I get out of the  
5 penitentiary, I'm going to kill you." And they  
6 didn't write just one letter; they wrote a lot  
7 of letters. And there were a lot of people  
8 writing the letters.

9 And you put judges at risk from the  
10 kooks of the world as they get more of a high  
11 profile, particularly on television.

12 MR. GEORGE: Well, I suppose that  
13 the problem with that argument just raised is  
14 that fundamentally those of you who offer  
15 yourself up for service on these courts have  
16 chosen to respond to, and appear, and deal  
17 with the people of Texas in their entirety,  
18 including those kooks. They're your  
19 constituents, too.

20 And it seems to me unfortunate to  
21 suggest that lack of information for the people  
22 to not know who you are is somehow in the  
23 interest of good government and good justice. I  
24 think that while that may be that the more  
25 well-known people -- Robert Bass was recently --

1 they arrested somebody trying to kidnap him  
2 because he is a well-known person -- maybe a  
3 rich person, as well -- but a well-known person.  
4 And well-known people are subject to more  
5 attention and unusual mail than not well-known  
6 people.

7 But after all, you are elected by  
8 all the people of this state of Texas, and you  
9 have to choose in some way, by seeking this  
10 office, to risk that notariety, because, in  
11 fact, it is important -- I think it's important  
12 that people do know what Justice Gonzalez looks  
13 like and who he is.

14 JUSTICE RAY: The drug dealers would  
15 delight in that. Drug dealers now, you know,  
16 are after judges, particularly who are tough on  
17 drugs.

18 MR. GEORGE: There's no question,  
19 and --

20 JUSTICE DOGGETT: Most of those  
21 folks know the people who sentence them, though.

22 MR. GEORGE: Well, I don't know that  
23 there is -- those folks probably know who you  
24 are already. I mean, it's the rest of the  
25 people that don't.

1 JUSTICE HECHT: Any other questions  
2 of Mr. George? Thank you --

3 MR. GEORGE: Thank you.

4 JUSTICE HECHT: -- Mr. George.

5 And Ms. Kneeland is here also to  
6 share her views.

7  
8 CAROLE KNEELAND,

9 appearing before the Supreme Court of Texas in  
10 administrative session to consider proposed  
11 changes to Texas Rules of Civil Procedure, Texas  
12 Rules of Appellate Procedure, and Texas Rules of  
13 Civil Evidence, stated as follows:

14  
15 MS. KNEELAND: I brought my remarks  
16 written, and I'll read them and try to go  
17 through them relatively quickly. We -- we  
18 double up a little bit on what we say, but --  
19 and then I -- I would like specifically to  
20 address your question, Justice Spears.

21 My name is Carole Kneeland. I'm the  
22 news director at KVUE television station,  
23 Channel 24, here in Austin, which is the ABC  
24 affiliate here.

25 I'm here to speak in support of a

1 resolution to allow television cameras inside  
2 this courtroom to record the legal proceedings  
3 of the Texas Supreme Court, proceedings normally  
4 open to the public and covered regularly now by  
5 news reporters without cameras. We feel opening  
6 up the Texas Supreme Court would be a tremendous  
7 first step toward television coverage of  
8 courtroom proceedings at all levels in Texas.

9 There are several reasons we think  
10 that's important. First, we feel the public's  
11 right to a public trial is abridged if cameras  
12 are excluded.

13 When that right was protected  
14 originally by our forefathers, television  
15 cameras hadn't been invented. But today more  
16 citizens say they receive their news through  
17 television than any other medium.

18 For most people, unless they are  
19 directly involved in a trial as an attorney, a  
20 juror, or a witness, there's no opportunity to  
21 watch the courts in action. We could provide  
22 that if we could televise the proceedings. We  
23 feel if we are to comply with the spirit of that  
24 right to a public trial in this day and age,  
25 television coverage is important.

1 Further, we believe if we could  
2 televise court proceedings, it would lead to a  
3 more -- much more informed public, giving people  
4 more confidence in the judicial process. By  
5 providing more accurate and complete court  
6 coverage, we could contribute to wider public  
7 acceptance and understanding of court decisions.

8 Under our form of government, there  
9 must be a constant concern for educating and  
10 informing people about all three branches of  
11 government. There may be no field of  
12 governmental activity where people are as poorly  
13 informed as the courts. Many of us complain  
14 about the apathy of voters in judicial  
15 elections, but we feel that by banning cameras  
16 from the courtrooms, we are closing the windows  
17 of information from which they might see and  
18 learn.

19 Beyond what we feel our coverage  
20 could do to promote understanding and respect  
21 for what's happening in our courtrooms, we feel  
22 it would eliminate some of the chaos that  
23 sometimes occurs outside the courtroom now, as  
24 we must chase people down in the hallways to get  
25 the television pictures we need to illustrate

1 our stories. We wouldn't have to do that if we  
2 could get our pictures quietly in the courtroom.

3 And this is where, in addressing  
4 your -- your concern, I think what -- one of  
5 the -- one of the problems that happens with  
6 trial judges now is that their only experience  
7 is seeing us crashing around in hallways and  
8 seeing on the air, you know, defendants kicking  
9 at us, or -- or whatever.

10 And if you think that our editing of  
11 what happened in a courtroom would perhaps be  
12 mistaken, you know, and misunderstood, I  
13 think -- I would argue that right now it's much  
14 more misunderstood because of the pictures that  
15 you are seeing over what we are saying. They  
16 are the only pictures we can get, and they  
17 frequently are very distracting from what really  
18 happened in the courtroom. We didn't really see  
19 a defendant in the courtroom, you know, walking  
20 down the hallway with a -- with a book in front  
21 of his face kicking at people; that's not what  
22 happened there. But that, right now, is the  
23 only thing we can show, because that's all we  
24 can get, outside of -- unless we have courtroom  
25 artists, which also don't depict the actual

1 thing that happened in the courtroom.

2 Once Texas was one of only two  
3 states that permitted television cameras in the  
4 courtroom. As I'm sure you know, it was the  
5 notorious 1965 Texas case of Billy Sol Estes  
6 that led to a ban of cameras in the courts. But  
7 in 1981, the U.S. Supreme Court ruled that the  
8 presence of television cameras is not inherently  
9 unconstitutional, throwing the issue back into  
10 the state courts. Since then, 44 other states  
11 have allowed cameras access to the courts, and  
12 not just the appellate courts, but in many cases  
13 the lower civil and criminal courts, as well.

14 Florida was the state that brought  
15 the issue to the U.S. Supreme Court in 1981.  
16 And I brought you a copy of the 1979 Florida  
17 guidelines which ensure that television cameras  
18 are as unobtrusive as possible so as not to  
19 prejudice court proceedings in any way. I will  
20 leave that with you.

21 You will see that the Florida  
22 experience has shown that the presence of the  
23 cameras in the courtroom has little negative  
24 effect on trial participants' perception of the  
25 judiciary or the dignity of the proceedings.

1 They found the cameras disrupt the trial either  
2 not at all or just slightly. The ability for  
3 jurors and judges to decide the truthfulness of  
4 witnesses or concentrate on testimony is  
5 unaffected, and no one seems to feel  
6 self-conscious. In fact, the Florida experience  
7 showed the presence of the cameras makes the  
8 jurors and witnesses feel slightly more  
9 responsible for their actions.

10 Technical advances have reduced the  
11 size, noise, and light levels of the electronic  
12 equipment so cameras can be used unobtrusively.  
13 And while you may find these lights distracting  
14 today, if we were -- if we were shooting in here  
15 on a regular basis, we could work out a better  
16 lighting arrangement that would more -- more  
17 fill in the room without having these spotlights  
18 like we have now. It's just that -- and I don't  
19 mean this in any -- in any more powerful way  
20 than I say it, but it's kind of dark in this  
21 room. It only --

22 JUSTICE HECHT: Literally.

23 MS. KNEELAND: Yeah, I mean it  
24 literally. No offense, please.

25 It only requires one camera

1           stationed in one place throughout the proceeding  
2           with video fed out of the courtroom through one  
3           cable for pool coverage by several television  
4           stations at once. Existing sound systems used  
5           by court reporters can be modified to provide  
6           sound for the television cameras.

7                       WFAA, the ABC affiliate in Dallas,  
8           has done a tape of television coverage of some  
9           mock trials, both appellate and criminal, and  
10          I'm getting that sent down to you as soon as  
11          possible for you to see for yourselves what it  
12          involved. They actually -- they shot video of  
13          the -- the camera involved.

14                      Beyond the technical advantages of  
15          the latest equipment, the authority given judges  
16          in Florida and other states to control their own  
17          courtrooms has proven to be very effective.  
18          Judges can, themselves, prevent videotaping of  
19          juries, children, victims of sex crimes, some  
20          informants, and particularly timid witnesses who  
21          might be unduly affected by the -- by the  
22          camera. I think in most cases, television  
23          stations will be more than happy to comply with  
24          those kinds of limitations, understanding that  
25          we do not want to change the outcome of a trial

1 by our presence.

2 I only heard about this resolution  
3 you're considering very recently, so my  
4 testimony was prepared rather hurriedly. I know  
5 there are other news directors around the state  
6 who would welcome the opportunity to discuss  
7 this with you further, and I'd be happy to  
8 answer any questions or try gather other  
9 materials for you that would help you make the  
10 decision on this. In fact, I brought a  
11 documentary that we did at KVUE a couple of  
12 years ago for you to look at, if you would like  
13 to, about the issue.

14 We feel this is one of the most  
15 significant actions you can take to enhance the  
16 public's understanding of the important job that  
17 you have.

18 JUSTICE HECHT: Have you left us a  
19 copy of your --

20 MS. KNEELAND: Yeah. Here's my  
21 remarks, and here is the copy of the Florida --  
22 the 1979 opinion that the Florida court  
23 rendered, with their guidelines, which was  
24 upheld by the U.S. Supreme Court in 1981.

25 CHIEF JUSTICE PHILLIPS: Ms.

1 Kneeland, are you aware of the Arizona  
2 experiment with their Supreme Court --

3 MS. KNEELAND: No, I'm not.

4 CHIEF JUSTICE PHILLIPS: -- on  
5 public television?

6 MS. KNEELAND: I'm not.

7 CHIEF JUSTICE PHILLIPS: They  
8 selected a few cases to broadcast their  
9 proceedings, and -- and the public television  
10 station in Arizona provided background on the  
11 case, went to the scene of where the --

12 MS. KNEELAND: Oh, uh-huh.

13 CHIEF JUSTICE PHILLIPS: -- the  
14 facts -- where the occurrence in question  
15 occurred and interviewed the attorneys and made  
16 a broadcast out of it.

17 Do you think that there would be  
18 enough interest in some of our proceedings for  
19 your station, or perhaps a public station or a  
20 cable station, to provide the background  
21 information --

22 MS. KNEELAND: Certainly.

23 CHIEF JUSTICE PHILLIPS: -- that  
24 would make our proceedings understandable?  
25 You -- you have sat here this morning through a

1 lot of discussions of our rules, and I must  
2 admit they are fairly arcane, even to lawyers.

3 MS. KNEELAND: I'm not sure that's  
4 the one we will want to cover, but....

5 CHIEF JUSTICE PHILLIPS: But most of  
6 our cases that come to us do not come on a -- on  
7 a judgment of the entire facts. We have no  
8 basis to review those facts. We are looking at  
9 one or two narrow points of law that we are  
10 reviewing, and would be unintelligible,  
11 perhaps -- many of our cases -- to viewers as a  
12 whole without background explanation.

13 MS. KNEELAND: Sure. And it might  
14 be that there would only be a few cases a year,  
15 even, that we actually were very interested in.

16 We would have been thrilled to have  
17 been able to use the video from the Edgewood  
18 case. It certainly would have made it very much  
19 more understandable, and that's probably one of  
20 the most important cases you -- you have dealt  
21 with this year, certainly, and we already had  
22 plenty of video to illustrate that story. We  
23 had video of the school -- the school -- the  
24 very school districts that you talked about  
25 your -- in the -- in the case, and -- and had

1. that kind of thing that would have provided  
2 background.

3           One thing I wanted to say, and this  
4 kind of relates to that in terms of what you  
5 asked about, although, you know, you mentioned a  
6 minute. We actually get a minute and thirty.  
7 I'm sure that really soothes your mind, doesn't  
8 it, and makes you feel a lot better? We get  
9 between a minute thirty and two minutes to  
10 present it.

11           And I would argue that, you know,  
12 almost anything you go to could use some  
13 editing. You may have felt that way about what  
14 you heard this morning. I don't -- I mean, I --  
15 I -- I didn't -- I don't know what you -- you  
16 know, I'm no lawyer, so I didn't understand part  
17 of what you're talking about, but I would think  
18 you wouldn't have minded to have heard the -- a  
19 summary, and --

20           JUSTICE SPEARS: No argument there.

21           MS. KNEELAND: Okay. And that's  
22 essentially what we do. And maybe sometimes we  
23 don't do it as well as you would like, or even  
24 we would like, but we try very hard to -- our  
25 philosophy is that we're trying to take the

1 viewer to the scene of whatever we witnessed,  
2 whether it's a trial, or the Legislature in  
3 action, or an accident, or a fire; whatever it  
4 is. But you are trying to go and get the  
5 essence of what happened there, the most  
6 important thing that happened, and present it.  
7 And in the case of trials, you are trying to  
8 present both sides, because there's usually at  
9 least two.

10 And maybe we don't succeed all the  
11 time, but that certainly is our -- our effort,  
12 and we could succeed at it a whole lot -- we  
13 would be a whole lot more likely to succeed at  
14 it if we could actually show what's said in here  
15 by intelligent people presenting the argument,  
16 and witnesses, than this business that we do  
17 now, which is, you know, people running --  
18 chasing people down stairways and through  
19 hallways trying to get them to repeat what they  
20 said in the courtroom. I think that does the  
21 whole judicial system a real disservice.

22 JUSTICE SPEARS: I hope you  
23 understand the spirit in which I said it.

24 MS. KNEELAND: Sure.

25 JUSTICE SPEARS: Often what is news

1 is what's bizarre, or strange, or unexpected, or  
2 dramatic. And sometimes that doesn't -- very  
3 often doesn't portray what is really at issue  
4 and the issue that the court, whether trial  
5 court or appellate court, is trying to focus  
6 upon.

7 MS. KNEELAND: Yeah. I would agree  
8 with you that sometimes that's --

9 JUSTICE SPEARS: The distractions is  
10 not a problem with me.

11 MS. KNEELAND: Uh-huh.

12 JUSTICE SPEARS: The technology  
13 today is -- is good enough that you can have a  
14 television camera, and you can have sound, and  
15 not disturb any of the proceedings. And I have  
16 been in one of those as a trial judge, and after  
17 about an hour, the jury forgets all about it, so  
18 I don't think it's a problem there.

19 My concern is its coverage in the  
20 way that it is edited and presented to the  
21 people, that it be an accurate portrayal of what  
22 the trial is really about, rather than some  
23 dramatic side issue or side event. Do you see?

24 MS. KNEELAND: Yeah, and I -- I  
25 absolutely agree with you and appreciate it and

1 realize that -- that, you know, in the short  
2 period of time, it's true that sometimes it is  
3 always, of course, the most dramatic and it's  
4 going to be reported.

5  
6 But if you cover a trial over a  
7 week's time, you know, that may be one thing  
8 that happens one day, but there will be -- you  
9 know, I -- I would hope that in the course of  
10 that time, you would cover the essence of the --  
11 of the whole issue. I certainly don't --

12 JUSTICE SPEARS: Those are usually  
13 criminal. Those are usually criminal trials in  
14 which --

15 MS. KNEELAND: Yeah. I'm not sure  
16 how much you had that was bizarre and dramatic  
17 in the school finance case. I -- I -- you know,  
18 if there were, we missed that completely.

19 JUSTICE SPEARS: It was absorbing.

20 MS. KNEELAND: I'm sure it was.

21 We would -- you know, and that's  
22 why, I think, starting here would be a good  
23 place to start. And, you know, you would -- you  
24 wouldn't be giving up control of your courtroom.  
25 You would -- you would have the authority to  
decide which cases we would get to do,

1 essentially. But we sure would like the  
2 opportunity, because we feel it would be -- it  
3 would be more accurate.

4 JUSTICE HECHT: Any other questions  
5 of Ms. Kneeland?

6 Thank you very much for coming.

7 And there's no other witnesses  
8 signed up on this subject -- Professor?

9  
10 PROFESSOR PATRICK HAZEL,

11 appearing before the Supreme Court of Texas in  
12 administrative session to consider proposed  
13 changes to Texas Rules of Civil Procedure, Texas  
14 Rules of Appellate Procedure, and Texas Rules of  
15 Civil Evidence, stated as follows:

16  
17 PROFESSOR HAZEL: I would -- if you  
18 don't mind, I'm going to say something very  
19 briefly again -- Patrick Hazel -- for another  
20 audience that would be most interested, at least  
21 in the videotapes of the proceedings before this  
22 Court, and those are the law schools. I think  
23 it would be of a tremendous asset for us to be  
24 able to have those arguments, and how the Court  
25 questioned the lawyers, and all of the

1 proceedings, for all the law schools.

2 Now, our students in Austin can come  
3 down here, but I'm sure you know with class  
4 schedules, parking, and all the other, they  
5 don't do it very often unless they are in a  
6 class that's related to the topic, or something.

7 But in Houston and in Waco and in --  
8 out in Lubbock, those don't have that much  
9 availability. So if videotapes were available,  
10 you might even benefit. We might be able to  
11 provide you with people who could argue a little  
12 better before the Court after seeing the others,  
13 so I speak in behalf of that.

14 JUSTICE HECHT: Any others on that  
15 subject? All right. Then returning to the  
16 Texas Rules of Civil Procedure, we had gotten  
17 through Rule 295. Any comments on Rules 296  
18 through 330?

19

20

HARRY TINDALL,

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

*TRCP*  
90  
156  
216(c)  
249  
307  
309  
542  
324(a)

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*Red Rules Sec*

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TELECOPY NUMBER:  
(512) 478-1978

November 26, 1989

*TRCP 21c*  
*TRCP 237c*  
*TRCP 41, 202, 240*  
*✓ 57(a)(1)*  
*✓ 12*  
*✓ 74*  
*✓ 41(a)(1)*  
*✓ 54(a)*  
*(2)(d)*

The Honorable Nathan L. Hecht, Justice  
The Supreme Court of Texas  
Post Office Box 12248  
Capitol Station  
Austin, Texas 78711

Dear Judge Hecht:

1. Is there a reason why the rules are initially subdivided in different ways? Some use parenthetical numbers (e.g., Tex. R. Civ. P. 3a); some use parenthetical letters (e.g., Tex. R. Civ. P. 298); some use plain numbers (e.g., Tex. R. Civ. P. 273); some use plain letters (e.g., Tex. R. Civ. P. 216); and others use no subdivision at all (e.g., Tex. R. Civ. P. 296). It would probably be best to continuing the current method of subdivision for existing rules that are merely being modified, but the court may wish to consider a uniform method of subdivision for new and totally rewritten rules similar to the system employed in the Texas Rules of Appellate Procedure.

I appreciate the opportunity to comment on the proposed rules amendments and hope that my comments are helpful.

Respectfully,



Charles A. Spain, Jr.

DAN R. PRICE  
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November 28, 1989

Honorable Nathan L. Hecht  
P.O. Box 12248  
Austin, TX 78711

RE: Comment on Proposed Rules Changes Regarding Discovery

Dear Justice Hecht:

Overhaul Needed: Finally, I personally believe that the entire area of discovery rules needs a complete reworking. I have read them a hundred times, have analyzed them sentence by sentence, written on them, given speeches on them, litigated them, etc., and I still have a hard time trudging through all of the different rules, all the different uses of terminology, all of the internal definitions, etc. I honestly believe that a complete overhaul of the discovery rules would greatly decrease the confusion among the bar and the litigation resulting therefrom. I realize the initial reaction to this suggestion is to try to pull one's hair out, but I honestly believe that this reorganization needs to be undertaken. These rules have got to be simplified. They have got to be better organized, less redundant, and written in language that a lay person could almost understand. The long run-on sentences need to be shortened. Perhaps this overhaul could be done under a new set of rules entitled "Texas Rules of Discovery." Start with a comprehensive list of definitions that will apply throughout the rules. Next, have a separate rule on "Permissible Forms of Discovery." See Rule 166b(1). Next, have a rule on "Permissible Scope of Discovery." See Rule 166b(2). Relying upon the prior definitions, state that the following is discoverable: facts, opinions, contentions, etc., relevant to the cause. Then state that these facts, etc., may be contained within oral testimony, documents, or tangible things (which terms would have already been defined above). Next, under another rule, set out examples of what may be discoverable, such as witness statements, the identity of experts, party communications, etc., all of which rules will be substantially shortened by the original "definition" section. Use short sentences, in laymen's language. Use standardized phrases, such as "requests" and "responses" to discovery. Next, have a separate rule on the "Duty to Initially Respond," which I discussed above. Next, have a separate rule on "Objections" wherein the four or five specific grounds for objections are set out in clear terms. Next, have a separate rule entitled, for example, "Objections Waived If Not Timely Raised," containing a simple statement that if a "discovery response" is not timely made, any objection thereto shall be deemed waived, "unless good cause . . . ." Next, have a separate rule entitled "Preservation Of Objections," which would be similar to present Rule 166b(4); however, having already set out the permissible objections, this rule would be more specific in how to preserve a particular type of objection. (Again, this is similar to present Rule 166b(4), except that I think it should be simpler language with shorter sentences per subject matter). Follow this by a new rule on "Protective Orders." See Rule 166b(5). Next, have a separate rule on the "Duty to Supplement," which would be similar to present Rule 166b(6). And so on.

166  
166a  
166(b)  
166(b)6  
167a  
168  
169  
20  
21  
Comm on [unclear]

ARNOLD ANDERSON VICKERY  
ELIZABETH J. HEALEY KILBRIDE  
VANESSA D. GILMORE  
E. LANGERS VICKERY

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November 15, 1989

Justice Nathan L. Hecht  
P.O. Box 12248  
Austin, Texas 78711

Re: Suggested Modification of Texas Rules of Civil Procedure

Dear Justice Hecht:

If the Court is truly serious about changing our rules of civil procedure in a way which will (i) increase the efficiency and fairness of the justice system; (ii) decrease the number and complexity of the rules; (iii) eliminate the need for constant amendments and the concomitant reeducation of bench and bar; (iv) reduce the cost and delay of litigation; and (v) bring Texas jurisprudence within the mainstream of litigation practice across the country, I offer the following recommendation, most seriously, and most urgently:

**ADOPT RULES WHICH PARALLEL THE FEDERAL RULES.**

This suggestion comes to you from a practitioner with 17 years of experience whose practice is limited exclusively to civil litigation.

The complexity and confusion of our current rules, and the constant process of amending them, is a disgrace to our judicial system. The rules have many pitfalls and perils which regularly trap or embarrass even the most experienced litigator and trial judge. The discovery rules, with automatic sanctions for exclusion of evidence, etc., are a source of constant squabble. They discourage professionalism between counsel and they virtually emasculate trial judges. The constantly changing appellate constructions of the rules make the trial practitioner's job something akin to Russian roulette. Compare e.g. your Court's opinion in McKinney I with the opinion on rehearing in McKinney II.

Fifty years ago last year the United States Supreme Court promulgated the Federal Rules of Civil Procedure. All of our law schools teach federal procedure. Lawyers all across the country are familiar with them, and, although many Texas "state court" practitioners eschew federal court, any competent litigator should be familiar with these rules. These rules entrust and empower trial judges with considerable discretion

*Committee to  
Comprehensively  
Review all rules  
and Counselor  
Fed. R. Civ. P.  
Order or adoption  
of substance*

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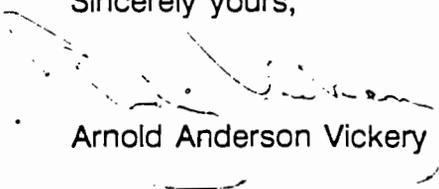
concerning procedure and discovery. They work quite well -- both in federal courts and in the courts of many of our sister states.

The trends in Texas practice over the past decade have been in the general direction of harmony with the federal rules. For example, we have abolished the cumbersome Plea of Privilege "trials", and gravitated towards submission of "questions" to juries which more closely parallels the federal system (although we still do not trust our jurors to really know the effects of their answers).

Most importantly from the standpoint of actually persuading the Texas bench and bar that adoption of rules which parallel the federal rules would be a step in the right direction, in 1983 the Court promulgated Texas Rules of Evidence which closely parallel the federal rules. I sincerely believe that the time has come to seriously consider doing the same with respect to the Rules of Civil Procedure, and would volunteer my time to work on such a project if the Court was seriously interested in pursuing it.

Thank you for the opportunity to provide this comment. Please feel free to contact me if I can be of any further assistance.

Sincerely yours,



Arnold Anderson Vickery

AAV:v

W. HUGH HARRELL

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November 22, 1989

Justice Nathan L. Hecht  
Bcx 12248  
Austin, Texas-78711

*Local Rules Sub*  
*20 to*  
*TKCP*  
*TKCP 13*  
*305*  
*W. H. H.*

Dear Judge Hecht:

As per the request of the Texas Supreme Court, I would like to offer the following suggestions concerning the Rules.

*LOCAL RULES*

1. Rescind ALL local rules and do not permit local Courts to trap the practicing attorney by making Rules.
2. Require a party taking the deposition or a party or witness to furnish the other attorney a copy of the deposition at the expense of the one taking the deposition.
3. Require the Appellant to deliver the copy of the Transcript and the Statement of Facts to the Appellee's attorney the day of or after the Appellant's Brief is mailed to the Court of Appeals; and, thereafter the Appellee's attorney will file same with the Clerk of the trial Court.
4. Remove, rescind, delete ALL sanctions by opposing counsel for alleged bad faith or frivolous law suits, because opposing counsel NOT having any counter-claim or cross-action is using these allegations alone to intimidate and coerce the opposing side. These allegations have become just as abusive as the party allegedly bringing a bad faith law suit. IF, retained in any manner, let JUST the trial Judge file a Motion and a hearing, and if a fact issue to be tried by a jury.
5. Require that a Judge NOT discuss any matter concerning the case with one attorney when the other attorney is NOT present, where there are opposing counsel. And, you might ought to say an attorney will not discuss matters with the Court unless the other attorney is present.
6. A Rule which would follow due process would require that NO order or judgment of the Court would be rendered or entered unless a hearing is set and notice served on all parties. This business of Courts just signing orders and/or judgments without opposing counsel being afforded an opportunity to be heard is for the birds. This would not apply as to a default judgment and this might be clarified as to default judgments and say no motion need be served upon the defaulting party. Other jurisdictions require a Motion asking for a default judgment, and that it be served and a date, time and palce set for a hearing thereon.
7. A Rule that any appeal from an administrative agency will in fact be trial de novo and not test an Administrative Order under the substantial evidence rule.

Yours very truly,  
WHH:wh cc: Ret.

*Hugh Harrell*

Hugh Harrell

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