SUPPLEMENT TO THE

SUPREME COURT ADVISORY COMMITTEE

1993/1994 AGENDA

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Index

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March 10, 1994

3/17

VIA FEDERAL EXPRESS

Mr. Luther H. Soules III
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San Antonio, Texas 78205-1457

Re: State Bar Committee on Court Rules

Dear Luke:

At the March 5 meeting, the Committee on Court Rules passed the following Rules for consideration by the Supreme Court Advisory Committee and recommendation to the Supreme Court of Texas:

(1) Rule 63, T.R.C.P., Amendment for a More Realistic Time for Filing Amended Pleadings.

(2) Rule 90, T.R.C.P., Amendment to Get Pleadings in Order in a Reasonable Period of Time Prior to Trial.

(3) An unnumbered rule to head that section of the rules addressing pretrial and discovery matters.

(4) Rule 166, T.R.C.P., Amendment related to scheduling and pretrial conferences to assist the lawyers in preparing cases for trial and involving the court to the extent that the attorneys cannot work together.

(5) Rule 166e, T.R.C.P., a completely new rule addressing the Amendment to Article 5490i as per a request to the Committee from President-Elect Jim Branton and Chief Justice Thomas Phillips.

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(6) Rule 166f, T.R.C.P., a new rule on pretrial and motion dockets for the implementation of Rule 166 and to establish a uniformity throughout the State for the trial courts to maintain pretrial or motion dockets.

(7) Rule 166g, T.R.C.P., a new rule that contains standard definitions aimed at reducing discovery disputes in regard these definitions.

Incidentally, except for Rule 166e which had two dissenting votes, all of the other Rules passed unanimously. These Rules are a part of an entire group of Rules the Committee on Court Rules has been working on for over three years. The Committee should pass the balance of these Rules at its April meeting. One of the Rules you will be seeing is almost identical to the standard interrogatories and request for production in health care claims that is enclosed, but will address the same subject for all other civil litigation. There are other Rules which are designed to facilitate discovery and minimize discovery disputes.

Besides the discovery area, we will be sending to S.C.A.C. following the April meeting, suggested revisions to Rule 13 and Rule 215. Based on discussions I heard at the November S.C.A.C. meeting, I believe these rules will be favorably received.

I look forward to seeing you at our next meeting on March 18 and 19.

Very truly yours,

J. Shelby Sharpe

JSS:cbc

Enclosure
xc: Mr. Doyle Curry
Mr. O. C. Hamilton, Jr.

s:/cyn/jss/soules.lt1

REQUEST FOR NEW RULE OR CHANGE FOR EXISTING RULES

TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording of Existing Rule:

RULE 63. AMENDMENTS AND RESPONSIVE PLEADINGS

Parties may amend their pleadings, respond to pleadings on file of other parties, file suggestions of death and make representative parties, and file such other pleas as they may desire by filing such pleas with the clerk at such time as not to operate as a surprise to the opposite party; provided, that any pleadings, responses or pleas offered for filing within seven days of the date of trial or thereafter, or under Rule 166, shall be filed only after leave of the judge is obtained, which leave shall be granted by the judge unless there is a showing that such filing will operate as a surprise to the opposite party.

II. Proposed Rule: The proposed new wording has been underlined.

RULE 63. AMENDMENTS AND RESPONSIVE PLEADINGS

Parties may amend their pleadings, respond to pleadings on file of other parties, file suggestions of death and make representative parties, and file such other pleas as they may desire by filing such pleas with the clerk on or before the times specified by the court in a scheduling order which shall not be less than thirty days prior to the date of trial. For good cause shown and only after leave of the judge is obtained, a party may file pleadings, responses, or pleas within thirty days prior to the trial date if such filing does not operate as a surprise to the opposite party. ~~at such time as not to operate as a surprise to the opposite party; provided, that any pleadings, responses or pleas offered for filing within seven days of the date of trial or thereafter, or under Rule 166, shall be filed only after leave of the judge is obtained, which leave shall be granted by the judge unless there is a showing that such filing will operate as a surprise to the opposite party.~~

III. Brief statement of reasons for requested change and advantages to be served by the proposed new Rule:

The purpose of this rule change is to extend the prior seven-day rule for filing of pleadings to the times specified by the trial court in the scheduling order and in no event permit the filing of pleadings within thirty days of the trial date except upon leave of court and for good cause shown.

Rule63.och/mt

REQUEST FOR NEW RULE OR CHANGE FOR EXISTING RULES

TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording of Existing Rule:

RULE 90. WAIVER OF DEFECTS IN PLEADING

General demurrers shall not be used. Every defect, omission or fault in a pleading either of form or of substance, which is not specifically pointed out by exception in writing and brought to the attention of the judge in the trial court before the instruction or charge to the jury or, in a non-jury case, before the judgment is signed, shall be deemed to have been waived by the party seeking reversal on such account; provided that this rule shall not apply as to any party against whom default judgment is rendered.

II. Proposed Rule: The proposed new wording has been underlined.

RULE 90. WAIVER OF DEFECTS IN PLEADING

General demurrers shall not be used. Every defect, omission or fault in a pleading either of form or of substance, which is not specifically pointed out by exception in writing and brought to the attention of the judge in the trial court ~~before the instruction or charge to the jury or, in a non-jury case, before the judgment is signed,~~ a reasonable time and not less than thirty (30) days before the commencement of a jury or non-jury trial shall be deemed to have been waived by the party seeking reversal on such account; provided that this rule shall not apply as to any party against whom default judgment is rendered.

III. Brief statement of reasons for requested change and advantages to be served by the proposed new Rule:

Historically, special exceptions were presented at the time of trial. Under our present day practice where "trial by ambush" has been abolished and liberal discovery is encouraged, a party's final version of the pleadings should be required within a reasonable time before trial commences. This includes special exceptions. Special exceptions should be dealt with at the pretrial stage of the proceedings so that final pleadings can be filed by each party within a sufficient time to allow each party to deal with any changes in the pleadings.

Rule90.och/mt

STATE BAR OF TEXAS

COURT RULES COMMITTEE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

Existing Rule - There is no existing Rule.

I. Exact wording of proposed Rule:

Rule _____ - Purpose of Pretrial and Discovery Rules

The purpose of the Pretrial and Discovery Rules is to afford litigants the means of discovering the true facts and legal theories which the parties in litigation will present in trial so that each litigant may be fully informed as to such facts and theories prior to trial; to reduce discovery disputes and contentiousness among lawyers; to the end that just, fair and impartial trials can be had without unreasonable expense to litigants or litigation brought to a just conclusion prior to trial.

To further this purpose a lawyer, as an officer of the court, has a duty to pursue the truth and shall not obstruct another party's access to the truth.

STATE BAR OF TEXAS

COURT RULES COMMITTEE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording of existing Rule:

RULE 166. PRETRIAL CONFERENCE

In an appropriate action, to assist in the disposition of the case without undue expense or burden to the parties, the court may in its discretion direct the attorneys for the parties or their duly authorized agents to appear before it for a conference to consider:

(a) All pending dilatory pleas, motions and exceptions;

(b) The necessity or desirability of amendments to the pleadings;

(c) A discovery schedule;

(d) Requiring written statements of the parties' contentions;

(e) Contested issues of fact and simplification of the issues;

(f) The possibility of obtaining stipulations of fact;

(g) The identification of legal matters to be ruled on or decided by the court;

(h) The exchange of a list of direct fact witnesses, other than rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before the time of trial, who will be called to testify at trial, stating their address and telephone number, and the subject of the testimony of each such witness;

(i) The exchange of a list of expert witnesses who will be called to testify at trial, stating their address and telephone number, and the subject of the testimony and opinions that will be proffered by each expert witnesses;

(j) Agreed applicable propositions of law and contested issues of law;

(k) Proposed jury charge questions, instructions, and definitions for a jury case or proposed findings of fact and conclusions of law for a non jury case;

(l) The marking and exchanging of all exhibits that any party may use at trial and stipulation to the authenticity and admissibility of exhibits to be used at

trial;

(m) written trial objections to the opposite party's exhibits, stating the basis for each objection;

(n) The advisability of a preliminary reference of issues to a master or auditor for findings to be used as evidence when the trial is to be by jury;

(o) The settlement of the case, and to aid such consideration, the court may encourage settlement;

(p) Such other matters as may aid in the disposition of the action.

The court shall make an order that recites the action taken at the pretrial conference, the amendments allowed to the pleadings, the time within which same may be filed, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions, agreements of counsel, or rulings of the court; and such order when issued shall control the subsequent course of the action unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or extend it to all actions.

II. Proposed Rule: The proposed new wording has been underlined.

RULE 166. SCHEDULING AND PRETRIAL CONFERENCES

~~In an appropriate action, to assist in the disposition of the case without undue expense or burden to the parties, the court may in its discretion direct the attorneys for the parties or their duly authorized agents to appear before it for a conference to consider:~~

(a) **Scheduling.** As soon as practicable but in no event more than one hundred fifty (150) days after the filing of Plaintiff's Petition the Court shall enter a scheduling order. The order can be as a result of a hearing or telephone conference with the attorneys for the parties and any unrepresented party or by agreement of the parties or their attorneys. The order shall establish times for:

(1) Joinder of additional parties;
(2) Amending or supplementing pleadings;
(3) Filing and hearing motions and special exceptions;
(4) Designating testifying expert;
(5) Taking of experts' depositions;
(6) Completion of discovery;
(7) Pretrial conference
(8) Filing of joint pretrial statement
(9) Trial on the merits; and
(10) Such other matters which the Court determines should be scheduled.

If the attorneys for the parties and any unrepresented party enter into an agreed scheduling order the parties shall submit the agreed scheduling order to the Court for entry by the Court not later than one hundred twenty (120) days after the filing of the Plaintiff's Petition. The scheduling order may be amended by the Court on the Courts own motion, by motion of any party or by agreement of the parties approved by the Court. In the event of an amendment, an amended scheduling order shall be entered.

(b) **Pretrial Conference.** At the time set by the Court, the attorneys for the parties and any unrepresented party shall appear before the Court for the pretrial conference. The pretrial conference is to assist in the preparation and disposition of the suit without undue expense or burden to the parties and for the purpose of establishing early and continuing control so that the suit will not be protracted for lack of management, expediting the disposition of the suit, discouraging wasteful pretrial activities, improving the quality of the trial through more thorough preparation and facilitating the settlement of the suit.

Matters to be Considered at the Pretrial Conference. At the pretrial conference the Court shall consider and may take action with respect to:

~~(a)~~ (1) All pending dilatory pleas, motions and special exceptions;

~~(b)~~ (2) The necessity or desirability of amendments to the pleadings;

~~(c)~~ (3) A discovery schedule including tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters including the allocation of expenses as are necessary for the proper management of discovery and the suit;

~~(d)~~ (4) Requiring written statements of the parties' contentions;

~~(e)~~ (5) Identification of contested issues of fact and simplification of the issues;

~~(f)~~ (6) The possibility of obtaining stipulations of fact;

~~(g)~~ (7) The identification of legal matters to be ruled on or decided by the court;

~~(h)~~ (8) The exchange of a list of ~~direct fact~~ testifying witnesses, other than rebuttal or impeaching witnesses ~~the necessity of whose testimony cannot reasonably be anticipated before the time of trial, who will be called to testify at trial, stating their address and telephone number, and the subject of the testimony of each such witness~~ together with the disclosures listed in Rule 166d A 1 and 2 of these Rules for those witnesses.

~~(i) The exchange of a list of expert witnesses who will be called to testify at trial, stating their address, telephone number, and the subject of the testimony and opinions that will be proffered by each expert witness;~~

~~(j) Agreed applicable propositions of law and contested issues of law;~~

~~(k) Proposed jury charge questions, instructions, and definitions for a jury case or proposed findings of fact and conclusions of law for a nonjury case;~~

~~(l) The marking and exchanging of all exhibits that any party may use at trial and stipulation to the authenticity and admissibility of exhibits to be used a trial;~~

~~(m) Written trial objections to the opposite party's exhibits, stating the basis for each objection;~~

~~(n) The advisability of a preliminary reference of issues to a master or auditor for findings to be used as evidence when the trial is to be by jury;~~

~~(o)~~ (9) The settlement of the case, and to aid such consideration, the court may encourage settlement;

~~(p)~~ (10) Such other matters as may aid in the disposition of the action.

(11) Consideration of alternative dispute resolution.

The Court shall ~~make an order that recites the action taken at the pretrial conference, the amendments allowed to the pleadings, the time within which same may be filed, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions, agreements of counsel, or rulings of the court; and such order when issued shall control the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or extend it to all actions.~~ establish a pretrial calendar for consideration of the matters referred to in this rule and as required by Rule 166f.

(c) Joint PreTrial Statement. At such time as set by the Court, the parties shall file with the Court a pretrial statement. The pretrial statement shall be prepared by the attorneys for the parties in the suit and any unrepresented party and shall be signed by the attorneys and any unrepresented party. The pretrial agreement shall include the following:

(1) A list of Plaintiff(s) witnesses;

(2) A list of Defendant(s) witnesses;

(3) Stipulations, if any, by the parties;

(4) The estimated time for trial;

(5) Plaintiff's proposed jury issues;

(6) Defendant's proposed jury issues;

(7) A short concise statement of contested issues of law;

(8) A list of any pending motions

(d) **Orders.** After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the suit unless modified by the court.

(e) **Non Compliance and Sanctions.** If a party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided such orders with regard thereto as are just, and among others any of the orders provided in Rule 215 Subparagraph 2b. In lieu of or in addition to any other sanction, the judge shall require such party or the attorney or both, to pay at such time as ordered by the Court, the reasonable expenses and reasonable attorneys fees of the other party(s) incurred for attendance at conferences or pretrials or in attempting to require compliance with prior orders unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expense unjust.

(f) **Waiver of Compliance.** By written agreement signed by all parties to the suit and filed with the Clerk of the Court, compliance with paragraph b or c or both of those paragraphs may be waived. Upon the filing of such agreement the Court shall enter an order stating which parts of this Rule, if any, are waived and will not be applicable for the suit. Notwithstanding such agreement of the parties, if the Court is of the opinion that compliance with paragraphs b or c or both of this Rule are necessary for a proper disposition of the case the Court may order compliance with such paragraph(s) as is appropriate.

STATE BAR OF TEXAS

COURT RULES COMMITTEE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULES

TEXAS RULES OF CIVIL PROCEDURE

I. Existing Rule: There is no existing Rule.

Exact wording of proposed Rule:

Rule 166e - Standard Interrogatories and Requests for Production in Health Care Liability Suits

A. Interrogatories and Requests for Production to be Answered By Plaintiff. The following are standard interrogatories and request for production in every suit involving a health care liability claim. The Plaintiff shall within forty-five (45) days after the filing of the original petition serve on Defendant's attorney, or if no attorney has appeared for the Defendant on the Defendant, full and complete answers to the following interrogatories and request for production. These answers are to be served without any request by Defendant.

1. Identification of each person believed to have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the claims or defenses to the claims. Knowledge or information includes knowledge or information that would not support the Plaintiff's claims or defenses. In addition, as to each person listed, (a) the general subject matter about which each person is likely to have knowledge or information, and (b) to the extent known at the time of answer or supplementation of answer a summary of the main facts favorable to the Plaintiff about which such person has knowledge.

2. As to any expert whom the Plaintiff may call to testify at the time of trial and for any expert whose mental impressions or opinions have been provided to or reviewed by an expert who may be called by the Plaintiff to testify at trial:

   a. Identification of said expert(s);
   b. The subject matter about which each expert has an opinion;
   c. The mental impressions or opinions of each expert;
   d. A general summary of the basis for the mental impressions and opinions of each expert; and
   e. Identification of documents and tangible things prepared by, provided to, or reviewed by each expert

3. Production of a copy of any settlement agreement entered into by the Plaintiff with any person or entity relating to any matter arising from the transaction or occurrence which is the subject of any claims or defenses.

4. Production of a written authorization signed by the Plaintiff which authorizes the Defendant, its agents, servants or employees to obtain medical records from any health care providers listed in response to disclosure number one of subparagraph A of this Rule.

5. Identification of each health care provider who has provided treatment to the Plaintiff for five years preceding the event or occurrence that gave issue to this suit.

6. Production of a written authorization signed by the Plaintiff which authorizes the Defendant, its agents, servants or employees to obtain medical records from any health care provider listed in the preceding interrogatory.

7. The factual basis to support each claim with sufficient specificity to give the Defendant fair notice of the factual basis for each claim of Plaintiff.

8. The legal theory(s) upon which each claim is based. Such legal theory(s) shall be set forth with sufficient specificity to give the Defendant fair notice of such legal theory and, where necessary for a reasonable understanding of the theory, citations of pertinent legal or case authorities may be included.

9. Production of any statement relating to the events, transactions, or occurrences which gave rise to the suit made by:

   a. the Defendant and;
   b. any person listed in disclosure number one of subparagraph A of this Rule.

   A statement is a document approved or adopted by the person making it.

10. Identification of all potential parties to the suit.

11. A listing of each element of damage claimed. As to each element of damage, the amount of which is capable of being determined by some calculation, the method of calculating such damage and a total amount of such damage claimed. As to the elements of damage, the amounts of which are wholly determined by the trier of facts, such as pain and suffering, mental anguish, and punitive damages, the total amount of such damages claimed for each element.

12. Identification of documents or tangible things upon which Plaintiff's damage computation is based, including those which bear on the nature and extent of injuries suffered.

13. A description of each act or omission which Plaintiff claims was below the relevant standard of health care for the person committing such act or omission, the name of the person who committed the act or omission and the date of such act or omission.

14. A description of the injury or impairment which Plaintiff claims was the result of the act or omission described in the preceding interrogatory.

15. Production of copy of all claims filed with any health care provider pursuant to The Medical Liability and Improvement Act of Texas, Article 4590i Sub Chapter D Section 4.01 VATS relating to Plaintiff's complaint.

16. A statement of the date and place of last treatment from this Defendant for the condition complained of by Plaintiff.

B. Interrogatories and Requests for Production to be Answered by Defendants. Every physician or health care provider who is a Defendant in a health care liability claim shall, within forty-five (45) days after the date on which an answer to the petition was due, serve on the Plaintiff's attorney, or if the Plaintiff is not represented by an attorney on the Plaintiff, full and complete answers to the following interrogatories and request for production. These answers are to be served without any request by the Plaintiff.

1. Identification of each person believed to have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the claims or defenses to the claims. Knowledge or information includes knowledge or information that would not support the Defendant's claims or defenses. In addition, as to each person listed, (a) the general subject matter about which each person is likely to have knowledge or information, and (b) to the extent known at the time of answer or supplementation of answer a summary of the main facts favorable to Defendant about which such person has knowledge.

2. As to any expert whom the Defendant may call to testify at the time of trial and for any expert whose mental impressions or opinions have been provided to or reviewed by an expert who may be called by the Defendant to testify at trial:

    a. Identification of said expert(s);
    b. The subject matter about which each expert has an opinion;
    c. The mental impressions or opinions of each expert;
    d. A general summary of the basis for the mental impressions and opinions of each expert; and

e. Identification of documents and tangible things prepared by, provided to, or reviewed by each expert

3. Production of a copy of any insurance or indemnity agreement which may cause or require another :

   a. to be liable to satisfy part or all of a judgment which may be rendered in the action against the Defendant;

   b. to indemnify or reimburse payments made to satisfy any judgment against the Defendant.

4. Production of a copy of any settlement agreement entered into by the Defendant with any person or entity relating to any matter arising from the occurrence which is the subject of the suit.

5. The factual basis to support each defense with sufficient specificity to give the Plaintiff fair notice of the factual basis for each defense.

6. The legal theory(s) upon which each defense is based. Such legal theory(s) shall be set forth with sufficient specificity to give the Plaintiff fair notice of such legal theory and, where necessary for a reasonable understanding of the theory, citations of pertinent legal or case authorities may be included.

7. Production of a copy of any statement claimed to have been made by

   a. the Plaintiff and;
   b. any person listed in interrogatory number one of Subparagraph B of this Rule.

   A statement is a document approved or adopted by the person making it.

8. Identification of all potential parties to the suit.

9. As to each individual listed in response to interrogatory number one in Subparagraph B. 1. above, who provided health care to the Plaintiff(s), describe such persons educational background and job experience to the extent known. In answering this interrogatory include the places and dates where such person received formal education, dates of graduation, degree obtained and specialty if any, internships, residencies and fellowships, including any board certifications and dates thereof, dates and places of all jobs including a brief description of the duties in each job.

10. Identify all claims made against Defendant pursuant to The Medical Liability and Insurance Improvement Act of Texas, Article 4590i Sub Chapter D Section 4.01 VATS.

C. **Objections and Privileged Matter.** It is rebuttably presumed that any objection made to a request for information in accordance with this rule is improper when made, however, objections are to be made within the same time as the time required for responses. Any request made pursuant to this rule is not intended to require disclosure of privileged documents or information; however, any party claiming a privilege shall identify with each response a listing of documents not produced which such Party claims are privileged.

D. **Response.** A response to and copies of documents responsive to any request shall not be filed with the Clerk of the Court; but a copy of such response and documents shall be served upon the Opposing Party and other parties pursuant to Rule 21a within forty-five (45) days of the date of service of the request. The response is to be signed by the attorney or party and each response is to be preceded by the written request. The response need not be verified, but the signature of an attorney or party constitutes a certification that to the best of his or her knowledge, information, and belief after an inquiry that is reasonable under the circumstances, the disclosure or supplementation is complete and correct as of the time it is made.

E. **Response Not Required.** No response shall be required where a particular interrogatory or request is clearly inapplicable under the circumstances of the case. However, the responding party shall state briefly why the information required is not applicable to the suit.

F. **Sanctions.** Failure to file full and complete answers and response to the above interrogatories and request for production of documents or the making of groundless objections shall be grounds for sanctions by the Court in accordance with the Texas Rules of Civil Procedure on motion of any party.

G. **Extension of Time to Answer.** The time limits imposed under this Rule may be extended by the Court on motion of a responding party for good cause shown and it shall be extended if agreed in writing between the responding party and all opposing parties. In no event shall an extension be for a period of more than an additional thirty (30) days.

H. **New Party to Answer.** If a party is added by an amended pleading, intervention, or otherwise, the new party shall file full and complete answers to the appropriate standard set of interrogatories and request for production no later than forty-five (45) days after the date of filing of the pleading by which the party first appeared in the action. Upon request by a new party to the suit, true copies of any written disclosure already produced under this rule shall be provided to the new party within thirty (30) days of the request.

I. **Supplementation.** The information or documents requested pursuant to this Rule shall be supplemented as required by Texas Rules of Civil Procedure 166b6.

J. Other Discovery. Nothing in this section shall preclude any party from taking additional non-duplicative discovery of any other party. The standard sets of interrogatories provided for in this section in this Rule shall not constitute, as to each Plaintiff and each physician or health care provider who is a Defendant, the first of two sets of interrogatories permitted under the Texas Rules of Civil Procedure.

II. **Brief Statement of Reasons for Requested Changes and Advantages to be Served by the Proposed New Rule.**

The purpose of this Rule is to implement Article 4590i Section 13.01 of Vernon's Annotated Civil Statutes and to provice for automatic disclosure of certain information between Plaintiff and Defendant in a suit involving a health care liability claim. Other changes are explained in the comments to Rule 166d, supra.

REQUEST FOR NEW RULE OR CHANGE FOR EXISTING RULES

TEXAS RULES OF CIVIL PROCEDURE

I. Existing Rule: There is no existing rule.

Exact wording of proposed rule:

RULE 166f. PRETRIAL AND MOTION DOCKETS

To assist in the preparation and disposition of suits and to implement Rule 166, all courts shall maintain a pretrial docket and motion docket for the purpose of scheduling pretrial and/or discovery conferences and hearings on motions.

II. Brief statement of reasons for requested changes and advantages to be served by proposed new rule.

The purpose of the rule is that there are some courts in the state which do not maintain pretrial or motion dockets, and the local rules do not provide for such; consequently, it is difficult to get motions heard or pretrial conferences arranged. The court coordinators will advise parties that the court's docket is filled with jury trials, non-jury trials, criminal matters, etc. The purpose of this rule is to require courts to provide for a pretrial and motion docket so that the parties will be given an opportunity to have a meaningful pretrial and/or discovery conference and to dispose of motions prior to the trial.

Rule 166e.ocn/mt

REQUEST FOR NEW RULE OR CHANGE FOR EXISTING RULES

TEXAS RULES OF CIVIL PROCEDURE

I. Existing Rule: There is no existing rule.

Exact wording of proposed rule:

Rule 166g. STANDARD DEFINITIONS

The following definitions are applicable to all written discovery requested pursuant to these Rules. When the words so defined are used in written discovery requests, they shall have the meaning stated in this Rule unless defined differently by the party seeking discovery. This Rule does not preclude a party from using additional definitions when such definition will aid in understanding the information requested.

(1) "You" -- "Your" and "you" refer to the party to whom these discovery requests are addressed; and your agents, servants, employees and attorneys.

(2) "Documents" -- "Document" and "Documents" include, but are not limited to: all paper material of any kind, whether written, typed, printed, punched, filmed, or marked in any way, including photographs and all nonidentical copies; and all data stored by, in, or on mechanical, electronic, or chemical forms or media, including films, transcriptions, graphic depictions, and other data compilations in the possession, custody or control of the party upon whom a request is made.

(3) "Tangible things" -- "Tangible things" includes everything that is not a document.

(4) "Person" -- "Person" means a corporation, partnership, organization, association, or entity, a natural person, and any government or governmental body, commission, board, or agency;

(5) "Identify or Identification" -- "Identify" or "identification," when used in reference to a document, means to state the date, the author (and, if different, the signer or signers), the addressee, type of document (e.g., letter, memorandum, telegram, chart, data compilation, etc.), and any other means of identifying it with sufficient particularity to meet the requirements for its inclusion in a request for production. If any such document was, but is no longer in your possession or subject to your control, state what disposition was made of it and the reason for such disposition;

"Identify" or "identification" when referring to a person means state information sufficient to enable the requesting party to locate such person, including, but not limited to: that person's full name; present or last known residential address and telephone number; and last known employer or business affiliation, including its address.

If the person to be identified is an entity other than a natural person, "identify" or "identification" means to state the entity's full name, the type of entity (e.g., corporation, partnership, proprietorship, organization, etc.) and the present or last known telephone number and address of its principal office or place of doing business.

II. Brief statement of reasons for requested changes and advantages to be served by proposed new rule.

The purpose of Rule 166g is to provide standard definitions for use in written discovery and to eliminate the necessity for numerous and different definitions to be given by the party seeking discovery; to standardize the definition in order to avoid unnecessary and time consuming objections.

4543.001

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March 23, 1994

Mr. Luther H. Soules III, Chairman
The Supreme Court Advisory Committee
State Bar of Texas
175 E. Houston, 10th Floor
Two Republic Bank Plaza
San Antonio, Texas 78205-2230

HHD
Scott Scott
Esparza
Lee Parsley

Re: Rules 2 and 523 Tx.R.Civ.P.

Dear Mr. Soules:

Mr. James S. Sharpe, of the Court Rules Committee suggested that I write you to suggest that your committee consider a textual change to Rules 2 and 523 which would resolve a situation which I have encountered. If my reading of both Rules 2 and 523 is correct, all civil proceedings in justice court are governed by the Texas Rules of Civil Procedure unless it is specifically provided otherwise by law or rules.

Unfortunately, it is the interpretation of a certain Justice of the Peace in the county where I practice that the Texas Rules do not apply when Justices of the Peace sit as judges in small claims court. It is my impression from this judge that in small claims court no rules apply.

The specific situation was this. I found myself defending a client who was sued in small claims court for over $4,000 on a alleged oral contract. After conducting some limited discovery it was clear that the claim was baseless and the plaintiff non-suited. I moved for a hearing for attorney's fees and was instructed that "[t]the Small Claims Court is not bound by TRCP rules." My motion was denied without hearing. A copy of the Court's letter is enclosed.

Under such an interpretation, a situation is created where individuals can be hailed into court, incur costs of defense and have no recourse to at least recover their costs. I believe that a textural change to rule 2 and 523 making reference to small claims courts or other clarifying language will resolve this issue for me and any others who find themselves in a like situation.

Your committee's kind attention to this matter will be greatly appreciated.

Yours truly,

Jeffrey S. Mahl

JSM/rr
enclosure

JAN 07 1994

COUNTY OF VAL VERDE

JUSTICE OF THE PEACE PRECINCT 3

GERALD L. PRATHER
P. O. BOX 838

DEL RIO, TEXAS 78840

PHONE 210 774-7511
210 774-7512

January 5, 1994

Mr. Jeffrey Mahl, Attorney At Law
108 West Losoya,
Del Rio, Texas 78840

RE: Cause No. 1412
AMANDY WENNER VS SAM SALEM

Dear Mr. Mahl,

Concerning your letter requesting a hearing on your prior motion with regards to attorney's fees: I refer you to Rule 2 of TRCP which lists the Courts that are controlled by the TRCP rules. You will note the Small Claims Court is not listed. The Small Claims Court, which hears Small Claims Suits, is a separate and distinct court from Justice Court, which hears all other Civil Suits.

Cause No. 1412 was filed as a Small Claims Suit. The Small Claims Court is not bound by TRCP rules.

Therefore, your motion for attorney's fees and your request for a hearing are hereby denied.

Respectfully,

Gerald L. Prather

Justice of the Peace, Pct. 3

SPg0023

MEMORANDUM

TO: Justice Hecht March 8, 1994

FROM: Lee Parsley

RE: TRAP 4(b) & TRCP 5

TRAP 4(b) and TRCP 5

Both Texas Rule of Appellate Procedure 4(b) and Texas Rule of Civil Procedure 5 provide that a document deposited in the United States mail, properly addressed and stamped, is deemed to have been filed on time if deposited in the mail on or before the last day for filing the document and received by the court within ten days.

One of the Deputy Clerks told me that they often receive documents (especially motions for rehearing) which were delivered to a private mail service (*i.e.* Federal Express, Airborne Express, etc.) on the due date but which arrived at the Court the day after the due date. He asked if these were timely filed under TRAP 4(b) since TRAP 4(b) (and TRCP 5) provide that the document must have been "sent to the proper clerk by first-class United States mail . . .." Although I did not opine as to the timeliness of the filing, it does point up a possible problem in the rules.

Should we have the SCAC look at the advisability of expanding TRAP 4(b) and TRCP 5 to include methods of delivery other than first class United States mail?

4543.001

LHS
hhd

5-31-94
SB

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL. (512) 463-1312
FAX (512) 463-1365

TRCP 13

May 27, 1994

HHD, SCAC Sub C Agenda ✓ SBOT Staff

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed is a letter from Robert Barfield regarding Rule 13.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

Robert E. Barfield, Lawyer
3612 West 6th Avenue, Room 4
Amarillo, Texas 79106-8664
Phone: (806) 372-1001

May 16, 1994

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

Re: Rule No. 13

Dear Justices of the Court:

I am addressing this to you in your capacity as makers of the rules of the Supreme Court of Texas.

I am very concerned about the inadequacy in Rule No. 13. I have been experiencing a great deal of unnecessary work, trouble, and grief as a result of repeated abuses of the discovery and Motion in Limine procedures. I am advised that there is some consideration about changing the rules to prevent discovery abuse, but I am more concerned at this time concerning the abuse of Motions in Limine. There are certain lawyers in this state who habitually file boiler plate Motions in Limine, indivual sections of which may or may not have any relevance whatever to the issues in the case. This causes a great deal of unnecessary trouble and inconvenience to the lawyers. I thought this would be covered under Rule 13, and it does appear to be covered under Rule 13 at least as far as forbidding lawyers from engaging in this kind of conduct. The sanctions provided, however, are inadequate. They refer to Rule 215-2B and say that:

"appropriate sanctions can be imposed".

The Rule 215-2B, is not appropriate at all in this situation. It concerns basically failures to respond, and provides such sanctions as striking pleadings and forbidding proof of certain facts. This is totally inappropriate to this abuse of the Motion in Limine because the Motion in Limine by its nature seeks to prevent the other side from proving things, rather than being auxiliary to proof of anything by the party submitting the Motion in Limine. It would be my suggestion that the Court be authorized to impose a monetary fine as a sanction for this sort of abuse

Please be good enough to refer this request to the appropriate committee and request that they give it due consideration and action.

Thanking you for your attention and consideration, I am,

Very truly yours,

Robert E Barfield

Robert E. Barfield

REB:g h-b

4543.001 LHS Ahd

1-25-94 93

RICHARD R. ORSINGER
ATTORNEY AT LAW
TOWER LIFE BUILDING, SUITE 1616
SAN ANTONIO, TEXAS 78205
(210) 225-5567
FAX (210) 229-1141

BOARD CERTIFIED
FAMILY LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

BOARD CERTIFIED
CIVIL APPELLATE LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

January 23, 1994

Mr. David J. Beck, Chair
Supreme Court Advisory Committee's
Subcommittee on Rules 15-165
BECK, REDDEN & SECREST
1331 Lamar, Suite 1579
Houston, Texas 77010-2002

HT
Scott Ogilvie
COAJ Staff
J Hedtke

Re: Proposed changes to TRCP 45 & 47

Dear David:

I am writing to propose changes to Rules 45 and 47 that would change the current practice regarding pleading claims and defenses.

My proposed changes would require parties to state any constitutional, statutory, or regulatory provisions relied upon as part of a claim or defense.

These proposed changes also make it clearer that a party must not only identify the cause of action or defense by name, but also must provide a description of facts sufficient for the opposing party to determine the circumstance which is sued upon.

The proposed comments make it clear that the pleader is not required to include in the pleading the specific acts or omissions that give rise to the claim or defense. This qualification is necessary to eliminate any risk that courts might require parties to plead all supporting facts, and then hold that party to those facts in discovery or trial. The purpose of the amendments to the two rules is to assure that the nature of the claims and defenses are unmistakably identified in the pleadings, without requiring the parties to plead the underlying facts in detail.

I believe that we should shore up the pleading requirements if we are going to restrict discovery, thus hampering a party's ability to use discovery to determine the basis of the opposing party's claims or defenses.

I also think that, if we are going to restrict discovery, we should permit parties to

use interrogatories to require the opposing party to detail the legal basis for claims or defenses, and the factual basis for each element of those claims or defenses.

Sincerely yours,

RICHARD R. ORSINGER

RRO:ro
Enclosure
cc. Other subcommittee members

January 23, 1994

**Proposed Changes to Rules 45 and 47,
Requiring That the Legal and Factual Basis
for Claims and Defenses be Stated in the Pleading**

RULE 45. DEFINITION AND SYSTEM

Pleadings in the district and county courts shall

(a) be by petition and answer;

(b) consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's grounds of defense. That an allegation be evidentiary or be of legal conclusion shall not be grounds for objection when fair notice to the opponent is given by the allegations as a whole. When a party relies upon a constitutional, statutory, or regulatory provision, it shall be identified in the pleading. When a party relies upon a recognized cause of action or defense, it shall be identified in the pleading;

(c) contain any other matter which may be required by any law or rule authorizing or regulating any particular action or defense;

(d) be in writing, on paper measuring approximately 8 1/2 inches by 11 inches, and signed by the party or his attorney, and either the signed original together with any verification or a copy of said original and copy of any such verification shall be filed with the court. The use of recycled paper is strongly encouraged.

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.

All pleadings shall be construed so as to do substantial justice.

Notes and Comments

Subsection (b) was amended in 1994 to provide that the legal basis for the claim or defense should be identified in the pleading. Examples would include: "Plaintiff

sues Defendant for breach of contract," or "Plaintiff sues Defendant for negligence, in part for violating Tex. Rev. Civ. Stat. Ann. art. 6701d, § 35," or "Plaintiff seeks recovery of attorney's fees under Tex. Civ. Prac. & Rem. Code, ch. 38," or "Plaintiff was contributorily negligent, and Defendant invokes the comparative responsibility provisions of Chapter 33 of the Tex. Civ. Prac. & Rem. Code," or "Defendant asserts the statute of limitations, Tex. Civ. Prac. & Rem. Code § 16.004, as a defense."

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 causes of action, stating the specific legal basis for each claim and giving a general description of the factual circumstances 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 the 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.

Notes and Comments

Subsection (b) was amended in 1994 to provide that claims for relief should provide both the specific legal basis for the claim and a general description of the facts upon which liability is founded. A description of the legal basis for a claim would identify the cause of action by name, and refer to any constitutional, statutory or regulatory provision upon which the claim is founded. The factual circumstances supporting a claim may be described generally, but in sufficient detail so that the opposing party can determine from the pleading the circumstances sued upon. The claimant is not, however, required to allege specific acts or omissions giving rise to the claim for liability.

4543.001

✓ 6-2-94

hnd

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL (512) 463-1312
FAX (512) 463-1365

May 31, 1994

HHD
Sctc Sctc
Agenda
✓
Staff

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed is a letter from Wendell Loomis regarding Rule 87.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

WENDELL S. LOOMIS, P.C.
A Professional Corporation

Wendell S. Loomis
Attorney at Law

FELLOW: Houston Bar Foundation

MEMBER: The College of the State Bar of Texas

14610 Falling Creek Drive
Houston, Texas 77068-2938

(713) 893-5900
(713) 893-5732 facsimile

May 24, 1994

THE SUPREME COURT OF THE STATE OF TEXAS
SUPREME COURT BUILDING
P.O. BOX 12248, CAPITOL STATION
AUSTIN, TEXAS 78711

Re: Problem with Rule 87, Determination of Motion to Transfer
Rule of Practice in District and County Court

Gentlemen:

In reading Rule 87, 2. Burden of Establishing Venue, there seems to be some confusion.

The confusion seems to stem from the wording as follows:

> A party who seeks to maintain venue of the action in a particular county in reliance upon Section 15.001 (General Rule), . . . has the burden to make proof, as provided in paragraph 3 of this rule, that venue is maintainable in the county of suit.

The next sentence is as follows:

> A party who seeks to transfer venue of the action to another specified county under Section 15.001 (General Rule), . . . has the burden to make proof, as provided in paragraph 3 of this rule, that venue is maintainable in the county to which transfer is sought.

Under paragraph 3 the burden to make proof apparently means prima facia proof and prima facia proof means supported by affidavit.

The problem arose when plaintiff filed a suit without necessarily alleging venue facts and defendant filed a Motion to Transfer Venue under Rule 86 stating some venue facts but without supporting them by affidavit. On hearing the Court passed the matter instructing counsel for both sides to support their position with affidavits or discovery.

It is suggested that the Rule should be amended to place a two tiered burden, perhaps with the initial maintenance of venue in the county of suit being required and only controverted by affidavits of the person requesting transfer.

If I may be of further service or further clarification if my suggestions are in order, please contact me.

Very truly yours,

Wendell S. Loomis

WSL:sml

4543.001

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL (512) 463-1312
FAX (512) 463-1365

May 16, 1994

HHD, SCAC agenda, SubC, STAT Staff.

TRCP 16.2

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Following our recent decision in *Transportation Insurance Co. v. Moriel*, 37 Tex. Sup. Ct. J. 450 (Feb. 2, 1994), an issue has arisen concerning the effect of bifurcation on plaintiff's right to nonsuit. May plaintiff nonsuit his entire case before he rests in the second trial? What if the jury is unable to reach a verdict in the second part of the trial? Should plaintiff's right to nonsuit after he rests in the first part of the trial be limited to his claim for punitive damages?

I would appreciate it if you would direct these inquiries to the appropriate subcommittee for consideration.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Reprinted From

The Review of Litigation

DISCOVERECTOMY II: THE END OF "GOTCHA" LITIGATION

Dan Downey
Lori Massey

SPRING 1994 VOL. 13, NO. 2

Discoverectomy II: The End of "Gotcha" Litigation

Dan Downey*
Lori Massey**

Table of Contents

I. Introduction

> Discovery was intended to be a domesticated bird dog to help flush out evidence. It has become, instead, a voracious wolf roaming the countryside, eating everything in sight.[1]

---

* Judge, 295th District Court, Houston, Texas. B.A. 1972, M.L.I.R. 1973, Michigan State University; J.D. 1976, Detroit College of Law.

** Briefing Attorney, Texas Supreme Court. B.A. 1990, University of Texas; J.D. 1993, South Texas College of Law.

1. Edward F. Sherman, *The Judge's Role in Discovery*, 3 REV. LITIG. 89, 196-97

In 1939, the new procedural process known simply as "discovery" was heralded as marking "the highest point so far reached in the English speaking world in the elimination of secrecy in the preparation for trial."[2] Some foresaw that discovery would "stamp the entire federal judicial process with a character of frankness and fairness that [would] go far in aiding our legal system to overcome the effects of its rather crude heredity."[3] Others might say that such predictions were nothing more than the wishful thinking of naive idealists. No one, though, could have foreseen the manipulation of the discovery process that so transformed the system as to make the original intent seem laughable.[4]

In a previous article, written in the midst of a barrage of petty discovery disputes, I proposed a virtual end to this madness we call discovery.[5] The proposal met with the overwhelming approval of those lawyers who actually try cases rather than climb under the rug of discovery to avoid the courtroom. Their response makes me believe that discovery can again be a tool of preparation rather than a tool of obstruction.

One lawyer, after reading *Discoverectomy (I)*, was so impressed with the novel concept that a litigator's practice should primarily involve preparation for trial that he inquired about the steps necessary to make *Discoverectomy* a reality.[6] Having no respect for those who simply criticize without suggesting meaningful solutions,

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(1982) (quoting Judge Gerard L. Goettel).

2. Edson R. Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737, 739 (1939). Professor Sunderland served on the committee appointed by the Supreme Court to draft the 1938 Federal Rules. His primary contributions were in the areas of depositions, discovery, and summary judgment. Charles E. Clark, *Fundamental Changes Effected by the New Federal Rules*, 15 TENN. L. REV. 551, 555-56 (1939).

3. James A. Pike & John W. Willis, *The New Federal Deposition-Discovery Procedure*, 38 COLUM. L. REV. 1436, 1459 (1938). This is the second part of Pike & Willis's article; the initial part can be found at 38 COLUM. L. REV. 1179 (1938).

4. *See* Jeffrey J. Mayer, *Prescribing Cooperation: The Mandatory Pretrial Disclosure Requirement of Proposed Rules 26 and 37 of the Federal Rules of Civil Procedure*, 12 REV. LITIG. 77, 81-82 (1992).

5. Dan Downey, *Discoverectomy: A Proposal to Eliminate Discovery*, 11 REV. LITIG. 475 (1992).

6. That lawyer was Joe Jamail. The authors wish to express their thanks for his support in this endeavor. Although he was principally responsible for this effort, he should not be held responsible for every view expressed herein.

we felt it imperative that an effort be made to rewrite the rules of procedure and outline a plan of action.

This endeavor was further motivated by a more personal interest. As a judge, I have gained more respect for good lawyering than I had when I was a practicing attorney myself. Despite what some think, professional advocates whose work product is characterized by honesty and integrity are the engines that drive not only our system of jurisprudence, but our entire system of governance. Sadly, their very existence is threatened by the current state of affairs.

Our preoccupation with "gotcha" discovery rules demeans the practice of law and all who participate in it. Even worse, it has driven some of our best trial lawyers out of the business or into the grave. The swelling ranks of full-time attorney-mediators who have given up the toil of litigation in frustration are a testimony to this unfortunate phenomenon.

Discovery was meant not only to inform the parties of the facts necessary to foster settlement, but to lead to a more efficient trial.[7] However, some attorneys are creating entire practices out of discovery by specializing in interrogatories and depositions. It has become the center of litigation rather than the facilitator of a later trial. "[O]ne comes to the conclusion that discovery has simply become an extended field of play in an on-going game of blindman's bluff."[8]

In devising this plan, we recognized early that it would be impossible to compile a set of rules addressing every conceivable problem that might arise in the course of litigation. We were also mindful of the perils of "overlegislating," which was precisely the problem we were seeking to correct. In recognition of these limitations, we adopted the "eighty percent rule." That is, these rules are designed to handle the realities of eighty percent of the cases tried. To deal with the other twenty percent, we have returned to that age-old jurisprudential concept of reposing in the judiciary the

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7. *See* WALTER JORDAN, MODERN DISCOVERY PRACTICE § 1.01 (1974) ("Before 1941, there were neither rules of civil procedure nor statutes specifically designed to provide litigants with the means of discovering pertinent information in the possession of their adversary or third parties.").

8. Michael E. Wolfson, *Addressing the Adversarial Dilemma of Civil Discovery*, 36 CLEV. ST. L. REV. 17, 18 (1987-1988).

freedom and discretion to craft rules where necessary to fit the needs of particular cases.[9]

The thrust of this Article concerns only those rules that we feel are the principal causes of the discovery maze in which lawyers today are expected to ply their trade, principally Texas Rules of Civil Procedure 166, 166b, 167, and 187. It is acknowledged that the adoption of the rules proposed herein will necessarily require amendment and adjustment of other rules of procedure. We have left that task to others.

II. The Plan in Practice

The first and foremost objective of our plan is to transform rights of discovery into real transfers of information. Currently, our system involves "compelled discovery." It is one in which a party will receive the information to which it is "entitled" only after first serving a request and then countering objections with a motion to compel.[10] As a first step, our plan establishes not only the right to know, but also the duty to disclose.

Through a structured timeline, much like that established in appellate procedure, attorneys wind their way along a preset path of discovery and disclosure, rather than spend months quibbling over what information shall be disclosed. The affirmative duties of disclosure in our plan somewhat mirror those proposed in the federal arena.[11] However, they do not go so far as to force one attorney to educate the other.[12] A lawyer may not lazily rely on the other

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9. *See infra* Appendix I, Proposed Rule 166c.

10. Rule 166b merely outlines information to which each party is "entitled," and gives no absolute right to such information. Even the United States Supreme Court has commented on the problem, stating that the Federal Rules merely give litigants the right to compel opponents to disclose certain information prior to trial. Hickman v. Taylor, 329 U.S. 495, 507 (1947).

11. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE (Proposed Draft 1991), *reprinted in* 137 F.R.D. 53 (1991) [hereinafter COMMITTEE ON FEDERAL RULES]. The idea of affirmative duties of disclosure is not merely a recently proposed cure. It is, in fact, consistent with the intention of the drafters of the discovery rules, who envisioned discovery as a process in which attorneys would lay their cards on the table. *See* Sunderland, *supra* note 2, at 738.

12. The Federal Rules do impose such an affirmative duty to disclose. *See infra*

party to make his case; he must affirmatively meet his own duties at each step of the timeline.

The second step in reaching the objective of our plan is to dispose of needless and inefficient practices.[13] Currently, parties play the game of "Gotcha!" with the tools of discovery. Instead of seeking relevant information, they seek to harass, avoid, or both. For this reason, our plan eliminates requests for admission[14] and interrogatories.[15]

Requests for admission were intended to forge common ground and to narrow the issues for trial. Instead, they are used to catch the opponent off guard. If the opponent fails to admit or deny within the time required, the requests are deemed admitted.[16] Thus, the request is often not a method of acquiring useful information, but a "get rich quick" method of litigation.[17] Instead, our plan calls for the joint filing of written stipulations prior to the pretrial conference.[18]

Interrogatories, although often yielding pertinent information, more often yield a severe headache. The questions are too often verbose, overbroad, or harassing, served by attorneys with no direction in their case. The objections are too often frivolous and serve merely as an avoidance tactic. As a result, interrogatories "spawn a greater percentage of objections and motions than any other discovery device."[19]

Dealing with this endless foray of requests, objections, and motions has transformed the judge from an adjudicator to a baby-sitter.[20] Our plan eliminates the need for such supervision by

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text accompanying notes 51-53.

13. *See* Wolfson, *supra* note 8, at 18 (recognizing that pretrial discovery was initially an attempt to make trials more efficient).

14. TEX. R. CIV. P. 169.

15. TEX. R. CIV. P. 168.

16. TEX. R. CIV. P. 215(4)(a).

17. *See, e.g.*, Hoffman v. Texas Commerce Bank Nat'l Ass'n, 846 S.W.2d 336, 339-40 (Tex. App.—Houston [14th Dist.] 1992, no writ) (affirming trial court's grant of summary judgment after deeming requests admitted).

18. *See infra* Appendix I, Proposed Rule 169.

19. Advisory Committee Notes to Rule 33—Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 522 (1970).

20. Ironically, the response to the maddening abuses pervading our system has been to involve the court even more heavily in guiding the litigants through the discovery maze. *See, e.g.*, FED. R. CIV. P. 16(b) (requiring that the court hold a

disposing of these "discovery" devices and, to the extent feasible, removing the judge from the discovery arena. By doing so, our plan frees the docket of wasteful discovery hearings and allows cases to move through the system at a more efficient pace. If properly executed, the result of our plan is a drastically shortened discovery schedule, one that allows a case to be tried within one year of the service of pleadings.[21] Thus, our plan promises a "just, speedy, and inexpensive determination of every action"[22] and mandates that discovery finally take a backseat to the judicial system's foremost objective—the adjudication of rights.

A. Discovery of Fact Witnesses

Currently, a party may not simply request the identification of fact witnesses whom the other party plans to call at trial.[23] Instead, detailed and often verbose interrogatories are propounded, requesting, among other things, the identification of those persons with knowledge of relevant facts.[24] Only after months of discovery and numerous, costly depositions may a party be compelled to identify who will actually testify at trial, and then only if a pretrial order is entered pursuant to Rule 166.[25] Regardless of whether the party is required to give notice of direct fact witnesses, no witness may be called who has not been previously identified as a person with knowledge of relevant facts.[26] However, this seemingly automatic

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scheduling conference); TEX. R. CIV. P. 166 (suggesting that the court hold a pretrial conference and encourage settlement).

21. *See infra* Appendix II, Timeline. When devising the plan, our intention was to create rules that would serve well in most situations. We did not forget, though, that special circumstances may arise. The court is given discretion to take such circumstances into account and to alter or extend the timeline when necessary. *See infra* Appendix I, Proposed Rule 166c.

22. FED. R. CIV. P. 1; *see also* TEX. R. CIV. P. 1 (stating that the objective of the rules is a "just, fair, equitable and impartial adjudication . . . attained with as great expedition . . . as may be practicable").

23. Gutierrez v. Dallas Indep. Sch. Dist., 729 S.W.2d 691, 693 (Tex. 1987).

24. *See* TEX. R. CIV. P. 166b(2)(d) (entitling party to information concerning persons with knowledge of relevant facts).

25. TEX. R. CIV. P. 166 (suggesting, but not requiring, that a pretrial conference be held).

26. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394, 395 (Tex. 1989).

exclusion is easily avoided by showing good cause,[27] a standard muddied by recent case law.[28]

This system of discovering fact witnesses seems workable enough on paper. In actual practice, however, it proves to foster nothing but aggravation. As an alternative, our plan calls for a two-part disclosure, which in the end yields the same information and provides the same protection as the current system.

1. Initial Disclosures.—First, each party, no later than ninety days after service of the complaint or answer,[29] shall disclose to all other parties the identification and location[30] of any and all parties,[31] potential parties, and other persons with knowledge of relevant facts.[32] Along with the identification of each person with knowledge of relevant facts, there shall be a statement of the subject matter and scope of his knowledge.[33] For the attorney faced with an overwhelming list of persons with knowledge of relevant facts, these statements will serve as effective aids to trial preparation by

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27. TEX. R. CIV. P. 166b(6), 215(5).

28. The present standard more closely resembles the lesser hurdle of surprise than good cause. *See, e.g.*, Henry S. Miller Co. v. Bynum, 836 S.W.2d 160, 162 (Tex. 1992); Rogers v. Stell, 835 S.W.2d 100, 100 (Tex. 1992); Smith v. Southwest Feed Yards, 835 S.W.2d 89, 91 (Tex. 1992) (each allowing the testimony of a witness clearly identified through some form of discovery as having knowledge of relevant facts); *see also* Texas Dep't of Human Servs. v. Green, 855 S.W.2d 136, 148 (Tex. App.—Austin 1993, no writ) ("The common thread running through these cases is that an opponent objecting to the unidentified party's testimony had reason to anticipate that the party would be a witness based on the party's other discovery responses or deposition testimony.").

29. The timeline for the initial disclosure begins for the plaintiff as soon as the complaint is served upon the defendant. However, the defendant may start the clock ticking either by filing an answer or otherwise making a general appearance, one not allowed as a special appearance under Rule 120a.

30. "Identification and location" includes the person's most recent known name, address, and telephone number. TEX. R. CIV. P. 166b(2)(d).

31. Because this rule explicitly states that this disclosure includes "all parties," there is no reason to treat with special care the failure of a party to name himself as a person with knowledge of relevant facts, as the court did in *Southwest Feed Yards*.

32. Appendix I, Proposed Rule 166b(1), *infra*. The definition of "persons with knowledge of relevant facts" remains the same as under current Rule 166b(2)(d).

33. Appendix I, Proposed Rule 166b(1), *infra*. Currently, it is common for an interrogatory to request such information. Furthermore, Rule 166(h) allows the court to order the parties to disclose the subject matter of each witness's testimony.

forcing the opposing party to identify those persons who are named merely for authentication purposes, as opposed to those who have truly relevant, material knowledge.

The ninety-day deadline is reasonable and lenient in comparison to the current system. With interrogatories, a plaintiff may be required to divulge this information as early as thirty days after the commencement of the action.[34] A defendant, even if served interrogatories with the complaint, only has fifty days to respond.[35] Even the proposed changes to the Federal Rules require this disclosure within thirty days of the filed answer.[36]

2. Depositions.—Only after the initial disclosure is made by both parties may they engage in a very limited form of discovery.[37] Under the current system, the postanswer period is packed with costly depositions, ostensibly designed to discern the knowledge of those persons identified. Problems arise, however, because parties tend to camouflage those persons who truly have knowledge of relevant facts among those who do not. The quest to separate the wheat from the chaff entails exorbitant costs and wasted effort because, out of a long list of persons identified as having knowledge of relevant facts, a party ends up calling only a few to testify.

To avoid undue expense and wasted time, our plan virtually eliminates "discovery depositions" as we know them.[38] Depositions of fact witnesses may be allowed only if a verified motion is filed with the court.[39] The motion shall state that the deponent's testimony is material and necessary to the presentation of the movant's case-in-chief[40] and either (1) the deponent is unavailable for trial due to illness or other "unusual circumstances"[41] or (2) the

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34. TEX. R. CIV. P. 168(4).

35. *Id.*

36. COMMITTEE ON FEDERAL RULES, *supra* note 11, at 88 (providing text of Proposed Federal Rule 26).

37. For example, it may be appropriate to seek an independent medical examination, conduct depositions to perpetuate testimony, contact persons with knowledge of relevant facts, or request documents.

38. Depositions on written questions would remain available, but only for authentication purposes. *See infra* Appendix I, Proposed Rule 208(a).

39. *See infra* Appendix I, Proposed Rule 187a(1)(a).

40. An adverse party may be deposed if material to the party's case-in-chief and not merely a rebuttal witness. *See infra* Appendix I, Proposed Rule 187a cmt.

41. Whether "unusual circumstances" exist is left to the discretion of the court,

deponent is beyond the subpoena power of the court.[42] Once the deposition is taken, the deponent may not appear live at trial.[43] As a result, the deposition is no longer utilized as a discovery tool per se. Instead, it is merely a substitute for the live testimony of the witness.

In light of the above restrictions, different rules are required regarding the assertion of privilege during the deposition.[44] When a privilege is asserted, the court reporter will certify the question and the witness will be required to answer outside the presence of all parties and attorneys. If the court later determines that the answer did not involve a privilege, it will be released. If the court finds that a second deposition of the witness is necessary to fairly and adequately develop the testimony of the witness, the court can order further limited examination. If the court finds that the assertion of the privilege was made without substantial justification, the court can charge the costs of any additional deposition, including attorney's fees, to the party asserting the privilege.

Admittedly, the procedure we have proposed involves the court in each attempt to take a trial deposition. However, because of the stringent requirements that must be met in order to take the deposition, the circumstances in which such means would be used are minimized. In the end, the plan frees the parties of the expense of hours, if not days, of unnecessary depositions.

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but would not include scheduling conflicts or expenses associated with appearing at trial. Appendix I, Proposed Rule 187a(1)(a)(i), *infra*. The court could also consider whether another party should bear any responsibility for the circumstances causing the witness to be unavailable.

42. Appendix I, Proposed Rule 187a(1)(a)(ii), *infra*.

43. Appendix I, Proposed Rule 187a(1)(b), *infra*; *see* JORDAN, *supra* note 7, § 1.01 (stating that the original purpose of depositions was merely to perpetuate testimony). If a party seeks the testimony of an adverse party's witness and can satisfy the necessary requirements, the deposition will not preclude the adverse party from bringing that witness live in his own case-in-chief.

A penalty for choosing not to use the deposition transcript at trial was considered, such as ordering the reimbursement of other party's expenses associated with the deposition. However, we rejected the penalty, deciding that the rule is stringent enough to prevent most abuse.

44. *See infra* Appendix I, Proposed Rule 187a(4).

3. Fact Statements.—A final tool for the discovery of fact witnesses is necessary to bridge the information gap created by the curtailment of depositions. At least sixty days prior to trial,[45] each party is required to "disclose to all other parties the identification and location of all direct fact witnesses expected to be called at trial."[46] More importantly, the identification of each fact witness shall be accompanied by a witness statement.[47] This statement shall be specific and detail the relevant facts known by the witness about which the witness will testify. No witness may testify at variance with the statement or in addition to the facts detailed in or reasonably inferred from the statement.

At first glance, the requirement of a witness statement flies in the face of Rule 166b(3), which exempts from discovery witness statements made in anticipation of litigation. The same argument, however, was once posed to protect expert reports from disclosure.[48] The argument was rejected in that context, making expert reports undeniably discoverable.[49] These statements, like expert reports, are prepared for the very purpose of disclosure. Furthermore, they are not work product because they detail facts to be raised at trial, not the thoughts, impressions, or opinions of counsel.[50]

Even though our plan prohibits discovery by way of interrogatory and severely limits the use of depositions, it does allow an

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45. "'[D]ate of trial' refers to the date the case is set for trial and not the date the trial actually begins." Carr v. Houston Business Forms, Inc., 794 S.W.2d 849, 851 (Tex. App.—Houston [14th Dist.] 1990, no writ).

46. Appendix I, Proposed Rule 166b(4)(a), *infra*. In accordance with current Rule 166(h), our proposed rule provides an exception to this disclosure for "those rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated prior to trial." *See* Aluminum Co. of Am. v. Bullock, No. D-3404, 1994 WL 6716 (Tex. Jan. 12, 1994).

47. Appendix I, Proposed Rule 166b(4)(a), *infra*.

48. *See* State v. Ashworth, 484 S.W.2d 565, 567 (Tex. 1972). In *Ashworth*, the court recognized the necessity of discovering such reports but found that the rules of procedure specifically exempted them.

49. The rule was amended after the decision in *Ashworth* to make such reports discoverable. *See* TEX. R. CIV. P. 166b(2)(e); *Ex parte* Shepperd, 513 S.W.2d 813, 815 (Tex. 1974).

50. *Cf.* Houdaille Indus. v. Cunningham, 502 S.W.2d 544, 548 (Tex. 1973) (stating that work product does not protect expert reports prepared by or for the expert in anticipation of his testimony).

attorney to acquire the information necessary to prepare for trial. More importantly, our plan reaches this goal through less costly and more efficient methods. Thus, while eliminating the more familiar means, our plan arrives at the same end.

B. *Discovery of Documents*

The second well of information most necessary to a litigator's preparation for trial is the documentation kept by the opposing party. Often, this area of discovery is also inundated with frivolous objections and unnecessary court hearings. However, the cure may be worse than the disease.

The proposed changes to the Federal Rules of Civil Procedure call for an affirmative duty to disclose "all relevant documents" within thirty days of the date the action is commenced.[51] Our plan, however, does not incorporate that duty because, unlike the duty to disclose persons with knowledge of relevant facts, it would involve crossing the line between requiring cooperation and requiring one party to make the other's case. Furthermore, it would force attorneys to guess what is relevant to an often sparse complaint. The likely result would be that attorneys would simply designate "Warehouse A" because of the fear of being accused of hiding a document. This would achieve no benefit for either side.

Finally, such a duty would subject the defendant to great expense and effort even before the plaintiff is required to show that he has a valid claim. This is particularly dangerous in Texas because once documents are discovered, they become public record.[52] Such a rule would invite persons to use the courthouse as a clearinghouse to make private documents public. For all these reasons, our plan leaves the procedure for requesting documents much the same as under the current system.[53]

There is one change, though, as stated above: our plan does not allow parties to serve interrogatories. Currently, a party will serve interrogatories to find out what documents are in the other party's possession, custody, or control. After answers are given or, more

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51. COMMITTEE ON FEDERAL RULES, *supra* note 11 (describing Proposed Federal Rule 26).

52. *See* TEX. R. CIV. P. 76a.

53. *See* TEX. R. CIV. P. 167; Appendix I, Proposed Rule 167, *infra*.

likely, compelled by order of the court, the serving party then requests those same documents through requests for production. It seems obvious that the initial interrogatory can be easily sidestepped. Instead, a party can simply request documents in the form as follows:

> Please produce the following documents. If you do not have these documents in your possession, custody, or control, please identify the source from which the documents may be obtained.[54]

If the documents do not exist, the other party may simply respond to that effect.

Finally, thirty days before trial, parties will disclose a list of all documents or tangible things to be used as exhibits at trial.[55] At the same time, the parties will make known all demonstrative aids intended to be used at trial and provide a date, time, and place where other parties may view the aids.[56] Because all exhibits and demonstrative aids are disclosed a month before trial, the parties should be prepared either to stipulate as to their admissibility[57] or to make written objections at the pretrial conference.[58]

C. *Discovery of Experts*

Many attorneys feel that the use of experts at trial is crucial to the presentation of a claim or defense. This theory is at best questionable. Undeniable, though, is the fact that the use of experts and the discovery associated with their use require the expenditure of more money and time than any other facet of litigation. Although nothing can be done about the amount of expert fees themselves, steps can be taken to avoid much of the cost incurred during discovery.

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54. The definition of "possession, custody, or control" is carried over from the current rule. "As long as the person has a superior right to compel the production from a third party, the person has possession, custody, or control." TEX. R. CIV. P. 166b(2)(b).

55. Appendix I, Proposed Rule 166b(4)(b), *infra*. Currently, Rule 166 requires the parties to disclose during the pretrial conference all exhibits intended to be used at trial.

56. Appendix I, Proposed Rule 166b(4)(b), *infra*.

57. Appendix I, Proposed Rule 169, *infra*.

58. Appendix I, Proposed Rule 166(b)(3), *infra*.

Discovery of experts has become an unnecessarily complicated journey. First, interrogatories are served requesting the identification of experts,[59] as well as any documents or tangible things used by the expert to form his opinions.[60] Once the interrogatories are finally answered, a motion to produce is filed requesting the documents or other tangible things identified in the interrogatory answers. Then, a deadline is set, and expert reports are exchanged outlining the experts' opinions and backgrounds.

As if the relevant information had not already been divulged, the attorneys then begin down another trail. They send out a notice of deposition that not only requires the expert's presence for hours, if not days, during which the meter is running for both expert and attorney's fees, but also requires the expert to produce the very documents previously disclosed in response to the request for production. In the deposition itself, the parties inquire as to the facts known by the expert, the subject matter of his testimony, his mental impressions and opinions, and his qualifications, all of which were previously disclosed in the expert report.

Needless to say, the current process is inefficient. The expense of the discovery methods in conjunction with the expert fees to review evidence, prepare data, testify at the deposition, prepare the report, and testify at trial is phenomenal. Our plan cuts the cost by making the discovery of experts and their opinions more straightforward by providing a simple two-step process.

1. Initial Disclosure.—First, at least 120 days before the first trial setting, each party discloses to all other parties the identification and location of all experts expected to testify at trial, either live or by deposition.[61] For each identified expert, the party shall disclose detailed information as to his qualifications and experience. The information must include the expert's name, address, and telephone number. In addition, the expert's curriculum vitae shall be disclosed

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59. *See* TEX. R. CIV. P. 166b(2)(e)(1). Rule 166b(2)(e)(1) allows the discovery of those experts who will testify at trial and consulting experts whose work product, mental impressions, and opinions have been reviewed by a testifying expert.

60. *Id.*

61. Appendix I, Proposed Rule 166b(6)(a), *infra*. As in current Rule 166b(2)(e)(1), parties must also disclose information regarding the identity of consulting experts whose work product, mental impressions, or opinions have been or will be reviewed by a testifying expert.

outlining his formal training, education, experience, and any publications or research conducted by the expert in his particular field of expertise. Information regarding previous cases in which the expert has testified is required, including the number of cases, the subject matter of each, and the side for which he testified, plaintiff or defendant. Finally, the expert's expected compensation shall be disclosed.

2. *Expert Reports.*—One final disclosure is made that details the expert's opinions and expected testimony. Thirty days before trial,[62] each expert is required to produce all documents and tangible things, including all reports, physical models, compilations of data, and other materials prepared by or for him or reviewed in anticipation of his testimony.[63] Along with the production of tangible evidence, each expert shall produce a detailed report of his opinions,[64] including any facts known to the expert that relate to or form the basis of his mental impressions and opinions.[65] The expert will be limited to the substance of this report when testifying on direct examination[66] and may not testify at variance with or in addition to the report. However, an expert may criticize another testifying expert's qualifications, opinions, or mental impressions without including that criticism in his report.

3. *Depositions.*—Because of the detailed disclosures and the required report outlining the expert's testimony, depositions need not be relied on to the extent they are under the current system. Our plan allows the party for whom the expert is testifying to decide

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62. The federal changes require that this disclosure be made 90 days before trial. COMMITTEE ON FEDERAL RULES, *supra* note 11 (describing Proposed Federal Rule 26). However, our 30-day deadline allows the experts time to review all information disclosed during discovery before having to submit a report. *See also infra* Appendix I, Proposed Rule 166b(4)(a) (requiring witness statements 60 days before trial).

63. Appendix I, Proposed Rule 166b(6)(b)(ii), *infra*; *see also* TEX. R. CIV. P. 166b(2)(e) (making such evidence discoverable).

64. Appendix I, Proposed Rule 166b(6)(b)(i), *infra*. If the expert is to be deposed, this report must be produced at least 10 days prior to the scheduled deposition. Appendix I, Proposed Rule 187a(2)(a), *infra*.

65. Appendix I, Proposed Rule 166b(6)(b)(i), *infra*.

66. *See* COMMITTEE ON FEDERAL RULES, *supra* note 11 (describing Proposed Federal Rule 26 and recommending that the Federal Rules preclude admission of facts and opinions not contained in the report).

whether the expert will testify live or by deposition.[67] As is the case with fact witnesses, the deposition is used in lieu of, not in the preparation of, the expert's live testimony.

Providing the party with this choice is admittedly more lenient than the rule for fact witnesses.[68] However, because experts often have busy schedules, are from different areas of the country, and, more importantly, are being paid to testify, it is sometimes more feasible for parties to pay experts to be deposed than to have them testify live at trial. As protection from abuse, a party who deposes but later chooses not to introduce the deposition testimony at trial must reimburse all other parties for their expenses in preparing for and attending the deposition.[69]

To limit the cost to other parties, the expert must be deposed in the county in which the case is to be tried.[70] This is required so that a party may not save expenses by deposing the expert in a foreign location, while forcing all other parties to travel around the country, and sometimes around the globe, to cross-examine the witness. Furthermore, bringing the expert to the deposition is practical, whereas it may not be for the ordinary fact witness. Unlike a fact witness who is beyond the subpoena power of the court, an expert who is being paid by the party has every reason to appear, especially if it is made a condition of his employment.

Thus, through two simple exchanges of information, the parties gain the same information obtained by the current system. More importantly, they do so at a fraction of the cost and frustration.

D. Duty to Supplement

Like the current rule, our plan prohibits a party from calling a witness, lay or expert, who was not identified prior to trial or introducing an exhibit that was not identified prior to trial.[71]

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67. Appendix I, Proposed Rule 187a(2), *infra*. This alone will reduce the number of depositions because by deposing the expert, the party precludes his live testimony.

68. *See supra* section II.A.2.

69. Appendix I, Proposed Rule 187(2)(d), *infra*. Reimbursement, however, would not be necessary in the event that the trial court limited the use of the deposition.

70. Appendix I, Proposed Rule 187a(2)(b), *infra*.

71. TEX. R. CIV. P. 166b(2), 215(5); *see also* Sharp v. Nat'l Bank, 784 S.W.2d

Witnesses must have been previously identified as persons with knowledge of relevant facts,[72] and documents, if requested, must have been produced. Although these initial duties to disclose are relatively clear-cut, the duty to supplement[73] is in need of an overhaul to make the pretrial plan complete and to avoid the pitfalls so characteristic of the current system.[74]

Under the current system, a party may wait until the last possible day to supplement and then bury the opponent in new information a month before trial.[75] Even if the party misses the deadline, the witness can testify or the document can be introduced merely on a showing of good cause, which under recent court decisions more closely resembles the standard of surprise.[76]

669, 671 (Tex. 1990) ("A party is entitled to prepare for trial assured that a witness will not be called because opposing counsel has not identified him or her in response to a proper interrogatory.").

72. *See, e.g.*, Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 916-17 (Tex. 1992) (excluding testimony of witness not previously identified as person with knowledge of relevant facts).

73. *See* TEX. R. CIV. P. 166b(6).

74. The Texas Supreme Court seems to be continually grappling with the "good cause" standard necessary to introduce a witness or exhibit not previously identified. *See, e.g.*, Henry S. Miller Co. v. Bynum, 836 S.W.2d 160, 161, 162 (Tex. 1992); Smith v. Southwest Feed Yards, 835 S.W.2d 89, 90-92 (Tex. 1992); Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394, 395-97 (Tex. 1989); Morrow v. H.E.B., Inc., 714 S.W.2d 297, 297-98 (Tex. 1986); Thompson v. Kawasaki Motor Corp., 824 S.W.2d 212, 215-17 (Tex. App.—Dallas 1991, writ granted). A growing number of interpretations exist of the "as soon as practical" language in Rule 166b(6)(b). *See, e.g.*, Mentis v. Barnard, 853 S.W.2d 119, 123 (Tex. App.—Dallas 1993), *rev'd and remanded*, No. D-3869, 1994 WL 27164 (Tex. Feb. 2, 1994); Northwestern Nat'l Casualty Co. v. McCoslin, 838 S.W.2d 715, 719-20 (Tex. App.—Waco 1992, writ denied); Tinsley v. Downey, 822 S.W.2d 784, 786 (Tex. App.—Houston [14th Dist.] 1992, writ granted); Mother Frances Hosp. v. Coats, 796 S.W.2d 566, 569-70 (Tex. App.—Tyler 1990, no writ); Builder's Equip. Co. v. Onion, 713 S.W.2d 786, 787-88 (Tex. App.—San Antonio 1986, no writ).

75. Current Rule 166b(6) merely prescribes a deadline to supplement and imposes no continuing obligation to update except for expert witnesses.

76. *See supra* note 28. *But see* Aluminum Co. of Am. v. Bullock, No. D-3404, 1994 WL 6716, at *2 (Tex. Jan. 12, 1994) (stating that when faced with an unanticipated change in testimony, a nondesignated rebuttal witness may testify); Sharp v. Broadway Nat'l Bank, 784 S.W.2d 669, 671 (Tex. 1990) (citing Morrow v. H.E.B., Inc., 714 S.W.2d 297, 298 (Tex. 1986)) (stating that a showing of the absence of surprise does not alone constitute good cause).

Our plan calls for a continuing obligation to seasonably supplement all disclosures to include any information later acquired or not yet disclosed.[77] Therefore, rather than waiting until the last day to supplement—or, more accurately, surprise—a party shall supplement the disclosure within a reasonable time of learning of the information. Unlike the current rule, the fact that the disclosure was correct when made is not good enough.[78]

Although the duty to supplement is continuing, the ability of the party to supplement depends on when he attempts to do so. If the party wishes to supplement either a disclosure or response *before* sixty days prior to the first trial setting, the party may do so *unless* an objecting party is able to show that either

> (i) the supplementing party had actual knowledge of the information at an earlier date and failed to supplement within a reasonable time; or
>
> (ii) the supplementing party, through reasonable diligence, should have known of the information at an earlier date and the late supplementation will now prejudice the objecting party.[79]

The objecting party's burden before the deadline is admittedly hard to sustain and should be so. In this way, parties are effectively discouraged from objecting to predeadline supplementation unless it is clear that the spirit and purpose of the continuing obligation to supplement has been ignored.

After the deadline, the burden shifts from the *objecting* party to the *supplementing* party. Instead of presuming that the supplementation is proper, the court will presume that it is improper. Therefore, it is the burden of the supplementing party to show that *both*

> (i) the exclusion of the information will by itself work a manifest injustice; and
>
> (ii) the supplementing party did not know and, through reasonable diligence, should not have known of the information at an earlier date.[80]

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77. Appendix I, Proposed Rule 166b(5), *infra*.

78. Current Rule 166b(6) requires supplementation only when (1) the party "knows that the response was incorrect or incomplete when made," or (2) the party "knows that the response though correct and complete when made is no longer true and complete and the circumstances are such that failure to amend the answer is in substance misleading."

79. Appendix I, Proposed Rule 166b(5)(a), *infra*.

80. Appendix I, Proposed Rule 166b(5)(b), *infra*.

This burden is much like the burden a party must meet before being granted a new trial based on newly discovered evidence.[81] Such a heavy burden is necessary in order to force the parties to meet their duty of disclosure. This furthers the objective of effective preparation for trial and encourages attorneys to do their homework up front.

E. Pretrial Conference

With the necessary information regarding persons, documents, and experts timely disclosed, the court may, in its discretion, schedule a pretrial conference any time within the month before trial.[82] This conference, established by current Rule 166, allows the court to use its authority under Texas Rule of Evidence 611(a) to assist in the smooth disposition of the case.[83] The court may require the attorneys and the parties or their duly authorized agents to appear together or separately on the record. At the pretrial conference, the court and the parties will discuss

> (1) all pending pleas, motions, and exceptions;
>
> (2) for a jury trial, proposed jury questions, instructions, and definitions, and for a nonjury trial, proposed findings of fact and conclusions of law;
>
> (3) stipulations of authenticity and admissibility of exhibits or written objections to such authenticity and admissibility;[84]
>
> (4) limits on the number of fact witnesses and experts allowed to testify;

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81. *See* Jackson v. Van Winkle, 660 S.W.2d 807, 809 (Tex. 1983) (describing elements for a motion for new trial based on newly discovered evidence: (1) the evidence surfaced after trial; (2) the party used due diligence before trial to discover the evidence but was unable to do so; (3) the evidence is not cumulative; and (4) the evidence is sufficiently material so as to make a different result in a new trial probable).

82. Appendix I, Proposed Rule 166, *infra*.

83. Texas Rule of Evidence 611(a) grants the trial court the authority to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

84. Instead of requests for admission, our plan makes use of written stipulations to narrow the issues for trial and ensure a smooth and efficient trial. These stipulations must be filed with the court at least 30 days before trial. Appendix I, Proposed Rule 169, *infra*.

(5) settlement, and in the aid thereof, the court may encourage settlement; and

(6) any other matters that may aid the disposition of the case.[85]

Any rulings made during the pretrial conference shall be made on the record and will preserve error. The rulings shall control the subsequent action unless modified to prevent manifest injustice.[86]

To finalize the case for trial, any amendment of pleadings must be done at least thirty days before trial.[87] This deadline comes after the deadline to supplement so that any new claims or defenses arising from supplemented information may be included. When presented with an amendment, the court has discretion to extend the timeline or grant a continuance.

Requiring the parties to take these last steps to prepare the case for trial truly transforms the "pretrial conference" into a meeting of last-minute preparation. By making discovery a self-sufficient system, our plan effectively removes the court from the initial discovery process and involves the court only after the parties have done their homework. Therefore, the court's involvement is limited to familiarizing itself with the issues about to be tried and to solving last-minute problems. More importantly, by forcing the parties to paint a final picture of what they will face at trial, our plan encourages a closer examination of the possibilities of settlement.

III. Conclusion

So, what have we accomplished? A lot with a little.

While keeping Rule 215 virtually unchanged, we have effectively limited the circumstances under which the parties will be entitled to resort to its application. In short, we have pulled the rug out from under the obstructionist. Interrogatories and requests for admissions are gone. In their place is the obligation to identify

85. Appendix I, Proposed Rule 166(b), *infra*.

86. This standard is borrowed from current Rule 166.

87. Appendix I, Proposed Rule 63, *infra*. The current rule allows for amendments up to seven days before trial. TEX. R. CIV. P. 63. Under our plan, however, parties are privy to all information at least 60 days prior to trial. Thus, there is no reason to allow a party to sit on its heels, amend, and possibly change the character of the entire suit, one week before the scheduled trial.

persons with knowledge of relevant facts and later to identify those actually intended to be called at trial. Also eliminated is the intolerable and ever-changing case law surrounding the duty to supplement an answer to discovery and the elusive quarry known as "good cause." In its place is a more reasonable standard for supplementation that, when coupled with the obligation to identify trial witnesses, retains the benefits of the old procedure.

Our plan also eliminates the opportunity for attorneys to designate and depose more experts than they could possibly intend to call to testify. The parties can still choose their own experts, and may either call them live or depose them, but not both. Further, if the proponent chooses to depose, the deposition must occur in the county where the suit is pending. If the proponent decides (without court intervention) not to use the deposition, he must pay everyone else for their trouble in attending and preparing for it.

Finally, the rules concerning production of documents have been left untouched, except with respect to the obligation to disclose trial exhibits and the application of the new standard for supplementation.

Those concerned that these changes might have an adverse effect on settlements need not be concerned. First, discovery is rarely the catalyst that settles cases. To the contrary, extensive abuse of discovery renders cases too expensive to settle. It is only when the parties and lawyers are faced with the fear and uncertainty of an imminent trial setting that they realistically evaluate their chances of success in the courtroom. Also, none of these changes will affect alternative dispute resolution techniques, which have been extremely effective in settling cases. In fact, the greater the number of cases that reach settlement, the more quickly others will be able to reach trial, which in turn will result in more settlements.

APPENDIX I

Rule 63—Amendment of Pleadings

Parties may amend their pleadings at any time so as not to operate as a surprise to an opposing party, provided that any pleadings offered for filing within thirty (30) days of the date of trial shall be filed only after leave of court is obtained, which leave shall be granted unless there is a showing that such filing will operate as a surprise to an opposing party.

Comment

The deadline for amendments is changed from seven (7) to thirty (30) days before the date of trial. The requirement for leave of court after that deadline, however, remains the same.

Rule 166—Pretrial Conference

(a) The court, in its discretion, to assist the disposition of the case without undue expense or burden to the parties, may require the attorneys and the parties or their duly authorized agents to appear together or separately on the record for a pretrial conference.

(b) The following matters are to be discussed in the pretrial conference:

(1) all pending pleas, motions, and exceptions;

(2) for a jury trial, proposed jury questions, instructions, and definitions, and for a nonjury trial, proposed findings of fact and conclusions of law;

(3) stipulations of authenticity and admissibility of exhibits or written objections to such authenticity or admissibility;

(4) limitations on the number of fact witnesses and experts allowed to testify;

(5) settlement, and in aid thereof, the court may encourage settlement; and

(6) any other matters that may aid the disposition of the case.

(c) The rulings made in the conference are to be made on the record and preserve error. Such rulings shall control the subsequent action unless modified to prevent manifest injustice.

Comment

Many items listed in current Rule 166 to be discussed at the pretrial conference are deleted, because under our new plan they are dealt with by the parties without court supervision. Because all documents must be disclosed thirty (30) days before trial at the latest, each party should have written objections ready to be presented and discussed at the conference. The standard for amending a ruling of the court made during the conference remains the same as under the current rule. Subsection (c) makes it clear that any rulings made during such conferences preserve error for purposes of appeal.

Rule 166b—Duties and Scope of Discovery, Supplementation, and Responses

(1) Initial Disclosures

Except when otherwise ordered, each party, within ninety (90) days of service of its complaint or answer, shall voluntarily, and without waiting for a discovery request, disclose to all other parties the identification and location (including the most recent known name, address, and telephone number) of any party or potential party, and of all other persons with knowledge of relevant facts. For each identified person, a statement of the subject matter and scope of his knowledge shall be included. A person has knowledge of relevant facts when he has or may have knowledge of any discoverable matter. The information need not be admissible in order to satisfy the requirements of this subsection and personal knowledge is not required.

Comment

This section mirrors the language in current Rule 166b(2)(b) making such information discoverable. The new rule simply makes it possible for a party who is "entitled" to this information to receive it without jumping through the hoops so prevalent in the current system. The requirement that statements accompany the disclosure is lifted from current Rule 166(h), which allows the court to require parties to exchange "the subject of the testimony of each . . . witness" identified by the party. It is also common for such statements to be requested through interrogatories. The definition of "person with knowledge of relevant facts" is the same as under the current rule.

(2) Discovery of Additional Matter

Once the initial disclosures have been made pursuant to section (1) of this rule, parties may obtain discovery by one or more of the following methods: oral or written depositions per Rules 187, 187a, and 208; requests and motions for production, examination, and copying of documents or other tangible things per Rule 167; requests and motions for entry upon land and examination of real property per Rule 167; and motions for a mental or physical examination of a party or person under the legal control of a party per Rule 167a.

Comment

Like proposed Federal Rule 26(d), this section requires that the parties wait for the initial disclosures before utilizing further discovery methods. This allows a party to focus on full disclosure and prevents wasteful requests served before the information is forthcoming pursuant to section (1) of this rule. The proper forms of discovery, listed in current Rule 166b(1), have been limited. Specifically, interrogatories and requests for admissions have been excised from the system. Both discovery methods have proven to be unnecessary and, more often than not, disserve the purpose of discovery. In addition, oral depositions are limited by Rule 187a and written depositions are to be used for authentication purposes only pursuant to Rule 208. The other forms of discovery are carried over from the current system.

(3) Scope of Discovery

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. It is not ground for objection that the information sought will be inadmissible at the trial, provided that the request for the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Comment

Language regarding the scope of discovery is lifted directly from current Rule 166b(2)(a). As with that rule, the scope is limited by the exemptions and privileges stated later in the rule. However, the language of the current rule relating to interrogatories and requests

for admissions that call for opinion or application of law are deleted because neither is a proper form of discovery under our plan. The remainder of current Rule 166b(2), entitling a party to request production of various documents, is transferred to Rule 167, which outlines the rules for such requests.

(4) Trial Disclosures

(a) At least sixty (60) days before trial, each party shall disclose to all other parties the identification and location of all direct fact witnesses expected to be called at trial, except for those rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated prior to trial. For each witness expected to testify live at trial, the party shall disclose a statement detailing the relevant facts known by the witness. No witness shall be allowed to testify who was not previously identified pursuant to section (1) of this rule, unless the court finds that the duty to supplement, as set forth in section (5), has been satisfied.

(b) At least thirty (30) days before trial, each party shall disclose to all other parties a list of all documents or other tangible things to be introduced as exhibits or demonstrative aids at trial. If an exhibit was not previously requested, the party shall disclose the document or tangible thing at this time. If an exhibit was not previously disclosed pursuant to an appropriate request, the party must satisfy the duty to supplement, as set forth in section (5). The party shall also make any demonstrative aid available to the other parties for their viewing.

Comment

Section (4)(a) of this rule requires the disclosure of information currently exchanged pursuant to current Rule 166(h). The disclosure of this information would be required under proposed Federal Rule 26(a)(3)(A). The deadline for this disclosure is set at sixty (60) days before trial so that experts may have this information prior to submitting their reports. The requirement of the actual witness statement, however, is more stringent than the requirement in current Rule 166(h) that the "subject of the testimony of each such witness" be disclosed. This statement is necessary to bridge the information gap created by the curtailment of depositions. The exemption

regarding witness statements in current Rule 166b(3)(c) is thus deleted.

Section (4)(b) requires the disclosure of information currently exchanged pursuant to present Rule 166(l). The disclosure of this information would be required under proposed Federal Rule 26(a)(3)(C). The difference in the deadline between sections (4)(a) and (4)(b) is due to the fact that experts are already privy to the information contained in the documents produced in response to earlier requests. Section (4)(b) merely narrows the field of documents that may be introduced at trial, whereas the witness statements in section (4)(a) may disclose new facts that must be taken into account by experts before they are required to file a report.

(5) Duty to Supplement

A party has a continuing obligation to seasonably supplement or correct discovery disclosures or responses to include information thereafter acquired.

(a) A party may supplement a disclosure or response any time prior to sixty (60) days before trial, unless the objecting party shows:

(i) the supplementing party had actual knowledge of the information at an earlier date and failed to supplement within a reasonable time; or

(ii) the supplementing party, through reasonable diligence, should have known of the information at an earlier date and the late supplementation will now prejudice the objecting party.

(b) A party may not supplement a disclosure or response later than sixty (60) days before trial, unless the supplementing party shows:

(i) the exclusion of the information will by itself work a manifest injustice; and

(ii) the supplementing party did not know and, through reasonable diligence, should not have known of the information at an earlier date.

Comment

Unlike the current duty to supplement, this plan calls for a continuing obligation, much like the one in proposed Federal Rule 26(e)(1)(2). An objection should not be made to supplementation before the deadline unless the spirit of this continuing obligation has been ignored. Acquisition of any new information triggers this duty to supplement, regardless of whether the original disclosure was correct and complete when made. To supplement after the deadline, a party must overcome a burden which mirrors that required before a new trial may be granted based on newly discovered evidence. This is appropriate because the party has had months to supplement and only that information which was not discoverable earlier should be thrust upon a hapless opponent on the eve of trial.

(6) Disclosure of Experts

(a) At least 120 days before trial, each party shall disclose to all other parties the identification of all experts expected to testify at trial, either live or by deposition. The following information shall be included regarding each expert:

(i) name, address, and telephone number;
(ii) curriculum vitae, including:
  (A) formal training;
  (B) education;
  (C) experience; and
  (D) publications, research, etc.;
(iii) expected compensation; and
(iv) previous cases in which the expert testified, including:
  (A) number of cases;
  (B) subject matter of each action; and
  (C) side for which expert testified.

This information is also required of consulting experts if their work product, mental impressions, or opinions have been or will be reviewed by a testifying expert.

(b) At least thirty (30) days before trial, each party shall disclose to all other parties the following:

(i) For each expert, a detailed report of his opinions, including any facts known to the expert that relate to or form a basis of the mental impressions or opinions held by the expert. The expert

will be limited to the substance of this report and may not testify at variance with or in addition to the report on direct examination. This limitation does not apply to the expert's criticisms of other testifying experts' qualifications, work product, mental impressions, or opinions.

(ii) All documents and tangible things, including all reports, physical models, compilations of data, and other materials reviewed or prepared by or for an expert in anticipation of the expert's testimony. The discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert must be reduced to tangible form and produced in compliance with this rule. If the tangible thing is a model or demonstrative aid, it must be made available for viewing within the same time frame.

Comment

This section requires disclosure of the information discoverable under current Rule 166b(2)(e). However, the new rule goes further and requires more detailed information, much like that in the proposed changes to Federal Rules 26(a)(2)(A)-(B) and 26(b)(4)(A). If an expert is being deposed rather than testifying live at trial, a report required under section (2) shall be submitted to all other parties at least ten days prior to the date of the scheduled deposition under Proposed Rule 187a(2)(a). By limiting the expert's testimony to that information disclosed in his report, the rule ensures that the report will be accurate and detailed.

(7) Exemptions

This section remains unchanged from current Rule 166b(3) except that 166b(3)(c), which exempts witness statements from discovery, is deleted. Such statements are discoverable under this plan.

(8) Presentation of Objections

This section remains unchanged from current Rule 166b(4) except for the following addition:

The party withholding information from disclosure or discovery on an express claim that it is privileged shall support the claim with a

description of the documents, testimony, or things not produced or disclosed that is sufficient to enable other parties to contest the claim. If an assertion is claimed to prevent voluntary disclosure as required by section (1) or (4), and the court finds that the information is well outside any privilege, the court may, in its discretion, order an appropriate sanction if the assertion violated or abused the spirit of discovery.

Comment

The requirement that a privilege be expressly asserted and supported is derived from the proposed changes to Federal Rule 26(b)(5).

(9) Protective Orders

This section remains unchanged from current Rule 166b(5).

(10) Discovery Motions

This section remains unchanged from current Rule 166b(7).

(11) Signing of Disclosures

Every disclosure made pursuant to this rule shall be signed by the party and at least one attorney of record. A party who is not represented by counsel shall sign the disclosure. The signature of the attorney or party constitutes a certification that, to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

Comment

This section is similar to that proposed for Federal Rule 26(g). The purpose of having the party, as well as his attorney, sign the disclosure is to prevent a party from eluding disclosure by simply not telling his attorney about the information. By signing the disclosure, the party and his attorney certify that it is complete.

Rule 166c—Court Discretion

When the circumstances of a case so require, the court, in the interests of justice, may alter or extend the timeline for a particular disclosure, or allow further or more expanded discovery.

Comment

This rule allows the court to take into account the particular complexities of a case and decide if the discovery plan needs to be expanded. The court should keep in mind that the goal of discovery is to facilitate the cooperative exchange of information and the preparation for trial.

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

(1) Procedure. Any party may serve on any other p 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, documents or tangible things which contain information within the scope of Rule 166b which are in the possession, custody or control of the party upon whom the request is served, including but not limited to:

(i) Indemnity, Insuring and Settlement Agreements. A party may obtain discovery of the following:

(A) The existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be rendered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(B) The existence and contents of any settlement agreement. Information concerning the settlement agreement is not by reason of disclosure admissible in evidence at trial.

(ii) Statements. Any person, whether or not a party, shall be entitled to obtain, upon written request, his own statement

previously made concerning the subject matter of a lawsuit, which is in the possession, custody, or control of any party. For the purpose of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, and (B) a stenographic, mechanical, electrical or other type of recording, or any transcription thereof which is a substantially verbatim recital of a statement made by the person and contemporaneously recorded.

(iii) Medical Records; Medical Authorization. Any party alleging physical or mental injury and damages arising from the occurrence which is the subject of the case shall be required, upon written request, to produce, or furnish an authorization permitting the full disclosure of, medical records not theretofore furnished to the requesting party which are reasonably related to the injury or damages asserted. Copies of all medical records, reports, x-rays or other documentation obtained by virtue of an authorization furnished in response, shall be furnished by the requesting party, without charge, to the party who furnished the authorization in response to the request and copies of all medical records, reports, x-rays or other documentation obtained by virtue of the written request or by virtue of the authorization shall be made available by the requesting party for inspection and photographing and/or copying to all parties to the action under reasonable terms and conditions. If such information, so obtained, is to be used or offered in evidence upon trial, it shall be furnished by the requesting party to the party who furnished the authorization and made available for inspection by all parties not less than thirty (30) days prior to trial.

Comment

The above additions to Rule 167 are transported from Rule 166b(f), (g), and (h). The remainder of the rule remains unchanged.

Rule 169—Stipulations

At least thirty (30) days before trial, the parties shall have conferred and filed written stipulations of agreed upon and contested issues of fact and law.

Comment

This rule replaces the current rule regarding requests for admissions. In the current system, such requests are no longer used to discover information, but rather to catch the other party off guard. Rather than reward such tactics, discovery tools should be tailored to foster cooperation. Therefore, the parties must now confer among themselves to produce stipulations of fact and law. If none can be agreed upon, they should file a statement outlining the contested issues so that the court can at least get acquainted with the case and the relevant issues.

Rule 187—Depositions to Perpetuate Testimony

This rule remains unchanged. Although there is some room for abuse because of the language allowing a person to depose "any other party," sufficient safeguards exist to limit any such threat. Judges rarely grant such depositions since they take place before any litigation and therefore not all parties are yet known. Under Rule 207, the deposition would not be admissible against any party not named and not appearing at the deposition.

Rule 187a—Trial Depositions

(1) No deposition of any fact witness may be taken unless:
   (a) a verified motion is filed with the court stating that the person to be deposed is a person whose testimony is material and necessary to the presentation of the movant's case-in-chief; and either:
      (i) is unavailable for trial due to illness or other unusual circumstances; or
      (ii) is beyond the subpoena power of the court; and
   (b) an order is entered by the court authorizing the deposition and setting the time and place.

If a deposition is taken pursuant to this rule, the witness may not later testify live at trial, even if available. The determination of "unusual circumstances" is within the court's discretion. "Unusual circumstances" does not include scheduling conflicts of counsel or expenses associated with appearance.

Comment

This rule limits depositions to unusual circumstances to ensure that depositions are not used for one party's fishing expedition while every other party is forced to incur exorbitant attorney's fees. Subsection (a)(i) is intended to limit the deposition to those persons the movant plans to bring as direct fact witnesses. Even if a witness is adverse to the movant, he may still be material to the presentation of the movant's case-in-chief. The rule somewhat limits the court's discretion by stating what may not constitute "unusual circumstances." These limitations, however, are reasonable. For example, where a witness is unable to pay the expenses associated with his testimony, it is more reasonable to require the party who intends to use his testimony to pay the expenses to get the witness to trial than to force all other parties to expend the time and resources associated with preparing for, traveling to, and attending a deposition. When determining whether "unusual circumstances" exist, the court should consider whether other parties in any way caused the witness to be unavailable. The rule barring live testimony once a deposition is taken is designed to ensure that the party seeks to depose only those persons who are likely to be unavailable at trial. It will also prevent depositions from being taken merely to prepare the witness for trial.

(2) In lieu of presenting an expert witness live at trial, a party may take the trial deposition of its own expert under the following conditions:

(a) a report and accompanying data must be served in compliance with Rule 166b(6)(b) upon counsel for all other parties at least ten (10) days before the date of the scheduled deposition;

(b) the deposition of the expert must be taken in the county where the suit is pending;

(c) the witness may not testify live at trial; and

(d) absent a court-imposed limitation on expert testimony, if the party noticing the deposition decides not to use it at trial, such party shall pay the costs associated with attending the deposition incurred by all other parties, including reasonable attorney's fees. The parties may waive this requirement per Rule 11.

Comment

In some cases, deposing an expert may be more feasible than having him testify live. If so, the deposition may be taken as long as the other parties are not disfavored thereby. The above conditions prevent shifting the inconvenience to the other parties. The parties are entitled to a report detailing the expert's opinions and the accompanying data prepared for or by the expert in anticipation of his testimony, just as if the expert were testifying live. This allows the parties to prepare for their cross-examination as they would have for trial. The deposed expert is barred from testifying live at trial.

(3) At least ten (10) days before the deposition takes place pursuant to section (1) or (2) above, the party, or his attorney, shall serve written notice on all other parties of the time and place designated therefor. The notice shall state the name of the deponent, the time and place of the deposition, and the identity of all persons who will attend the deposition other than the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the deposition.

Comment

This rule is derived from current Rule 200(2). The only changes are that a deadline of ten (10) days is added to clarify the meaning of "reasonable notice." Also, the provisions regarding notice of requested documents are deleted because they are handled by a Rule 167 request.

(4) When a witness asserts a privilege during a trial deposition and is instructed by counsel not to answer the question:

(a) the question shall be answered on the record outside the presence of any other party or counsel;

(b) the answer shall be kept under seal by the court reporter and not disclosed without court order;

(c) the court, upon motion by a party seeking to compel the answer to such sealed questions, may order that such answers be disclosed; and

(d) if additional questions reasonably related to the sealed answers are required to ensure full and fair cross-examination, the party asserting the privilege shall reconvene the deposition upon ten (10) days notice. The costs associated with the reconvened

deposition incurred by all other parties, including reasonable attorney's fees, shall be borne by the party asserting the privilege.

Comment

This rule ensures that a privilege is not asserted merely to hide the ball. Because counsel's instructions that the witness not answer are given at his peril, he will likely do so only if he truly believes the answer is protected.

Rule 188—Depositions in Foreign Jurisdiction

This rule remains unchanged except that the deposition must be one in compliance with Rule 187a.

Rule 200—Depositions upon Oral Examination

This rule is deleted. Oral depositions may only be taken in compliance with Rule 187a.

Rule 201—Compelling Appearance; Production of Documents and Things; Deposition of Organization

This rule remains unchanged with the exception of the following deletion. As to the request of documents through subpoena duces tecum, parties have ample opportunity to compel production of such documents either at or before the deposition in accordance with Rule 167. Thus, section (2) of Rule 201 is deleted.

Rule 203—Failure of Party or Witness to Attend; Expenses

This rule remains unchanged.

Rule 204—Examination; Cross-Examination; Objections

This rule is deleted. The deposition must be taken as a trial deposition to ensure its admissibility.

Rule 205—Submission to Witness; Changes; Signing

This rule remains unchanged.

Rule 206—Certification by Officer; Exhibits; Copies; Notice of Delivery

This rule remains unchanged.

Rule 207—Use of Deposition Transcripts in Court Proceedings

This rule remains unchanged.

Rule 208—Depositions upon Written Questions

This rule remains unchanged from current Rule 208 except for the following, which replaces the first paragraph of Rule 208(1):

(1) Serving Questions; Notice.

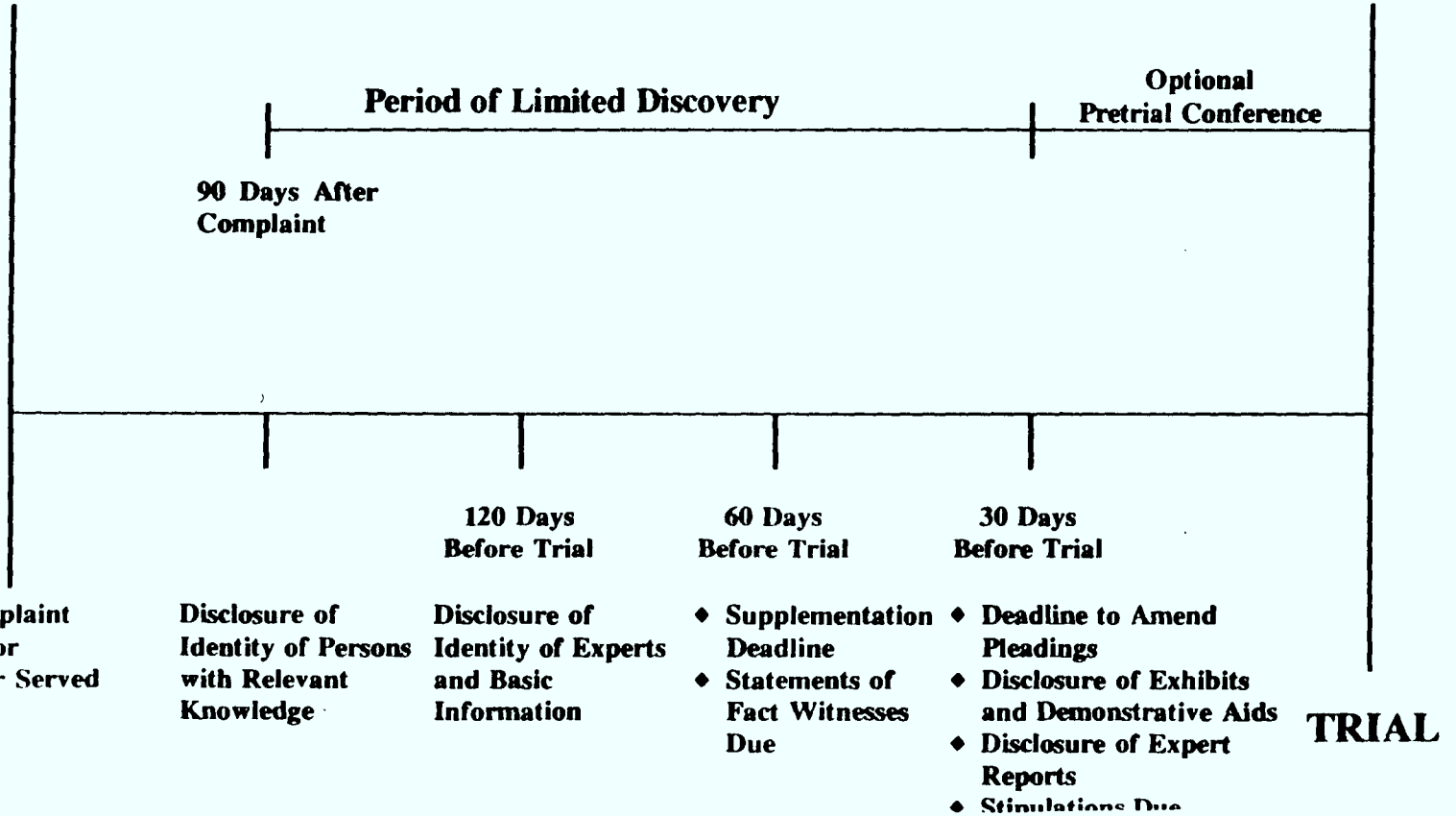
(a) After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. All questions shall be limited to developing the authenticity or admissibility of documentary evidence. Leave of court, granted with or without notice, must be obtained only if a party seeks to take a deposition prior to the appearance day of any defendant.

(b) Attendance of witnesses may be compelled by a subpoena issued in accordance with Rule 201.

Comment

This form of discovery is the last remaining vestige of attorney-controlled depositions. It can only be used, however, to ask questions pertaining to the authenticity or admissibility of documentary evidence. This is a necessary tool because although documentary evidence is the main objective of discovery, its use requires that it be in admissible form.

APPENDIX II
Timeline to Trial



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Mr. Stephen D. Susman
5100 First Interstate Bank Plaza
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Dear Mr. Susman:

The Bar is deeply indebted to you for your thoughtful speech which I received in today's mail. I think some form of your suggested changes should, as you say, be voluntarily adopted by the trial community.

I am disturbed by two things:

1. To permit counsel the unbridled right to interrogate a witness in any manner he sees fit, and without objection, letting the jury hear and see it all, gives me deep concern.

2. Punitive damage awards payable to educational institutions may very well be an inducement to the jury to "sock it to" defendants as aid to higher education and (as seen by the jurors, in all probability) as a means of lowering their own taxes.

I agree wholeheartedly with your third suggestion. It has the double-barreled effect of inducing defendant to make a realistic offer at the outset, and it will behoove plaintiff's attorney to counsel acceptance if it is reasonable.

Possible cures to my reservations;

1. Provide for a mandatory pre-trial conference at least 30 days before trial to give an objecting party the opportunity to request the striking of inadmissible portions of depositions and possibly to permit sanctioning counsel for "brow-beating" or otherwise abusing a witness.

2. A. Punitive Damages to go to Educational Institutions: I have long argued that the State should receive these funds, but have been met with the objections I have made above. Perhaps these objections can be cured with a mandatory jury instruction which would say to the jury: "Any sums awarded by way of punitive damages shall not be paid to plaintiff but shall be utilized in such a way as the Court may direct. You are not to concern yourself with the disposition of those funds."

B. Attorneys fees for Recovery of Punitive Damages I believe plaintiff and plaintiff's counsel should have a reasonable share. The old Texas vacancy statute comes to mind. My recollection is that plaintiff automatically was awarded 1/8th of the recovery. If you applied some such rule here it would enable both plaintiff and his counsel to profit (but not unreasonably so) and to divide their share any way they may desire.

You are correct. It may be later than we think. The public is fed up with us and our system. Unless something is done, we may be replaced by a computer.

Sincerely yours,

RALPH LANGLEY

RL/dm

cc: Chief Justice Jack Pope, Ret.
✓ Luke Soules

MAY 23, 1994

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TEXAS LAWYER

COMMENTARY

A CASE FOR A CEASE-FIRE

LITIGATION
by Stephen D. Susman

Every night, CNN and network news bring us vivid illustrations of what happens when civilized people fail to restrain their natural tendencies to distrust, despise and denigrate those who are different. They call it "racial cleansing" in Bosnia; "tribal cleansing" in Rwanda. And we ask ourselves, how can it happen? The best explanation we are given is that his is only a manifestation of centuries-old hatreds unleashed by circumstances. And while we tell ourselves it couldn't happen here and to us, the truth is that it is happening here, and now and to us — the trial lawyers of America.

Lawyer jokes are nothing new, we say. The public has never loved lawyers. So why, we ask, is it surprising that today we find ourselves, as trial lawyers, under attack? Because what we are witnessing is a particularly pernicious form of lawyer-bashing. I call it "professional cleansing." Several months ago, I appeared on a program sponsored by *The American Lawyer* in New York and was surprised by Steven Brill's question as to whether I would recommend that my son become a lawyer. I candidly confessed that I wasn't sure.

A friend of mine from Kentucky who read my remarks, wrote me this letter:

Dear Steve:

I enjoyed the supplement to *The American Lawyer* called NAVIGATING THE NINETIES. What particularly caught my attention was your answer to Steve Brill's question as to whether your son should enter the practice of law.

My answer would be completely different, and I have given it to my son-in-law, who is at Kent Law School, many times. I love the practice of law and believe that it is fun, interesting and as rewarding as any other profession.

Maybe my opinion is such in that I do not litigate. My specialty is estate and business planning and most of my clients are not only my clients, but also friends. The majority of them are multimillionaires and I can honestly say over the years my clients don't hate me. We entertain each other, play golf with each other, and have a good time in "whipping the IRS."

I think that the hatred that you are referring to is not a hatred of lawyers, but hatred of litigation. That's too bad in that litigation is only one aspect of the law and, in my opinion, a very small aspect of it.

That generous remark comes from a fellow lawyer who suffers from the bystander syndrome. What kind of monsters are we that our non-litigating colleagues might rejoice in our downfall? Why do we seem to be our worst enemies, incapable of rallying to our own defense?

SELF-DESTRUCTION

There are, I suspect, two reasons. First, we think we are committed to advocate what our clients want, even if it is our own destruction. For years, I have watched with dismay as the private antitrust bar has advocated the demise of private enforcement of the antitrust laws. And they have just about succeeded in putting themselves out of business. Today, corporate lawyers are beginning to do the same with private enforcement of the anti-fraud provisions of the securities laws. Marching to the drumbeat of their business clients, lawyers who have been paid well to draft disclosure documents to avoid half-truths, are about to put themselves out of business.

Second, we, as a professional group, are no different from other bystanders. We take comfort that our dog is not in that fight; that this public outcry is about the lawyers who wear polyester suits and tasseled loafers, who work for a piece of the action. Besides, what can we do? If the courts fail to curb abusive discovery, if our clients enjoy and are willing to pay for scorched-earth litigation — well, that's not our problem.

I thought about preaching about the evils of discovery, mediation, hourly fees and long trials. But to a sophisticated group of trial lawyers, that would be like preaching to the choir. Hopefully, we all sense that something is amiss; that the

CONTINUED ON NEXT PAGE

Stephen D. Susman is name partner in Houston's Susman Godfrey. This article is based on a speech Susman presented April 15 to the annual meeting of the TIPS Section of the American Bar Association in San Antonio and April 21 to the Texas ssociation of Civil Trial & Appellate pecialists in Houston.

CONTINUED FROM PRECEDING PAGE

curtain is about to fall; that we are in danger of extinction unless something dramatically is done now and by us. Our sense of despair and desperation is heightened by our recognition of the fact that although we helped elect the president of the United States, nothing seems to have changed for the better. We are still the target of public distrust and feel impotent to channel the winds of change.

To be sure, there are hopeful signs. Many jurisdictions, including Texas, are considering rules that would limit the number or hours of depositions, limit the time allowed for discovery, limit the number of experts, curtail the use of contention interrogatories, eliminate abusive requests for admission.

Several years ago, a special committee of the ABA, known as the Task Force on Fast Track Litigation, concluded that the most needed reform to hasten litigation would be to empower and encourage courts to limit the length of trials. Giving litigants their *day* in court, not a *week* or *month*, allows greater access to the adversary system with little sacrifice in the quality of justice. Less may be better than one at all; trial by ambush may be better than compulsory mediation or arbitration.

Articles abound on the virtues of alternative billing arrangements; most federal courts, in common fund cases, have abandoned the lodestar approach to setting attorneys' fees because it encourages unnecessary work and prolonging litigation.

But when will we stop talking about the problem and do something about it? Must we wait for the courts or legislatures or our clients or their in-house counsel to reform the system, or is there something we can do, here and now?

TIME TO ACT

My thesis is that if we do not act now, we will not like the solutions that others devise for the problems. Let me give you a painful, recent example. In recent months, a group of powerful lobbyists sponsored by insurance companies and accounting firms has advocated major changes in laws that encourage private enforcement of the antifraud provisions of the federal securities laws. Their premise is that encouraging private plaintiffs to serve as private attorneys general has resulted in a rash of frivolous securities fraud class actions that innocent companies and their advisers must settle to avoid a bet-your-company jury trial; that these lawsuits, allegedly filed whenever stock prices drop 10 percent, allegedly discourage capital formation, shift wealth from one group of innocent shareholders to another group of unvictimized investors and their lawyers, and inhibit candid disclosures about forward-looking events. A few weeks ago, a small group of plaintiffs' securities lawyers made a presentation to the president's Council of Economic Advisors, a group one would expect to be, but was not, unsympathetic to the current criticisms. We were eloquent in refuting the economic arguments, but when the president's men and women asked us what we would do to reform the system, there was an embarrassing silence. We had no plan; no program for reform; most of all, we failed to recognize that the unarticulated issue is *us* — why we sue so soon, so often, and settle so fast for so little.

And the U.S. Supreme Court decided in April in *Central Bank of Denver* that Rule 10(b)5 does not contemplate aider-and-abettor liability — changing three decades of established securities fraud jurisprudence. A five-justice majority (and a Blackmun replacement would only join the dissent) could have justified this sea-change solely on Congress' failure to provide expressly for this type of secondary liability. Instead, however, the majority went out of its way to comment on the fact that these lawsuits are often frivolous and require blackmail-type settlements to avoid the uncertainty of jury trials:

> Because of the uncertainty of the governing rules, entities subject to secondary liability as aiders and abettors may find it prudent and necessary, as a business judgment, to abandon substantial defenses and to pay settlements in order to avoid the expense and risk of going to trial.
>
> In addition, "litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." . . . Litigation under 10b-5 thus requires secondary actors to expend large sums even for pretrial defense and the negotiation of settlements. See 138 Cong.Rec. S12605 (Aug. 12, 1992) (remarks of Sen. Sanford) (asserting that in 83% of 10B-5 cases major accounting firms pay $8 in legal fees for every $1 paid in claims).
>
> This uncertainty and excessive litigation can have ripple effects. For example, newer and smaller companies may find it difficult to obtain advice from professionals. A professional may fear that a newer or smaller company may not survive and that business failure would generate securities litigation against the professional, among others. In addition, the increased costs incurred by professionals because of the litigation and settlement costs under 10b-5 may be passed on to their client companies, and in turn incurred by the company's investors, the intended beneficiaries of the statute.

In short, the court changed the substantive law to curtail lawyer abuse, and it acted before Congress or the president or those that lobby them could be heard. The unstated premise is that the best way to avoid the abuses of what goes on in the courtroom is simply to close the courthouse doors to a large category of the victims of fraud.

So I ask — are we going to sit by while we are bombed into oblivion like the Bosnians, or can we do something now to protect the system that we have spent our lives and staked our livelihoods on preserving? Sure, we can continue to travel to Washington and our state capitols to lobby for our cause, but that simply involves asking others to solve our problem. Sure, we can buy our own billboards to praise lawsuit use and the virtues of a jury trial, but the problem is more than a public relations one.

I have three proposals that we can begin implementing today.

SELF-CONTROL

First, why don't we declare our own cease-fire, our own moratorium on discovery abuse? I chair the Discovery Subcommittee of the Texas Supreme

CONTINUED ON NEXT PAGE

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Court Advisory Committee. We are about to propose some radical changes in the way we do business: all discovery must be completed in six months; each side is allowed a maximum of 50 hours of deposition during which no objections can be voiced and whatever is said can be played to the jury; if either side designates more than two experts, additional time is given the other side to depose them and costs may be awarded against the side that designates experts that are not called at trial; contention interrogatories that ask more than a yes or no answer are prohibited.

I have been pleasantly surprised by the near-unanimous support that our suggestions are generating among both sides of the bar, judges of all political stripes and academics. Still, we are a long way from having these suggestions enacted into rules.

But there is no reason that trial lawyers couldn't begin now by taking the pledge. We will voluntarily commit ourselves and our firms to limit what we do, how long we do it and perhaps even what we spend, on discovery. We will take our voluntary rules of engagement to the Inns of Court in our communities and seek their agreement. In short, we will declare a cease-fire, before the courts or the Legislature does it for us.

Second, I think we need to re-examine whether there is a grain of legitimacy in the public's criticism of punitive damages. Of course, preserving punitives is necessary to discourage wrongdoing. If a wrongdoer simply must repay his ill-gotten gains, there is little disincentive to steal and cheat, particularly when the chance of detection and disgorgement is less than certain. But the real complaint is not that the wrongdoer has to pay punitives, but that the victim and his attorney are the recipients of a windfall. Don't get me wrong. I don't propose to work for nothing, but suppose we advocated a system where punitive damages, after a modest deduction of attorneys' fees, were paid to the institutions of higher education in this state? Wouldn't we get some powerful allies in favor of retaining that remedy, even if they had to pay the plaintiff's attorney a small part of the proceeds for his effort in obtaining them?

My final proposal for change involves lawyer compensation. Several months ago, a group of influential lawyers and corporate executives in New York and Washington went public in a letter to *The New York Times* with a suggestion that would limit the amount of fees a plaintiff's lawyer could get from a quick settlement. If I recall the proposal, if a case were settled in 60 days, the plaintiff's lawyer would be limited to hourly compensation. After that, she would also receive her negotiated contingent fee, but only on the amount in excess of what the defendant offered at the end of 60 days.

While my colleagues in the plaintiffs' bar were aghast at the notion that their right to contract with their clients could be interfered with, the proposal coming from the East Coast is not all that outrageous. I do a lot of contingent fee work for large corporate plaintiffs, and during our fee negotiations, little is left on the table. Often my clients insist on a fee structure not so different from that being proposed. So what's so awful about a rule that assures clients without clout of the same protection against a lawyer windfall?

These three suggestions — a discovery cease-fire, a redirection of the proceeds of punitive damages, and a limit on windfall fees — are reforms we can adopt quickly and without destroying our adversary system. We should begin to discuss them now; we should appoint subcommittees to study them. If we did, can you imagine what *The Wall Street Journal* would have to say about our efforts? ■

4543.001

WHS
WHD
6-15-94
SB

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL (512) 463-1312
FAX (512) 463-1365

June 13, 1994

HHD,
Scott Sobb
v. Agenda
SBOT Staff
file

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed is a letter Lee Parsley received from Jim Parker regarding discovery.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

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June 1, 1994

Mr. Lee Parsley
Texas Supreme Court
P.O. Box 12248
Austin, Texas 78711

Dear Mr. Parsley:

I am writing to give you my comments on the Rules Advisory Committee session I observed on May 21, 1994. At that meeting, rules to set out a framework for discovery were discussed. These rules fell into two versions, one submitted by the subcommittee and one submitted by the State Bar of Texas. I have divided my comments into pro and con regarding each set of proposed rules.

Subcommittee proposal

The subcommittee should be commended for taking a giant step back from the problem and considering the entire issue from scratch instead of tinkering with the existing rules. The result they reached, however, is too much of a change.

Pro	Con
1. Tries to set out a discovery plan in the rule instead of relying on detailed management by the court.	1. Too bizarre and byzantine to be acceptable. Too radical a change in a system that is basically conservative.
2. Sets out standard, unobjectionable discovery in order to stop fights over basic information.	2. It is unrealistic to discover a case fully and then "put it in the can" for months or years and assume that one can pull it out of the can and try the case efficiently.
3. Leaves open the option of putting limits on the length of trials.	3. Discovery is "one size fits all" unless the parties agree or the judge orders otherwise.

SBOT proposal

The SBOT committee did a good job of focusing on the current problem areas and addressing them. I do not believe, however, that such a judge-intensive system can function statewide.

Pro	Con
1. The system is simple.	1. The system relies too much on early, significant, detailed trial court involvement to make it work. This will not happen in practice.
2. Discovery is tailored to the case. Each case gets as much or as little discovery as it needs.	2. The standardization should go further to include standard, basic discovery requests to avoid fights over the basics.
3. Definitions are standardized.	

Both proposals have good innovations, but both can be improved. A system with different levels of intensity of discovery could reduce the need for trial court management. Cases should start on the minimum intensity plan and only move out of that if the court orders or the parties agree to a change. A system with standardized, unobjectionable definitions and discovery would also allow cases to be prepared without the unnecessary fights that go on now over basic information.

One problem that occurs in both systems is that they are geared toward massive cases. This is the kind of cases the lawyers on the committee handle, but they are not the majority of all cases. Lip service is paid to meeting the needs of the average lawyer and the average case, but the everyday case is not well-served by either proposal.

I believe that any system must meet the criteria below to be workable and fair to all lawyers and not just the big, important ones. With these criteria, the rules will assume a case is small, and the lawyers or the court will have to override this assumption instead of the other way around.

A. A lawyer should be able to take a $10,000 case with the certainty that discovery will be so limited that the case can be handled through trial without bankrupting the lawyer or the client.

B. A solo lawyer should be able to take a small case against a big firm or big party with the certainty that any defeat will be on the merits (facts and quality of lawyer) instead of losing by being overwhelmed in discovery.

C. The system must not depend on the active involvement of the trial judge.

Thank you for this opportunity to offer my comments.

Sincerely,

Jim Parker

Jim Parker

4543 001

11-15-93

4/15 hhd

THE SUPREME COURT OF TEXAS

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November 11, 1993

HHD.

Agenda Item

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed is a letter from Ronald Wren regarding the Discovery Task Force, a copy of which has been sent to David Keltner.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

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November 2, 1993

The Honorable Nathan Hecht
Judge, Texas Supreme Court
Supreme Court Building
P. O. Box 12248
Austin, TX 78711

RE: Comments upon Texas Supreme Court Discovery Task Force

Dear Judge Hecht:

This letter will be a follow-up to the solicitation by yourself, Chief Justice Phillips, and Justice Doggett at the recent Advanced Civil Practice Course put on by the State Bar of Texas of comments upon issues involved in the ongoing work of the Supreme Court discovery task force towards revising the civil discovery rules in Texas. According to the panel discussion at the seminar, the task force is apparently considering two aspects of discovery reform which have been adopted in model programs in federal court designed to reform federal civil discovery practice. These proposals are (1) some type of mandatory disclosure of information or form interrogatories and requests for production which must be answered by a party within a given time following the filing of a suit, and (2) use of a "track" system under which the Court essentially assigns and controls with strict limits the amount and type of discovery which parties can engage in a particular case. These aspects of discovery practice are currently being utilized, for example, in the Eastern District of Texas under a model program established by the federal judges there.

It is these two aspects of proposed discovery reform I wish to comment upon in this letter, for am I am strongly in favor of some type of form or mandatory discovery while I am strongly opposed to any type of mandatory "track" system as being unfair and unworkable.

I believe, with respect to form discovery, the best approach is that taken by the recently enacted amendments to TEX. REV. CIV. STAT. ANN. article 4590i, requiring the Supreme Court to promulgate sets of form interrogatories and requests for production, with input from representatives of both sides of the bar. I think that a similar approach could be used in other types of cases, or even generically in all civil cases, through modifications in the existing rules of civil procedure. I believe that court-promulgated form interrogatory and request for production sets are preferable to the Eastern District approach of incorporating "mandatory disclosure" as part of its local rules. By promulgating the form discovery as a part of the Texas Rules of Civil Procedure, just as the form parts of the charge are similarly promulgated in those rules, I believe that the Court can thereby eliminate traps to the unwary, who might otherwise be unaware of the need for disclosure and compliance. One of the problems with the Eastern District approach of incorporating mandatory disclosure as a part of a set of local rules is that practitioners who are unfamiliar with or rarely practice in that district can be blind sided by unfamiliar requirements, or by local interpretations of those requirements. Placing the form discovery in the rules themselves supplies adequate notice to all parties from all parts of the state as to the requirements of disclosure. I believe that this approach, utilizing a system similar if not identical to that employed by recent amendments to article 4590i, is the correct approach for the Court to take.

With respect to "tracking", my objection to that system, as it has been used in the Eastern District, are the same as the objections which were made to the Texas sanction rules prior to the Court's decision in ***TransAmerican v. Powell***: it encourages disposition of cases on a basis other than the merits and it sacrifice fairness to the parties in favor of judicial expediency. By giving trial courts the power to essentially dictate which party gets discovery and which do not, you give those trial judges incredible power to influence the ultimate outcome of the case. Experience in the Eastern District has been that courts are routinely refusing to allow anything more than very rudimentary discovery, force cases to trial prematurely, and are successful in producing settlements precisely because they have a system that virtually amounts to trial by ambush in which parties settle cases out of fear of the unknown rather than upon a rational appraisal of the merits of the lawsuit.

Further, by placing such ultimate and total power over discovery in the hands of the trial court, the "tracking" system opens up significant potential for abuse and favoritism toward specific law firms or specific sides of the bar. Such favoritism need not even be overt (e.g., allowing one side of a lawsuit more discovery than another). The most fundamental problem with such a system based upon inadequate discovery is that inherently favors the party who has the most knowledge when the lawsuit begins. Cases which are heavily fact-specific or involve technical or professional standards, such as products liability, antitrust, or medical negligence cases, a "tracking" system is almost going to inherently favor the defendants in such cases and make it extremely difficult, if not impossible, for a plaintiff to prosecute such cases successfully. In business litigation or fraud cases, a system which provides for inadequate discovery will again favor defendants, no matter what their degree of culpability because in most cases the defendants will be in possession of the vast majority

of the information upon which the lawsuit must be tried. On the other hand, in toxic tort litigation, in which the regular practitioners on the plaintiffs' side of the bar have knowledge from prior lawsuits of the defendants' products and the sole issues are product identification and the condition of the plaintiff, a system, based upon adequate discovery, such as that provided by "tracking" system, will inherently favor the plaintiff because the information on these issues lies with plaintiff and his co-workers, who are typically in line with the plaintiff's cause.

The net result of an inadequate opportunity to discover the opponent's superior bank of information will result in legitimate cases being lost precisely because of that inadequate opportunity. In other situations, it may result in bonafide defenses being lost not on their merits but on the basis of inadequate opportunity to develop the information necessary to assert those defenses. The bottom line on the "tracking" system is that it is a device designed solely to get cases off the docket by whatever means available without respect to the merits. The similar problems with the "sanctions" rules led to reform of those rules in *TransAmerican*. As *TransAmerican* makes clear, the goal of the civil justice system remains justice, and a significant component of justice involves a decision of cases on their merits rather than on some wholly unrelated and arbitrary basis. I do not believe that any type of "tracking" system will further that goal.

I thank the court for its willingness to allow comment on those matters.

Very truly yours,

Ronald D. Wren

RDW/cc

✓1-3-93
SB

LHS

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December 29, 1993

HHD,
re SCAC Decision Subc's
✓ Agenda
COAJ Staff
J. Hecht.

Mr. Lonny D. Morrison
President
State Bar of Texas
P. O. Drawer 5008
Wichita Falls, Texas 76307-5008

Re: American Bar Association Summit on Civil Justice System Improvements

Dear Lonny:

This letter will constitute my report on the above referenced meeting I attended on behalf of the State Bar of Texas since you, Jim and Karen were unable to attend. I am copying them, as well as Luke Soules, since all of you need to be aware of what took place at this very important conference.

In a nutshell, the civil justice system must undergo significant changes to avoid collapse and to eliminate the rapidly rationing of justice to those who can't afford to participate in the system. Too much litigation is too expensive and takes too long. It is, also, imperative that civility among attorneys be restored to the system. The number of attorneys who are leaving the practice of law, and those who are discouraging others from going into the practice because of the acrimony which so often is a part of the litigation process, is growing at an incredibly rapid pace.

Several states have already taken significant steps to revise their rules of court to deal with the expense and length of litigation and to minimize antagonism between opposing counsel. I am enclosing a copy of several pages from the Arizona Civil Rules handbook. Arizona has been operating under these rules since June 1, 1992, and, according to Justice Thomas Slaket of the Arizona Supreme Court, they have been working extremely well. The new rules have three objectives. First, cut the expense caused by discovery. Second, cut the length of time from filing to final disposition. Third, provide sanctions for Rambo type tactics. Justice Slaket did not hesitate in stating that the initial response of the bar to the rules was anything but enthusiastic. Fortunately, the bar has learned that their fears were unjustified.

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The leadership of the ABA exhorted the participants in the conference to urge the rulemakers in their respective states to pursue the recommendations of the report distributed to the participants, a copy of which is enclosed for you and the others receiving this letter. It appeared to me that the participants intend to seriously pursue this admonition.

Court Rules and the Supreme Court Advisory Committee have already started on this journey, and, hopefully, within the next twelve months recommendations will be coming from these committees to the Supreme Court of Texas for rule changes that will accomplish all of the foregoing objectives.

I will be urging both of these committees to recommend rules which require mandatory disclosure within a reasonable period of time of filing suit of the identity of witnesses and the production of all documents relevant to the issues in the litigation. I will, also, be recommending that unless there is agreement of counsel, or, if no agreement, a court order based on good cause, that no oral deposition exceed six hours. Consideration should, also, be given to limiting the number of depositions to parties, witnesses who might not be available at trial, and experts. In fact, there may be great wisdom in limiting the number of experts to one per issue.

With respect to restoring civility, it is imperative that motions to compel be the first line of action in discovery matters followed by motions for sanctions if motions to compel fail. Sanctions must become a last resort, and, then, only to punish conduct where other avenues have failed. Further, the mentality of awarding costs because a party prevails on a motion is counterproductive. Before we know it, attorney's will be requesting expenses because of being successful on special exceptions or objections during the presentation of evidence at a trial. Definitely, there should be encouragement of the courts to move rapidly to stop any type of Rambo tactic or discourteous treatment of one attorney by another when such conduct manifests itself. We definitely must return to the days when attorneys treated each other with respect and courtesy, even though they might vigorously oppose each other on the issues.

I recommend the Board of Directors approve a change of the name of Court Rules back to Administration of Justice. There is a lot in a name. We must not lose sight

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of the reason for rules of court. Justice must always be the objective.

In conclusion, I believe that the entire rules of court need to be reorganized, simplified and stated in common language. Both Court Rules and the Supreme Court Advisory Committee are already pursuing what is coming from Bill Dorsaneo's Task Force on this subject.

Very truly yours,

J. Shelby Sharpe

JSS:cf

Enclosures

cc: Jim Branton w/enclosures
Karen Johnson w/enclosures
Luther Soules, III w/enclosures

REACHING COMMON GROUND:
A SUMMIT ON CIVIL JUSTICE SYSTEM IMPROVEMENTS
DECEMBER 13 - 14, 1993
WASHINGTON, D. C.

DISCUSSION DRAFTS
CIVIL JUSTICE IMPROVEMENTS PROPOSALS

This document is being distributed as a discussion draft only. The views expressed in this draft are solely the views of some members of the American Bar Association Ad Hoc Committee on Civil Justice Improvements. This document has not been reviewed or approved by the governing body of any organization, including the ABA House of Delegates or Board of Governors. Viewpoints herein expressed are those of some members of the Ad Hoc Committee and do not necessarily represent the positions or policies of the ABA unless clearly stated.

FORWARD

SO WHY ARE WE HERE?

This Summit was preceded by countless meetings, and thousands of hours of work, extending over more than a year.

The origin for it was a meeting in Chicago in October of 1992, when several of us reviewed together daunting, intersecting facts:

* That underfunding of the Justice System was likely to worsen rather than improve, absent intensive action by the Bar and judges;

* That Justice System case overload was likely to increase precipitously;

* That poor and even Middle America felt ever less access to the Justice System;

* That lawyer polls show disturbing signs of wide-spread disspiritedness among providers of legal services, throughout all segments of the Bar;

* That by any objective measure the litigation process often costs too much and takes too long;

* That, just as the public was placing greatly increased demands upon the System, they were expressing vocal dissatisfaction with it, approaching a groundswell; and

* Finally, that although a lot of heated reform rhetoric had been advanced by one constituency or another, that battle had been waged at a high cost to the profession. And no one could point with unvarnished satisfaction to favorable results of that Justice "reform" exchange.

So it was that we decided to bring together a wide array of groups interested in civil justice improvement. The hope was that a collaborative enterprise might afford a prospect of some real betterment in the Civil Justice System. Following early discussions on the desirability of setting upon this course, it was decided to pursue two projects: (1) to develop some concrete proposals; and (2) to convene this meeting.

The process for developing Civil Justice Improvement proposals was a lengthy one. We began by dividing that large topic into three subgroups: (1) Case Management; (2) Early Disposition Initiatives; and (3) Discovery and Trial Efficiencies. After speaking with a number of experts in the respective fields, the groups selected three academic reporters to research the experience and literature in those areas and to assist in preparing some proposals worthy of consideration. Volunteers, with disparate backgrounds and viewpoints, were enlisted to work closely with the reporters in each of these three areas. Each group met several times and considered a long list of possible procedures. After that, initial draft proposals were circulated to a broad audience and comments were solicited. A number of thoughtful, comprehensive

comments were received from a wide-range of groups: spanning the business community, to the public interest community, to the legal services community, to various ABA entities, and the like. All of those comments were then carefully reviewed by the reporters as well as those working actively with them on the subgroups. Substantial changes were made to take into account the views to the commentors. That, in turn, led to repromulgation of the draft proposals in the form now contained in your materials. While time did not permit a written comment-by-comment analysis and response, all comments were afforded substantial consideration. The reporters are available at the Conference to explain the degree to which the final draft reflects suggestions emanating from the comments and the reasons why additional changes, as suggested by some of the comments, were not deemed advisable.

A couple of general comments about the draft proposals merit emphasis:

First, our claims regarding these proposals are modest. Opposition still exists to some of the proposals, even as revised to reflect comments. And it was never the idea they were to serve as any mandatory, one-size-fits-all, set of sure-fire solutions to all manner of justice system issues. Rather, they are being developed to serve as a substantial menu of items deserving of consideration as procedural change is explored, particularly in the various states. Rules that make sense for Wiscasset, Maine courts often do not fit for courts in Los Angeles, California.

Second, the proposals in no way are designed to discourage consideration of other suggested improvements within these three areas or, for that matter, on broader issues.

Third, perhaps as important as the particulars of the draft proposals are the themes that have emerged in all three reports, among them: an emphasis on dialogue, lawyer-to-client, lawyer-to-judge, lawyer-to-lawyer; a redefinition or recalibration of roles and functions; and a call to the Bar to take a lead in the improvements process by, for example, serving as judicial adjuncts and taking on the responsibility of convening meet-and-confer conferences.

Finally, a few words on the purposes for this Summit Meeting. One of the them, to be sure, is to have discussion on the specific draft proposals, to flesh out areas of agreement and disagreement, and other proposals that we should be looking at in the future. But the purpose of the Conference will transcend that. We think it is useful here to lay out the facts on the vast scope of the Civil Justice problems. We think it is useful to be clear collectively that we are not defensively claiming that the justice system is perfect, but rather that it faces pressing problems. It is important for all of us to understand the terrible consequences left in the wake of a system under these monumental strains. We think it is imperative that we are all heard to say together that we are prepared to work as hard as we know how to bring about improvement. We also think it useful for all of us to learn more about what has worked in the Civil Justice Improvement arena in some areas and that might be expected to work elsewhere.

And last it is important to reach some agreement on the process of dealing with these Justice System concerns. We hope that consensus embraces: the wisdom of focusing considerable attention -- bar, bench and public -- on state justice systems; the need and feasibility of altering

local legal cultures so that they deal more aggressively with these problems: on the utility of our continuing to monitor innovative features of Civil Justice Reform Act Plans and widely disseminating information about the most promising of those; and the need to make alternate dispute resolution procedures more widely understood and more accessible to those unable to pay for these services.

That is what we will be talking about here. We hope you will all join in and help us determine where we go from here.

Dudley Oldham
Chair, Tort and Insurance Practice Section

Robert N. Sayler
Chair, Litigation Section

November 1993

INTRODUCTION

America's civil justice system has served our nation with distinction for more than three centuries. The courts are the one place in our governmental structure where the doors are always open and where claims cannot be ignored. They articulated the rights that spurred the growth of democracy and individual autonomy, and established the principles upon which the most productive economy in the world was built. As the American Bar Association said in the *ABA Blueprint for Improving the Civil Justice System*:

> A justice system that provides citizens with a way to resolve disputes peacefully and protects individual rights and property has been a most crucial factor in America's success as a nation. This fact is underscored by an ever-expanding reliance on the justice system to vindicate the rights and claims of all Americans -- rich and poor, corporations and individuals, and advocates of every political point of view.

Those who pass through our courts may feel satisfaction or frustration about their specific outcome, but virtually all embrace without reservation their opportunity to be heard.

Despite this success, or perhaps in part because of it, the civil justice system has serious problems. The courts are overcrowded, deluged especially with criminal cases involving drug offenses. The courts are traditionally and pervasively underfunded. In 1991, courts in eight states were forced to suspend civil jury trials for all or part of the year because of a lack of funds. A similar shutdown in the federal system was narrowly averted in the summer of 1993. The expense of litigation has grown dramatically, and delay in getting cases to trial has become a pervasive concern. The result of these problems has been a progressive narrowing of the availability of court-based adjudication, especially for middle class and small business litigants. It may even be that these problems are a factor in the growing public antipathy to lawyers and the legal system.

There has been much heated debate about the civil justice system in recent years. Most of that debate has focused on such issues as the number of lawsuits filed, the number of lawyers in the United States, the cost of the civil justice system and what impact it may have on competitiveness. Missing, however, has been meaningful discussion of how to be responsive to the interests of the public, or of how to evaluate and implement the many proposals to improve the system that already exists, such as those found in the *ABA Blueprint*; the Brookings Institution Task Force Report, *Justice for All*; the Civil Justice Reform Act and reports developed under that Act; the President's Council on Competitiveness' *Agenda for Civil Justice Reform in America*; and proposed amendments to the Federal Rules of Civil Procedure. Instead, civil justice initiatives have been fractionalized and inclined toward rhetorical attacks, resulting not in improvement but in polarization and gridlock.

We need a coherent vision for the future, based on facts and trends and grounded in the public interest. To begin that process, the American Bar Association formed a Long Range Planning Group on Civil Justice System Improvements (now the Ad Hoc Committee on Civil

Justice Improvements), which sought to involve individuals and groups of all points of view who are active in considering civil justice issues. Working groups were formed in three areas on which it was believed consensus most probably could be reached -- early settlement, discovery and trial process, and case management. The charge to these groups was to identify or develop specific potential improvements in the civil justice process on which the widest range of interested parties -- lawyers, business and consumers -- could agree.

All of these groups recognize that improvement of the system is vital if it is to continue to function effectively. Yet many proposed and even adopted improvements, improvements about which there is widespread expert consensus, have been greeted with substantial hostility. The working groups believe the primary reason for this resistance is failure of the advocates of change to recognize and incorporate into their proposals values that are of fundamental importance to the American judicial mechanism.

The working groups have identified five such fundamental values, which served as the basis for formulating and measuring the improvements they now recommend.

The core principles identified by the working groups include the following:

Rule of Law

Americans believe that everyone should be subject to, and benefit from, the same laws; that each party to a dispute has the right to have the law fully and fairly applied, and to have his or her case decided in the same manner as other, similarly situated, individuals.

Litigant Participation and Choice

Americans share a deep concern for personal autonomy. Our legal system accommodates that concern by ensuring that litigants have a substantial degree of choice with respect to the sorts of claims they will bring, how they will go about bringing them, and the evidence upon which they will be based.

Access to the Courts

Procedural changes must not create barriers that deny people a genuine opportunity to be heard by a neutral adjudicator who is authorized to consider the evidence the parties choose to present. Litigants must be assured of reasonable access to the decisionmaker. Procedures that permit the resolution of all or a part of a dispute short of a full trial -- such as summary judgment or alternative dispute resolution -- should not materially affect the parties' ability to present their cases if a trial is ultimately held. Furthermore, all procedures should be reasonably calculated to further the fair resolution of the dispute. Procedures that impose costs and delay without a concomitant increase in the likelihood of a fair resolution should be avoided.

Alternatives to Trial

Procedures that provide mechanisms for resolution of a dispute short of trial should provide the parties with the sense of having had their "day in court." Studies indicate that litigants tend to judge the fairness of dispute proceedings not simply on whether they win or lose, but on whether they view the process itself to have been fair. Respect for our judicial system can only be maintained if parties who settle as a result of court-imposed settlement or alternative dispute resolution procedures feel that they had a fair opportunity to have their say and voluntarily choose to settle rather than going to trial. Thus alternative dispute resolution procedures should provide for a proceeding in which the parties, and not merely their attorneys, have an opportunity to participate, and which allows for a fair and reasoned consideration of the issues and interests at stake.

Adjudicator Impartiality

An essential element of the American approach, and one intimately associated with the constitutionally protected right to jury trial, is the preservation of real and apparent adjudicator neutrality. No amount of delay reduction or cost savings can redeem a system that is perceived as partial or biased. Traditional mechanisms for protecting neutrality should be respected, including availability of an appellate forum to review judicial actions, and avoidance of mechanisms that authorize the exercise of arbitrary or unreviewable power.

In alternative dispute resolution, the impartiality of settlement judges, facilitators, mediators, and arbitrators is also important. A judlge who has been actively involved in settlement proceedings should not be the ultimate adjudicator without the express and uncoerced agreement of all the parties. Persons appointed as third-party neutrals should have no conflict of interest and should not be subject to coercion by the court. In appropriate circumstances in ADR, the traditional standards of openness to the public and appealability may be outweighed by the need for confidentiality and finality.

Minimize Satellite Litigation

Procedures that provoke satellite contests and intensify the confrontation between the parties, or between the court and a party, seldom produce useful results. Vague or standardless requirements, and invitations to invoke sanctions without the clearest of purpose, are inappropriate ways to structure the system because they exacerbate tensions and compound delay. Sanctions may have an important part to play in policing adjudication, but they should not be seen as the technique of choice in most circumstances and should only be imposed in the context of clear, concrete, and nondiscriminatory standards.

EXECUTIVE SUMMARY

Early Settlement

A very high percentage of civil cases -- in excess of 95 percent -- are settled prior to trial. A significant proportion are settled just before trial begins or within the last few weeks or months before trial once a firm trial date has been set. The obvious response to this state of affairs is to ask what could be done to encourage parties to settle at an earlier stage in the litigation, when less time and expense have been devoted to discovery and trial preparation.

The Early Settlement Working Group focused on procedures that could result in earlier resolution of many suits if they are used effectively by courts. It drafted four proposals.

The center piece, and by far the most important proposal, is its *Pretrial Settlement Facilitation Procedures*, which would provide a comprehensive schedule to address case administration and alternative dispute resolution at various stages of the litigation:

> Within 20 days after filing of responsive pleadings, the parties and their lawyers must "meet and confer" to consider the possibility of settlement, determine the utility of ADR, establish a discovery plan, and formulate and simplify the issues. Upon the request of any party, the court may appoint a "case facilitator" to assist the parties. Within 10 days after the conference, a pretrial plan must be submitted to the court, which must include the parties' recommendations as to referral to a non-binding ADR procedure. The court will then enter its pretrial order (with the option of holding a pretrial conference first if it feels it necessary). If the case is referred to ADR, the parties may object within 10 days, but the court will determine whether to withdraw the referral or not. If the case is referred to ADR, the court may require the parties to attend with settlement authority and may impose sanctions for noncompliance. The type of sanctions will be explored and discussed at the symposium. The court will have a standing panel of ADR neutrals to review applications and prepare a list of those qualified. The parties may be required to pay the fees of an ADR neutral, but their input as to who should be appointed must be considered. Communications made during an ADR procedure are confidential, with limited exceptions for policy reasons.

The second proposal is a *Summary Judgment Rule* that attempts to codify the most workable modern approaches to summary judgment. It includes:

> Summary judgment would be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. A party which does not have the burden of proof may move for summary judgment by demonstrating an absence of evidence as to an essential element of the opponent's case and thereby shift the burden of production to the opposing party. In response to such a motion, the non-moving party need not produce evidence in a form admissible at trial so long as it demonstrates that it could be reduced to admissible evidence. Partial summary judgments on less than all the issues may

be granted where appropriate. A broad range of materials may be submitted to support or oppose the motion. Summary judgment must not be rendered before any party opposing the motion has had a reasonable time to discover evidence bearing on any fact sought to be established.

The Working Group also drafted two proposals on which there was some disagreement, both as to their overall utility and as to specific provisions. They are presented as examples of the kinds of incentives that might be created to encourage earlier settlement and for further discussion of their merits.

- *Pre-Complaint Notice Procedures* --At least 30 days before filing most suits, a prospective plaintiff would be required to give notice of the impending suit to the intended defendant(s). The Statute of Limitations period is extended if it would have run during the 30-day period. The parties are encouraged to confer concerning the possibility of resolving the dispute without trial. On the request of any party, the court may appoint a "court settlement facilitator" to assist the parties. There are exceptions to the notice requirement in circumstances where immediate resort to court is necessary.

- *Offer of Settlement Procedures* -- Any party may make an offer of settlement to another party. Incentives to induce settlement should be considered. The type of incentive to be used is highly controversial. The following possible example of and incentive is being set forth for exploration and discussion at the Symposium. The Symposium will explore the appropriateness of such a mechanism. If a party that refuses an offer of settlement does not obtain a judgment at least 50 percent better than the amount of the offer, it shall pay the offering party's costs, including reasonable attorney's fees and expenses, from the time of the offer. In the case of a plaintiff who does not do 50 percent better than the offer, the sanction of paying the defendant's costs will be reduced by the amount of plaintiff's attorney's fees incurred before the offer which plaintiff would have been entitled to recover as prevailing party. The court may reduce the sanction to avoid undue hardship or for any other compelling reason justifying the offeree to seek judicial resolution of the suit.

Discovery and Trial Process

The Discovery and Trial Process Working Group believes that a case-by-case evaluation of discovery needs, by attorneys in the context of fashioning a discovery plan, will help to eliminate the boilerplate discovery and technical objections that consume time and waste money under the present system. The working group recommends that lawyers be required to meet early in a lawsuit, prior to conducting any discovery, to develop a plan that will control the timing and form of discovery throughout the case. Like the proposal of the Early Settlement Working Group, this meeting is also aimed at early identification and disposition of cases that can be settled or resolved through an alternative dispute resolution mechanism.

The salient features of the proposed rule are the following:

- Meeting at the Outset of the Lawsuit -- Counsel are required to meet very early in the

lawsuit so that a customized and efficient discovery process can be developed. The early meeting also provides an opportunity to identify and resolve many potential problems early on, before they slow down the progress of the case or consume large amounts of time and money in the process of being resolved by motion.

- Purposes of early meeting -- The early meeting of counsel in the proposed rule has four purposes: assignment of the case to a discovery track with presumptive time limits; drafting a discovery place; discussing settlement of the action; and considering the suitability of alternative dispute resolution.

- Prompt Submission of Proposed Scheduling Order -- Within 10 days of the meeting, counsel must submit a discovery plan and a proposed scheduling order to the court. Where counsel cannot agree on a joint proposed order, separate orders may be submitted with a brief description of the matters in dispute.

- Judge Must Promptly Enter Scheduling Order -- The judge's entry of a scheduling order, based on the parties' proposed order or modified as the judge deems necessary, formalizes counsel's agreement.

- Exemptions and Enforcement -- The proposed rule gives the court discretion to exempt actions from the operation of the rule on a case-by-case basis or by local rule. It explores the use of enforcement mechanisms on litigants who refuse to participate in good faith in framing a discovery plan.

Case Management

Over the course of the past 15 years there has been growing receptivity to the "management" of cases as a means of reducing cost and delay. The concept of judicial management has had a substantial impact on the way courts are organized and litigation processed. The key to all of this has been acceptance of the idea that individual courts are not walled-off fiefdoms but parts of larger governmental systems that need centralized management and oversight to operate effectively. Thinking in systemic terms has yielded a range of reform proposals with the potential to improve the speed and quality of justice.

While some of the steps proposed are relevant to the federal courts, the Case Management Working Group's main concern is with improvements at the state level. The working group chose this focus in the belief that those management reforms work best which have been designed with the needs and concerns of a particular jurisdiction in mind by drafters intimately acquainted with the special characteristics and requirements of that jurisdiction.

Over the course of last 10 years a consensus has developed about the efficacy of a package of six management techniques in reducing cost and delay:

- Judicial commitment and leadership;

- Court supervision of case progress;

- Appropriate time standards and goals;
- Monitoring and information systems;
- Scheduling for credible trial dates; and
- Court control of continuances.

This report fleshes out the basic management proposal by identifying state statutes, ABA standards and state court rules that have been used to implement each of the six points in various settings. Of special value have been the *ABA Standards Relating to Court Delay Reduction*, which provide everything from time standards (prescribing a timetable requiring resolution of 90 percent of cases within 12 months, 98 percent of cases within 18 months, and 100 percent of cases within 24 months) to methods to "firmly and uniformly" enforce limitations on continuances. Finally, it should be noted that effective cooperation between bench, bar and court administration is crucial to case management reform, and processes that foster such cooperation are an important part of the reform effort.

Implementation

The working groups concluded that the most effective strategy to pursue in improving the civil justice system is to gather leading members of the state bench, bar, court administration and public together into a commission or task force, and charge them with the responsibility of designing a faster and less expensive means of conducting the civil business of the courts. A program created in this way is far more likely to garner the support of all those involved in the justice system than is a package imposed "from above" by legislative rules drafters or judicial committees removed from the concerns and realities of practice.

The working groups together recommend that each state interested in improving its civil justice system form a State Justice Commission composed of judges, bar association representatives, other interested lawyers, court administrators, and a balanced group of litigants. The Commission should be charged with the responsibility of designing and, subject to appropriate approval, implementing an expense and delay reduction plan within 12 to 18 months of its creation.

The Commission, or, if appropriate, local task forces must determine:

- the condition of the civil docket and, where relevant, the condition of the criminal docket
- trends in case filings and in the demands being placed on the courts' resources
- the principles causes of cost and delay in civil litigation, and
- the extent to which costs and delays can be reduced by specific improved management techniques.

All this inquiry should be recorded in a written report and completed pursuant to a specified

timetable of no more than 18 months duration, along with a detailed proposal concerning steps to reduce expense and delay.

When the Commission or task forces' reports have been submitted, they should be reviewed by the state's highest court and, state law permitting, be implemented insofar as seems appropriate to achieve their objectives.

Throughout this process, the state bar association must commit itself to providing the most substantial input and cooperation of which it is capable. The American Bar Association must commit itself to assisting the state bar associations in any way it can. To the extent possible, the ABA should identify and make available to each State Justice Commission technical resources likely to be of assistance in their efforts.

EARLY SETTLEMENT PROCEDURES

Pretrial Settlement Facilitation Procedures

Court statistics have long indicated that a very high percentage of civil cases -- in excess of 95 percent -- are settled prior to trial. A significant proportion are settled "on the courthouse steps," just before trial begins or within the last few weeks or months before trial once a firm trial date has been set. The obvious response to this state of affairs is to ask what could be done to encourage parties to settle at an earlier stage in the litigation, when less time and expense have been devoted to discovery and trial preparation.

For years, judges have conducted informal settlement conferences to promote resolution of cases without trial. *See* Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U.Chi.L.Rev. 306 (1986).; R. Keeton, *Judging*, 198-205 (1990). Increasingly, attendance at such conferences is required by the court. *See Report of the Task Force on the Civil Justice Reform Act*, 33 (ABA Section of Litigation, 1992)[hereinafter ABA Report]("of all the ADR processes, it is in the case of the settlement conference that the ['expense and delay reduction'] plans [of federal district courts] most frequently give the court authority to compel the parties to participate"). Originally, only the attorneys usually attended such settlement conferences; for example, Federal Rule of Civil Procedure 16, promulgated in 1936, authorized federal courts only to "direct the attorneys for the parties to appear before it for a conference." Gradually it came to be appreciated that the parties' attendance was also useful, if not essential, in a settlement conference. In 1983, Rule 16 was amended to include in the attendance order "any unrepresented parties," and more recently a number of local federal district court and state court rules have been drafted to require the attendance of all parties.[4]

Settlement conferences vary considerably with the personality of the judge, but have often involved a combination of reality testing as to the law and facts, jaw-boning, and veiled threats, to move the parties towards settlement. When the judge who conducts the settlement conference will also preside at the trial (or try the case without a jury), there has been concern that the parties might be coerced to settle according to the judge's view of the case. Case law has established that settlement procedures must not have the effect of coercing the parties into settling, but "impermissible" coercion has been limited to a court imposing its terms for settlement on the parties. *See Kothe v. Smith*, 771 F.2d 667 (2d Cir. 1985)(judge may not sanction a party for refusing to settle before trial within the dollar range considered to be fair by the judge). Concerned with the broader potential for coercion, some courts have now adopted the practice of having settlement conferences conducted by a judge (or judicial surrogate) who will not preside at the trial. *See* ABA Report, at App. C-1 (plan of U.S.D.Ct.E.D.Cal. provides that "the judicial officer handling settlement will be disqualified from trying the case unless there is agreement by the parties to waive this restriction").

The alternative dispute resolution (ADR) movement of the last two decades has introduced a whole new range of pretrial settlement procedures, suitable for different kinds

of situations and timing, outside the traditional judge-conducted settlement conference. ADR procedures generally involve a third-party neutral who serves as a facilitator (as in mediation) or evaluator (as in neutral evaluation or non-binding arbitration) to assist the parties to reach a settlement. They may also provide a "trial run" to enable the parties to observe how their case is likely to play out before a selected audience (as before the parties' decision makers and a neutral advisor in a mini-trial, or before a representative jury in a summary jury trial).

In recent years, courts have added various ADR procedures to their arsenal of settlement devices. One of the more controversial aspects has been whether participation in ADR should be mandated as a prerequisite to going to trial, and there has been a gradual increase in both state and federal court rules that mandate ADR. *See* ABA Report, 32-53; *Court-ADR: Elements of Program Design* (E. Plapinger & M. Shaw eds. CPR, 1992).[8] Any such rules should ensure that mandated ADR procedures are non-binding, do not prejudice the parties' ultimate resort to trial, respect the parties' autonomy over the development and presentation of their cases, and provide a fair and rational proceeding that is equivalent to a "day in court."

The pretrial settlement facilitation procedures recommended in this report are based on the accumulated experience derived to date from experimentation with court-mandated settlement conference and ADR requirements in state and federal courts. They derive from a number of sources and attempt to utilize what seems to have worked best. Considerable discretion has been accorded to trial courts to determine whether and when to mandate ADR procedures and what form of ADR to use.

Proposal (To be Implemented by Statute or Rule)

§1 Purpose

The purpose of this Act [Rule] is to provide court encouragement and support for the parties to meet and confer early in the litigation to consider settlement and the use of alternative dispute resolution (ADR), and to agree on such trial preparation matters as a discovery plan and formulation and simplification of issues. This Act [Rule] also governs the referral of a case to ADR.

§2 Discussion of Alternative Dispute Resolution with Clients

Before the "meet and confer" conference provided for in this Act [Rule], counsel shall discuss with their clients the appropriateness of using alternative dispute resolution in this case.

§3 Meet and Confer Requirements

In any action, as soon as practicable, but in no event more than twenty (20) days after the filing of all responses to the complaint, any counterclaims and any third-party

claims, the parties and their attorneys shall meet and confer concerning the following matters:

(a)To determine if settlement can be achieved without further disposition of the suit;

(b)To determine whether this case is suitable for alternative dispute resolution and, if so, to agree upon an alternative dispute resolution procedure and the date thereof;

(c)To establish a plan for discovery, including both what discovery will be made and at what time periods. The discovery plan will take into account what discovery is necessary and desirable in order to serve the objectives of any alternative dispute resolution procedure that is agreed upon or contemplated;

(d)To formulate and simplify the issues, including amendment of the pleadings, joinder of additional parties, and elimination of frivolous claims or defenses.

§4 Appointment of a Case Facilitator

If any party notifies the court within fifteen (15) days after the filing of the answer that it believes that settlement and trial facilitation opportunities would be enhanced by having a "case facilitator" present, the court may appoint such a facilitator. A request for appointment of a facilitator should specify those matters or functions as to which the facilitator is sought.

§5 Qualifications and Function of Case Facilitator

A case facilitator shall have such qualifications and training as are established by the court in its rules for court settlement facilitators. A case facilitator who is appointed for a "meet and confer" conference will preside at the conference and assist the parties in accomplishing the objectives set out in §3. The facilitator will not have the power to make rulings or to require the parties to agree as to any matter.

§6 Pretrial Plan Submitted to Court

Within ten days after the "meet and confer" conference, whether or not assisted by a case facilitator, the attorneys shall be responsible for submitting a pretrial plan to the court setting out (l) their certification that they have satisfied the requirements of §3, and (2) the agreement reached by the parties as to the matters discussed in the conference pursuant to §3. Any matters as to which the parties cannot agree will be succinctly stated, together with the reasons for disagreement.

§7 Pretrial Conference with Court

If, after receiving the pretrial plan, the court determines that a pretrial conference with the court is needed, it shall enter an appropriate order for a pretrial conference with the court.

§8 Referral of a Case to Alternative Dispute Resolution

The court may refer a case to non-binding alternative dispute resolution (ADR) after receiving a pretrial plan resulting from the "meet and confer" conference in which the parties agree to a particular ADR procedure, or after holding a pretrial conference between the parties and the court, or at any time on its own motion or the motion of a party. [Alternative: The court may not refer a case to alternative dispute resolution unless all parties agree.] If the parties agree upon an ADR method or provider, the court will respect the parties' agreement unless the court believes another ADR method or provider is better suited to the case and parties. The authority to refer a case to ADR does not preclude the court from suggesting or requiring other settlement initiatives.

§9 Appropriate ADR Procedures

Appropriate court-ordered ADR procedures include mediation, neutral evaluation, non-binding arbitration, mini-trial, and summary jury trial. The court may approve any other ADR procedure that it believes is suited to the litigation.

§10 Appointment from List of ADR Neutrals

The court will appoint an ADR neutral from a list prepared by a standing panel on ADR neutrals. The court will appoint the three members of the panel and designate one member as chairperson. The panel will review applications from neutrals and annually prepare a list of those qualified under the criteria contained in this rule. A neutral denied listing may request a review of that decision. Willingness to serve pro bono may be made a condition for a neutral's being put on the approved list. Both private and public or not-for-profit neutrals and providers are eligible for listing if they otherwise meet the requisite requirements.

§11 Objection to ADR Referral

Any party who objects to a referral of a case to an ADR procedure or to the appointment of a particular ADR neutral may file written objections with the court within ten days of receiving notice of the referral or neutral, explaining the reasons for any opposition.

§12 Required Attendance and Participation in an ADR Proceeding

A court order referring a case to ADR may contain a requirement for the attendance of and participation by all parties or party representatives with authority to negotiate a

settlement and all other persons necessary to negotiate a settlement, including insurance carriers.

§13 Sanctions for Noncompliance with ADR Referral Order.

If an unrepresented party or a party's attorney fails to obey an order of the court directing attendance and participation in a settlement conference, the court may, upon motion of either party, or upon the court's own initiative, make such orders with regard thereto as are just and appropriate. In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred by the opposing party or parties because of any noncompliance with this section, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

§14 Fees of ADR Neutral

The ADR neutral and the parties will determine the fees for the ADR. If the neutral and parties cannot agree as to the fees, the court may appoint another neutral or determine that the fees sought by the originally appointed neutral are reasonable and that the ADR should proceed with that neutral. The fees will be assessed as costs, to be shared equally by the parties, unless the court, in its discretion, determines that some other allocation is warranted. The court may on its own motion, or the motion of a party, review the reasonableness of the fees.

§15 Binding Effect

The results of ADR are non-binding unless the parties agree otherwise.

§16 Confidentiality

All communications made during ADR procedures, and the conduct of the participants, are confidential and protected from disclosure and may not be used as evidence in any judicial or administrative proceeding. This does not apply to any communication relevant to:

(a) Reports made by an ADR neutral to a court, pursuant to that court's order, only as to whether the parties appeared as ordered, whether a settlement resulted, and when the dispute resolution procedure was completed;

(b) A motion for sanctions made by a party to a dispute resolution procedure based on a claim of another party's noncompliance with the court's order to participate in an ADR procedure;

(c) A claim of malpractice against an ADR neutral arising out of that ADR provider's performance in the ADR proceeding;

(d) A matter that is required by law to be reported; and

(e) A determination of the meaning or enforceability of an agreement resulting from an ADR procedure in a pending law suit if the court in such suit determines that testimony concerning what occurred in the ADR proceeding is necessary to prevent fraud or manifest injustice, except that, in any such case, the ADR neutral is not subject to subpoena and cannot be required to make disclosure through discovery or testimony at trial.

Confidentiality does not extend to a communication that is discoverable or admissible based on proof that is not dependent on any communication made during the ADR proceeding.

§17 Conclusion of ADR Proceeding

At the conclusion of each ADR proceeding, the provider, parties, and counsel will take the following action:

(a) The ADR neutral will send the court clerk a memorandum stating the style and civil action number of the case; the names, addresses, and telephone numbers of counsel; the type of the case; the method of ADR proceeding; whether ADR was successful; and the provider's fees.

(b) The court clerk shall submit a questionnaire to the parties concerning their satisfaction with the ADR procedure and will require counsel and their clients to complete and return the questionnaire for reference by the court, attorneys, and public.

(c) The court clerk annually shall tabulate, analyze, and report on the disposition of ADR proceedings. The clerk shall keep on file the questionnaires from closed ADR proceedings.

Commentary

This Act [Rule] is derived from a variety of sources, including Federal Rule of Civil Procedure 16, a number of state court rules and statutes, and various local federal district court rules, including provisions of Civil Justice Expense and Delay Reduction Plans promulgated pursuant to the Civil Justice Reform Act of 1990. For discussion of such rules, *see Report of the Task Force on the Civil Justice Reform Act* (ABA Section of Litigation, 1992)[hereinafter ABA Report]; *Court ADR: Elements of Program Design* (E. Plapinger & M. Shaw eds.)(Center for Public Resources, 1992).

Section 3's "meet and confer" requirements are a shortened form of the "meet and confer" rule proposed by the Discovery and Trial Process Working Group, which follows. If

such a rule were adopted at the same time as these Pretrial Settlement Facilitation Procedures, Section 3 might simply refer to the "meet and confer" rule. See also a "meet and confer" provision in the proposed amendment to Federal Rule of Civil Procedure 26(e).

Under Section 4's provision that the court may appoint a "case facilitator" to assist the parties at the "meet and confer" conference, it is contemplated that the facilitator will assist the parties to accomplish the four tasks set out in Section 3. Although one of those tasks is "to determine if settlement can be achieved without further disposition of the suit," the facilitator is not expected to serve as a mediator or ADR neutral to accomplish settlement. On rare occasions, the discussions between the parties at the conference may lead to an immediate settlement, and the facilitator can use his or her best offices to aid in such settlement. However, the primary role of the facilitator is to assist the parties in accomplishing the case-administration tasks (a discovery plan, formulation of issues, and determination of an ADR procedure), and not to try to settle the case. In most cases, settlement will not be achievable at this conference, and recommendation of an ADR procedure is the appropriate way to proceed in the interests of settlement.

This provision is not intended to preclude the court from itself serving as a facilitator for assisting the parties in accomplishing the case-administration tasks. There are sometimes advantages for the court to perform this role, although it may impose a considerable burden on the court's time.

Unless the court chooses to serve as a facilitator itself, the first direct involvement of the court in these procedures might occur under Section 7 if the court determines that a pretrial conference is necessary. If the pretrial plan submitted by the parties is satisfactory, and the court has no other reason to believe that the case cannot proceed adequately according to it, there would be no reason for the court to hold a pretrial conference.

Section 8 states that the court will respect the parties' choice of an ADR method or neutral unless it believes another method or neutral is better suited. Since ADR is a non-binding process, and party agreement is essential to its success, a court should give considerable weight to the parties' choice. A court may also want to adopt a process for selection of the neutral that gives the parties the first opportunity to make the selection. See proposed Order of Referral to Mediation of the ADR Committee of the Texas State Bar Association, 2 Alternative Resolutions 11 (Winter 1992) (parties ordered to confer and within ten business days may submit an agreed order nominating a mediator, but meanwhile naming a mediator who will be appointed in default of the parties' agreement). To ensure against the appearance of cronyism in appointments of ADR neutrals, some procedures provide that the court will select a neutral randomly or by rotation from a list of qualified neutrals. Community justice centers or dispute resolution centers could be a source for ADR neutrals.

In referring a case to an ADR neutral, the court should consider the views of the parties concerning the neutral's fee schedule, as well as the parties' ability to pay those fees. The parties' desire to have a neutral appointed from a community or dispute resolution center

who will serve for a low fee, or tho have a neutral appointed who will serve pro bono, should be given substantial weight. Since public and not-for-profit neutrals and providers are eligible for the approved list of ADR neutrals under Sec. 10, the court should consider appointing an ADR neutral who will serve pro bono if the payment of the neutral's fees would cause hardship to the parties.

Section 9 authorizes five specific ADR processes, but provides that this list is not exclusive. Mediation is perhaps the most commonly used form of ADR, providing an unstructured process by which a neutral third-party facilitates discussion, reality testing, and exploration of solutions by the parties. In neutral evaluation, a neutral -- often an attorney with some expertise in the subject matter -- meets with the parties and attorneys (who make a narrative presentation of their cases), asks questions, tries to help them identify common ground, and, if there is no resolution, gives them a non-binding evaluation of the issues in the case. *See* Brazil, *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 Judicature 279 (1986). In non-binding arbitration, the parties and counsel make an informal, abbreviated presentation of their cases to an arbitrator or arbitrators (typically either one or three), who are either lawyers or professionals with expertise in the subject matter, after which the arbitrators render a non-binding judgment that can be appealed de novo by either party. *See* Mierhoefer, *Court-Annexed Arbitration in Ten District Courts* (Federal Judicial Center, 1990). The mini-trial was created for disputes involving corporate parties (but is now used for a variety of disputes), in which each side presents a shortened form of its best case to the CEOs or policy makers of the parties, who then negotiate, often with the participation of a neutral advisor who has expertise in the matter and may be asked for his evaluation or opinion. *See* Green, *Growth of the Mini-Trial*, 9 Litigation 12 (Fall 1982). The summary jury trial is a summarized presentation of the evidence before a judge and representative jury, which renders a non-binding verdict and can informally discuss their perceptions afterwards with the parties and counsel. *See* Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461 (1984).

Section 10 assumes that courts will adopt requirements as to education, training, experience, and continuing education for individuals to be on an approved ADR neutral list. Qualifications for mediators and other ADR neutrals has been a much debated topic throughout the nation in recent years. The *Report of the Commission on Qualifications of the Society of Professionals in Dispute Resolution* (SPIDR)(1989) concluded that no single entity, but rather a variety of professional organizations, should establish qualifications; that the greater the degree of choice the parties have over the ADR process, the less mandatory should be the qualification requirements; and that qualification criteria should be based on performance, rather than paper credentials. Some states, such as Florida, have established detailed qualification requirements for state credentialling of ADR professionals. Codes of professional conduct for mediators and ADR neutrals have been issued by various professional organizations. *See, e.g., Ethical Standards of Professional Responsibility* (SPIDR, 1987); *Professional Standards of Practice for Mediators* (Mediation Council of Illinois, 1985); *Code of Professional Conduct for Mediators* (Colorado Center for Dispute

Resolution, 1982). There is also a movement for courts to adopt professional codes to govern the conduct of court-appointed ADR neutrals.

The court must only appoint a neutral from the approved list. The court may make it a condition for being put on the list that the neutral is willing to serve pro bono in a set number of cases each year.

Section 11 allows the parties to object to an ADR referral, but does not require the court to accept any objection. Courts should be aware that certain circumstances may make ADR inappropriate, such as when discovery that one of the parties feels is critical has not yet been done; when one or more parties has a strong desire to obtain a judicial precedent as to an issue of undecided law or as to a matter of rights or obligations affecting future conduct; or in certain complex cases where resolution is likely to require further discovery, court management, and rulings. Likewise, certain ADR procedures are better suited to some situations than others, and a court should be sensitive to the parties' objections to a particular method.

Section 12 rejects a "good faith participation" standard (which has been imposed by some courts) in the belief that it is too subjective and intrusive on the parties' rights to determine how they will present their cases in an ADR proceeding. The term "participation" is used without elaboration, suggesting that some minimal level of meaningful participation is required of the parties to prevent the particular ADR process from being a wasteful and futile exercise. *See* Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L.Rev. 2079, 2096 & 2099 (1993)("mediation requires at least briefly indicating one's positions as to the relevant issues, listening to the other side, and reacting to the other side's positions," while in "trial run" processes, the parties can be "expected accurately to summarize their evidence and present their best arguments").

This section on required attendance does not attempt to resolve the issue of what persons must attend when a party is a corporation, governmental body, or organization and as to whether representatives of such non-personal parties must possess full authority to settle. See, e.g., In re Stone, 986 F.2d 898 (5th Cir. 1993)(per curiam)(recommending a "practical approach" to settlement-authority requirements, for governmental bodies, as in allowing the official with ultimate authority to be fully prepared and available by telephone at the time of the conference). There is a growing body of case law on these issues which could be selectively codified in the adoption of these procedures, or the issues could be left to common law development. *See* Riskin, *The Represented Client in a Settlement Conference: The Lessons of G. Heileman Brewing Co. v. Joseph Oat Corp.*, 69 Wash.U.L.Q. 1059 (1991); Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L.Rev. 2079, 2103-2110 (1993).

Sec. 14 provides that the parties and the ADR neutral will determine the fees for the ADR procedure. The fees will be assessed as costs, to be shared equally by the parties,

unless the court determines otherwise. This is intended to give the court broad discretion to determine the allocation, and the court could choose to allocate all the fees to one party. The court may take into consideration a wide range of factors in making the allocation, just as it does in assessing other costs, such as discovery expenses. One appropriate factor is the relative financial positions of the parties. An impecunious party should also have been considered by the court in making its referral of the case to a particular ADR procedure and neutral under Sec. 8. Since public and not-for-profit neutrals and providers are eligible for the approved list of ADR neutrals under Sec. 10, the court should consider appointing an ADR neutral who will serve pro bono if the payment of the neutral's fees would cause hardship to the parties.

Section 16 takes a middle course between the polar positions of various statutes and case law of either according no special confidentiality to ADR proceedings or extending absolute confidentiality. *See* account of various approaches to confidentiality in J. Murray, A. Rau, & E. Sherman, *Dispute Resolution: Materials for Continuing Legal Education III* (National Institute for Dispute Resolution, 1992), which recognizes the need for confidentiality in order to encourage the parties to be candid in their discussions, but also recognizes five situations in which, for other more compelling policy reasons, confidentiality should not pertain. The last exception, subparagraph (e), is perhaps the most controversial, allowing the court to waive confidentiality when testimony as to what occurred at the ADR proceeding is necessary to determine the meaning or enforceability of an agreement. It raises the fear that parties might claim ambiguity in many situations, thus undermining the broad grant of confidentiality. However, the exception only arises when a court determines that the testimony is necessary to prevent fraud or manifest injustice, and, in any event, absolute immunity is accorded to ADR neutrals in the belief that this is needed to reinforce their status as neutrals and to protect them from harassment from subpoenas by parties seeking to set aside a settlement agreement. The confidentiality provisions could be changed, or the issue could be left to common law development, in any adoption of these procedures.

The extension of confidentiality to "all communications made during ADR procedures" includes verbal and non-verbal communications, anything in writing, and position papers and documents provided to the neutral in advance of, or during, the proceeding at the neutral's request.

The confidentiality in this section would also extend to any proceeding conducted by a "court settlement facilitator" pursuant to Section 4 if the facilitator acts as a neutral in an ADR procedure (for example, acts as a mediator in an attempt to achieve settlement). It would not apply if the facilitator only assists the parties to achieve the goals of subsections (b), (c) and (d), that is, to agree upon a future ADR procedure, to establish a plan for discovery, and to formulate and simplify the issues.

Summary Judgment Rule

Identifying and disposing of meritless cases early in the litigation process can avoid much

of the most unjustifiable costs and delays of litigation. Summary judgment is the most feasible modern procedure for disposing of meritless cases short of trial. Summary judgment rules vary markedly from jurisdiction to jurisdiction, and in many jurisdictions the requirements imposed on a moving party are so strict as to prevent most cases, no matter how tenuous, from being disposed of on summary judgment.

This rule adopts modern approaches to summary judgment in specifying various procedural matters that have sometimes been uncertain in summary judgment practice. They also adopt the federal court interpretation of the federal summary judgment rule, providing that a party that does not have the burden of proof may move for summary judgment by demonstrating an absence of evidence and shift the burden of production to the opposing party. Given assurance of the right to adequate discovery, this standard provides a proper balance between the right to jury trial and the appropriateness of granting summary judgment when there is no evidence on which a reasonable jury can base a judgment for the nonmoving party.

Proposal

(A) Motion for Summary Judgment For Claimant

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(B) Motion for Summary Judgment For Defending Party

A party against whom a claim, counterclaim, or cross-claim is asserted, or a declaratory judgment is sought, may at any time move, with or without supporting affidavits, for a summary judgment in the party's favor upon all or any part thereof.

(C) Motion and Proceedings Thereon

The motion shall be served at least 20 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. A motion for summary judgment must be rendered if the material presented in its support shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages. Wherever a motion for summary judgment is rendered or denied, the court must set forth specific findings which support its ruling.

(D) Shifting of Burden of Production to Party With Burden of Proof

Either claimants or defending parties may move for summary judgment with or without supporting affidavits. A party which does not have the burden of proof may move for summary judgment by demonstrating an absence of evidence as to an essential element of the opponent's case and thereby shift the burden of production to the opposing party. In response to such a motion, the non-moving party with the burden of proof need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment so long as it demonstrates that the evidence it produces could be reduced to admissible evidence at the time of trial.

(E) Case Not Fully Adjudicated on Motion

If a motion for summary judgment is not rendered upon the whole case or for all of the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and evidence before it and by interrogating counsel, shall ascertain what material facts exist without substantial controversy, and what material facts are actually in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(F) Materials Used to Support or Oppose Motion

To support or oppose a motion for summary judgment, a party may, subject to the provisions of this subdivision, rely upon a pleading or other admission of the fact by the opposing party, or affidavits, depositions, answers to interrogatories, documents, or items of physical evidence that are admissible or that can be demonstrated as capable of being reduced to admissible evidence at trial, to prove or disprove the fact to be established or that confirm the availability of such evidence. Where only a portion of any such material is relevant to the fact to be established, only that portion shall accompany the motion or memorandum in support of or in opposition to the motion.

(G) Form of Affidavits; Further Testimony; Defense Required

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary

judgment, if appropriate, shall be entered against the adverse party.

(H) When Affidavits are Unavailable

Should it appear from the affidavit of a party opposing the motion that the party cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(I) Affidavits Made in Bad Faith

Should it appear to the satisfaction of the court at any time that any of the affidavits presented are made in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(J) Opportunity for Discovery

No summary judgment shall be rendered with respect to any claim, counterclaim, cross-claim, or third party claim, nor shall any fact be summarily established, until any opposing parties have had a reasonable time to discover evidence bearing on any fact sought to be established.

Commentary

Section (D) represents a codification of the essential holding in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), as to shifting the burden of production to a non-moving party which has the burden of proof by demonstrating an absence of evidence on an essential element of its case.

Some sections of this rule are derived from the amendments to Rule 56 proposed by the Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure, 127 F.R.D. 237, 370-85 (1989), which were not adopted.

Section (J) reflects the concern that parties not be rushed to summary judgment without being given a fair opportunity to discover critical information and to prepare their cases. This proposed summary judgment procedure follows dicta in *Celotex v. Catrett*, that parties should have a fair opportunity to make discovery before determination of a summary judgment motion. It provides a specific requirement that no summary judgment shall be rendered until a non-moving party has had a reasonable time for discovery, and that evidence sufficient to prevent a summary judgment need not be in a form admissible at trial so long as it is

demonstrated that it could be reduced to admissible evidence.

Pre-Complaint Notice Procedures

There are sometimes cases in which, due to misunderstandings or lack of communications, defendants would resolve the dispute without suit if they were on notice of plaintiff's firm intention to sue. This proposed procedure would require plaintiffs to give written notice to potential defendants 30 days before filing suit.

The procedure also encourages the parties to confer, prior to filing suit, as to the possibility of resolving the dispute, and incorporates ADR mechanisms by allowing a prospective court to assign a "court settlement facilitator" to assist the parties upon request. These procedures could avoid the cost of filing suit, the attendant attorney's fees, and the inflexibility that can arise once parties are before a court.

The pre-filing notice requirement provides a less expensive mechanism for encouraging settlement without suit. It is hoped that the 30-day notice would cause a change in the practices of some defendant's of not making meaningful settlement offers until suit is filed. It provides an inexpensive way for a plaintiff to demonstrate its serious intent and gives the defendant an opportunity to avoid the cost and publicity of a suit by making serious settlement offers before suit is filed.

Proposal (To be Implemented by Statute or Rule)

§1 Purpose

The purpose of this Act [Rule] is to require plaintiffs to give written notice to potential defendants thirty days before filing suit, to encourage the parties to confer prior to filing suit as to the possibility of resolving the dispute, and to permit a prospective court to assign a "court settlement facilitator" to assist the parties upon request, in the interests of resolving disputes prior to filing a complaint.

§2 Notice as a Prerequisite to Bringing Suit

(a) At least thirty days before filing suit, a claimant shall transmit written notice to the intended defendant(s) of the general nature of the claims involved, including the date or time period of the alleged liability-creating event(s), a brief description of the facts giving rise to the claim, and an estimate of the amount of actual damages and expenses. Claimant shall transmit such notice to the intended defendant(s) at an address reasonably calculated to provide actual notice to each such party. The word "transmit" shall mean to mail by certified or return receipt requested mail, or to contract for delivery by any company which physically delivers correspondence as a service to the public in its regular course of business.

(b) Any applicable statute of limitations which would expire during the period of notice shall expire on the thirtieth day from the date written notice was transmitted to the intended defendant(s).

§3 Parties Encouraged to Confer

Claimant is encouraged, in giving notice to the intended defendant(s), to indicate willingness to confer with defendant(s) as to the possibility of resolving the dispute without the necessity of filing suit. Likewise, defendant(s) is encouraged to confer with claimant as to the possibility of resolving the dispute without suit.

§4 Request for Appointment of Court Settlement Facilitator

If, within the thirty-day period following the giving of written notice by claimant, claimant or defendant(s) notifies a court in which the suit is expected to be filed that it believes that settlement opportunities without suit would be enhanced by having a "court settlement facilitator" meet with the claimant or defendant(s), the court may appoint such a facilitator. In such case a representative of the court or the appointed facilitator will contact the claimant and defendant(s) and, if all agree, convene a meeting at the earliest possible date, but in no event later than 45 days from the date written notice was transmitted to the intended defendant(s). In that case the statute of limitations which would expire during the period of notice shall expire on the forty-fifth day from the date written notice was transmitted to the intended defendant(s).

§5 Qualifications and Function of Court Settlement Facilitator

A court settlement facilitator shall have the requisite qualifications and training established by the court in its rules for court settlement facilitators. The facilitator will not have the power to make rulings or to require the parties to agree as to any matter.

§6 Exceptions.

Pre-complaint notice is not required:

(a) in any action to seize or forfeit assets subject to forfeiture or in any bankruptcy, insolvency, receivership, conservatorship, or liquidation proceeding;

(b) where it is reasonable under the circumstances to believe that (i) the assets that are the subject of the action or that would satisfy the judgment are subject to flight dissipation or destruction, or (ii) the defendant is subject to flight;

(c) where a written notice prior to filing suit is otherwise required by law;

(d) in proceedings to enforce a civil investigative demand or an administrative summons;

(e) in domestic relations suits where the plaintiff alleges a risk of violence from the defendant;

(f) in suits to foreclose liens; or

(g) in actions pertaining to temporary restraining orders, preliminary injunctive relief, or fraudulent conveyance of property.

§7 Pleading Requirement

(a) When notice is provided pursuant to subsection 2(a), a copy of such notice shall be filed as an appendix to the plaintiff's original complaint.

(b) When notice pursuant to subsection 2(a) is not provided, the complaint shall set forth the reason for such failure, referencing the relevant rationale under Section 6.

§8 Penalties

If the court determines that the claimant failed to comply with the notice requirements set forth in this Act, and such defect is asserted by the defendants(s) within sixty (60) days of service of the summons or complaint upon such defendant, the claim shall be dismissed without prejudice and the costs of such action, including attorney's fees, may be imposed upon the claimant. Whenever an action is dismissed under this section, the claimant may refile such claim within 60 days after dismissal regardless of any statutory limitations period if, during the sixty days after dismissal, proper notice is effected and the original action was timely filed.

§9 Severability

If any provision of this Act [Rule] or the amendments made by this Act [Rule] or the application of any provision or amendment to any person or circumstance is held invalid, the remainder of this Act [Rule] and such amendments and the application of such provision and amendment to any other person or circumstance shall not be affected by that invalidation.

Commentary

Section 4's provision for the appointment of a "court settlement facilitator" could be

fulfilled by the use of volunteers. Volunteer attorneys have been used to perform specialized tasks relating to court administration and ADR, for example, as neutral evaluators (*see, e.g.*, Early Neutral Evaluation program of the U.S. District Court for the N.D. of California; Neutral Case Evaluation Program of Fairfax County, Virginia Circuit Courts) and as court-annexed arbitrators (*see* Meierhoefer, *Court-Annexed Arbitration in Ten District Courts* (1990)). They have also served as court-appointed officers to provide recommendations in child welfare cases (*see* Texas Family Code, §11.101, providing for 30 hours of training from the court to qualify). A court settlement facilitator need not be an attorney, but experience or training in court administration would seem to be necessary. Community justice or dispute resolution centers could be a source for facilitators. No provision is made in this procedure for payment to court settlement facilitators. Many ADR programs have found that attorneys are willing to provide such services pro bono in the interests of assisting the courts and the profession. Any particular program could choose to provide some form of payment.

Section 5 contemplates that courts will establish requirements relating to education, training, experience, and continuing education for court settlement facilitators. If the Pretrial Settlement Facilitation Procedure is passed at the same time, qualifications established thereunder for court settlement facilitators and ADR third-party neutrals could be relied on for court settlement facilitators under this procedure. However, different qualifications may be desirable for a court settlement facilitator than, for example, for a mediator.

Offer of Settlement Procedures

It has long been recognized that settlement can be furthered by creating incentives for parties to make realistic offers of settlement to opponents. Federal Rule of Civil Procedure 68, promulgated in 1938, created such an incentive by penalizing a party who refused an offer of judgment and who did not obtain a judgment at trial "more favorable" than the offer. However, the penalty was only to shift "costs" to the offering party, which did not include attorney fees, and therefore the rule has been little used. In addition, Rule 68 only permits defendants to make offers of settlement, and not plaintiffs, thus excluding half of the opportunities for settlement incentives.

There has been new interest in devising offer of judgment or settlement rules. The Judicial Conference of the United States proposed amendments to Rule 68 in 1983 to extend the device to plaintiffs and to add the shifting of attorney's fees, but these amendments were not adopted. Considerable experimentation with offer of judgment rules has gone on since that time in state courts and, most recently, in federal district court Expense and Delay Plans submitted pursuant to the Civil Justice Reform Act of 1990. Academic writers have also explored the incentive structures created by offer of judgment rules. Based on these developments, it now seems possible to craft an offer of judgment rule that will serve the interests of both settlement and fairness.

The rule in this proposal would extend the offer of settlement to all parties. It would

apply a sanction, including shifting of attorney's fees, against a defendant offeree if the plaintiff offeror does at least 50 percent better at trial than the rejected offer or against a plaintiff offeree if, at trial, he recovers less that 50% of the rejected offer. This percentage was chosen in the belief that case evaluations lack exact precision and that a considerable margin of error should be accorded to offerees before imposing sanctions.

There is controversy over the very purpose of an offer-of-judgement rule, and for this reason, this proposal is submitted for discussion simply as an example of the kind of incentives that might be created to induce settlement. Concern that the rule imposes unfair pressure on a party has been expressed on behalf of both defendants and plaintiffs. On behalf of defendants, it is said that plaintiffs, particularly in personal injury suits, will often be judgement proof and therefore will not be able to pay any of the defendant's attorney's fees shifted to it under the rule. However, since the rule does not apply if there is a defendant's verdict, it will be applicable when a plaintiff is the prevailing party but does not do 50% better than the offer it refused. In that case there will be an award of damages out of which the defendant's attorney's fees can be paid. On behalf of plaintiffs, it is said that plaintiffs with limited resources may be so risk averse that they will accede to an unreasonable offer under the fear of having to pay the defendant's attorney's fees. Of course, the more reasonable the defendant's offer, the more pressure it will create on the plaintiff, but that also occurs when the plaintiff invokes the rule by making an offer to the defendant. Making the rule available to plaintiffs for the first time empowers them to use the rule to their advantage as well.

There is one concern, however, that relates to plaintiffs' possible risk aversion. If plaintiffs who do not do better by 50% would not only have to pay defendant's attorney's fees, but would also lose their right to recover their own attorney's fees as prevailing party (when, as under the Civil Rights Attorney's Fees Act, a statute awards attorney's fees to a prevailing party), they have a great deal to lose. This is the situation under the present interpretation of Rule 68 by the Supreme Court in Marek v. Chesney, 473 U.S. 1 (1985). For this reason, this proposal would provide a set-off for a plaintiff who is sanctioned under the rule for the plaintiff's attorney's fees incurred before the date the offer was made which plaintiff would have been entitled to recover as prevailing party. This removes one of the most serious concerns of civil rights and other plaintiffs in fee-shifting cases. It also creates an incentive for defendants to make an early reasonable offer of settlement to cut off the plaintiff's set-off entitlement, which is to the plaintiff's advantage in obtaining a settlement without incurring the cost and delay of trial.

All of the ramifications of this type of arrangement have not been thoroughly explored by the Working Group and will be a topic for discussion at the Symposium.

Proposal (To be Implemented by Statute or Rule)

§1 Offer of Settlement

Any party may make an offer of settlement to another party.

(a) The offer must:

(1) be in writing and state that it is an offer of settlement made under this rule;
(2) be served at least 60 days after service of the answer or other responsive pleading;
(3) not be filed with the court;
(4) remain open for at least 45 days; and
(5) specify the relief offered.

(b) An offer may be withdrawn by writing served on the offeree only if it has not been accepted and if the time period during which it is to remain open has not expired.

§2 Acceptance; Disposition

(a) An offer made under §1 may be accepted by a written notice served on the offeror within the time that the offer remains open.

(b) If a party files the offer, notice of acceptance, and proof of service, the clerk or court must then enter the judgment specified in the offer.

§3 Rejection

(a) An offer is rejected if the offeree conveys a rejection in writing to the offeree within the time period specified in the offer that it would remain open.

(b) An offer is deemed to be rejected if it is not accepted within the time period specified in the offer that it would remain open. If the offer specifies no period for the offer to remain open, it has a time period of 45 days.

§4 Successive Offers

A party may make an offer of settlement after making or failing to accept an earlier offer. A successive offer that is rejected does not deprive a party of sanctions based on an earlier offer, but a party would not be entitled to sanctions from multiple offers made by that party.

§5 Sanctions (See Introductory Remarks preceding this Proposal for disussion of this Section.)

(a) If the judgment finally obtained by a plaintiff offeree is not greater than 50 percent of the amount of a defendant's monetary offer, or, when the offer involves nonmonetary relief, is not substantially equivalent to the property or to

the relief specified in the defendant's offer, the plaintiff offeree shall pay the defendant offeror's costs, including all reasonable attorney's fees and expenses, excluding expert witness fees and expenses, incurred after the date that defendant's offer is made, minus those reasonable attorney's fees, costs, and expenses incurred by the plaintiff offeree prior to the date of the offer which such plaintiff offeree would have been entitled to recover as prevailing party. This subsection (a) shall not apply if the defendant offeror is awarded a take-nothing judgment against the plaintiff offeree.

(b) If the judgment finally obtained by a plaintiff offeror against a defendant is greater than 150 percent of the amount of the plaintiff's offer, or, when the offer involves non-monetary relief, is substantially equivalent to the property or to the relief specified in the offer, the plaintiff offeror shall recover the plaintiff offeror's reasonable attorney's fees, costs, and expenses, excluding expert witness fees and expenses, incurred after the date that plaintiff's offer was made. Such recovery shall be in addition to the right to recover any other costs pursuant to statute or rule, except that a plaintiff offeror may not recover twice for the same costs, attorney's fees, or expenses.

(c) Upon motion and for good cause, the court may reduce the sanction to avoid undue hardship, or for any other compelling reason justifying the offeree party in having sought a judicial resolution of the suit rather than accepting the offer of settlement.

(d) In comparing the amount of a monetary offer with the judgment finally obtained, the latter shall not include any amounts included in that judgment that are attributable merely to the passage of time from the making of the offer, such as prejudgment interest, nor include attorney's fees incurred from the making of the offer to the entering of final judgment.

§6 Nonapplicability

This rule does not apply to an offer made in an action certified as a class or derivative action or in an action involving family law, divorce, or child custody.

Commentary

This Act is derived from a number of different sources, including Federal Rule of Civil Procedure 68; proposed amendments to Rule 68, see Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 98 F.R.D. 337, 363-67 (1983); a draft of proposed changes to Federal Rule of Civil Procedure 68 circulated by Professor Edward H. Cooper, Reporter to the Advisory Committee on Civil Rules (letter of Jan. 21, 1993), which, in turn, was based on proposals by Judge William Schwarzer, *Fee-Shifting Offers of*

Judgment - An Approach to Reducing the Cost of Litigation, 76 Judicature 147 (1992); and a draft of a proposed new rule of Texas Civil Procedure, 2 Alternative Resolutions 10 (Winter 1992), which, in turn, was influenced by an offer of judgment rule in the Civil Justice Expense and Delay Reduction Plan Pursuant to the Civil Justice Reform Act of 1990 of the U.S. District Court for the Eastern District of Texas (Chief Judge Robert Parker), Art. 6(9)(Dec. 31, 1991). See also Rowe & Vidmar, *Empirical Research on Offers of Settlement: A Preliminary Report*, 51 Law & Contemp. Probs. 13 (1988); Burbank, *Proposals to Amend Rule 68 - Time to Abandon Ship*, 19 U.Mich.J.L.Ref. 425 (1986); Simon, *The Riddle of Rule 68*, 54 Geo.Wash.L.Rev. 1 (1985).

A number of states, by either statute or rule, have offer of judgment or settlement rules. Those that are substantially similar to Federal Rule 68 include Kansas (Kan. Stat. Ann. sec. 60-2002 (1992 Supp.)); Montana (Mont. Code Ann. tit. 25, ch. 20, R.Civ.P.Rule 68 (1991)); Nebraska (Neb. Rev. Stat. sec. 25-901 (1989)); New York (N.Y. Civ. Prac. L. & R. 3221 (McKinney 1992)); North Carolina (N.C. Gen. Stat. ch. 1AA, art. 8, Rule 68 (1990)); Territory of Puerto Rico (P.R. Laws Ann. tit. 32, Append. III, sec. 35.1 (1992)); South Carolina (S.C. Code Ann. R.Civ.P., Rule 68 (Law. Co-op 1976)); and South Dakota (S.D. Cod. Laws Ann. sec. 15-6-68 (1984)). The California rule makes the offer procedure available to all parties (Cal.Civ.Proc.Code sec. 998 (West Supp. 1993)).

State offer of judgment or settlement procedures that provide different standards for sanctions than Federal Rule 68 include Connecticut (Conn.Gen.Stat.Ann. sec. 52-195 (West 1991)(plaintiff must obtain a final judgment greater than the offer plus interest thereon)); Florida (Fla.R.Civ.P. 1.442 (offeree must do better by more than 25 percent of the offer)); and Wisconsin (Wis. Stat. Ann. sec. 8077.01 (West Supp. 1992)(sanctions limited to costs and an interest penalty using a 12 percent annual rate)). Some rules expressly exclude the shifting of attorney's fees as a sanction (e.g., California, Colorado and Nevada).

Sec. 1 accords any party the right to make an offer of settlement to any other party.

Sec. 1(a) provides more precise standards than does Rule 68 as to the mechanics and time periods governing the making of the offer.

Sec. 1(a)(1) requires the offer to be in writing; no exact words are required other than that the terms of the offer be apparent and it be indicated that it is an offer made under this rule.

The provision in Sec. 1(a)(2) that an offer cannot be made before 60 days after service of the answer is intended to insure that the parties have a reasonable period of time after the joinder of pleadings to assess their cases. Using the filing of the answer or other responsive pleading as the date from which the time period runs is based on a belief that offers of judgment could cause more harm than benefit if made before an answer is filed.

The provision in Sec. 1(a)(3) that the offer not be filed with the court is to prevent the conduct of the parties in offer of settlement matters from being brought to a court's attention

and possibly prejudicing a party.

The requirement in Sec. 1(a)(4) that an offer remain open for 45 days provides a generous period to allow an offeree to assess an offer.

The provision in Sec. 1(b) that an offer may be withdrawn only before it is accepted and after the expiration of the time period during which it was to remain open recognizes that an offeree may expend time and money in considering an offer. For this reason, the offeror should not be permitted to withdraw it until the time period for remaining open has passed. If the conditions are met, an offer may be withdrawn and will have no further consequences.

Sec. 2(a) requires that acceptance also be made in writing. The acceptance must be made within the time period, at least 45 days, which the offer specified that the offer would remain open.

Sec. 2(b) requires that an offer which is accepted be entered as a judgment.

Sec. 3(a) provides that an offer can be formally rejected by conveying a rejection in writing to the offeror.

Sec. 3(b) provides another form of rejection of an offer: an offer is deemed to be rejected if not accepted within the time period specified in the offer during which it would remain open. If the offer specifies no time period for remaining open, it has a time period of 45 days, and when that period has passed, it will be deemed to be rejected.

Sec. 4 permits successive offers. The reason to allow successive offers is that parties may want to make new offers based on a reevaluation of the case due to discovery and other information. It would seem that successive offers would often be more favorable to the opposing party. This would result in a greater likelihood that the opposing party would be subjected to sanctions for refusal, and the successive offer would create a greater incentive for the opposing party to accept it and for the case to be settled. If an offeror would be entitled to sanctions under more than one offer, it would be required to choose which offer it wants to recover sanctions under.

Just as successive offers are permitted, there may be counter offers back against an offeror. In applying sanctions, the amount of sanction would be computed for each offer and counter offer, which could partially cancel each other out.

The term "plaintiff" used in Sec. 5 is intended to refer not only to plaintiffs, but to any party claimant regarding a claim it is asserting, such as a defendant asserting a counter-claim, a co-party asserting a cross-claim, or a party asserting a third-party claim. Likewise the term "defendant" is intended to refer not only to defendants, but to any party against whom a claim is asserted regarding that claim, such as plaintiff against whom a counter-claim is asserted, a co-party against whom a cross-claim is asserted, or a party against whom a third-party claim is asserted.

Sec. 5 contemplates that, upon the application of a party, the court will hold a hearing on the application of sanctions. The sanctions are mandatory unless the amount is reduced by the court as authorized in sec. 5(c).

The 50%-150% percentages in Sec. 5(a) & (b) that trigger sanctions were chosen in the belief that case evaluations by parties and their attorneys often lack exact precision and that a considerable margin of error should be accorded to offerees before imposing sanctions. The higher margin of error, however, could remove the incentive to settle in certain cases, and there is an argument for lowering the percentage to 25% to affect a larger range of offers.

To offset the potential for disparate impact of such a rule on individual plaintiffs who might be more risk averse, the rule would limit the defendant's recovery of its attorney's fees to those incurred after the date the offer was made and would permit the plaintiff to offset its required payment with those attorney's fees that it incurred before the date the offer was made that plaintiff would have been entitled to recover as prevailing party. This rule thus modifies the interpretation of Rule 68 in Marek v. Chesney, 473 U.S. 1 (1985), that when a statute awards a prevailing party attorney's fees as part of costs, a plaintiff who did not obtain a judgment greater than the defendant's offer loses the right to recover such attorney's fees. This rule would allow a set-off for those attorney's fees incurred by a plaintiff before the date the offer was made which plaintiff would have been entitled to recover as prevailing party.

The following is an example of how the sanctions under Sec. 5(a) would apply: In an action in which a prevailing-party plaintiff is entitled under a statute to recover its attorney's fees, plaintiff refuses defendant's offer to settle for $100,000. Plaintiff obtains a judgment of $49,000 and thus is subject to sanctions (it had to obtain a judgment of more than $50,000). Assume that plaintiff's reasonable attorney fees incurred before the offer were $5,000, and that defendant's reasonable attorney's fees incurred before the offer were $4,000 and after the offer were $15,000. Plaintiff would have to pay defendant $10,000 ($15,000 minus $5,000). This example demonstrates that there is an incentive for defendants to make an early offer of settlement before plaintiff has run up high attorney's fees and when most of defendant's attorney's fees will be in the post-offer category.

For an example of sanctions under Sec. 5(b), defendant refuses plaintiff's offer to settle for $50,000. Plaintiff obtains a judgment of $76,000 and thus defendant is subject to sanctions (it had to keep plaintiff's judgment below $75,000). Assume that plaintiff's reasonable attorney's fees incurred after the offer were $17,000. Defendant would have to pay plaintiff $17,000.

It is contemplated that the amount of "reasonable attorney's fees" will be calculated on a fee-per-hour basis. Thus attorneys will have to keep records of their time. When an attorney works on a contingent-fee basis, the amount of reasonable attorney's fees will still have to be computed on a fee-per-hour basis. Statutes and rules that shift attorney's fees to a prevailing party now generally require contingent-fee attorneys to determine their fees on an hourly

basis.

When offers to settle involve *nonmonetary relief*, the court will have to determine if the nonmonetary relief ultimately obtained in the judgment is or is not "substantially equivalent" to the property or relief specified in the offer. This is consistent with the practice followed by most courts under Rule 68. Comparing nonmonetary relief, however, is much more difficult than comparing monetary relief, and a valid option would be to limit the offer of judgment rule to situations only involving monetary relief. One possible formula for determining whether the nonmonetary relief obtained in the judgment is greater than what was offered is whether the "judgment includes substantially all the nonmonetary relief offered and grants additional relief." Cooper, Letter of Jan. 21, 1993, supra.

The provision in Sec. 5(a) that the sanctions awardable to a defendant "shall not apply if the party defendant is awarded a take-nothing judgment against the adverse party claimant" is consistent with the interpretation of Federal Rule 68 in Delta Air Lines v. August, 450 U.S. 346, 350-53 (1981). This limitation is necessary as otherwise any defendant who obtained a take-nothing judgment would be entitled to sanctions if it had made even a nominal offer since, for example, a zero judgment would not be greater than 50% of the amount of a one-cent offer.

Sec. 6 excludes class and derivative actions in the belief that the duties of representation owed by the representative party and his attorneys to the class could be adversely impacted by an offer of judgment rule. Actions involving family law, divorce, or child custody are also excluded because the issues at stake often involve non-monetary relief and highly emotional questions as to which the incentives created by the rule might not be effective and fair. Other situations in which the rule might cause unfairness can be remedied by the authority in sec. 5(c) for the court to reduce the sanctions to avoid undue hardship or for any other compelling reason for the offeree to have sought a judicial resolution.

DISCOVERY AND TRIAL PROCESS

Discovery

When the Federal Rules of Civil Procedure became effective in 1938, the far-reaching discovery provisions they contained were part of a vision of the best and most effective way to resolve disputes: each party would have the opportunity to approach trial fully armed with facts known to the other side. The course of the lawsuit could be based on all relevant information since both sides would be "laying their cards on the table." Lawyers would have the tools they needed to assist clients in resolving disputes short of trial, and, where trial was necessary, lawyers apprised of all the facts would be able to come to trial prepared to home in on the essential issues.

It is clear today that the wide open discovery system initiated by the Federal Rules and adopted by most states has produced mixed results. Many contend that discovery has become an end in itself. Much discovery proceeds on the assumption that the case will be tried, yet in today's civil justice system fewer than five percent of all cases go to trial. More focused, productive uses of discovery -- preparing a case for disposition on motion, leading the parties to settlement, identifying issues appropriate for summary judgment -- are eclipsed by the time and effort spent conducting discovery in preparation for trials that will never occur. As a result, while the potential for using discovery to clarify issues and facilitate either settlement or an efficient trial still exists, the feeling is widespread, among lawyers and non-lawyers alike, that discovery is a prime culprit for the delay and cost that plague the civil justice system.

Although some critics believe that discovery is at the root of most of the trouble in the civil justice system, defining the problem with precision is not easy. A number of studies, including a very recent statistical study of five state court systems conducted by the National Center for State Courts,[1] show that discovery does not take place at all in almost half of all civil cases.[2] The NCSC study found that most cases in which discovery does take place involve three or fewer discovery "events."[3]

At the same time, studies that measure the perceptions of judges and lawyers find that they consider discovery abuse to be a problem. The problems mentioned most frequently include the practice of using "boilerplate" discovery -- for example, firing off a massive number of general interrogatories -- before understanding anything about the nature of the particular case; requests that seek broad categories of information unrelated to the merits of the case; technical objections to ambiguities in an opponent's discovery requests that an understanding of the case would make unnecessary; and other dilatory tactics in responding to discovery, such as withholding information on a false or shaky claim of privilege.

When these studies are taken as a whole, it appears that, while discovery abuse does not occur in all cases, when it does occur it has a disproportionate impact on expenditures of time and money by courts and litigants alike.[5] A case with only one discovery "event" may

appear on the surface to be within appropriate limits but, in reality, even a single set of over-broad interrogatories or one deposition conducted in a dilatory fashion wastes time and money and has a negative impact both on individual litigants and on the system as a whole. Discovery abuse can cause system costs to escalate and delays to increase, eroding public confidence in the system by making swift justice unavailable and justice itself prohibitively expensive. Delay can cause grave financial hardship to individual litigants and can impede the ability of businesses and other organizations to plan for the future.

In examining ways to improve the discovery system, the Working Group on Discovery and Trial Process faced a task both similar to and different from that undertaken by the Early Settlement and Case Management working groups. Like those groups, the Discovery working group focused on making swift justice more accessible and less costly. Unlike the areas focused on by the other working groups, however, discovery reform is not a new idea. It lacks the "frontier" quality that still adheres to notions of alternative dispute resolution and case management. A significant part of the working group's task was therefore to consider what reforms have taken place or have been proposed, what impact they have had on perceived problems with discovery, and what reform efforts are most likely to be successful. An additional challenge was to recognize that a successful reform effort must address a broad spectrum of cases, including those where little or no discovery takes place, not just the "monster cases" where discovery abuse is most prevalent. Working group members represented a variety of interests coming together to find areas of agreement about discovery reforms that could make the system more precise and efficient. Members considered the literature regarding the problems posed by the current discovery system, examined and discussed a variety of existing efforts at discovery reform, and spoke with judges and lawyers in jurisdictions where reforms have been adopted or proposed.

Discovery Reform Efforts

In an effort to control the amount of time and money spent on discovery, a number of reforms have been considered by various jurisdictions and many have been adopted. They include:

- *Increasing judicial involvement in monitoring discovery.* A prime example of this is Federal Rule of Civil Procedure 26(f), the discovery conference provision added to Rule 26 in 1980. Case management techniques that include holding a discovery and status conference also take this approach. *See, e.g.*, Kentucky Rule of Civil Procedure 90.

- *Automatic disclosure.* Disclosure of certain information without the need for formal discovery requests is required in proposed Federal Rule of Civil Procedure 26, discussed further below. A number of state and federal courts have rules requiring the exchange of specified categories of information. *See, e.g.*, Central District of California Local Rule 6; Arizona Rule of Civil Procedure 26.1.

- *Phased discovery.* This concept includes a variety of possible phases,

including discovery addressed only to certain issues (including issues relevant to alternative dispute resolution) and sequencing by parties or by discovery form (*e.g.*, first, requests for documents; then depositions; then interrogatories and requests for admission).[6] A number of district court plans under the Civil Justice Reform Act provide for phased discovery, with complex cases considered the most appropriate for such treatment. Massachusetts District Court Rule 2.05 encourages the use of phased discovery in every case.

- *Numerical limitations on discovery*. More than 50 federal district courts have adopted presumptive numerical limits on discovery, the most common of which limit the number of interrogatories.[7]

- *Time limits*. Professor Earl Dudley of the University of Virginia has argued that much of the inefficiency inherent in modern discovery could be curbed if the time for discovery were strictly limited.[8] The Eastern District of Virginia uses an across-the-board discovery time limit of 90 days for all civil cases.[9]

- *Narrowing definition of relevance*. Federal Rule of Civil Procedure 26(b)(1) permits discovery of any unprivileged matter "relevant to the subject matter involved in the pending action." Some courts and commentators would strictly construe this concept of relevancy, reasoning that its breadth allows much groundless discovery deliberately aimed at increasing costs rather than uncovering useful information.[10]

- *Tailoring discovery according to the subject matter or complexity of the case*. Examples of this type of effort include uniform interrogatories for automobile accident cases (*see* Uniform Rules of Practice for the Supreme Court of Arizona, at Appendix XVII (interrogatories 501-93)), and proposals for local rules establishing in advance different schedules for discovery for different types of cases based on their subject matter or, alternatively, on their complexity.

- *Requiring parties to attempt to resolve discovery disputes prior to applying to the court for relief*. Many federal jurisdictions have enacted local rules with such a requirement; some have recently extended these rules under Civil Justice Reform Act implementation plans. *See, e.g.*, Civil Justice Reform Act Plan of the Eastern District of Pennsylvania, Section 5:01.

- *Imposition of sanctions for discovery abuse*. Federal Rule of Civil Procedure 26(g), added to Rule 26 in 1983, imposes sanctions for the improper use of discovery, including reasonable attorney's fees. A similar rule was adopted by Arizona in 1991. *See* Arizona Rule of Civil Procedure 26.1(e). In 1991, the President's Council on Competitiveness proposed a "loser pays" system whereby the party losing a discovery motion would pay the winner costs and attorney fees.

Consensus on Discovery Reform

The working group's charge to develop a consensus proposal aimed at improving discovery was particularly significant given the number of attempts at discovery reform already in existence. The inability of any single reform to solve completely the problems of discovery suggests that, at least in part, rule changes imposed from above without attorney participation or agreement cannot achieve total success. Along these lines, in a 1993 study of attorneys' views on discovery in the state courts, authors from the National Center for State Courts observed that, "the success of any procedural reforms of the civil discovery process will depend on their ability to change the attitudes and behaviors of attorneys."[11]

While some support for each of the reform proposals listed above could be found among members of the working group, resistance was expressed to "one size fits all" procedural reforms. For example, some members supported the concept of numerical limits on discovery initiatives for most lawsuits, but understood the concern of other members about the application of these limits in particular kinds of cases. In general, the reaction of the working group was not unlike that of the attorneys described in the 1993 NCSC study who "do not welcome rigid rules that restrict their ability to pursue their case."[12]

In particular, the group rejected the automatic disclosure provision in proposed Federal Rule of Civil Procedure 26(b)(1), currently under consideration by Congress. This proposal would require the disclosure of certain categories of information without the necessity of either party framing a discovery request. Some working group members found that the categories of information set forth in the rule were not precise enough to be workable. Many foresaw a negative impact on large, complex cases where more control is necessary, and a strong possibility of expensive satellite litigation. The group felt that greater success in streamlining discovery and averting procedural disputes could be achieved by requiring attorneys to create a discovery plan tailored to the needs of an individual case and to restrict the time available for discovery.

Rather than proposing specific across-the-board rule changes, the working group supports a "meet and confer" rule that would permit attorneys to consider the applicability of a menu of discovery initiatives, including the reforms listed above, to their particular cases. Recognizing that much discovery abuse results from lack of focus, the proposal includes varying time limits on discovery based on the complexity of a case and an early meeting of counsel to develop a proposed joint Scheduling Order. The group's proposal, discussed in further detail below, also mandates that the court enter a Scheduling Order, based upon the parties' proposed order or modified as the court sees fit. The proposal is consistent with the sort of reform supported by attorneys participating in the 1993 NCSC survey:

> Three of the proposed measures [to control discovery] stand out as the most favored by the attorneys.... [S]etting a time frame for completing discovery is among the three highest rated measures.... [T]he other top rated proposals are to require an early discovery conference or plan and to require counsel to negotiate discovery conflicts

themselves. Both of these measures also were viewed favorably by large majorities of attorneys practicing in the federal courts (Harris, 1989) as well as the respondents to the Defense Research Institute's study of state court litigation (Defense Research Institute, 1992). Each of these proposals calls for the establishment of parameters within which attorneys can still control the progress of their cases. These measures also would require the court to play a role in getting the case on track and keeping the attorneys within the bounds of the game plan.[13]

The meet and confer proposal is an attempt to move discovery away from the exclusive focus on trial preparation that has long dominated discovery practice. It seeks to make discovery part of a modern dispute resolution system that, in addition to trial, relies on settlement and alternatives to trial in resolving disputes.[14] With significant attorney support and judicial oversight, it is anticipated that an early meeting of counsel to frame and refine discovery in the context of an individual case will help to streamline the discovery process, making it less costly for litigants.

Review and Comment Process

The working group's proposal was widely circulated for review by lawyers, judges and legal scholars. A number of comments were received concerning one of the most challenging issues faced by the working group: how to deal with litigants who refuse to participate in good faith in framing a discovery plan. The group's proposal includes a section that tracks Federal Rule 37 by requiring the imposition of costs and fees on recalcitrant litigants. Some commentators found this section problematic but, in the absence of suggestions for an alternative enforcement mechanism, the group's proposed rule retains the cost and fees section as originally written. It should be pointed out, however, that the proposed rule may be adopted without this section, leaving a jurisdiction free to devise its own method for ensuring good faith cooperation by all litigants in a more focused discovery process.

Another area that drew comment is the inclusion in the proposed rule of discovery time tracks. The working group was committed to including discovery time limits in its proposal as a way of making discovery less costly and time consuming, thus allowing litigants to reach a resolution of their dispute without unnecessary expense and delay. This commitment incorporates the recommendations of a clear majority of lawyers surveyed in 1993 by the National Center for State Courts, as well as identical findings of earlier similar surveys. In response to suggestions by some who reviewed the proposal, commentary was added following the proposed rule to make clear that the specific time tracks may be altered to meet the needs of a particular jurisdiction. In addition, the rule was revised to reflect comments that there should be some means of changing the track to which a case is assigned if subsequent developments in a case so require.

Proposed Meet and Confer Rule

A number of jurisdictions have meet and confer rules in place[15] or are considering their adoption.[16] Commentators have supported the requirement of an early meeting of counsel[17] as have a variety of interest groups.[18] The working group's proposed meet and confer rule draws heavily on similar rules used in three federal jurisdictions, the Southern District of Florida (Local Rule 16.1), the Central District of California (Local Rule 6), and the District of Guam (Local Rule 235); a proposed local rule for the Southern and Eastern Districts of New York; and a proposal by Griffin Bell, Chilton Davis Varner and Hugh Gottschalk in a recent law review article.

The rule requires that attorneys meet prior to conducting any discovery in order to develop a plan that will control the timing and form of discovery throughout the case. It is based on the notion that a case-by-case evaluation of discovery needs and attorney participation in fashioning a discovery plan will help to eliminate the boilerplate discovery and technical objections that consume time and waste money under the present system. Recently Judge William O. Bertelsman, Chief Judge of the Eastern District of Kentucky, observed that an early meeting of counsel serves this purpose, stating that, "If the attorneys have to start by getting together and discussing what the case is really about, instead of firing off a barrage of interrogatories and deposition notices at each other, a much more cooperative spirit seems to result...."[19] Similarly, the New York State Bar Association Section on Commercial and Federal Litigation, proposing a local meet and confer rule, made the following observation:

> In our view, what becomes discovery abuse often starts when discovery requests are made or objected to before the parties have adequately considered what evidence is needed to try the action. A related cause is the frequent practice of both parties' firing off mammoth discovery requests at the outset of a litigation, in order to prove to the other that each is serious about pursuing the litigation.... To address this perceived antecedent of discovery abuse, the proposed local court rule requires counsel to consult on the scope of discovery and to jointly plan its course before any party makes a discovery request.[20]

The salient features of the proposed rule are the following:

- *Meeting at the outset of the lawsuit.* Counsel are required to meet very early -- within 20 days after the answer is served -- so that they can develop a customized and efficient discovery process for the case. The early meeting also provides an opportunity to identify and resolve many potential problems before they slow down the progress of the case or consume large amounts of time and money in the process of being resolved by motion. In proposing a similar rule, Griffin Bell and his coauthors noted that, "It is based on the unremarkable notion that discovery problems in an adversarial process can be eliminated by early planning by the parties and involvement by the court on a case-by-case basis.... [T]he Meet and Confer Rule would allow the parties to sculpt their own cases and to present basic discovery issues to the court early in the litigation."[21]

- *Purpose of meeting*. The early meeting of counsel in the proposed rule has four purposes:

  1. Assignment of case to a discovery track with presumptive time limits. Lawyers are required to determine which of three tracks (expedited, standard or complex), each with a presumptive time limit for discovery, is most appropriate for their case. The use of strict time limits for discovery is intended to make the process more focused and efficient by requiring that discovery be conducted in a concentrated effort rather than in fits and starts with long periods of inaction.[22] These time frames can be altered to respond to the mix of cases in a particular jurisdiction.

  2. Drafting a discovery plan. The discovery plan provides an opportunity for lawyers to tailor discovery to meet needs of individual cases. They are advised to consider the appropriateness of phased discovery, limitations on discovery and voluntary disclosure, and are required to draft a plan showing both what discovery will take place and a schedule for its completion within the limits of the applicable discovery track.

  3. Discussing settlement of the action. In addition to refining discovery and making it more efficient, the early meeting of counsel can facilitate the early settlement of the action.

  4. Considering alternative dispute resolution. It is appropriate to consider at an early meeting whether alternative dispute resolution is suitable for the case, which alternative dispute resolution procedure is most desirable, and what discovery plan best serves the objectives of the alternative dispute resolution procedure.

- *Prompt submission of proposed scheduling order*. Within ten days of the early meeting, counsel must submit a discovery plan and a proposed scheduling order to the court. Where counsel cannot agree on a joint proposed order, separate orders may be submitted with a brief description of matters in dispute.

- *Judge must enter scheduling order*. The meet and confer rule does not provide simply another opportunity for counsel to come together to discuss discovery; rather, it confers an obligation on counsel to focus both on the timing and exact nature of discovery and to commit to a course of action that will shape how that discovery takes place. The judge's entry of a scheduling order, based on the parties' proposed order or modified as the judge deems necessary, formalizes counsel's agreement. The provision requiring the judge to enter a scheduling order is therefore critical to the operation of the meet and confer rule. It is judicial involvement that one group of commentators termed "the fundamental premise of a more cost-effective discovery process."[23]

- *Exemptions* and Enforcement. The proposed rule gives the court discretion to exempt actions from the operation of the rule on a case-by-case basis or by local rule. It incorporates the enforcement mechanism of Federal Rule of Civil Procedure 37,

requiring the court to impose costs and fees on litigants who refuse to participate in good faith in framing a discovery plan.

Proposal (To be Implemented by Statute or Rule)

§1 Early Meeting of Counsel and Proposed Scheduling Order

In any action, as soon as practicable but in no event more than twenty (20) days after the filing of an answer by the last answering defendant or within sixty (60) days after the filing of a complaint (whichever shall first occur), unless extended by stipulation of the parties for a period not to exceed twenty (20) days, counsel for the parties shall meet for the following purposes:

A. Discovery Tracks

To determine the proper discovery track for the case:

i. There shall be three discovery tracks, as follows:

(a) Expedited -- a relatively non-complex case requiring only 1 to 3 days of trial may be assigned to an expedited track in which discovery shall be completed within 90 days from the date of the Scheduling Order.

(b) Standard Track -- a case requiring 3 to 10 days of trial may be assigned to a standard track in which discovery shall be completed within 180 days from the date of the Scheduling Order.

(c) Complex Track -- a complex case requiring over 10 days of trial may be assigned to the complex track in which discovery shall be completed within 365 days from the date of the Scheduling Order.

In no case shall the discovery period exceed 365 days without a showing of extraordinary good cause.

ii. Evaluation and Assignment of Cases

The following factors shall be considered in evaluating and assigning cases to a particular track: the type of case, the complexity of the case, number of parties, number of witnesses, volume of evidence, problems locating or preserving evidence, time estimated by the parties for discovery and time reasonably required for trial. The majority of civil cases will be assigned to a standard track.

iii. Track Designation in Proposed Scheduling Order

The parties shall recommend to the Court in their proposed Scheduling Order to which particular track the case should be assigned. At the request of either party, the judge may consider redesignating the track to which a case has been assigned based on subsequent developments in the case.

B. Discovery Plan and Schedule

To draft a plan for discovery, including both what discovery will take place and a schedule for its completion. The discovery plan should consider whether discovery should be conducted in phases, should be limited in some fashion or should be focused on particular issues, and whether limits should be placed on the use of particular discovery devices. The discovery plan shall take into account any alternative dispute resolution procedures that will take place, including what discovery is necessary and desirable in order to serve the objectives of the alternative dispute resolution procedure.

This discovery plan shall contain a schedule for completing all discovery, including the following, within the time limits of the applicable discovery track contained in paragraph A:

1. Request for and production of documents by the parties;
2. Requests for and production of documents by nonparties;
3. Propounding and responding to interrogatories;
4. Depositions of (a) parties and (b) non-parties;
5. Exchange of documents and other information without the necessity of a formal discovery request;
6. Identification of expert witnesses, providing their reports or otherwise disclosing their anticipated testimony, and deposing the experts;
7. Identification and exchange of the exhibits each party intends to offer at trial;
8. Providing a computation of damages;
9. Any contemplated motions relating to discovery.

C. Settlement

To discuss settlement of the action.

D. Alternative Dispute Resolution

To determine whether the case is suitable for alternative dispute resolution and, if so, to agree upon an alternative dispute resolution procedure and the date thereof.

§2 Notice of Requirement

Counsel for plaintiff, or plaintiff if proceeding pro se, shall be responsible for giving notice of the requirements of this rule to each defendant or counsel for each defendant as

soon as possible after such defendant's first appearance.

§3 Submission of Joint or Separate Scheduling Orders

Within ten (10) days of the Early Meeting of Counsel, counsel shall jointly submit to the Court a discovery plan and a scheduling order which reflect the agreements reached with respect to the provisions of this Act (Rule). The Proposed Scheduling Order shall include assignment of the case to a particular discovery track. With respect to those issues on which the parties are unable to agree, each party shall within ten (10) days submit its own proposed order with a brief description of the matters in dispute and the party's position with respect to those matters.

§4 Scheduling Order and Conference

Based on the submissions of the parties, the court shall enter an appropriate Scheduling Order. The Court may, in its discretion, order counsel to attend a Scheduling Conference prior to entering this order. If the trial court fails to enter an appropriate order or to schedule the matter for conference within 30 days after receiving the parties' agreed or proposed orders, the magistrate assigned to the case shall act forthwith to enter an order or schedule a conference.

No discovery shall be conducted by any party prior to the Court's approval of the Scheduling Order.

§5 Award of Expenses (See Commentary for discussion of this Section)

With respect to any dispute resolved by the Court arising out of the early meeting of counsel or the submission of the agreed order required by the Act (Rule), the Court shall award to the prevailing party its reasonable expenses, including attorneys fees, incurred in bringing the dispute before the Court, unless the Court finds that the position of the losing party was substantially justified or that other circumstances make an award of expenses unjust.

§6 Exempt Actions

If the Court determines that this Act (Rule) will not promote the just, speedy, and inexpensive resolution of certain actions or types of actions, including those in which no discovery is required, the Court by local rule or order in a particular action may exempt those actions from the requirements of this Act (Rule).

Commentary

This procedure is derived from a number of sources: local rules in effect in the Southern District of Florida (Local Rule 16.1), the Central District of California (Local Rule 6), and

the District of Guam (Local Rule 235); a proposed local rule for the Southern and Eastern Districts of New York, 127 F.R.D. 625, 639-40 (1989); and a proposal by Griffin Bell, Chilton Davis Varner and Hugh Gottschalk in *Automatic Disclosure in Discovery -- The Rush to Reform*, 27 Ga. L. Rev. 1 (1992). The rule provides counsel an opportunity to consider the discovery needs of a case before formal discovery begins, and confers responsibility on counsel to develop a discovery plan that will serve as the roadmap for discovery throughout the case. This provision is aimed at reducing the abusive practice of making uninformed, unfocused and sometimes excessive discovery requests, often as a matter of course.

Section 1 adopts the approach of the Southern District of Florida, requiring a meeting 20 days after the answer of the last answering defendant or 60 days after the filing of the complaint, whichever comes first. It adds a provision for up to a 20 day extension of time by stipulation, an effort to avoid the need for judicial involvement at this stage.

Section 1(A) adopts a modified version of the tracking system in effect in the Southern District of Florida, and uses a multi-factored approach to defining tracks. The use of specified presumptive time limits has as its aim making discovery more focused and efficient. *See generally* Earl C. Dudley, Jr., *Discovery Abuse Revisited: Some Specific Proposals to Amend the Federal Rules of Civil Procedure*, 26 U. San Fran. L. Rev. 189 (1992). It is intended that in no case would the discovery period exceed one year without a showing of extraordinary good cause. These time tracks may be altered to respond to the mix of cases in a particular jurisdiction. They reflect the working group's commitment to discovery time limits as a way of making discovery less costly and time consuming, thus allowing litigants to reach a resolution of their dispute without unnecessary expense and delay. This commitment incorporates the recommendations of a clear majority of lawyers surveyed in 1993 by the National Center for State Courts, as well as identical findings in earlier similar surveys. This section also includes a provision recognizing that in some instances the initial designation of a track may need to be changed to respond to subsequent developments in a case.

Further discussion on the ramifications of establishing time tracks will occur at the symposium.

Section 1(B) requires the drafting of a discovery plan that not only sets forth a schedule for traditional discovery but also considers the use of a variety of discovery reforms that may be appropriate in an individual case, even when such reforms have not been enacted by local rule or otherwise. These include phased discovery, numerical limits on discovery, and exchange of information without the necessity of a formal discovery request. The discovery plan may also address discovery aimed at serving the objectives of an applicable alternative dispute resolution procedure.

Section 2 places responsibility for convening the early meeting of counsel on plaintiff's lawyer or on plaintiff in order to conserve judicial resources. Some jurisdictions may wish to have a court official convene the meeting and monitor its progress.

Section 4 incorporates the notion that a Scheduling Conference may not be necessary in every case; in some instances, a judge may simply approve the Scheduling Order submitted by the parties and have that order control subsequent discovery activity. To keep the process moving, however, some judicial action will be necessary soon after the early meeting of counsel, since no discovery can take place until after entry of the Scheduling Order. As a way of prompting early judicial action, the proposed procedure automatically confers responsibility on a magistrate when a judge has not acted within 30 days. This latter provision is the approach taken by Griffin Bell et al. in 27 Ga.L.Rev. 1 at 49-51 note 182. It can, of course, be deleted in a system where magistrates are not routinely used.

Section 5 incorporates the enforcement mechanism of Federal Rule of Civil Procedure 37, requiring the court to impose costs and fees on litigants who refuse, without substantial justification, to participate in framing a discovery plan. A jurisdiction may adopt the proposed rule without this section if it prefers to devise its own method of ensuring that litigants participate in good faith in the early meeting of counsel. The concept of enforcing an early meeting of counsel through the ward of expenses including attorneys' fees is highly controversial. For this reason this Section is submitted for discussion simply as an example of the kind of incentives that might be created to induce compliance with the rule.

Section 6 uses general exemption language, *see* Bell et al., 27 Ga.L.Rev. 1 at 51 note 182, tailored to include the case where no discovery is contemplated. This is an alternative to the "laundry list" approach which exempts categories of cases according to subject matter, such as habeas corpus cases, social security cases, land condemnation cases, pro se prisoner's civil rights cases, and other cases where an early meeting of counsel to plan discovery is deemed to serve no purpose. *See, e.g.*, Committee on Discovery, New York State Bar Association Section on Commercial and Federal Litigation, Report on Discovery Under Rule 26(b)(1), 127 F.R.D. 625, 639-40 (1989).

Trial Process

Because only a small percentage of cases go to trial,[24] the working group focused primarily on the discovery process. At the same time, the group also endorses efforts directed toward trial process reforms, particularly reforms that would free judicial time to engage in necessary pre-trial management.

As a report from a joint ABA/Brookings Institution symposium noted, "Ultimately, judges have the greatest ability to influence the way in which trials in their courts are conducted."[25] It is judges who, through trying new approaches and making changes in their courtrooms, reform the trial process most effectively. We note several such efforts by way of example:

- In the state of Washington, one federal judge uses a "chess clock" approach. On the eve of trial, based on discussions with counsel and his own assessment

of the complexity of the case, the judge allots a certain number of trial days for each side to use in putting on its case. All time consumed by that side counts against the allotted time: direct, cross, objections and so forth. Once the time is up, it is up -- subject to convincing the trial judge that there are legitimate, pressing needs for more time.

- One judge has proposed calling a Rule 16 pre-trial conference to allow the parties to consider a "shorter and more sharply focused form of trial than the traditional model adversary trial -- a somewhat different model of adversary trial in which the redefined roles of the lawyers and the judge give the trial judge both power and responsibility to control excesses of traditional adversariness."[26] Parties and their attorneys may decide that, given the circumstances of a particular case, they will benefit from a more streamlined trial and could so stipulate. The result may be not only savings in time and cost but also enhancement of the quality of the disposition.

- Some judges require parties to submit direct testimony in written form prior to trial. They find that, in addition to making the evidence more understandable for the jury, this practice can improve the quality of cross-examination and eliminate repetitious direct testimony and confusing questions and answers.[27]

- Videotape is used in a variety of ways to streamline trials. Some judges are using pre-recorded videotaped trials, edited so that the jury sees only admissible testimony.[28] Videotaped depositions of medical and other expert witnesses are permitted in some courts, provided certain procedural prerequisites have been met.[29]

Suggestions such as these have emanated from judges and have been tried in individual courtrooms. We recommend that, as part of reform efforts at state and federal levels, opportunities be created for judges to communicate their ideas to colleagues and to lawyers. We urge appropriate judicial organizations to convene regular meetings for the purpose of allowing judges to share ideas and experiences in managing and expediting trial and to disseminate published results of these meetings.[30]

END NOTES

1 Susan Keilitz, Roger Hanson and Henry W.K. Daley, *Is Civil Discovery in State Trial Courts Out of Control?*, National Center for State Courts (1993).

2 *Id.* at 21 (finding that no formal discovery took place in 48 percent of state cases studied). See also David Trubek et al., *The Costs of Ordinary Litigation*, 31 U.C.L.A. 73, 75 (1983) (finding no evidence of discovery in over half of the state and federal cases examined).

3 Keilitz et al., *supra* note 1, at 5. See also Trubek et al., *supra* note 2, at 91 (rarely did the cases studied reveal more than five discovery requests).

4 *See, e.g.*, Susan Keilitz, Roger Hanson & Richard Semiatin, *Attorneys' Views of the Civil Discovery Process in the State Trial Courts*, National Center for State Courts (1993); Louis Harris & Assoc., *Judges' Opinions of Procedural Issues: A Survey of State and Federal Trial Judges Who Spend At Least Half Their Time on General Civil Cases*, 69 B.U.L. Rev. 731 (1989); Wayne Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 Am. B. Found. Res. J. 217; Wayne Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 Am. B. Found. Res. J. 787; Paul R. Connolly et al., *Judicial Controls & the Civil Litigative Process: Discovery*, Federal Judicial Center (1978).

5 *See* Stephen N. Subrin, *The Empirical Challenge to Procedure Based in Equity: How Can Equity Procedure Be Made More Equitable?*, in Equity and Contemporary Legal Developments (ed. Stephen Goldstein, 1992) 761 at 771-77.

6 *See generally* Robert Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 Rutgers L. Rev. 253 (1985).

7 There is some indication that attorneys have viewed these rules favorably. *See* J. Shepard & C. Seron, *Attorneys' Views of Local Rules Limiting Interrogatories, Appendix A* (Federal Judicial Center, 1986). *See also* William W. Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure be More Effective than Discovery?* 74 Judicature 178, 179 (1991); Robert A. Sacks, Note, *Coping with the Jekyll-Hyde Nature of Interrogatories by Imposing a Numerical Limitation: The Uses and Abuses of Discovery Procedures as Exemplified by Texas Rule of Civil Procedure 168*, 2 Rev. Litig. 95 (1981). However, a recent study showed only marginal support for restrictions on the number of discovery initiatives permitted. *See* Keilitz et al., *supra* note 4, at 29. *See also* Alfred W. Cortese, Jr. & Kathleen L. Blaner, *Civil Justice Reform in America: A Question of Parity with our International Rivals*, 13 U. Pa. J. Int'l Bus. L. 1, 48 (1992) (expressing concern over inflexibility of numerical limits); Jeffrey J. Mayer, *Prescribing Cooperation: The Mandatory Pretrial Disclosure Requirement of Proposed Rule 26 and 37 of the Federal Rules of Civil Procedure*, 12 Rev. Litig. 77, 107-08 (1992) (predicting that limits will have no effect on discovery practice); Frank H. Easterbrook, *Discovery as Abuse*, 69 B. U. L. Rev. 635, 641-42 (1989)(same).

8 *See generally* Earl C. Dudley, Jr., *Discovery Abuse Revisited: Some Specific Proposals to Amend the Federal Rules of Civil Procedure*, 26 U. S. F. L. Rev. 189 (1992). *See also* Subrin, *supra* note 5, at 784-792.

9 *See* Dudley, *supra* note 8, at 203-207.

10 *See, e.g., Herbert v. Lando*, 441 U.S. 153 (1979) (Powell, J., concurring); *Solarex Corp. v. Arco Solar, Inc.*, 121 F.R.D. 163 (E.D.N.Y. 1988); Committee on Discovery,

New York State Bar Association Section on Commercial and Federal Litigation, Report on Discovery Under Rule 26(b)(1), 127 F.R.D. 625, 628-34 (1989).

11 Keilitz et al., *supra* note 4, at 30.

12 *Id.* at 29.

13 *Id.* at 23-24.

14 The attached proposal has many of the same goals as the meet and confer procedure proposed by the Early Settlement Working Group. That rule contains an expanded treatment of alternative dispute resolution principles in the meet and confer context and could be modified and combined with the attached proposal.

15 *See, e.g.*, C.D. Calif. Local Rule 6; S.D. Fla. Local Rule 16.1; Guam Local Rule 235.

16 *See, e.g.*, Paul L. Friedman, *Speeding Up Justice at the District Court*, LEGAL TIMES, Apr. 19, 1993, at 30 (reporting on meet and confer proposal of CJRA Advisory Group of the U.S. District Court for the District of Columbia).

17 *See, e.g.*, Griffin B. Bell et al., *Automatic Disclosure in Discovery -- The Rush to Reform*, 27 Ga. L. Rev. 1, 48-53 (1992); Cortese & Blaner, *supra* note 7, at 47-48.

18 For example, the Product Liability Advisory Council, Lawyers for Civil Justice, and the United States Chamber of Commerce have supported the meet confer concept in proposed Federal Rule of Civil Procedure 26(f).

19 William O. Bertelsman, *Federal Judges Experiment With Proposed Disclosure Provisions Proves Successful*, State-Federal Judicial Observer, No. 2, April 1993 at 1.

20 New York State Bar Association Section on Commercial and Federal Litigation, Committee on Discovery, Report on Discovery Under Rule 26(b)(1), 127 F.R.D. 625 at 637 (1989) (footnote omitted).

21 Bell et al., *supra* note 3, at 53.

22 *See generally* Earl C. Dudley, Jr., *Discovery Abuse Revisited: Some Specific Proposals to Amend the Federal Rules of Civil Procedure*, 26 U. S. F. L. Rev. 189 (1992).

24 *See, e.g.*, David Trubek et al., *supra* note 2, at 89 (finding that in a combined sample of federal and state cases, fewer than eight percent of the cases went to trial).

25 *Charting a Future for the Civil Jury System*, Report from an American Bar Association/Brookings Symposium (Brookings Institution, 1992), at 23.

26 Robert E. Keeton, *Time Limits As Incentives in an Adversary System*, 137 U. Pa. L. Rev. 2053, 2055 (1989).

27 *See, e.g.*, Charles R. Richey, *A Modern Management Technique for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony to be Submitted in Written Form Prior to Trial*, 72 Geo. L. J. 73 (1983).

28 *See, e.g.*, James L. McCrystal & Ann B. Maschari, *Will Electronic Technology Take the Witness Stand?*, 11 Toledo L. Rev. 239 (1980).

29 *See, e.g.*, Calif. Code of Civ. Pro. sec. 2025(u)(3)(C)(4).

30 This proposal is nearly identical to a recommendation resulting from the joint ABA/Brookings Institution symposium on the civil jury:

> Finally, we urge the appropriate judicial organizations at both the federal and state levels to provide more training for judges to learn about and use modern communication techniques. In addition, we encourage these organizations to convene regular seminars and meetings at which judges who are experimenting with new ways of running trials can share their experiences with their colleagues and members of the legal profession and thereby speed the diffusion of jury trial innovations throughout the judicial system. *Charting a Future for the Civil Jury System*, at 25.

CASE MANAGEMENT

Case Management Techniques Requiring Consideration

Over the course of the past 15 years there has been growing receptivity to the "management" of cases as a means of reducing cost and delay, and the concept of judicial management has had a substantial impact on the way courts are organized and litigation processed. The key to all this has been acceptance of the idea that individual courts are not walled-off fiefdoms, but parts of larger governmental systems that need centralized management and oversight to operate effectively. Thinking in systemic terms has yielded a range of reform proposals with the potential to improve the speed and quality of justice.

Two important points must be made at the outset. First, as the introduction makes clear, satisfactory reform is only possible if the rule of law, litigant participation and choice, guarantees of access, protections of adjudicator impartiality, and restraints on satellite litigation are respected. While what follows focuses most of its attention on a means of effectuating case management reform, the principles previously enunciated are an essential part of any reform package. Second, while some of the steps we discuss are relevant to the federal courts, our main concern in the case management context is with improvements at the state level. We have chosen this focus in the belief that those management reforms work best which have been designed with the needs and concerns of a particular jurisdiction in mind by drafters intimately acquainted with the special characteristics and requirements of that jurisdiction. In 1987 the American Bar Association published a seminal study regarding case management entitled *Caseflow Management in the Trial Courts*. Its authors, Maureen Solomon and Douglas Somerlot, concluded that there is general consensus about the efficacy of six management techniques in reducing cost and delay:

- judicial commitment and leadership
- court supervision of case progress
- appropriate time standards and goals
- a monitoring and information system
- scheduling for credible trial dates
- court control of continuances.

Empirical research by Barry Mahoney and a number of others on behalf of the National Center for State Courts reconfirmed the effectiveness of these measures. Mahoney's conclusion, set forth in a volume entitled, *Changing Times in the Trial Courts*, was that delay is not an inevitable concomitant of urban practice and that the six steps set forth above can help courts move cases quickly and economically. All the steps recommended by these scholars and experts have been endorsed by the American Bar Association, and all appear in the ABA's *Standards Relating to Court Delay Reduction* (Sections 2.50-2.55). In what remains of this section we provide excerpts from Solomon and Somerlot, the ABA Standards, and court rules regarding each of these six techniques.

Judicial Commitment and Leadership

Caseflow Management in the Trial Courts, by Solomon and Somerlot (pp. 7-10)

The judges of the court, particularly the chief or presiding judge, set the tone for the organization. If these judges are not committed to the philosophy of court responsibility for case progress, then little will be gained by devising systems for establishing deadlines and tracking cases. Further, it is becoming clear that supreme court leadership and support of delay reduction programs (including programs to prevent delay) can be of major statewide benefit. Local courts unable to initiate or sustain such a program on their own may be able to do so with supreme court support. Both the chief judge and the court administrator are critical to the caseflow management program, but neither can perform effectively without the other. A partnership is necessary to shape and guide the caseflow system....

Judicial commitment to the concept of court responsibility for the pace of litigation was identified [in an earlier version of these materials] as a primary element of effective caseflow systems. However, further observation and study as well as consultation with social scientists has disclosed that judicial commitment by itself is not sufficient to bring about change. It is now recognized that internal court efforts to improve case management and minimize delay usually involve the leadership of an influential member of the bench. Leadership and commitment are not the same thing.

Leadership by a key judge or judges is needed to initiate changes or improvements; commitment to the concepts by a majority of the judges and staff is necessary to sustain them. Accordingly, sustained improvement eventually must involve the total organization.... As noted by Barry Mahoney, most of the successful delay reduction efforts in courts throughout the United States in the past five to ten years have occurred under the effective leadership of the chief or presiding judge. However, the programs that have survived the test of time have had the commitment of the trial judges, the court staff, and the majority of the leaders of the local bar.

Judicial commitment to caseflow excellence and delay avoidance carries with it judicial responsibility for observing case management procedures and policies. Collegial development and adoption of such policies facilitates commitment. Implementation of caseflow management programs will necessitate personal sacrifices of style or inclination in order to assure consistency of operation and equal treatment of cases regardless of the judge to whom they are assigned. Accordingly, the planning of change must proceed with concern for both the organization and the individuals who constitute it.

There will be a tendency for some judges to view the caseflow management system as a threat to judicial independence. It is important to distinguish between independence in decision making and administrative independence. An effective caseflow management system, while requiring some sacrifice of administrative independence with respect to processes, should in no way threaten independent judicial decision making. Caseflow management

enhances the quality of justice by imparting rationality and predictability to the process and by minimizing delay to disposition.

Both the chief judge and the court administrator have critical roles in the caseflow management process, but neither can perform effectively without the other. A partnership is necessary to shape and guide the caseflow management system.

Court Supervision of Case Progress

Caseflow Management in the Trial Courts, by Solomon and Somerlot (pp. 11-14)

The concept that the court must actively supervise the progress of all cases from filing to disposition is the foundation of effective caseflow management. It flows logically from the philosophy that the court is responsible for assuring timely disposition and equality of access to court processes for all cases. Only through early and continuous oversight of case progress can this responsibility be discharged effectively....

As implemented in court during the past five to ten years, early and continuous supervision of case progress has been incorporated into caseflow management through a variety of techniques. Most of the systems have been characterized by early court attention to the case (often in the form of a conference between a judge and the attorneys), creation and monitoring of deadlines for completion of subsequent events in the life of the case (such as discovery deadlines), and mechanisms for identifying and dealing specially with complex cases. Some courts begin monitoring case progress based upon statutory deadlines in the pleadings stage. By and large, the goals of these techniques have been to facilitate early, non-trial disposition in appropriate cases and to shepherd the remaining cases toward timely settlement or trial by encouraging attorney diligence.

Considerable interest in the early "status conference," referred to above, has been generated in the last few years. Judges who employ such a conference usually schedule it within the first ninety days after the case is filed. At the conference, attorneys come prepared to discuss the apparent issues in the case, its potential complexity, the amount of discovery required, motions expected to be filed, whether the case should be assigned to arbitration or mediation and the number of experts expected to be involved. Based on this information, the lawyers and judge usually are able to agree on deadlines for completion of discovery, motions and other matters; these deadlines are positioned to assure that the case can reach disposition within the court's disposition deadlines. Accomplishing all of this usually consumes no more than ten minutes.

In especially complex cases, later conferences may be needed to solidify the dispositional timetable in the case. Early agreement on a timetable builds attorney commitment to the deadlines. Negotiated dates usually are preferable to automatic deadlines imposed by the court. Further, this process allows some cases to be completed in less than the maximum time that might be allowed under a system that automatically assigns deadlines based on court

rule. Following the status conference, the court's monitoring system is invoked to assure adherence to the agreed deadlines. Judges who use this early conference realize a time savings in their caseload because fewer cases remain on their dockets at later stages. In addition, cases that go to trial are tried more expeditiously because of better attorney preparation.

ABA Standards Relating to Court Delay Reduction

§2.50 Caseflow Management and Delay Reduction: General Principle:

From the commencement of litigation to its resolution, whether by trial or settlement, any elapsed time other than reasonably required for pleadings, discovery and court events, is unacceptable and should be eliminated. To enable just and efficient resolution of cases, the court, not the lawyers or litigants, should control the pace of litigation. A strong judicial commitment is essential to reducing delay and, once achieved, maintaining a current docket.

§2.51 Case Management:

Essential elements which the trial court should use to manage its cases are:

A. Court supervision and control of the movement of all cases from the time of filing of the first document invoking court jurisdiction through final disposition.

Examples of State Rules Concerning Court Supervision of Case Progress:

Kansas -- *General Principles and Guidelines for the District Courts*

(2) Litigation delay causes litigants expense and anxiety. Judges and lawyers have a professional obligation to avoid misuse and overuse of discovery and to terminate litigation as soon as it is reasonably possible to do so....

(8) The most effective way of combating court delay is to modify the local legal culture by the adoption and use of a case management system. *The basic concept of case management is that the court, rather than the attorneys, should control the pace of litigation. It is the duty of the judge to the people to run the court and not abdicate the responsibility to counsel.* (emphasis in original)

Alabama -- *Standards and Recommendations Relating to Delay Reduction*

Recommendations of the Circuit Judges Time Standards Committee and District Judges Time Standards Committee to be Implemented by the Courts and Appropriate Agencies of the Unified Judicial System

Recommendation I. CASE MANAGEMENT PLANS

Each circuit and district court should establish an effective case management plan which will promote compliance with the recommended time standards and eliminate unnecessary delay in the processing of cases. Such a case management plan should provide for:

A. Judicial supervision and early and continuous control of all cases, including the setting of civil and criminal dockets under the supervision of the trial judge or court administrator, where available.

B. Specialized procedures for the handling of cases involving complex substantive or procedural issues.

C. Intermediate time frames for critical events in the processing of cases which can be monitored by the court to ensure compliance.

D. Trial setting policies which will reasonably assure that cases scheduled for trial on any given date will be reached.

E. Setting of trials for a date certain.

F. Strict policies on continuances.

G. Where feasible, individual dockets should be adopted in multi-judge circuits where more than one judge is assigned to a division of the court.

COMMENT

Judicial commitment is essential to a successful case management program. Once an action is filed, it is the responsibility of the court to ensure that the issue is expeditiously brought to conclusion. Research indicates that those courts which are most successful in reducing unnecessary delay are those which instigate control at an early point, e.g., time of filing, and maintain continuous supervision through each discrete processing phase. It is equally important that courts require all trials to be set for a date certain. Court dockets should be structured to reasonably ensure that all trials scheduled for a specific date will, in fact, be tried. Continuances should be granted only in exceptional circumstances when substantial good cause requires.

Kentucky -- Rule 90, *Kentucky Rules of Civil Procedure*

Rule 90. Discovery and status conference. (1) A discovery and status conference shall be held in each case for the purpose of scheduling each event in the case and determining the period of time necessary to complete discovery. The conference shall be set within fifteen (15) days after service of the last responsible pleading or the last day a responsive pleading could have been served. A date for a pretrial conference shall be set for a date not more than sixty (60) days following the discovery and status conference and a trial date shall be set not more than thirty (30) days after the pretrial conference. However, in the discretion of the trial judge these times may be extended or reduced to meet the needs of the individual case.

Official Commentary. The discovery and status conference is essentially a planning conference. It is at this meeting with all the parties and the trial judge that the progress of discovery is planned, the period necessary to complete discovery established and the date for the pretrial conference set.

Appropriate Time Standards and Goals

Caseflow Management in the Trial Courts, by Solomon and Somerlot (pp. 15-20)

One of the first steps in developing a court-supervised caseflow management system is creation of time standards governing case disposition. These standards are the statement of goals which the entire delay reduction or prevention program is designed to achieve.

It is important to distinguish between time standards developed and used as management tools and time restrictions specified in procedural rules and statutes. In civil cases, procedural time restrictions frequently are not self-enforcing or enforced by the court on its own motion. They are a basis for dismissal or default judgment if an attorney chooses to invoke them, usually only as a last resort. Further, these limits often bear little relationship to reasonable time limits for processing cases. For example, the Code of Civil Procedure in California still allows three years to serve the complaint on the defendant. Sometimes, however, if the statutory limits are reasonable, courts incorporate these restrictions into their case management plan and monitor compliance. If the limits are not met, appropriate action is taken. For example, if the answer is not timely filed, the court notifies the plaintiff to move for a default judgment or face dismissal....

While criminal standards were most often legislatively mandated, civil standards are being adopted by the judicial branch. Although this approach is not the only model, it is the preferred model in terms of judicial independence. True professional independence requires planning and directing one's own work. Many arguments can be advanced in favor of judicial as opposed to legislative development of disposition time standards, but two of the most important are:

1. Development of time standards is part of the court's overall program of caseflow supervision. Standards developed with the overall program in mind help assure commitment by the judges and administrators.

2. Development by the judicial branch helps assure consultation with the bar and other concerned agencies and individuals, promoting commitment to achieving the standards by all who had a hand in their development.

Overall time standards provide a basis for case progress decisions in the management of individual cases. These decisions are facilitated by incorporation of time guidelines governing each significant intermediate event from filing to disposition. For example, if the disposition standard is one year from filing, intermediate standards establish the times for occurrence of status conferences, arbitration hearings or issue conferences so that all will be concluded in time for the trial (if needed) to occur within the one-year limit.

Intermediate event time standards are an important component of any type of dispositional time standard. It is through application of intermediate standards that court supervision of case progress becomes reality. By monitoring to assure that intermediate events occur as scheduled, orderly progress toward the conclusion of the case is nurtured, counsel preparation is facilitated and prompt disposition of cases that will settle is encouraged. Since application of the intermediate limits to each case should involve contact between the court and counsel, selection of intermediate guidelines, like the selection of all guidelines, is best achieved through consultation with the bar. The dialogue will apply the judgment of the court and counsel on the time needed to complete the activities in question.

ABA Standards Relating to Court Delay Reduction

§2.52 Standards of Timely Disposition:

The following time standards should be adopted and compliance monitored:

A. General Civil -- 90% of all civil cases should be settled, tried or otherwise concluded within 12 months of the date of case filing; 98% within 18 months of such filing; and the remainder within 24 months of such filing except for individual cases in which the Court determines exceptional circumstances exist and for which a continuing review should occur.

B. Summary Civil -- Proceedings using summary hearing procedures, as in small claims, landlord-tenant and replevin actions, should be concluded within 30 days from filing.

C. Domestic Relations -- 90% of all domestic relations matters should be settled, tried or otherwise concluded within three (3) months of the date of case filing; 98% within six (6) months and 100% within one (1) year.

Examples of State Rules Concerning Standards and Goals:

Michigan -- Administrative Orders of the Michigan Supreme Court -

Administrative Order 1991-4

TIME GUIDELINES FOR CASE PROCESSING

A. Probate Court Guidelines

1. Delinquency and Neglect Proceedings

a. In-Custody. Where a minor is being detained or is held in court custody, 90% of all petitions or complaints should have adjudication and disposition completed within 84 days from the authorization of the petitions, and 100% within 98 days.

b. Non-custody. Where a minor is not being detained or held in court custody, 75% of all petitions or complaints should have adjudication and disposition completed within 119 days from authorization of the petition, 90% within 6 months and 100% within 7 months.

2. Probate Proceedings. 75% of all contested probate matters should be resolved within 6 months from the time the issue is joined, 90% within 9 months and 100% within 12 months except for individual cases in which the court determines exceptional circumstances exist and for which a continuing review should occur.

B. District Court Guidelines.

1. Civil Proceedings.

a. General Civil. 90% of all civil cases should be settled, tried or otherwise concluded within 6 months from the date of case filing, 98% within 9 months and 100% within 12 months except for individual cases in which the continuing review should occur.

b. Summary Civil. Proceedings using summary hearing procedures, as in small claims, landlord/tenant and claim and delivery actions should be settled, tried or otherwise concluded within 35 days from the date of service. In those cases where a jury is demanded, actions should be concluded within 63 days from the date of service.

2. Criminal and Traffic Proceedings.

a. Misdemeanor. 90% of all misdemeanors, civil infractions, and other non-felony cases should be adjudicated or otherwise concluded within 63 days from the date of the first appearance, 98% within 91 days and 100% within 126 days.

b. Felonies. 100% of preliminary examinations to be concluded within 12 days of arraignment unless good cause is shown.

NOTE: When a case is removed from circuit to district court, the district court Time Guidelines should apply and the time should commence when the case is received by the district court.

C. Circuit and Recorder's Court Guidelines.

1. Civil Proceedings. 75% of all civil cases should be settled, tried or otherwise concluded within 12 months from the date of case filing, 95% within 18 months and 100% within 24 months except for individual cases in which the court determines exceptional circumstances exist and for which a continuing review should occur.

2. Domestic Relations Proceedings.

a. Divorce Without Children. 90% of all divorce cases without children should be settled, tried, or otherwise concluded within 91 days from the date of case filing, 98% within 10 months and 100% within 12 months.

b. Divorce With Children. 90% of all divorce cases with children should be settled, tried, or otherwise concluded within 8 months of the date of case filing, 98% within 10 months and 100% within 12 months.

c. Paternity. 90% of all paternity cases should be settled, tried or otherwise concluded within 3 months of the date of service of process, 98% within 6 months and 100% within 12 months.

d. Initiating Uniform Reciprocal Enforcement of Support Act (URESA). 100% of all URESA orders should be forwarded to the court of the responding state having reciprocal legislation within 24 hours of the filing of the Certificate of Support.

e. Child Support/Responding Uniform Reciprocal Enforcement of Support Act (URESA). 90% of all child support/responding URESA cases should be adjudicated or otherwise concluded within 91 days from the date of case filing or receipt of order from initiating state, 98% within 6 months and 100% within 12 months.

f. Child Custody Issues. 100% of all child custody issues should be adjudicated or otherwise concluded within 91 days from notice of request for custody hearing.

3. Criminal Proceedings. 90% of all felony cases should be adjudicated or otherwise

concluded within 91 days from the date of entry of order binding the defendant over to circuit court, 98% within 154 days and 100% within 10 months. Incarcerated persons should be afforded priority for trial.

4. Appeals to Circuit Court.

a. Appeals From Courts of Limited Jurisdiction. 100% of all appeals to the circuit court from courts of limited jurisdiction should be settled or otherwise concluded within 154 days from the filing of the Claim of Appeals.

b. Appeals From Administrative Agencies. 100% of all appeals to the circuit court from administrative agencies should be settled or otherwise concluded within 154 days from the filing of the Claim of Appeals.

c. Extraordinary Writs. 98% of all extraordinary writ requests should be adjudicated within 35 days from the date of filing, and 100% within 91 days.

5. Matters Submitted to the Judge. Matters under submission to a judge or judicial officer should be promptly determined. Short deadlines should be set for presentation of briefs and affidavits and for production of transcripts. Decisions, when possible, should be made from the bench or within a few days of submission; except in extraordinarily complicated cases, a decision should be rendered no later than 35 days after submission.

Nebraska -- Rules of the Supreme Court/Court of Appeals of the State of Nebraska - Cases Progression Standards

Trial of hearing on the merits of a case should be within the following time limits from the date of filing:

DISTRICT COURT

Appeals.....3months
Criminal Cases.....6months
Domestic Relations Cases.....9months
Civil Cases -- Nonjury.....1year
Civil Cases -- Jury.....18months

COUNTY COURT

Misdemeanor and Traffic Offenses -- Nonjury.....60 days
Misdemeanor and Traffic Offenses -- Jury.....6 months
Civil Cases.....6months
Preliminary Hearings.....Assoon as possible, but no more than 30 days

Final disposition of probate cases should be within 1 year from filing except when a federal estate tax return is required, and in that event, 18 months.

A longer interval may be approved where deemed necessary because of extraordinary eventualities, such as exceptionally complicated discovery, stabilization or injury in personal injury cases, or settlement of financial affairs in complex cases.

Ohio -- Summit County Court of Consumer Pleas Rules of the Civil Division - Rule 20 Civil Case Flow Management

20.3 Limitations as to Time. The civil cases in this Court shall be divided in the following categories, with the time limitations for handling the cause, as follows;

Professional Tort	24months
Product Liability	24months
Other Torts	24months
Worker's Compensations	12months
Foreclosures	12months
Administrative Appeals	6months
Complex litigation	36months
All other civil matters	12months

No trial of the cause shall be scheduled beyond the time limits without the express approval and concurrence of the individually-assigned Judge, and for good cause shown.

California -- *Local Rules, San Diego County Superior Court, Administration of Civil Litigation*

10.1 Policy

It is the policy of the San Diego County Superior Court to manage all cases from the moment the complaint is filed.

It is the policy of the court to conclude 90 percent of all cases filed within one year of the filing of the complaint.

It is the policy of the court to conclude 98 percent of all civil litigation within 18 months of the filing of the complaint and 100 percent within 24 months.

It is the policy of the court that once any date has been set, that date can only be changed by an ex parte written application and a showing of good cause.

A Monitoring and Information System

Caseflow Management in the Trial Courts, by Solomon and Somerlot (pp. 20-23)

A caseflow management system that creates deadlines and timetables governing case progress must be supported by an effective information system. In particular, the system must incorporate the capacity to monitor the compliance with deadlines and trigger court action in cases in danger of exceeding disposition time standards. Effective delay reduction programs have been begun with less than the information systems suggested in this description. Similarly, systems that provide an acceptable level of information can be designed to function without using computers. Resources insufficient to provide computer systems should not deter a court from beginning a caseflow management system.

In this section capabilities of a comprehensive court information system are described. This is the system we believe is needed. While it is true that effective delay reduction programs have begun with less than the full range of features suggested, few have sustained success, commitment and enthusiasm without at least the ability to (a) monitor the progress of each case and (b) monitor the degree of success in meeting disposition time standards. The court that is developing an information system -- manual or automated -- is better served by planning for a maximum system from the beginning. By preparing the plans for a full system, expensive false starts, program rewrites and uninformed purchasing decisions can be avoided.

Until recently, information accumulated about the court's caseload tended to be statistical information of limited utility for court or case management. Many courts have effective systems for producing aggregate information on the caseload; few have systems that facilitate tracking the progress of cases or monitoring whether deadlines are met. Without this capability and the feedback connected with it, it is difficult to sustain the enthusiasm present at the introduction of the new system. A vital link in the process of building commitment, setting goals and measuring progress is missing.

A complete caseflow management information system should provide at least the following:

1. measures of activity;
2. measures of inventory;
3. measures of delay;
4. measures of case scheduling accuracy;
5. evaluation measures; and
6. individual case progress information....

[All categories except "Individual Case Progress Information"] are concerned with cases in the aggregate. The performance of the court's caseflow management system is profiled by the information in these categories. Although aggregate statistics have been titled

"management information" in many courts, it should be clear that their utility in managing the processing of cases is negligible.

In contrast, information for managing case progress is not statistical. It is explicitly geared to scrutiny of each individual case. Information in this category should be used by case managers and judges every day. It is case-specific information that allows the courts to actively manage the progress of individual suits. At minimum, it should allow case managers to:

- determine the current status (between what major case events) of each pending case;
- compute and monitor compliance with procedural deadlines for case events, such as filing the answer;
- identify cases that are not in compliance with time deadlines set by the court; and
- audit the information system, e.g., identify cases that do not have all information needed, or do not have future action dates assigned.

ABA Standards Relating to Court Delay Reduction

§2.54 Court Delay Reduction Program:

Each court should have a program to reduce and prevent delay.

A. Essential ingredients of the program are:

. . . . .

3. A system to furnish prompt and reliable information concerning the status of cases and case processing.

Scheduling for Credible Trial Dates

Caseflow Management in the Trial Courts, by Solomon and Somerlot (pp. 24-28)

Achieving trial date credibility should be a primary goal of the court's case scheduling system. Accurate scheduling for trial date credibility and court control of continuances are very closely related. In fact, one cannot be implemented successfully without the other. Accurate scheduling depends in large part on the court's willingness and ability to incorporate a restrictive continuance policy into the caseflow management system and to enforce it in day-to-day calendar management. Conversely, a strict continuance policy cannot be enforced if the calendar routinely is excessively over-scheduled. It is through the continuance policy and scheduling practices that the court establishes or alters attorneys' expectations concerning readiness. Doing so depends on the ability to schedule accurately.

"Accurate scheduling" is defined as scheduling planned in a way that achieves the following results:

- the judges available can try all scheduled cases that do not settle;
- the number of continuances is minimized; and
- few cases are held over or reset because they are not reached....

In view of the many variables that may affect scheduling a reasonable question is, "How can accurate scheduling be achieved?" While 100 percent accuracy over the long term can never be achieved, most courts can significantly improve through better record keeping, analysis and planning....

The seven factors that can be used to schedule accurately and achieve trial date certainty are:

1. likelihood of trial;
2. length of trial;
3. number of court days;
4. expected judicial complement;
5. judge days available;
6. judicial capacity; and
7. fallout....

No scheduling system is a panacea. Continuous analysis of calendar data, judicial absence data and judicial capacity data is necessary. Conditions change and the factors in the formula must change accordingly....

While this discussion may seem technical, it can be simplified for those not mathematically inclined in the following summary: Accurate scheduling requires consideration of the judicial resources expected to be available, the historical capacity of those resources and the expected case fallout after scheduling.

A corollary issue concerns the conundrum often faced by courts with a substantially over-scheduled calendar: too few ready cases to occupy the judges and excessive continuances. When a court has too few ready cases for the available judges in spite of scheduling a large number of cases, the panic response usually is to schedule even more cases. This action decreases the likelihood that attorneys will prepare since they perceive a low probability of trial. Because the calendar is heavily over-scheduled, the likelihood that a continuance on the grounds of unpreparedness will be requested increases. Thus, there are still too few cases for the judges.

The correct remedy is to reduce the number of scheduled cases to the point that the lawyers have absolute certainty of trial. Under these circumstances, many of the common bases for continuances can be rejected, and the case can be forced to trial. Accordingly,

attorney preparation is assured.

Accurate scheduling is vital to an effective, court-supervised caseflow management system. The effort required initially to obtain the information to design and implement a new approach will be one of the best investments of human and other resources the court undertakes.

ABA Standards Relating to Court Delay Reduction

§2.51 Case Management:

Essential elements which the trial court should use to manage its cases are:

. . . . .

E. Adoption of a trial setting policy which schedules a sufficient number of cases to ensure efficient use of judge time while minimizing resettings caused by over-scheduling.

F. Commencement of trials on the original date scheduled with adequate advance notice.

Examples of State Rules Concerning Scheduling for Credible Trial Dates.

Arizona -- Uniform Rules of Practice, Rule V

Section (d) Active Calendar. Ten days after a Motion to Set and Certificate of Readiness has been filed, if a Controverting Certificate has not been filed, or otherwise by order of the court, the clerk of the court or court administrator shall place the case on the Active Calendar and shall stamp thereon a chronological list number which shall generally govern the priority of the case for trial, except as to those cases which are entitled to preference by statute or local rule, and except that short causes may be preferred for trial accordance with local rules.

Section (h) Setting for trial. Cases on the Active Calendar shall be set for trial as soon as possible. Preference shall be given to short causes and cases which by reason of statute, rule or court order are entitled to priority....

Court Control of Continuances

Caseflow Management in the Trial Courts, by Solomon and Somerlot (pp. 28-30)

It is as true today as it ever has been that a court's policy on continuances reflects its commitment to the philosophy of court responsibility for case progress. Through leniency in

continuing scheduled trial dates, even a court that has adopted the philosophy of court responsibility loses control of the process. Aside from the obvious fact that continuances result in delay for the cases involved, the court's policy on continuances is linked to two critical aspects of effective court management of caseflow:

- attorneys' perceptions of the court's attitude toward caseflow management; and
- trial date certainty.

A court's posture on continuances creates expectations on the part of the trial bar, which in turn affects attorneys' diligence in preparation. Cases are ready for trial or other hearing only if the attorneys have prepared. Attorneys prioritize the cases to which they will devote time based upon a variety of factors. In the face of a large inventory of cases, prioritization of work is based partly on attorney perception of whether the court is actively supervising the progress of cases, whether scheduled trials and hearings will occur and whether a request for continuance will be granted for unreadiness to proceed.

If the court is lenient on continuances, a busy attorney may be less likely to be prepared or likely to be less prepared. Time will be devoted to the most pressing business, and postponements will be requested for less urgent matters, including cases in which a continuance due to unreadiness can be obtained. Each time the court grants such a request, it reinforces counsels' perception of the court's leniency and lack of case management orientation.

The effect of the court's continuance philosophy and policies on trial date certainty is linked to the effect on attorney expectations and perceptions. A court cannot adopt a restrictive continuance policy if it consistently schedules more cases than the available trial judges can be expected to conclude in the period for which cases are scheduled. Inevitably, cases will be continued on the court's motion due to unavailability of a judge. When this degree of over-scheduling occurs repeatedly, attorneys will take the chance that their case will be one of those not reached. They may, for example, announce that they are ready for trial on the trial date but not have witnesses readily available. Or they may simply request a continuance on grounds of unreadiness. The problem is compounded by the fact that when a court frequently is so over-scheduled that it must continue cases, expert witnesses are less willing to agree to come to court on the scheduled date or even to be available on call. The consistent absence of trial date certainty conditions not only the lawyers but also certain experts, making it even more difficult for counsel to be ready for trial on the scheduled date....

Care should be exercised to assure that the process of requesting a continuance retains formality and that telephone requests are not allowed. A showing of good cause should be required and reviewed. Stipulation by the attorneys should never be the basis for granting a continuance. Automatic granting of any request for continuance should never be the court practice. Rather, inquiry into the validity of the request and consideration of possible

remedial action should be the rule. Some courts require the litigants' signatures on the continuance request, often with significant reductions in the number of continuances requested.

Often, in frustration over attorneys' lack of preparation, courts consider possible sanctions to encourage attorney preparation. While there are a number of sanctions available, sanctions are not a management remedy to the problem. A basic premise of the type of court supervision of case progress advocated in this monograph is that the caseflow management system must be an orderly, predictable process whose reliability encourages and facilitates appropriate preparation and attention to the cases by all involved. Thus, failure to prepare becomes an exceptional occurrence and can be dealt with on that basis. This is quite different from the "rules and sanctions" approach.

This discussion should not be construed as saying that all requests for continuance should be denied, even those in which good cause is substantiated. Rather we suggest that the court supervision system be designed to facilitate attorney preparation for scheduled events, expert witness availability for trials, and anticipation of possible problems.

Emergencies arise, and some cases inevitably will have to be continued. When this necessity arises, the continuance should be to a date certain as close as possible to the original date. No case should ever be continued "generally" or continued to be reset on motion of counsel. Even under circumstances that render the future trial date uncertain (such as the illness of one of the parties), a future date certain should be set for joint review of case status. By following this practice, the court can assure continuity of court supervision of the case and avoid unnecessary delay.

ABA Standards Relating to Court Delay Reduction

§2.55 Firm Enforcement:

The court should firmly and uniformly enforce its caseflow management and delay reduction procedures.

> A. Continuance of a hearing or trial should be granted only by a judge for good cause shown. Extension of time for compliance with deadlines not involving a court hearing should be permitted only on a showing to the court that the extension will not interrupt the scheduled movement of the case.
>
> B. Requests for continuances and extensions, and their disposition, should be recorded in the file of the case. Where continuances and extensions are requested with excessive frequency or insubstantial grounds, the court should adopt one or a combination of the following procedures:
>
> 1. Cross-referencing all requests for continuances and

extensions by the name of the lawyer requesting them.

2. Requiring that requests for continuances and stipulations for extensions be endorsed in writing by the litigants as well as the lawyer.

3. Summoning lawyers who persistently request continuances and extensions to warn them of the possibility of sanctions and to encourage them to make necessary adjustment in management of their practice. Where such measures fail, restrictions may properly be imposed on the number of cases in which the lawyer may participate at any one time.

C. Where a judge is persistently and unreasonably indulgent in granting continuances or extensions, the presiding judge should take appropriate corrective action.

Examples of State Rules Concerning Court Control of Continuances

Ohio -- Rules of Superintendence for Courts of Common Pleas, Rule 7

Rule 7, Conflict of Trial Court Assignment Dates, Continuances and Engaged Counsel

(A) Continuances; Granting of:

The continuance of a scheduled trial or hearing is a matter within the sound discretion of the trial court for good cause shown.

No party shall be granted a continuance of a trial or hearing without a written motion from the party or counsel stating the reason for the continuance, endorsed in writing by the party as well as counsel, provided that the trial judge may waive this requirement upon a showing of good cause. No court shall grant a continuance to any party at any time without first setting a definite date for the trial or hearing.

When a continuance is requested by reason of the unavailability of a witness at the time scheduled for trial or hearing, the court shall consider the feasibility of resorting to the several methods of recording testimony permitted by Civ.R. 30(B) and authorized for use by Civ.R. 32(A)(3).

(B) Conflict of Trial Assignment Dates:

1. When a continuance is requested for the reason that

counsel is scheduled to appear in another case assigned for trial on the same date in the same or another trial court of this state, the case which was first set for trial shall have priority and shall be tried on the date assigned. Criminal cases assigned for trial have priority over civil cases assigned for trial. The court should not consider any motion for a continuance due to a conflict of trial assignment dates unless a copy of the conflicting assignment is attached to the motion and the motion is filed not less than thirty days prior to trial.

2. A continuance shall be granted, upon request, when a party, counsel, or witness under subpoena is scheduled to appear on the same date at a hearing before the Board of Commissioners on Grievances and Discipline of the Supreme Court as a member of the Board, as a party, as counsel for a party, or as a witness under subpoena for the hearing.

(C) Engaged Counsel:

If a designated trial attorney has such a number of cases assigned for trial in courts of this state so as to cause undue delay in the disposition of such cases, the administrative judge may summon such trial attorney who persistently requests continuances and extensions to warn the attorney of the possibility of sanctions and to encourage the attorney to make necessary adjustments in the management of his or her practice. Where such measures fail, restrictions may properly be imposed by the administrative judge on the number of cases in which the lawyers may participate at any one time.

(D) Continuances; Reporting:

Trial continuances shall be reported on a monthly basis to the administrative judge. Where a judge is persistently and unreasonable indulgent in granting continuances or extensions, the administrative judge shall investigate the reasons for the excessive continuances and take appropriate corrective action at the local level. If corrective action at the local level is unsuccessful, the administrative judge shall report that fact to the Court Statistical Reporting Section of the Supreme Court. If it comes to the attention of the Court Statistical Reporting Section that the judge of a single-judge division is persistently and unreasonably indulgent in granting continuances, the Court Statistical Reporting Section shall report to the Chief Justice, who shall take appropriate corrective action.

Case Management Techniques Warranting Consideration

The six techniques discussed in the preceding section have been so widely accepted and their efficacy has been so frequently demonstrated that any case management effort designed to address the problems of cost and delay must carefully consider their adoption. There are a number of other techniques that have not received such unanimous endorsement, but which nevertheless warrant careful consideration. Perhaps the most frequently discussed of these is Differentiated Case Management (DCM).

Differentiated Case Management

The organizing principle of DCM -- that it is useful to segregate and treat differently particular categories of cases -- is not new. It was the concept that led to the formation of small claims courts, domestic relations divisions, and juvenile courts. DCM hypothesizes that all cases do not need the same sort of procedural mechanisms or level of judicial involvement. It is assumed that some categories of cases can be handled with far greater expedition than others.

DCM has been used with apparent success in a number of state and federal courts. The Civil Justice Reform Act, passed by Congress in 1990, specifically requires that all Civil Justice Expense and Delay Reduction Plans adopted under the legislation consider "systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case." (28 U.S.C. § 473 (a)(1)).

DCM operates on the basis of two key assumptions: first, that cases can be divided into categories or classes on the basis of specified case management criteria, and second, that within each category the courts can effectively employ a distinct set of procedures, time limits, and discovery processes. The DCM programs that have appeared to operate most successfully are those that have used a simple tripartite division of the civil caseload into expedited, standard, and complex cases. Such a division alone is not sufficient to assure expedition or reduced cost. Court staff must carefully monitor the progress of each case to ensure that DCM requirements are being met. To this end court staff must be specially trained to administer DCM programs and substantial resources must be devoted to the process on an ongoing basis. Experts have also noted that DCM systems cannot operate successfully without the creation and utilization of a sophisticated, automated information system. Manual systems are simply inadequate to the task.

In 1991 Thomas Henderson and Janice Munsterman of the National Center for State Courts undertook an assessment of the civil DCM programs of Ramsey County, Minn. (St. Paul), and Camden County, N.J. Their summary description of those programs provides perhaps the most useful and succinct description of the attributes and operation of DCM:

Summary of Civil Differentiated Case Management (DCM) Programs
in Camden County, N.J., and St. Paul, Minn.

	Ramsey County	Camden County
Track definition		
Expedited	• Time to disposition: 185 days • Master calendar	• Time to disposition: 180 days • Accelerated schedule of interim events • Master calendar
Standard	• Time to disposition: 305 days • Established schedule of interim events • Master calendar • New events (see below)	• Time to disposition: 365 days • Established schedule of interim events • Master calendar
Complex	• Time to disposition: 2 years • Case by case schedule of interim events • Individual calendar	• Case by case schedule of interim events • Individual calendar
Distribution of cases by track		
Expedited	• 14 percent	• 30 percent
Standard	• 84 percent	• 69 percent
Complex	• 2 percent	• 1 percent
Staff	• DCM coordinator, three assistants	• Civil case manager, two track coordinators, two clerks
Staff duties	• Track assignment • Monitor case movement • Maintain case information • Schedule events • Communicate with counsel	• Track assignment • Monitor case movement • Maintain case movement • Schedule events • Communicate with counsel • Identify and resolve case movement problems
New events	• Attorneys prepare a joint-at-issue memorandum within 90 days of filing note of issue • Standard cases: detailed information statement required 30 days before pretrial conference; pretrial conference 30 days before trial	• No new events; general calendar call eliminated
Information requirements	• Attorneys file joint-at-issue memorandum • Attorneys file joint disposition conference report trial	• Attorneys file case information statement (CIS) with their pleadings • Attorneys file case scheduling plan (CSP) in nonexpedited cases • Attorneys file trial information statements (TIMS) in nonexpedited cases
Track assignment	• Attorneys request; if none is made, the case coordinator assigns the track	• Attorneys request; if none is made, the case coordinator assigns the track
Criteria for track assignment	• Type of case and the judgment of the case coordinator	• Type of case and the judgment of the case coordinator

Henderson and Munsterman, along with a number of others, have found that DCM can improve the flow of cases and "help courts more effectively manage their rising caseloads." Others have claimed that DCM provides additional benefits including the following:

- lawyers are provided with substantial incentives to pay early and careful attention to all the cases in their inventory
- judicial time and attention can be concentrated on the cases most in need of it
- procedures tailored to the particular requirements of different sorts of cases can be brought to bear quickly, most particularly with respect to complex litigation
- trial date certainty can be increased.

Despite these apparent benefits there is a great deal that remains to be determined about DCM. The courts that have adopted it have generally increased their expenditures on management substantially. They have shifted staff and dedicated considerable resources to making DCM work. As Henderson and Munsterman conclude, "A detailed cost/benefit analysis is needed to assess whether the returns outweigh the additional resources required." Moreover, it is not yet clear whether DCM facilitates the management of complex cases or whether it, in some unanticipated way, unfairly favors one group of litigants (plaintiffs, defendants, tort claimants, contract defendants, etc.) over others. These questions, as well as those about the long-term impact of DCM on the court system, require thoughtful analysis by any jurisdiction that chooses to adopt such an approach.

Example of State Statute Concerning Differentiated Case Management

California - Code Section 68603(c)

(c) The Judicial Council shall adopt rules effective July 1, 1991, to be used by all delay reduction courts, establishing a case differentiation classification system based on the relative complexity of cases. The rules shall provide longer periods for the timely disposition of more complex cases. The rules may provide a presumption that all cases, when filed, shall be classified in the least complex category.

New Jersey -- Rules for Differentiated Case Management Camden Civil Project Rules for Differentiated Case Management - Rule 4:9A

4:9A-1, Tracks and Subtracks; Standards for Assignment

Every action filed in the Law Division shall be assigned, as prescribed by this rule, to the complex track, the standard track, or the expedited track in accordance with the following criteria and giving due regard to attorney requests for track assignment made pursuant to R. 4:9A-2:

(a) Complex Track. An action shall ordinarily be assigned to the complex track for individual judicial management if it appears likely that the cause will require a

disproportionate expenditure of court and litigant resources in its preparation for trial and trial by reason of the number of parties involved, the number of claims and defenses raised, the legal difficulty of the issues presented, the factual difficulty of the subject matter, or a combination of these or other factors.

(b) Standard Track. An action not qualifying for assignment to the complex track or expedited track shall be assigned to the standard track. All personal injury cases shall be presumptively assigned to the standard track.

(c) Expedited Track. An action shall ordinarily be assigned to the expedited track if it appears that by its nature it can be promptly tried with minimal pretrial discovery and other pretrial proceedings. All actions in the following categories shall be assigned to the expedited track subject to reassignment as herein provided:

1. commercial matters, excluding construction cases, in which liquidated damages are sought, such as book accounts, collection of bills and notes, and actions involving secured transactions;

2. actions to compel arbitration or to confirm, vacate or modify an arbitration award;

3. actions to be tried exclusively on a record already made by a court or administrative agency, such as actions in lieu of prerogative writs;

4. actions to recover benefits pursuant to N.J.S.A. 39:6A-1 to -23 (New Jersey Automobile Reparation Reform Act);

5. proof cases in which default has been entered and proceedings pursuant to R. 4:44 to approve settlements.

(d) Subtracks. Some cases may be further assigned to one of the following subtracks:

1. Complicated/Standard -- medical malpractice, products liability, construction accident cases with serious injury, and any other case which demonstrates a need for this track;

2. Asbestos/Standard -- all asbestos cases;

3. PIP/Expedited;

4. Declaratory Judgment/Expedited;

5. Prerogative Writ/Expedited;

6. Criminal Based Forfeiture Cases.

After track and subtrack assignment has been made, the special procedures prescribed by these rules for each track governing such matters as discovery, motion practice, case management and pretrial conferences and orders, and the fixing of trial dates shall apply.

Judicial Adjuncts

A "judicial adjunct" is a lawyer whose services are used, on a temporary basis, as a supplement to those of full-time judges to help a court manage its caseload. The adjunct's services may be compensated or not, but he or she, as contrasted with a magistrate or other full-time court employee, serves on an intermittent basis. Judicial adjuncts have been utilized in American courts since very early in the nation's history. In modern times they have been used effectively in a variety of programs to help combat cost and delay. Most frequently they have been utilized in situations where a large backlog of cases has built up and there is a temporary need for expanded judicial manpower.

The National Center for State Courts (NCSC) Advisory Board on the Use of Volunteer Lawyers as Supplemental Judicial Resources has identified six basic categories of adjunct services calibrated both on the basis of the functions performed by the adjunct and the extent of judicial authority exercised. These six, beginning with the most modest exercise of judicial authority are:

- *Alternative dispute-resolution mechanisms*. Examples are court-annexed arbitration or mediation programs.

- *Settlement conferences*. Typically, the conferences are mandated by the court, conducted before a lawyer, a team of lawyers, or two lawyers and a judge. The lawyers usually have expertise in the general subject area of the lawsuit in question. The settlement conferences are used to provide the parties and their counsel with an evaluation of the case by a disinterested third party.

- *Quasi-judges*. Although the terminology differs, these are usually known as referees, fact-finders, or masters. The majority are granted power to compel testimony, hold hearings, and make recommended findings of fact and law to the supervising judge.

- *Commissioners or magistrates*. They are empowered to perform limited judicial duties, such as signing warrants and subpoenas, setting bail, hearing arraignments, and presiding over preliminary hearings, nonjury misdemeanor cases, traffic infractions, and small claims cases.

- *Pro tempore trial judges*. They are given full judicial powers temporarily. They may hear and decide any case, and their rulings are as appealable as those of any other judge of the court on which they are sitting. This classification includes lawyers who serve as

substitute judges while a regular judge is absent and those who routinely supplement existing judicial resources in an effort to reduce backlog.

- *Pro tem judges on the appellate bench.* They serve as full-fledged members of the appellate court for hearing and deciding one or more cases, and draft their share of opinions for the court. (p. 4)

In 1987 the NCSC published a study of six adjunct programs. The study was entitled *Friends of the Court*, and focused on judge *pro tempore* programs in Arizona and Oregon, as well as referee, arbitration and settlement programs in Connecticut, Minnesota and Washington respectively. The study's conclusions concerning the use of adjuncts as a means of responding to case management problems were encouraging. It was determined that, in most instances, the number of dispositions increased, case processing time improved, and the use of adjuncts had a "spillover" effect leading to more efficient handling of the caseload remaining in judicial hands.

The NCSC also found that those affected by adjunct decisions were, generally, well satisfied with the results. Participants reported that they felt the appearance of justice had been maintained. In some settings litigants or their counsel believed that adjunct decisions were more satisfying than those of regular judges. Reasons for this included the particular attentiveness of adjuncts and their special expertise in areas like domestic relations and malpractice. It was found that adjunct programs had other benefits as well, most particularly fostering improved relations between bench and bar.

Despite these benefits there is need for some caution with respect to adjunct programs. As the NCSC said of its own evaluation, "In no site are the statistical indicia of success unambiguous." (xxii) The costs of adjunct programs need to be carefully weighed. Each such program requires extensive monitoring by judges and other court personnel. Such monitoring is essential if quality is to be kept high and the case management reforms discussed previously are to be effectuated in all cases. In addition to these costs and the concomitant overhead expenditures, it is necessary that the courts ensure the adequate training, and where appropriate, compensation, of adjuncts. From the adjunct's perspective there may also be substantial costs. These involve the time each adjunct takes out of his or her practice to serve (whether this time is compensated or not) and the use of whatever support services are needed to produce a decision. Perhaps more serious than any of the foregoing are two questions that deserve careful analysis before any adjunct program is undertaken. The first is whether the use of adjuncts depreciates the value of the full-time professional judiciary, thereby undermining its status and credibility. The second is whether legislators will seize upon adjunct programs as a means of avoiding necessary outlays to increase full-time judicial staff. These questions have no easy answers and should be considered carefully both before any adjunct program is undertaken and while any is in operation. Despite these questions it is our conclusion that adjunct programs warrant the consideration of court systems seeking measures to reduce cost and delay.

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Guidelines for the Use of Lawyers to Supplement Judicial Resources, by the National Center for State Courts Advisory Board on the Use of Volunteer Lawyers as Supplemental Judicial Resources:

Guideline 1: The Use of Lawyers to Supplement Judicial Resources

Court systems should consider using lawyers in a variety of capacities as supplemental resources when full-time judicial resources are inadequate to meet the demands made of them. Such use should not be a permanent alternative to the creation of needed full-time judicial positions. Lawyers temporarily serving the courts in any capacity are referred to in these guidelines as judicial adjuncts.

Guideline 2: Establishing a Judicial Adjunct Program

The development of any judicial adjunct program should include the following:

Program Objectives. Programs should be developed to meet identified needs. Objectives for each program should be related to the identified needs and should be stated prior to the start of each program. These objectives should be explicit and, to the extent feasible, expressed in measurable terms.

Court Involvement and Control. Responsibility for administration of the program should reside with the court. Judges and other personnel of the court to be served should be involved in its planning.

Bar Involvement. The support and cooperation of the local legal community is necessary to the success of any judicial adjunct program. Lawyers should be involved in program planning from the outset.

Other Support. The court should solicit the advice and cooperation of others who will play a role in the program.

Evaluation and Monitoring Procedures. To the extent possible, programs should be planned to permit sound evaluation of their effectiveness. Evaluation procedures should be in place before a program is commenced. Continuing programs should be monitored periodically for sustained effectiveness.

Guideline 3: Scope of Judicial Adjunct Programs

Except for serious criminal trials and child custody proceedings, most types of cases are appropriate for assignment to judicial adjuncts.

Guideline 4: Selection of Judicial Adjuncts

Those eligible to serve as judicial adjuncts should be selected by the appropriate judicial authority. Criteria should be established to ensure that participants in the program are highly qualified. As required by the nature of the duties to be performed, emphasis should be placed on reputation, demeanor, knowledge of the law, and specific experience in trial, appellate, or other relevant practice.

Guideline 5: Orientation and Training of Judicial Adjuncts

Orientation and training programs should be provided for new judicial adjuncts. Their scope, format, and length should vary with the complexity and formality of proceedings over which the judicial adjunct will preside.

Guideline 6: Party Consent to Appearance Before a Judicial Adjunct

Assignment of cases to judicial adjunct programs should not be subject to the consent of the parties or their counsel. Appropriate mechanisms should be established to provide parties an option concerning the particular judicial adjunct before whom they will appear, without permitting a party to delay the resolution of the case.

Guideline 7: Ethical Considerations

Judicial adjuncts should be bound by the Code of Professional Responsibility and by appropriate provisions of the Code of Judicial Conduct. The judicial adjunct and the litigating attorneys should share responsibility for identifying conflicts and possible conflicts that preclude the judicial adjunct from hearing a particular matter.

Guideline 8: Compensation

Court establishing programs of limited duration or programs that require limited time from judicial adjuncts should solicit service on a *pro bono* basis. Other programs should compensate judicial adjuncts in the amount necessary to recruit and retain an adequate number of qualified lawyers.

Guideline 9: Facilities and Other Resources

The type of judicial function to be performed and the availability of public facilities and other resources should be considered in determining the facilities and other services furnished to judicial adjuncts.

Examples of State Statutes and Rules Concerning Judicial Adjunct Programs

Arizona - Revised Statutes §§12-141 through 12-147

§12-141 Upon request of the presiding judge of the superior court in any count

the chief justice of the state supreme court may appoint judges *pro tempore* of the superior court for such county in the manner provided by this article and subject to the approval of the board of supervisors of the county.

§12-142(A) A judge *pro tempore* of the superior court shall be:

1. Not less than thirty years of age.
2. Of good moral character.
3. Admitted to the practice of law in this state for not less than five years next preceding this appointment.
4. A resident of this state for not less than five years next preceding his appointment.

(B) A judge *pro tempore* may be appointed to serve in the county of his residence or in a county of which he is not a resident.

(C) The salary of a judge *pro tempore* shall be paid for the period of the appointment based on an annual salary equal to that of a superior court judge. A judge pro tempore may agree in advance to donate any or all of his services.

(D) Judges *pro tempore* are not subject to any provision of law relating to the retirement of judges.

§12-143(A) The salary of a judge *pro tempore* shall be paid one-half by the state and one-half by the county to which such judge is assigned.

(B) The sessions of the superior court presided over by a judge *pro tempore* shall be held wherever the county board of supervisors may direct, if approved by the chief justice of the supreme court. The expense for the court and other required facilities such as attendants, judicial employees, fuel, lights and supplies suitable and sufficient for the transaction of business shall be provided by the county.

(C) Assignment of judicial employees to the court over which a judge *pro tempore* presides, such as any deputy clerk of the court, certified superior court reporter, bailiff, interpreter and adult probation officer, shall be made by the county.

§12-144(A) The chief justice of the state supreme court may appoint a judge *pro tempore* of the superior court for a county as provided for in §12-141 without regard to the number of judges prescribed by §12-121.

(B) The term of the judge *pro tempore* may be for any period of time not to exceed six months for any one term and a person previously appointed as judge *pro tempore* may be reappointed by the chief

justice. The chief justice may at any time terminate the term of a judge *pro tempore*.

(C) The judicial powers and duties of a judge *pro tempore* shall extend beyond the period of his appointment for the purpose of hearing and determining any proceeding necessary to a final determination of a cause heard by him in whole or in part during the period of his appointment.

(D) The powers and duties of a judge *pro tempore* of the superior court are the same as are provided for superior court judges in title 12, chapter 1, article 2, relating to the superior court.

§12-145 Upon request of the chief judge of a division of the court of appeals, the chief justice of the state supreme court may appoint judges *pro tempore* of the court of appeals for such division in the manner prescribed by this article, subject to the availability of appropriated funds.

§12-146(A) A judge *pro tempore* of the court of appeals shall be:

1. Not less than thirty years of age.
2. Of good moral character.
3. Admitted to the practice of law in this state for not less than five years next preceding his appointment.
4. A resident of this state for not less than five years next preceding his appointment.

(B) A judge *pro tempore* may be appointed to serve in the division of his residence or in a division of which he is not a resident.

(C) The salary of a judge *pro tempore* shall be paid for the period of the appointment based on an annual salary equal to that of a judge of the court of appeals. A judge pro tempore may agree in advance to donate any or all of his services.

(D) Judges *pro tempore* are not subject to any provision of law relating to the retirement of judges.

§12-147(A) The chief justice of the state supreme court may appoint a judge *pro tempore* for a division of the court of appeals as provided for in §12-145 without regard to the number of judges prescribed by §12-120, subsection B.

(B) The term of judge *pro tempore* may be for any period of time not to

exceed six months for any one term, and a person previously appointed as judge *pro tempore* may be reappointed by the chief justice. The chief justice may at any time terminate the term of a judge *pro tempore*.

(C) The judicial powers and duties of a judge *pro tempore* shall extend beyond the period of his appointment for the purpose of hearing and determining any proceeding necessary to a final determination of a cause heard by him in whole or in part during the period of his appointment.

(D) The powers and duties of a judge *pro tempore* of the court of appeals are the same as are provided for court of appeals judges in article 1.1 of this chapter, relating to the court of appeals.

Connecticut - Practice Book, Superior Court - Civil Sec. 431 - Sec. 444

§431. Appointment of Committee or Referee

It is the function of the court or judge to determine and appoint the person or persons who shall constitute a committee, or the referee to whom a case shall be referred. Recommendations by counsel shall be made only at the request of the court or judge. If more than one person shall constitute the committee, the first person named by the court shall be the chairman of the committee.

§432. Effect of Reference

When any case shall be referred to a committee, no trial will be had by the court unless the reference be revoked upon stipulation of the parties or order of court. Any reference shall continue in force until the duties of the committee thereunder have been performed or the order revoked.

In making a reference in any domain proceeding, the court shall fix a date not more than sixty days thereafter, unless for good cause shown a longer period is required, on which the parties shall exchange copies of their appraisal reports. Such reports shall set forth the valuation placed upon the property in issue and the details of the items of, or the basis for, such valuation. The court may, in its discretion and under such conditions as it deems proper, and after notice and hearing, grant a further extension of time, beyond that originally fixed, to any party confronted with unusual and special circumstances requiring additional time for the exchange of appraisal reports.

§433. Pleadings

No case shall be referred until the issues are closed and a trial list claim filed. Thereafter

no pleadings may be filed except by agreement of all parties or order of court. Such pleadings shall be filed with the clerk and by him transmitted to the committee.

§434. Report

The report of a committee shall state, in separate and consecutively numbered paragraphs, the facts found and the conclusions drawn therefrom. It should not contain statements of evidence or excerpts from the evidence. The report should ordinarily state only the ultimate facts found; but if the committee has reason to believe that his conclusions as to such facts from subordinate facts will be questioned, he may also state the subordinate facts found proven; and if he has reason to believe that his rulings will be questioned, he may state them with a brief summary of such facts as are necessary to explain them; and he should state such claims as were made by the parties and which either party requests him to state.

The committee may accompany his report with a memorandum of decision including such matters as he may deem helpful in the decision of the case, and, in any case in which appraisal fees may be awarded by the court, he shall make a finding and recommendation as to such appraisal fees as he deems reasonable.

§435. Request for Finding

Either party may request a committee to make a finding of subordinate facts or of his rulings, and of the claims made, and shall include in or annex to such request a statement of facts, or rulings, or claims, he desires the committee to incorporate in the report.

§436. Alternative Report

If alternative claims are made before the committee, or he deems it advisable, he may report all the facts bearing upon such claims and make his conclusions in the alternative, so that the judgment rendered will depend upon which of the alternative conclusions the facts are found legally to support.

§437. Amending Report

A committee may, at any time before a report is accepted, file an amendment to it or an amended report.

§438. Motion to Correct

If either party desires to have the report or the finding corrected by striking out any of the facts found, or by adding further facts, or by stating the claims of the parties made before the committee, or by setting forth rulings upon evidence or other rulings of the committee, he shall within two weeks after the filing of the report or finding file with the

court a motion to correct setting forth the changes and additions desired by him. He shall accompany the motion with a brief statement of the grounds of each correction asked, with suitable references to the testimony. The file shall then be returned to the committee for consideration of the motion to correct. As soon as practicable the committee shall file with the court the motion to correct together with his decision thereon.

§439. Exceptions to Report or Finding

If a committee fails to correct a report or finding in compliance with a motion to correct, the moving party may, within ten days after the decision on the motion to correct, file exceptions seeking corrections by the court in the report or finding. The court will not consider an exception unless its subject matter has been submitted to the committee in a motion to correct, provided that this requirement shall not apply to exceptions taken to corrections in the report or finding made after it was filed; nor will the court correct a finding of fact unless a material fact has been found without evidence or the committee has failed to find an admitted or undisputed fact, or has found a fact in such doubtful language that its real meaning does not appear. A party excepting on these grounds must file with his exceptions a transcript of the evidence taken before the committee, except such portions as the parties may stipulate to omit.

§440. Objections to Acceptance of Report

A party may file objections to the acceptance of a report on the ground that conclusions of fact stated in it were not properly reached on the basis of the subordinate facts found, or that the committee erred in rulings on evidence or other rulings or that there are other reasons why the report should not be accepted.

If an objection raises an issue of fact the determination of which may require the consideration of matters not appearing in the report or stenographic notes of proceedings before the committee, the adverse party shall, within two weeks after the filing of the objection, plead to it by a motion to strike, answer or other proper pleading.

§441. Time to File Objections

Objections to the acceptance of a report shall be filed within two weeks after the filing of the report or finding, or if a motion to correct the report or finding has been made, within two weeks from the filing of the decision on the motion.

§442. Judgment on the Report

After the expiration of two weeks from the filing of the report, if no motion to correct and no objections to the report have been filed and no extension of time for filing either has been granted, either party may, without written motion, claim the case for the short calendar for judgment on the report of the committee, provided, if the parties file a stipulation that no

motion to correct or objections will be filed, the case may be so claimed at any time thereafter. If exceptions or objections have been seasonably filed, the case should be claimed for the short calendar for hearing thereon; and the court may, upon its decision as to them, forthwith direct judgment to be rendered.

§443. Function of the Court

The court shall render such judgment as the law requires upon the facts in the report as it may be corrected. If the court finds that the committee has materially erred in his rulings or that by reason of material corrections in his findings the basis of the report is subverted or that there are other sufficient reasons why the report should not be accepted, the court shall reject the report and refer the matter to the same or another committee for a new trial or revoke the reference and leave the case to be disposed of in court.

The court may correct a report at any time before judgment upon the written stipulation of the parties or it may upon its own motion add a fact which is admitted or undisputed or strike out a fact improperly found.

§444. Extensions of Time

The committee for good cause shown may extend the time for filings motions to correct with him, and any judge of the court in which the report is filed may for good cause shown allow extensions of time for filing such motions to correct and for taking any of the other steps herein provided.

IMPLEMENTATION

The working groups concluded that the most effective strategy to pursue in improving the civil justice system is to gather leading members of the state bench, bar, court administration and public together into a commission or task force, and charge them with the responsibility of designing a faster and less expensive means of conducting the civil business of the courts. From their efforts is likely to come a package of improvements reflecting the concerns of the local legal culture as well as the sorts of improvements discussed in this report. A program created in this way is far more likely to garner the support of all those involved in the justice system than is a package imposed "from above" by legislative rules drafters or judicial committees removed from the concerns and realities of practice.

This conclusion is supported by research that has repeatedly demonstrated that consultative strategies between the bench and bar yield the most effective results in improving the justice system. Solomon and Somerlot, for example, in their 1987 study on behalf of the ABA, found that a critical factor in any managerial improvement program is "court consultation with the bar," regardless of where the impetus for change originated. Similarly, Barry Mahoney in 1988, in a study on behalf of the National Center for State Courts of the impact of case management approaches on case processing and court delay, found that,

> Ultimately, it is essential to have local level leadership and commitment in order to achieve case processing time goals and institutionalize effective caseflow management practices in trial courts.
>
> - Even where a successful program has not been the product of a local initiative... it has been the judges, court staff, and bar leaders at the local level who have made it work....
>
> - Where local level leaders have not "bought into" state level delay reduction initiatives, significant improvements have not taken place. For state level initiatives to be successful, close attention must be paid to developing local level leadership and commitment. (197)

This theme of cooperation has been taken up in a number of states. In 1986, for example, the California legislature adopted the *Trial Court Delay Reduction Act*. Section 68612 of the California Code sets out the key elements of that legislation:

> The judges selected in each county as judges of an exemplary delay reduction program shall, in consultation with the bar of the county to the maximum extent feasible, develop and publish the procedures, standards, and policies which will be used in the program, including time standards for the conclusion of all critical steps in the litigation process, including discovery, and shall meet on a regular basis with the bar of the county in order to explain and publicize the programs and the procedures,

standards, and policies which shall govern cases assigned to the program. Such procedures, standards, and policies may be inconsistent with the California Rules of Court. In its discretion, the Judicial Council may assist in the development of, or may develop and adopt, any or all of such procedures, standards, or policies on a statewide basis.

Kansas followed a similar course in its *General Principles and Guidelines for the District Courts:*

(7) The pace of litigation is often the result of "local legal culture" rather than court procedures, case load, or backlog. Local legal culture consists of the established expectations, practices, and informal rules of behavior of judges, attorneys and the public.

• • • •

(10) The judges and the lawyers of Kansas should work together with interested citizens to monitor the workings of the judicial system in the state and each judicial district. They should explore methods of improvement, keep the public informed of the operation of the courts, and seek public suggestions and support for the improvement of the judicial system.

In 1990, the U.S. Congress set out to reduce cost and delay in the federal district courts, adopting the proven strategy of utilizing task forces of local judges and lawyers as the drafters of reform. Congress also mandated that litigants be included in those groups, in the belief that the parties share responsibility for the courts' problems and can play a critical part in resolving them.

The first 34 advisory groups completed their initial reports in 1992. In examining their work, the Judicial Conference of the United States noted the wide array of sources they drew upon, including judge interviews, judge surveys, attorney surveys, audits of court business, clerk interviews, open public forums, attorney interviews, literature reviews, consultant reports and litigant interviews. Virtually without exception, the reports submitted by the advisory groups became the plans adopted by the federal district courts.

On the basis of the foregoing research and experience, the working groups together recommend that each state interested in improving its civil justice system form a State Justice Commission composed of judges, bar association representatives, other interested lawyers, court administrators, and a balanced group of litigants. The Commission should be charged with the responsibility of designing and, subject to appropriate approval, implementing an expense and delay reduction plan within 12 to 18 months of its creation.

The Commission should be required to decide whether changes can be made most effectively on a statewide basis, or whether local task forces should be appointed. If local

task forces are appointed, they should be constituted in the same manner as the Justice Commission itself.

In either case, the body assigned to prepare the actual plan must determine:

- the condition of the civil docket and, where relevant, the condition of the criminal docket
- trends in case filings and in the demands being placed on the courts' resources
- the principles causes of cost and delay in civil litigation, and
- the extent to which costs and delays can be reduced by specific improved management techniques.

All this inquiry should be recorded in a written report and completed pursuant to a specified timetable of no more than 18 months duration, along with a detailed proposal concerning steps to reduce expense and delay.

When the Commission or task forces' reports have been submitted, they should be reviewed by the state's highest court and, state law permitting, be implemented insofar as seems appropriate to achieve their objectives.

Throughout this process, the state bar association must commit itself to providing the most substantial input and cooperation of which it is capable. The American Bar Association must commit itself to assisting the state bar associations in any way it can. To the extent possible, the ABA should identify and make available to each State Justice Commission technical resources likely to be of assistance in their efforts.

Proposal (To be Implemented by Statute or Rule)

§1 Findings

The [Court/Legislature] makes the following findings:

(1) The problems of expense and delay in this state's courts are of critical concern and must be addressed immediately.

(2) The courts, litigants, lawyers, legislature and executive branch share responsibility for expense and delay in the courts.

(3) The solution to the problems of expense and delay must include significant and ongoing contributions by the courts, litigants, lawyers, legislature and executive branch.

(4) In identifying, developing and implementing solutions to the problems of expense and delay in litigation, it is necessary to achieve a method of consultation so that judges, litigants, the State Bar Association and lawyers cooperate in the development of workable and effective expense and delay reduction plans.

(5) Because the increasing volume and complexity of civil and criminal cases imposes increasingly heavy workload burdens on judicial officers, clerks of court, and other court personnel, it is necessary to create an effective administrative structure to ensure ongoing consultation and communication regarding effective litigation management and expense and delay reduction principles and techniques.

§2 Requirement for a State Justice Commission Charged with the Formulation of an Expense and Delay Reduction Plan

There shall be created in this State a State Justice Commission charged with the formulation of an expense and delay reduction plan. The purposes of the plan are to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy and inexpensive resolution of civil disputes. The plan must be complete within [12/18] months from the creation of the State Justice Commission.

§3 State Justice Commission Determination of the Propriety of the Formation of Local Justice Commission Task Forces to Prepare Local Expense and Delay Reduction Plans

(A) Upon the decision of a majority of the members of the State Justice Commission, local Justice Commission Task Forces may be created to prepare local expense and delay reduction plans. The geographical jurisdiction of each such local Task Force shall be defined by the State Justice Commission. The membership of each local Task Force shall be determined by the State Justice Commission in conformity with the requirement established for the formation of the Justice Commission itself.

(B) If the State Justice Commission chooses to constitute local Task Forces, each such Task Force shall complete its work and file a written expense and delay reduction plan with the State Justice Commission within 12 months of the Task Force's creation. In all particulars the local Task Force expense and delay reduction plans shall conform to the requirement for such plans if drafted by the State Justice Commission itself.

(C) Upon the submission of a local Task Force's expense and delay reduction plan, the State Justice Commission shall review such plan and determine its acceptability. Should any such plan be rejected, it shall be the duty of the State Justice Commission, within three months of such rejection, to prepare and present its own expense and delay reduction plan for the locality in question.

§4 Development and Implementation of an Expense and Delay Reduction Plan

(A) The expense and delay reduction plan(s) prepared by the State Justice

Commission or its local Task Forces shall be implemented in conformity with the requirements of state law either through the action of the State Supreme Court or, where necessary, through legislative enactment by the State Legislature.

(B) The State Justice Commission shall submit to the appropriate implementing authority a report, which shall be made available to the public and which shall include:

(1) an assessment of the matters referred to in subsection (C)(1);
(2) the basis for the recommendation contained in its expense and delay reduction plan;
(3) recommended measures, rules and programs; and
(4) an explanation of the manner in which its recommendations comply with Section 5 of this title.

(C) (1) In developing its recommendation, the Commission or its Task Forces shall promptly complete a thorough assessment of the state and/or local courts' civil and criminal dockets. In performing the assessment, the Commission and/or its Task Forces shall:

(a) determine the condition of the civil and criminal dockets;
(b) identify trends in case filings and in the demands being placed on the court's resources;
(c) identify the principal causes of cost and delay in civil litigation, giving consideration to such potential causes as court procedures and the ways in which litigants and their attorneys approach and conduct litigation; and
(d) examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts.

(2) In developing its recommendations, the Commission and/or its Task Forces shall take into account the particular needs and circumstances of each court, litigants in such court, and the litigants' attorneys.

(3) The Commission and/or its Task Forces shall ensure that its recommended actions include significant contributions to be made by the court, the litigants, and the litigants' attorneys toward reducing cost and delay and thereby facilitating access to the courts.

§5 Content of the Expense and Delay Reduction Plan

(A) In formulating the provisions of its expense and delay reduction plan, the State Justice Commission and/or its Task Forces shall consider and may include the

following principles and guidelines of litigation management and expense and delay reduction:

(1) With respect to caseflow management reform, such plans shall consider the necessity for:

(a) judicial commitment and leadership;
(b) close court supervision of case progress;
(c) the setting of appropriate time standards and goals for case disposition and intermediate case events;
(d) the establishment of an effective monitoring and information system;
(e) the utility of scheduling for credible trial dates; and
(f) tight court control of continuances.

(2) [ADR]
(3) [Discovery and Trial]

§6 Expense and Delay Reduction Plan Proposals May Be Inconsistent with the State Rules of Procedure

The State Justice Commission and/or its local Task Forces' expense and delay reduction plans may be inconsistent with the State Rules of Procedure wherever appropriate so long as implementation of said proposals occurs after review by the judicial or legislative body responsible for the creation and amendment of such Rules of Procedure.

§7 Periodic Assessment

After developing an expense and delay reduction plan, the State Justice Commission shall assess annually the condition of the courts' civil and criminal dockets with a view to determining appropriate additional actions that may be taken to reduce expense and delay and to improve the litigation management practices in the courts.

§8 Membership of the State Justice Commission

(A) Within 90 days of the date of the enactment of this chapter, the State Justice Commission shall be appointed by the Chief Justice of the State Supreme Court after consultation with the other justices of such court.

(B) The State Justice Commission shall be balanced and include judges, litigants, State Bar Association officials, lawyers, and court administration officials, as determined by the Chief Justice after consultation with the other Justices of the State Supreme Court.

(C) In no event shall any member of the State Justice Commission serve longer

than four years.

(D) There shall be no fewer than 15 nor more than 25 members of the State Justice Commission, at least three of whom shall be drawn from each category of participants identified in subsection (B).

(E) The State Justice Commission may designate a reporter or group of reporters who may be compensated in accordance with guidelines established by the State Supreme Court.

(F) The members of the State Justice Commission and any persons designated as reporters for such Commission shall be considered as independent contractors of the State when in the performance of official duties of the Commission and may not, solely by reason of service on or for the Commission, be prohibited from practicing law before the Supreme Court or any inferior court.

RULE 8. GENERAL RULES OF PLEADING

(a) **Claims for Relief.** A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain:

1. A short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it.

2. A short and plain statement of the claim showing that the pleader is entitled to relief.

3. A demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

Amended Sept. 15, 1987, effective Nov. 15, 1987.

(b) **Defenses; Form of Denials.** A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs, or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits, but when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11(a).

Amended Sept. 15, 1987, effective Nov. 15, 1987.

(c) **Affirmative Defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and

any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Former subdivision (c) abrogated Sept. 26, 1991, effective Dec. 1, 1991. Former subdivision (d) relettered as new subdivision (c) Sept. 26, 1991, effective Dec. 1, 1991.

(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

Former subdivision (e) relettered as new subdivision (d) Sept. 26, 1991, effective Dec. 1, 1991.

(e) Pleading to Be Concise and Direct; Consistency.

1. Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

2. A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or equitable grounds or both. All statements shall be made subject to the obligations set forth in Rule 11(a).

Former subdivision (f) amended Sept. 15, 1987, effective Nov. 15, 1987; relettered as new subdivision (e) Sept. 26, 1991, effective Dec. 1, 1991.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

Former subdivision (g) relettered as new subdivision (f) Sept. 26, 1991, effective Dec. 1, 1991.

(g) Claims for Damages. In all cases in which a party is pursuing a claim other than for a sum certain or for a sum which can by computation be made certain, no dollar amount or figure for damages sought shall be stated in any pleading allowed under

Rule 7(a) of these Rules. The pleading setting forth the claim may include a statement reciting that the minimum jurisdictional amount established for filing the action has been satisfied.

Former subdivision (h) added May 9, 1990, effective Sept. 1, 1990; relettered as new subdivision (g) Sept. 26, 1991, effective Dec. 1, 1991.

Library References:

C.J.S. Account, Action on §§ 10 et seq.; Pleading §§ 6–10 et seq., 53–87 et seq., 100–119 et seq.

West's Key No. Digests, Account, Action on ⇐6; Pleading ⇐16–21, 34(1–7), 51–53, 78, 87, 94, 129.

AUTHOR'S COMMENTS

Analysis

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1. *Scope and Purpose of Rule.* Rule 8 generally governs the form, nature, scope and construction of pleadings that assert claims or

RULE 16. PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT

(a) **Pretrial Conferences; Objectives.** In any action, the court may in its discretion direct the parties, the attorneys for the parties and, if appropriate, representatives of the parties having authority to settle, to participate, either in person or, with leave of court, by telephone, in a conference or conferences before trial for such purposes as:

1. expediting the disposition of the action;

2. establishing early and continuing control so that the case will not be protracted because of lack of management;

3. discouraging wasteful pretrial activities;

4. improving the quality of the trial through more thorough preparation; and

5. facilitating the settlement of the case. At any settlement conference, with the consent of all those participating in the conference, the court may engage in ex parte communications.

Amended Aug. 7, 1984, effective Nov. 1, 1984; Sept. 15, 1987, effective Nov. 15, 1987.

(b) **Scheduling and Planning.** Upon written request of any party the court shall, or upon its own motion the court may, schedule a Comprehensive Pretrial Conference.

Amended Aug. 7, 1984, effective Nov. 1, 1984; Dec. 20, 1991, effective July 1, 1992.

(c) **Subjects to Be Discussed at Comprehensive Pretrial Conferences.** At any Comprehensive Pretrial Conference under this rule the Court may:

(1) Determine the additional discovery to be undertaken and a schedule therefor. The schedule shall include depositions to be taken and the time for taking same; production of documents; non-uniform interrogatories; admissions; inspections or physical or mental examinations; and any other discovery pursuant to these rules.

(2) Determine a schedule for the disclosure of expert witnesses. Such disclosure shall be within 90 days after the conference except upon good cause shown.

(3) Determine the number of expert witnesses or designate expert witnesses as set forth in Rule 26(b)(4).

(4) Determine a date for the disclosure of non-expert witnesses and the order of their disclosure; provided, however, that the date for disclosure of all witnesses, expert and non-expert, shall be at least 45 days before the completion of discovery. Any witnesses not so disclosed shall not be allowed to testify at trial unless there is a showing of good cause.

(5) Resolve any discovery disputes which have been presented to the court by way of motion not less than 10 days before the conference. The moving party shall set forth the requested discovery to which objection is made and the basis for the objection. The responding party may file a response not less than 3 days before the conference. No replies shall be filed unless ordered by the court. The court shall assess an appropriate sanction, including those permitted under Rule 16(f), against any party or attorney who has engaged in unreasonable, groundless, abusive or obstructionist discovery.

(6) Eliminate non-meritorious claims or defenses.

(7) Permit the amendment of the pleadings.

(8) Assist in identifying those issues of fact which are still at issue.

(9) Obtain stipulations as to the foundation or admissibility of evidence.

(10) Determine the desirability of special procedures for management of the case.

(11) Consider alternative dispute resolution.

(12) Determine whether any time limits or procedures set forth in the discovery rules or set forth in the Uniform Rules of Practice or Local Rules of Practice should be modified or suspended.

(13) Determine whether Rule 26.1 has been appropriately complied with by the parties.

(14) Determine a date for a settlement conference if such a conference is requested by a party or deemed advisable by the court.

(15) Determine a date for compliance with Rule VI(a), Uniform Rules of Practice.

(16) Determine a trial date.

(17) Make such other orders as the court deems appropriate.

Amended Aug. 7, 1984, effective Nov. 1, 1984; Dec. 20, 1991, effective July 1, 1992.

(d) Final Pretrial Conference. Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

Amended Aug. 7, 1984, effective Nov. 1, 1984.

(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

Amended Aug. 7, 1984, effective Nov. 1, 1984.

(f) Sanctions. If a party or attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, shall, except upon a showing of good cause, make such orders with regard to such conduct as are just, including, among others, any of the orders provided in Rule 37(b)(2)(B), (C), or (D). In lieu of or in addition to any other sanction, the judge shall require the party, or the attorney representing the party, or both, to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorneys' fees, or payment of an assessment to the clerk of the court, or both, unless the judge finds that the noncompliance was substantially justified, or that other circumstances make an award of expenses unjust.

Amended Aug. 7, 1984, effective Nov. 1, 1984; Sept. 15, 1987, effective Nov. 15, 1987; Dec. 20, 1991, effective July 1, 1992.

(g) Alternative Dispute Resolution. Upon motion of any party, or upon its own initiative after consultation with the parties, the court may direct the parties in any action not subject to compulsory arbitration to submit the dispute which is the

subject matter of the action to an alternative dispute resolution program created or authorized by appropriate local court rules.

Subdivision (g) promulgated July 16, 1991, effective October 1, 1991.

STATE BAR COMMITTEE NOTES

1984 Amendments

[Rule 16(a)] The 1984 amendment thoroughly reorganizes Rule 16. The subject matter of Rule 16(a) is now transferred to 16(c). New Rule 16(a) emphasizes judicial management of the pretrial as well as the trial phase.

[Rule 16(b)] This section is new. It is an adaptation of Federal Rule 16(b), intended to retain as much conformity with the federal rule as is consistent with the needs of the state court system. The principal difference is that under the federal rule a scheduling order is mandatory in all cases not exempted by district court rule, while under the Arizona rule a conference will be held on motion of the parties or order of the court to determine whether a scheduling order is appropriate. Because the order is an option to be exercised in the discretion of the court, it can be employed where useful without incurring the administrative burdens of a mandatory rule.

Former 16(b) is deleted. Originally enacted as Ariz.Rev.Stat.Ann. § 21–454 (1939), it provided that no civil action shall be heard on its merits until all motions are disposed of, and that the setting of an action for trial shall be deemed to overrule all motions pending. There were no cases on this provision, and it had no apparent utility.

[Rule 16(d)] If there is more than one pretrial conference, Rule 16(d) makes clear that the time between the final pretrial conference and trial should be as short as possible; the Advisory Committee to the Judicial Conference of the United States cites authority to the effect that ten days to two weeks is the optimal period. See, Discussion, 1981 Proposed Amendments to the Federal Rules of Civil Procedure, Report of the Judicial Conference of the United States (1982). However, the timing is left to the court's discretion.

Rule 16(f) incorporates the sanctions which the court may now impose for failure to provide or permit discovery under Rule 37(b)(2). See, e.g., B & R Materials, Inc. v. U.S. Fidelity and Guaranty Co., 132 Ariz. 122, 644 P.2d 276 (App.1982). In the four situations enumerated, sanctions may be imposed, either upon the court's initiative or upon a party's motion. In addition, the court shall require the payment of expenses, including attorneys' fees, by the uncooperative party, the attorney, or both, unless circumstances warrant otherwise. Compare, Golleher v. Horton, 119 Ariz. 604, 583 P.2d 260 (App.1978) and Zakroff v. May, 8 Ariz.App. 101, 443 P.2d 916 (1968). These sanctions are reviewable under the abuse-of-discretion standard. See, Sears Roebuck and Co. v. Walker, 127 Ariz. 432, 621 P.2d 938 (App.1980).

1991 Amendments

[Rule 16(b)] The trial court may require the parties to file pretrial memoranda and may, by minute entry, prescribe the form and content thereof.

proposing rules to reduce discovery abuse and to make the judicial system in Arizona more efficient, expeditious, and accessible to the people.

For more complete background information on the rule changes proposed by the Committee, see Court Comment to Rule 26.1.

Library References:

C.J.S. Trial § 17(2).
West's Key No. Digests, Pretrial Procedure ⇐741-753.

AUTHOR'S COMMENTS

Analysis

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1. *Scope and Purpose of Rule.* Rule 16 authorizes the application by the Court of various pretrial case management procedures with a view toward simplifying and shortening the trial, and perhaps avoiding it entirely. Rule 16 was thoroughly revised in 1984 to conform generally to recent amendments to the corresponding provisions of the Federal Rules of Civil Procedure. As revised, it provides the trial court with broad powers of case management at the pretrial stage. A pretrial conference, and resulting order, may serve to shorten trial time, and to limit the issues to be tried. *Walters v. First Federal Sav. & Loan Ass'n*, 131 Ariz. 321, 641 P.2d 235 (1982); *Calderon v. Calderon*, 9 Ariz.App. 538, 454 P.2d 586 (1969). While some of the purposes for a Rule 16 pretrial conference are served by the Pretrial Statement required by Rule VI(a) of the Uniform Rules of Practice, Rule 16 deals with a variety of other matters and functions that may be accomplished in a pretrial conference. The relationship between this Rule and Rule VI of the Uniform Rules of Practice of the Superior Court is discussed in Section 4 of the *Author's Comments* under the latter rule.

In December 1991, the Arizona Supreme Court adopted, to become effective July 1, 1992, a comprehensive package of discovery and court reform proposals proposed by a Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay. These proposals, as adopted, contemplate mandatory disclosure of pertinent facts and documents, and the imposition of presumptive limits on the amount of discovery to be conducted in the ordinary civil case. Rules 16(b) and (c) were also amended to authorize the conduct of a Comprehensive Pretrial Conference to facilitate case management, to monitor compliance with the

new discovery rules and limitations, and to impose and exercise judicial control in those cases not suited for disposition according to the new limited discovery regime.

2. *Comparison With Federal Rule.* As a consequence of the 1992 court and discovery reform amendments, there are now significant differences between Rules 16, Ariz.R.Civ.P. and Rule 16, Fed.R.Civ.P. Rules 16(a), (d), (e) and (f), Ariz.R.Civ.P. are substantially identical to Rules 16(a), (d), (e) and (f), Fed.R.Civ.P. except that Rule 16(a), Ariz. R.Civ.P. authorizes the Court to engage in *ex parte* communications, with the consent of all parties participating, at settlement conferences and authorizes telephone pretrial conferences. In addition, the range of sanctions available to the Court under Rule 16(f), Ariz.R.Civ.P. is slightly greater. Rules 16(b) and (c), Ariz.R.Civ.P., which authorize the Comprehensive Pretrial Conference differ materially from the corresponding Federal provisions. There is no counterpart in the Federal Rules of Civil Procedure to Rule 16(g), Ariz.R.Civ.P.

3. *Comprehensive Pretrial Conference.* The discovery and court reform amendments which became effective July 1, 1992 authorized the conduct of what is termed a Comprehensive Pretrial Conference to facilitate case management and judicial control. At a Comprehensive Pretrial Conference requested or ordered pursuant to Rule 16(b), the Court may consider and resolve any or all of the items specified in amended Rule 16(c). A Comprehensive Pretrial Conference may be held upon written request of any party or upon the Court's own motion. Rule 16(a) authorizes the conduct of pretrial conferences by telephone, with leave of court. Presumably, that authority extends to the conduct of Comprehensive Pretrial Conferences as well.

4. *Alternative Dispute Resolution.* Rule I(a), Uniform Rules of Practice of the Superior Court, was amended in 1991 to give the Presiding Judge in each county the authority to identify and develop alternative dispute resolution programs to be governed by Local Rules approved by a majority of judges in the county. Under Rule 16(g), Ariz.R.Civ.P., adopted in 1991, the Court, on motion of any party or on its own initiative after consultation with the parties, may direct the parties in a civil action to submit their dispute to such an authorized alternative dispute resolution program. It is probably the case that the Court cannot make the result of any such program binding on the parties without their consent.

5. *Settlement Conferences.* Rule VI(e), Uniform Rules of Practice of the Superior Court, as adopted effective July 1, 1992, requires the conduct of a Settlement Conference, in all cases not subject to compulsory arbitration, on request of any party or on the Court's own motion. The setting of a date for such a Settlement Conference is one of the matters that may be considered at a Comprehensive Pretrial Conference held pursuant to Rule 16(c), Ariz.R.Civ.P. Any request for a

Settlement Conference must be made no later than sixty (60) days prior to trial. See Section 5 of the *Author's Comments* to Rule VI, Uniform Rules of Practice of the Superior Court. Rule 16(a) permits the Court at a settlement conference to engage in *ex parte* communications, but only with the consent of all those participating.

6. *Pretrial Statements.* The form and content of the joint pretrial statement is specified in Rule VI(a) of the Uniform Rules of Practice of the Superior Court, and it is at least analogous to the final pretrial order contemplated by Rules 16(d) and (e). The pretrial statement controls the subsequent course of the action through trial unless modified by the Court to prevent manifest injustice. *Gertz v. Selin*, 11 Ariz.App. 495, 466 P.2d 46 (1970); *Loya v. Fong*, 1 Ariz.App. 482, 404 P.2d 826 (1965). Any stipulations made in a pretrial conference or a pretrial statement are binding unless the parties are relieved from them by the Court. *Harsh Bldg. Co. v. Bialac*, 22 Ariz.App. 591, 529 P.2d 1185 (1975).

7. *Sanctions.* As part of the court and discovery reform amendments, Rule 16(f) was also amended to enhance the Court's ability to insure meaningful participation in, and compliance with, pretrial case management procedures. Amended Rule 16(f) authorizes sanctions for failure to appear at a pretrial conference, failure to be substantially prepared to participate in a pretrial conference, failure to participate in good faith at a pretrial conference, and/or failure to comply with a pretrial or scheduling order. Sanctions are virtually mandatory unless there is a showing of good cause and may include an order to pay to the Clerk of the Court an assessment determined by the trial judge. It has previously been held, however, that dismissal of an action may be too severe a sanction to impose for counsel's failure to attend a pretrial conference. *Stoyer v. Doctor's Hospital*, 15 Ariz.App. 255, 488 P.2d 191 (1971).

V. DEPOSITIONS AND DISCOVERY

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide preceding the Summary of Contents.

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

(a) **Discovery Methods.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

Added July 17, 1970, effective Nov. 1, 1970; amended Aug. 7, 1984, effective Nov. 1, 1984.

(b) **Discovery Scope and Limits.** Unless otherwise limit[illegible] by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in subdivision (a) may be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or obtainable from some other source that is either more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, given the needs of the case, the amount in controversy, limitations on the parties' resources, and the impor-

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tance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

(2) *Insurance Agreements.* A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral

statement by the person making it and contemporaneously recorded.

(4) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(D) Each side shall presumptively be entitled to only one independent expert on an issue. Where there are multiple parties on a side and the parties cannot agree as

to which independent expert will be called on an issue, the court shall designate the independent expert to be called or, upon the showing of good cause, may allow more than one independent expert to be called.

(5) *Non-party at Fault.* Any party who alleges, pursuant to A.R.S. § 12-2506(B) (as amended), that a person or entity not a party to the action was wholly or partially at fault in causing any personal injury, property damage or wrongful death for which damages are sought in the action shall provide the identity, location, and the facts supporting the claimed liability of such nonparty at the time of compliance with the requirements of Rule V(a) of the Uniform Rules of Practice of the Superior Court, if applicable, or within one hundred fifty (150) days after the filing of that party's answer, whichever is earlier. The trier of fact shall not be permitted to allocate or apportion any percentage of fault to any nonparty whose identity is not disclosed in accordance with the requirements of this subpart 5 except upon written agreement of the parties or upon motion establishing newly discovered evidence of such nonparty's liability which could not have been discovered within the time periods for compliance with the requirements of this subpart 5.

Amended July 17, 1970, effective Nov. 1, 1970; Aug. 7, 1984, effective Nov. 1, 1984; Sept. 15, 1987, effective Nov. 15, 1987; May 3, 1989, effective July 1, 1989; Dec. 20, 1991, effective July 1, 1992.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only

in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

Amended July 17, 1970, effective Nov. 1, 1970.

(d) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

Added July 17, 1970, effective Nov. 1, 1970.

(e) Supplementation of Responses. Except as provided in Rule 26.1 a party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify and the substance of the person's testimony, (C) the identity of any other person expected to be called as a witness at trial and (D) the identity, location and the facts supporting the liability of any nonparty who is claimed to be wholly or partially at fault in causing any personal injury, property damage or wrongful death, pursuant to A.R.S. § 12-2506(B) (as amended). A party shall supplement responses with respect to any question directly addressed to (B), (C) or (D) prior to thirty days before the date of trial, except that in those courts which, by local rule, have adopted the provisions of Rule V(b)(3)(i) or (ii), Uniform Rules of Practice, the parties shall supplement their responses with respect to any question directly addressed to (B), (C) or (D) at the time of filing their lists of witnesses and exhibits required by Rule V(a), Uniform Rules of Practice. Any witness not

identified in accordance with this Rule shall not be permitted to testify except for good cause shown or upon written agreement of the parties. The trier of fact shall not be permitted to allocate or apportion any percentage of fault to any nonparty whose identity is not disclosed in accordance with subpart (D) of this rule except for good cause shown or upon written agreement of the parties.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

Added July 17, 1970, effective Nov. 1, 1970; amended July 27, 1978, effective Sept. 1, 1978; July 6, 1983, effective Sept. 7, 1983; Sept. 15, 1987, effective Nov. 15, 1987; May 1, 1989, effective July 1, 1989; Dec. 20, 1991, effective July 1, 1992.

(f) Discovery Requests, Responses, Objections and Sanctions. The court shall assess an appropriate sanction including any order under Rule 16(f) against any party or attorney who has engaged in unreasonable, groundless, abusive, or obstructionist conduct.

Added Aug. 7, 1984, effective Nov. 1, 1984; amended Dec. 20, 1991, effective July 1, 1992.

STATE BAR COMMITTEE NOTES

1970 Amendments

Rule 26: The 1970 revision of rules is the first substantial alteration of discovery practice since the rules were first adopted in 1939. The 1970 revision includes some reorganization and redistribution of provisions within the discovery rules, which are, principally, Rules 26 through 37 of the Rules of Civil Procedure. The federal rules as revised are the subject of extensive annotations of greater length than is the normal Arizona practice. Major points of those notes plus matters of special application to Arizona are included in these notes.

RULE 26.1 PROMPT DISCLOSURE OF INFORMATION

(a) **Duty to Disclose, Scope.** Within the times set forth in subdivision (b), each party shall disclose in writing to every other party:

(1) The factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense.

(2) The legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities.

(3) The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call at trial with a designation of the subject matter about which each witness might be called to testify.

(4) The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.

(5) The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.

(6) The name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert.

(7) A computation and the measure of damage alleged by the disclosing party and the documents or testimony on which such computation and measure are based and the names, addresses, and telephone numbers of all damage witnesses.

(8) The existence, location, custodian, and general description of any tangible evidence or relevant documents that the disclosing party plans to use at trial and relevant insurance agreements.

(9) A list of the documents or, in the case of voluminous documentary information, a list of the categories of documents, known by a party to exist whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents will be made, or have been made, available for inspection and copying. Unless good cause is stated for not doing so, a copy of each document listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the document shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.

Promulgated Dec. 20, 1991, effective July 1, 1992.

(b) Time for Disclosure; A Continuing Duty.

(1) The parties shall make the initial disclosure required by subdivision (a) as fully as then possible within forty (40) days after the filing of a responsive pleading to the Complaint, Counterclaim, Cross-claim or Third Party Complaint unless the parties otherwise agree, or for good cause, the Court shortens or extends the time. For good cause, the court may shorten or extend this time. If feasible, counsel shall meet to exchange disclosures; otherwise, the disclosures shall be served as provided by Rule 5. Upon each service of a disclosure, a notice of disclosure shall be promptly filed with the court.

(2) The duty prescribed in subdivision (a) shall be a continuing duty, and each party shall make additional or amended disclosures whenever new or different information is discovered or revealed. Such additional or amended disclosures shall be made seasonably but in no event more than thirty (30) days after the information is revealed to or discovered by the disclosing party, but in no event later than sixty (60) days before trial except by leave of court.

(3) All disclosures shall include information and data in the possession, custody and control of the parties as well as that which can be ascertained, learned or acquired by reasonable inquiry and investigation.

Promulgated Dec. 20, 1991, effective July 1, 1992.

(c) **Exclusions of Undisclosed Evidence.** In addition to any other sanction the court may impose, the court shall exclude at trial any evidence offered by a party that was not timely disclosed as required by this rule, except by leave of court for good cause shown, and no party shall be permitted to examine that party's witness to prove facts other than those identified in the written disclosure to the party's opponents except by leave of court for good cause shown.

Promulgated Dec. 20, 1991, effective July 1, 1992.

(d) **Signed Disclosure.** Each disclosure shall be made in writing under oath, signed by the party making the disclosure.

Promulgated Dec. 20, 1991, effective July 1, 1992.

(e) **Misleading Disclosure.** A party or attorney who makes a disclosure pursuant to this rule that the party or attorney knew or should have known was inaccurate and thereby causes an opposing party to engage in substantial unnecessary investigation or discovery shall be ordered by the court to reimburse the opposing party for the cost including attorneys' fees of such unnecessary investigation or discovery and may be subject to other appropriate sanctions as the court may direct.

Promulgated Dec. 20, 1991, effective July 1, 1992.

(f) **Claims of Privilege or Protection of Trial Preparation Materials.** When information is withheld from disclosure or discovery on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced or disclosed that is sufficient to enable other parties to contest the claim.

Promulgated Dec. 20, 1991, effective July 1, 1992.

(g) **Failure to Comply.** If a party or attorney fails to comply with the provisions of this rule, the court upon motion of a party or on the court's own motion shall make such orders with regard to such conduct as are just, including any of the orders provided in Rule 16(f).

Promulgated Dec. 20, 1991, effective July 1, 1992.

STATE BAR COMMITTEE NOTES

1991 Promulgation

[Rule 26.1(a)] This addition to the rules is intended to require cooperation between counsel in the handling of civil litigation. The Committee has

RULE 30. DEPOSITIONS UPON ORAL EXAMINATION

(a) **When Depositions May Be Taken.** After commencement of the action, the testimony of parties or any expert witnesses expected to be called may be taken by deposition upon oral examination. Depositions of document custodians may be taken to secure production of documents and to establish evidentiary foundation. No other depositions shall be taken except upon: (1) agreement of all parties; (2) an order of the court following a motion demonstrating good cause, or (3) an order of the court following a Comprehensive Pretrial Conference pursuant to Rule 16(c).

If the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service which is completed under Rule 4.2 of these rules, leave of court, granted with or without notice, is required except that leave is not required: (1) if a defendant has served a notice of taking deposition or otherwise sought discovery or (2) if special notice is given as provided in subdivision (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

Amended July 17, 1970, effective Nov. 1, 1970; Oct. 2, 1991, effective Dec. 1, 1991; Dec. 20, 1991, effective July 1, 1992.

(b) **Notice of Examination; General Requirements; Special Notice; Nonstenographic Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.**

(1) Absent a stipulation of all parties to the action or an order of the court authorizing a briefer notice, a party desiring to take the deposition of any person upon oral examination shall give notice in writing to every other party to the action at least ten days prior to the date of the deposition. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which that person will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) The parties may stipulate or the court may order that a deposition be taken by telephone. For the purposes of this Rule and Rules 28(a), 37(a)(1) and 45(e), a deposition is taken in the county where the deponent is to answer questions propounded to the deponent.

Amended July 17, 1970, effective Nov. 1, 1970; July 6, 1983, effective Sept. 7, 1983; Sept. 15, 1987, effective Nov. 15, 1987; March 12, 1990, effective June 1, 1990.

(c) Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Arizona Rules of Evidence. The examination shall commence at the time and place specified in the notice or within thirty minutes thereafter. And, unless otherwise stipulated or ordered, will be continued on successive days, except Saturdays, Sundays, and legal holidays until completed. Any party not present within thirty minutes following the time specified in the notice of taking deposition waives any objection that the deposition was taken without that party's presence. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. If the deposition is taken telephonically and the witness is not physically in the presence of the officer before whom the deposition is to be taken, the officer may nonetheless place the witness under oath with the same force and effect as if the witness were physically present before the officer. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subdivision (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed. If the testimony is transcribed, the party noticing the deposition or the party causing the deposition to be taken shall be responsible for the cost of the original transcript.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. The court shall assess an appropriate sanction, including a sanction provided for under Rule 16(f), against any party or attorney who has engaged in unreasonable, groundless, abusive or obstructionist conduct. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

Amended July 17, 1970, effective Nov. 1, 1970; July 23, 1976, effective Oct. 1, 1976; June 1, 1977, effective Sept. 1, 1977; April 18, 1979, effective July 1, 1979; Sept. 15, 1987, effective Nov. 15, 1987; Dec. 20, 1991, effective July 1, 1992.

Comment

The scope of discovery at depositions is governed by 16 A.R.S. Rules of Civil Procedure, Rule 26(b).

(d) **Length of Deposition; Motion to Terminate or Limit Examination.** Depositions shall be of reasonable length. The oral deposition of any party or witness, including expert witnesses, whenever taken, shall not exceed four (4) hours in length, except pursuant to stipulation of the parties, or, upon motion and a showing of good cause. The court shall impose sanctions pursuant to Rule 16(f) for unreasonable, groundless, abusive or obstructionist conduct.

At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the county where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make

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Amended July 17, 1970, effective Nov. 1, 1970; July 23, 1976, effective Oct. 1, 1976; June 1, 1977, effective Sept. 1, 1977; April 18, 1979, effective July 1, 1979; Sept. 15, 1987, effective Nov. 15, 1987; Dec. 20, 1991, effective July 1, 1992.

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The scope of discovery at depositions is governed by 16 A.R.S. Rules of Civil Procedure, Rule 26(b).

(d) Length of Deposition; Motion to Terminate or Limit Examination. Depositions shall be of reasonable length. The oral deposition of any party or witness, including expert witnesses, whenever taken, shall not exceed four (4) hours in length, except pursuant to stipulation of the parties, or, upon motion and a showing of good cause. The court shall impose sanctions pursuant to Rule 16(f) for unreasonable, groundless, abusive or obstructionist conduct.

At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the county where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make

a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

Amended July 17, 1970, effective Nov. 1, 1970; Dec. 20, 1991, effective July 1, 1992.

(e) **Submission to Witness; Changes; Signing.** When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

Amended July 17, 1970, effective Nov. 1, 1970; Sept. 15, 1987, effective Nov. 15, 1987.

(f) **Certification and Filing by Officer; Exhibits; Copies; Notice of Filing; Preservation of Notes and Tapes of Depositions.**

(1) The officer shall certify on the deposition that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. Unless otherwise ordered by the court, the officer shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and promptly file it with the court in which the action is pending or send it by registered mail or certified mail to the clerk thereof for filing.

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, and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the

RULE 33.1 UNIFORM AND NON-UNIFORM INTERROGATORIES; LIMITATIONS; PROCEDURE

(a) **Presumptive Limitations.** Except as provided in these Rules, a party shall not serve upon any other party more than forty (40) interrogatories, which may be any combination of uniform or non-uniform interrogatories. Any uniform interrogatory and its subparts shall be counted as one interrogatory. Any subpart to a non-uniform interrogatory shall be considered as a separate interrogatory.

Promulgated Dec. 20, 1991, effective July 1, 1992.

(b) **Stipulations to Serve Additional Interrogatories.** If a party believes that good cause exists for the service of more than forty (40) interrogatories upon any other party, that party shall consult with the party upon whom the additional interrogatories would be served and attempt to secure a written stipulation as to the number of additional interrogatories that may be served.

Promulgated Dec. 20, 1991, effective July 1, 1992.

(c) **Leave of Court to Serve Additional Interrogatories.** If a stipulation permitting the service of additional interrogatories is not secured, a party desiring to serve additional interrogatories may do so only by leave of court. Upon written motion or application showing good cause therefor, the court in its discretion may grant to a party leave to serve a reasonable number of additional interrogatories upon any other party. The party seeking leave to serve additional interrogatories shall have the burden of establishing that the issues presented in the action warrant the service of additional interrogatories, or that such additional interrogatories are a more practical or less burdensome method of obtaining the information sought, or other good cause therefor. No such motion or application may be heard or considered by the court unless accompanied by the proposed additional interrogatories to be served, and by the certification of counsel required by Rule IV(g) of the Uniform Rules of Practice of the Superior Court. The proposed additional interrogatories shall only be attached to the judge's copy of the motion and the copy served on opposing parties.

Promulgated Dec. 20, 1991, effective July 1, 1992.

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RULE 34. PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

(a) **Scope.** Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated through detection devices into reasonably usable form when translation is practicably necessary) or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served: or (2) 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 26(b).

Amended July 17, 1970, effective Nov. 1, 1970; Sept. 15, 1987, effective Nov. 15, 1987.

(b) **Procedure and Limitations.** The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. After commencement of the action, a party may not submit, without leave of court, more than one request for production of documents and things. The request shall set forth the items to be inspected either by individual item or by specific category, and describe each item and specific category with reasonable particularity. The request shall not, without leave of court, include more than ten (10) distinct items or specific categories of items. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. If a party believes that good cause exists for the service of more than one request for production or for more than ten (10) distinct items or categories of items, that party shall consult with the party upon whom the request would be served and attempt to secure a written stipulation to that effect.

The party upon whom the request is served shall serve a written response within 40 days after the service of the request,

except that a defendant may serve a response within 60 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

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.

Amended July 17, 1970, effective Nov. 1, 1970; July 6, 1983, effective Sept. 7, 1983; Dec. 20, 1991, effective July 1, 1992.

(c) **Persons Not Parties.** This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

Amended July 17, 1970, effective Nov. 1, 1970.

STATE BAR COMMITTEE NOTES

1970 Amendments

[Rule 34] The principal changes alter the pre–1970 Rule to eliminate "good cause" by transfer to Rule 26(b) of the portions relating to trial preparation; to have the Rule operate extra-judicially; to include sampling and testing as well as inspecting or photographing tangible things; and to make clear that the Rule does not preclude an independent action for discovery against persons not parties.

Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices. When the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form, as by print out.

[Rule 34(a)] This section eliminates the good cause requirement, which as to materials acquired in anticipation for trial is transferred to Rule 26(b); the matter is covered in the Note to that Rule. Arizona had previously concluded that "good cause" is too general a phrase to help much in concrete cases; see State Farm Ins. Co. v. Roberts, 97 Ariz. 169, 398 P.2d 671 (1965) and Watts v. Superior Court, 87 Ariz. 1, 347 P.2d 565 (1960), holding that each good cause case depended heavily on its particular facts. The resolution of the problem adopted by this amendment makes the rule read about as Arizona had interpreted it in Dean v. Superior Court, 84 Ariz. 104, 324 P.2d 764 (1958), that

RULE 37. FAILURE TO MAKE DISCOVERY: SANCTIONS

(a) **Motion for Order Compelling Discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the county where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the county where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

Amended July 17, 1970, effective Nov. 1, 1970; Sept. 15, 1987, effective Nov. 15, 1987.

(b) Failure to Comply With Order.

(1) *Sanctions by Court in County Where Deposition Is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the county in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action Is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35 the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof,

or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Amended July 17, 1970, effective Nov. 1, 1970; Sept. 15, 1987, effective Nov. 15, 1987.

(c) **Expenses on Failure to Admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (4) there was other good reason for the failure to admit.

Amended July 17, 1970, effective Nov. 1, 1970; Sept. 15, 1987, effective Nov. 15, 1987.

(d) **Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper

notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

Amended July 17, 1970, effective Nov. 1, 1970; Sept. 15, 1987, effective Nov. 15, 1987.

STATE BAR COMMITTEE NOTES

1970 Amendment

[Rule 37] The general purpose of the 1970 revisions of this rule is to stiffen the sanctions for the occasional frustrations of discovery. A further change, largely of style, is the use of the term "failure" to comply in lieu of "refusal," to accord with Societe Internationale v. Rogers, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958).

In case of non-performance of the duties itemized in Rule 37(a), the party seeking discovery may move for an order compelling performance. Under the pre-amendment practice, expenses are awarded only upon an affirmative finding that the losing party was without substantial justification. The amended rule slightly tilts the burden in that situation. With full realization that any discovery motion will necessarily put some cost on someone, the rule provides that the cost shall be borne by the loser unless the court affirmatively finds that his conduct was substantially justified. The change is intended to encourage judges to be more alert to discovery abuses, and should result in charging expenses where no genuine dispute exists. Expenses should ordinarily be awarded unless a court finds that the losing party acted justifiably.

The cost provision is carried over to the enforcement of court orders respecting discovery by Rule 37(b)(2). This is particularly appropriate where a court order is disobeyed; and so also under Rule 37(d) as to failures to attend a deposition or otherwise make responses.

While the rule should stiffen Arizona practice as to costs, it does not affect the results of any decided cases. Thus, where the question on the necessity to

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Resolution Urges nternational Pact on Judgments

by Anthony E. DiResta
Associate Editor

he ABA House of Delegates has roved a resolution supporting an ini- ve by the State Department to ex- e with the Hague Convention of ate International Law the feasibility reparing a multilateral convention he recognition and enforcement of ;ments.

\ccording to the report accompany- the resolution, holders of United es court judgments are currently un- to avail themselves of a treaty that :ld facilitate the recognition and en- ement of those judgments abroad, le holders of foreign judgments nst United States debtors generally : thos- ·dgments enforced here un- he ; ples of comity.

)avid W. Rivkin, New York City, Chair, International Litigation Com- ee of the Section, argues that such a /ention is needed. Rivkin notes that, ıericans are at a distinct disadvan- ." He says that the absence of an in- ational treaty has often resulted in usion, delay, and financial hardship olders of United States judgments find it necessary to seek enforce- t of such judgments abroad if no as- of the judgment debtor can be found e United States.

ointing to the report, Rivkin be- s that a multilateral judgments y "would be of tremendous benefit nited States lawyers and their its" by:

cilitating the enforcement of "out- und" judgments rendered in Ameri- ı courts;

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sser e perceived unfairness im- ed by the current system "which mits exorbitant bases of jurisdiction be invoked against U.S. parties;"

ablishing a more "level playing d in the international judgments na."

OPPOSING COUNSEL

Last April, the U.S. Supreme Court approved and sent to Congress a series of amendments to the Federal Rules of Civil Procedure. One of the proposed changes—a revision of Rule 26 to create a mandatory disclosure obligation—created a firestorm of controversy. Rule 26(a)(1), as adopted by the Supreme Court, would require lawyers to disclose key facts and to produce documents at the outset of a lawsuit. The proposed rule changes will become effective on December 1, 1993, unless Congress takes action to amend them.

The ABA's Board of Governors, with support from the Section of Litigation, has formally opposed the mandatory disclosure requirements of Rule 26(a)(1), urging that they not be adopted. In early August, a House subcommittee favorably reported H.R. 2814, a bill which would delete the mandatory disclosure rule from the amendments to the Federal Rules. Proponents of mandatory disclosure maintain that even if the new rule is defeated in Congress this year, they will again urge its adoption once the experiments under the CJRA are completed in 1995. One thing is clear: while many people agree that discovery has become a virulent problem, not everyone agrees that mandatory disclosure is the way to go.

Mandatory Discovery Reform

by Ernest E. Svenson, *Associate Editor*

Pro

Discovery is much too expensive and needs to be reformed, says Brad D. Brian, Los Angeles, Co-Chair of the Section of Litigation's Task Force on the State of the Justice System.

Critics of the proposed rule changes do not discount the expense of discovery, but they believe that Congress should wait for the Civil Justice Reform Act studies to be completed before implementing any new discovery rules. Brian, however, says the need for discovery reform is urgent enough to warrant action now. Like many proponents of the new discovery rules, he also is concerned that waiting for another couple of years might mean that discovery reform never will take place.

The controversy surrounding the new rules stems from at least three of the proposed changes. First, the amendments to F.R.C.P. 26(a)(1) requires litigants to tell their opponents—without even being asked—the names, addresses, and telephone numbers of all people who are likely to have information "relevant to disputed facts alleged with particularity in the pleadings." Relevant documents must also be identified, and in some cases copied, for the opposing side. And all of this basic information must be turned over at least 10 days before the preliminary scheduling conference, which must be held within 120 days of service of the complaint.

The rules also provide for sanc-

(continued on page 7—Pro)

Con

The proposals for discovery reform pending before Congress "may well be the most ambitious group in the half-century history of the civil rules," writes Carl Tobias, a professor of law at the University of Montana.

Perhaps so. But some litigators say the new rules—particularly the mandatory disclosure rules—will not reform discovery, but instead will simply create more initial skirmishes and interfere in the attorney-client relationship. The notion of mandatory disclosure "is essentially unworkable and adds another layer of complexity to an already overly complex structure," says Loren Kieve, Washington, DC, Chair of the Section's Bylaws, Resolutions, and Blanket Authority Committee, who testified before the House Subcommittee on the new proposed rules.

Kieve believes that discovery reform is warranted, acknowledging that there is universal agreement that discovery has become a nightmare. In fact, he believes that the best solution may be no discovery at all. Kieve has joined other Section leaders in urging Congress to hold off adopting the mandatory disclosure rules until the various experiments conducted pursuant to the Civil Justice Reform Act have had a chance to be evaluated. The CJRA experiments will not be complete until 1995.

According to Tobias, the timing of

(continued on page 7—Con)

Second Circuit Says Footnotes Not Sufficient

by Joseph W. Ryan, Jr.
Associate Editor

The United States Court of Appeals for the Second Circuit has announced that it will not consider arguments mentioned only in footnotes of briefs to be adequately raised or preserved for appellate review.

In *United States v. Restrepo*, 986 F.2d 1462 (2d Cir. 1993), the court pointed out that reference to a claim in a footnote without proper identification as required by Appellate Rule 28 is insufficient to raise an argument or to preserve the claim for review on direct appeal.

The *Restrepo* decision involved a motion for reargument on behalf of a plaintiff who had pled guilty to four counts of indictment for conspiracy to launder money. Although the statutory maximum sentence for one of the counts was five years, the district court sentenced the defendant to 14 years on that count.

Appellant's counsel, Larry J. Silverman, New York City, who raised the issue in a footnote, says that, "this was an apparent mistake, and I was not going to waste four or five pages of my brief to make this point."

In the *per curiam* opinion, the court noted that "the enormous volume of briefs and arguments pressed on each panel precludes our scouring through footnotes . . . ." The court went on to direct counsel's attention to Appellate Rule 28, which spells out the appropriate method for advancing arguments on appeal.

The Second Circuit's broad language troubles some appellate practitioners. "If the court's use of the term 'argument' can include a line of reasoning plainly advanced in the footnote, does this court really mean that it won't consider this?" asks Kathleen McCree Lewis, Detroit, Co-Chair of the Section's Appellate Practice Committee. "Don't we often look for an appellate court's reasoning in its footnotes?"

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Lewis also points out that the Eleventh Circuit has a local rule that "strongly implies that the only proper material for footnotes is quoted material or citations."

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tions when reasonable discovery efforts are improperly obstructed. Litigants who fail to make the required early disclosure "shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." Additional powers granted to the court include awarding attorneys' fees and even informing the jury of a party's failure to make the required disclosure. Finally, the proposed rules contain some built-in mechanisms designed to rein in the overly zealous discoverer. Litigants are limited to 10 depositions per side—not per party—and 25 interrogatories. Leave of court must be obtained if more discovery is deemed necessary.

Of these proposals, it appears none is more controversial than the mandatory early disclosure requirement. Virtually all of the opposition is focused on this as[pect] f the proposed amendments.

[Wil]am W. Schwarzer, Washington, DC, Director of the Federal Judicial Center, downplays the concerns about mandatory disclosure. First, he observes that the amended rules contain the equivalent of an opt-out provision that would give the courts broad discretion to alter disclosure obligations through their local rules. The rules' drafters, he notes, "expect that courts will exempt certain categories of cases in which disclosure would make no sense, such as social security and government collection cases." Courts may also set different timetables for disclosure and discovery as they have already done pursuant to the experiments being carried out under the Civil Justice Reform Act.

As for complex litigation, Schwarzer believes the proposed rules are flexible and allow "courts to adapt the disclosure obligation to the needs and circumstances of particular cases." Many opponents of the new rules, he believes, ignore the reality that most civil cases in federal court are "small" cases in which, as a result of excessive discovery activity, the cost of litigation can become disproportionate in relation to the amount at issue.

Opponents have argued that the mandatory disclosure requirement is premature and that waiting for the CJRA studies to be finalized might provide useful feedback. Schwarzer is skeptical: "It is not at all clear that the CJRA will give us any clear empirical answers," he says. Schwarzer points out that while there are about 25 districts now experimenting with early disclosure, not all of those districts use the same system.

For this and other reasons, any study of these districts' use of early disclosure is not likely to provide any better information than is already available. "The idea [of early disclosure] stands on its own, and has merit," he says. Certainly hopes are high that the new rules reduce the amount of time that lawyers spend arguing about discovery matters, and thereby streamline the litigation process.

As for the claim by amendment opponents that the new rules will drive a wedge into the attorney-client relationship, Schwarzer believes that these concerns are overstated. He explains that the amendments require no more disclosure than good lawyers recognize that they must now make when the right discovery demand is made. The amendments hopefully also will reduce the amount of controversy over discovery that some lawyers now generate, "often in the hope of wearing down their opponent and delaying the evil day when they must produce or disclose that which they would rather withhold," Schwarzer says. Finally, he notes the amendments do not undermine the work-product privilege, because Rule 26(b)(5) specifically allows parties to assert work-product of privilege claims before disclosure.

Still, even some proponents of the new rules express concerns about mandatory disclosure. The difficult part of disclosure, according to H. Thomas Wells, Jr., Birmingham, AL, a Section Council Member who also serves on the Task Force on the State of the Justice System, "is not the theory of it, but the definition of what must be disclosed." He points out that the proposed rule is a vast improvement over earlier drafts, some of which were used by some of the first courts to implement early disclosure under their CJRA plans.

The proposed rule requires the disclosure of information that is relevant to "disputed facts alleged with particularity in the pleadings . . . ." Obviously, this means that the time-worn notion of "notice pleading" will quickly evolve into "fact pleading" as plaintiffs attempt to increase the amount of information that defendants must disclose. Of course, the rule works also in favor of defendants to the extent that they have counterclaims or third-party claims.

Although the initial mandatory disclosure requirement has generated controversy, proponents like Wells argue that the new rules set forth two other disclosure obligations that simply codify today's accepted practice. Under proposed rule 26(a)(2), expert witnesses who are expected to testify at trial must now be disclosed and copies of their reports produced. The rules also contemplate that experts identified for trial will be deposed. This is beneficial, says Wells, because it will standardize the practice regarding expert discovery and, with regard to the rule requiring early identification of trial experts, allow time for rebuttal experts to be designated.

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the proposed rule changes is somewhat awkward. He points out that under the CJRA nearly 55 federal districts must issue civil justice plans, which include the decision of whether to adopt mandatory disclosure by the same December 1993 date on which the proposed rule changes will take place. But the real problem, says Kieve, is that it is just too early to tell whether mandatory disclosure is viable.

Proponents of mandatory disclosure contend that discovery battles are inherently non-productive because they involve peripheral disputes that do nothing to advance the merits of the case. Kieve counters by urging that there will be an equal amount of ancillary litigation over alleged failures to disclose information. "If you like Rule 11 battles," he says, "you'll love Rule 26(a)(1) disclosure wi[th]

[Dav]id C. Weiner, Cleveland, Chair-Elect of the Section, joins Kieve in opposing the mandatory disclosure requirements because he believes it will create rifts between clients and their lawyers. It is this prospect of potential conflict between attorney and client that has some litigators most concerned.

William T. Hangley, Philadelphia, Co-Chair of the Section's Committee on Federal Procedure, believes that clients and attorneys will see a fundamental change in their relationship. Under the present law, he observes, the conscientious lawyer reviews facts and materials with his client because he knows that he must in order to do a good job. Now, he will have to tell his client: "I must review the facts and look at documents because I have to provide them to your opponent without being asked." At that point, he maintains, the attorney-client relationship is in a precarious state.

Hangley also faults the mandatory disclosure requirement because it will most adversely affect the careful and reasonable lawyer. Because discovery is governed by the pleadings, "no longer will I be able to decide which questions I want to ask," he laments. Hangley also is troubled that the information that he receives will depend on another lawyer's assessment of what is relevant to his claims, "an assessment that may be affected by conscious bias, unconscious bias, or naked stupidity."

On the other hand, Hangley says, the conscientious lawyer will bend over backwards and still never be sure that he has provided enough information. Under the current discovery system the reasonable lawyer can respond honestly to a series of discrete, and hopefully well-framed, questions. But Hangley points out that "when you haven't been asked any questions, you can spend significant amounts of time agonizing over what is or is not 'relevant to disputed facts alleged with particularity in the pleadings.'"

On July 28, 1993, Hangley, Weiner, and Kieve presented their views to a Senate subcommittee, pointing out that the mandatory disclosure system was opposed by virtually every segment of the bar, including plaintiffs' groups, the defense bar, the public interest bar, and numerous federal judges and law professors.

However, others such as John Rabiej, Chief Of Rules Committee Support Office in the Administrative Office of the U.S. Courts, believe that the proposed amendments are well supported. He points out that the amendments now before Congress were the product of a three-year effort by a committee of the Judicial Conference, during which more than 1,000 lawyers, judges, and professors were given the opportunity to offer suggestions for improvement. Rabiej is quick to point out that the rules also contain many improvements, besides mandatory disclosure, that are not at all controversial.

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November 10, 1993

Dear Task Force Members:

We had an extremely successful meeting in Fort Worth on October 29 and 30, 1993. Special kudos go to Terry Jacobson, Lee Hamel, Eddie Rodriguez, John Warner, and Jim McCartney who were able to make the meeting on Friday. On Saturday, we had the same group and Mark Kincaid and David Keltner. The Saturday meeting was extremely productive because we were able to "leap frog" on work done on Friday.

I am enclosing with this letter drafts of new Rules 166d and e, which contain limitations on discovery. The proposed discovery limits will include a limit on 60 requests for production, 60 interrogatory responses, 30 requests for admission, and 10 oral and written depositions. These limits on discovery can be limited or expanded by request or agreement of the parties. The standards for expansion or limitation come from similar rules in Illinois and Colorado. Please see the comments to the drafts.

The comments to both alternative drafts express the unanimous feelings of the Task Force members present. However, we realize that some of the other Task Force members are against any limitation on discovery. Nonetheless, we thought that a limited version of the rules ought to be the norm, with expansions or reductions necessary to fit the particularized case.

I am also enclosing copies of Rules 167, 167b and 167c. These were largely the work of the Friday group. However, they were reviewed and approved by the entire group on Saturday. As you can see, "nonparty discovery" and entry upon land and other personal property have been removed from Rule 167, and are now addressed in Rules 167b and 167c. Additionally, the Task Force members present felt that the current burden on the requesting party of stating the time and manner for production was unworkable. These requests are generally ignored. As a result, if the producing party does not produce the document or thing at the time that the response is filed, the responding party must give a date, place, and manner of production. Furthermore, there is a slight change to new Rule

167(7)(b) to clarify the situation where the request for production is served after the petition, but before the answer date. (This change incorporates a glitch originally noted by Mark Kincaid.) As you can see, Rule 167b creates an entirely new approach to the production of documents from nonparties. It allows the parties to the lawsuit to object before any request is made directly to the nonparty. Thereafter, the nonparty is served with a subpoena to produce the document or thing. This procedure is similar to the Alabama and Florida procedure, and remedies some of the problems that nonparty production has caused in Texas. The only real change in Rule 167c "Entry on Property" is a provision requiring the parties to seek entry on land before making a formal request to the court. This is included in Rule 167c(2), and is self-explanatory.

We will need to revisit the drafts of Rules 166d and e. We also need to address the "subpoena duces tecum" issue to determine whether any limitations should be placed on documents that can be subpoenaed. There was a slight disagreement among the Task Force members present regarding this limitation. As a result, these will be the first issues we will review at our next meeting. Thereafter, we will take up Rules 168 and 169, as well as the deposition rules.

Our next Task Force meeting will be on Saturday, November 13, 1993. The meeting will be in the Fort Worth office of Haynes and Boone, 801 Cherry Street, 1300 Burnett Plaza, and we will begin at 9:30 a.m. You will note this is a change in the current schedule. The meeting next following will be on December 11, 1993. We have not yet set the time or place.

Sincerely yours,

David E. Keltner

DEK:c
Enclosures
f-0011101.01

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RULE 166d. DISCOVERY LIMITS.

1. General Limitations on Discovery. Except as provided in subsections _____ of this Rule, plaintiff(s), defendant(s), and third-party defendants (s) will be entitled to the following discovery:

a. No more than 60 requests for production pursuant to Rule 167;

b. Interrogatory questions, including subsections, that require no more than 60 answers contained in one or more sets of interrogatories;

c. No more than 30 requests for admission pursuant to Rule 169; however, there is no limit on requests for admission used to admit or deny the genuineness of documents;

d. No more than 10 oral or written depositions, except that there is no limitation on the number of written depositions used to "prove up" records, documents, or things by a records custodian. [Rule 803]

RULE 166e. ALTERNATIVE DISCOVERY LIMITS.

1. Request for Alternative Discovery Limits. A party may, at any time, file a written request that discovery in the case be limited as provided in subsection ___ of this Rule; be expanded as provided in subsection ___ of this Rule; or be limited or expanded in some other specific manner. All other parties may either agree, in whole or in part, or respond to the motion within 30 days after the filing of the motion. However, if no party opposes the motion, the discovery will be limited or expanded as requested. If opposition to the motion is filed, the matter shall be determined either by agreement of the parties, pursuant to Rule 166c, or by prompt court order after notice and hearing.

2. Determination. The factors to be considered by the trial court in determining whether to order limited or expanded discovery shall include, but shall not be limited to, the following:

a. Whether the factual and legal issues involved in the case lend themselves to the limited or expanded discovery;

b. The extent and expense of discovery anticipated in the case;

c. The amount in controversy;

d. The importance of the controversy;

e. The number of parties and their alignment with respect to the underlying claims and defenses;

f. Whether any party would be prejudiced in the trial of the case by limitation or expansion of discovery.

3. Options.

a. Limitation of Discovery. Within 30 days of the court order on a motion to limit discovery, or agreement of the parties pursuant to Rule 166c to limit discovery, or in civil actions in which the plaintiff files a designation with the court that a tort, contract or tax collection civil matter involves damages not in excess of $40,000.00, exclusive of interest, costs and attorney's fees, the parties shall file a written disclosure statement as required by Rule [mandatory disclosure rule]. Additionally, the parties will disclose the identity and location of all witnesses the party intends to call to testify at the trial, together with the identity of the subject matter of the testimony, on or before 60 days before the date of trial. No more than two depositions will be allowed to each party.

b. Expansion of Discovery. The court may expand discovery pursuant to subsection 1 of this Rule only in the following manners:

(1) Expand the number of interrogatories, requests for production, requests for admission or depositions;

(2) The court may expand discovery in other ways requested by a party only for good cause shown that the expansion will materially benefit the court, but will not unduly burden or prejudice the opposing party.

4. Duty to Respond and Supplement. The duty to respond in Rule ___ and duty to supplement contained in Rule ___ apply to each of the options listed in this Rule.

Commentary:

This rule is a combination of the Illinois and Colorado rules that allow for limitation of discovery in some specific manners.

This proposed rule differences from Illinois and Colorado in that it allows for an expansion of discovery in some particulars. While both the Illinois and Colorado rules allow for this expansion, the expansion is generally contained in pretrial hearing provisions. The Task Force believed that any expansion ought to be contained in the same rule with limitations for ease of reference.

The limitation provided in Rule 166d(3)(a) includes an expansion on the mandatory disclosure rule. This expansion generally mirrors the proposed federal rule contained in FRCP 25(a)(1). Several Task Force members believed it was important to exclude some depositions in this limited discovery rule on the belief that otherwise, there would be a very limited use of the rule. However, there was some dissent to the inclusion of depositions.

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RULE 167. REQUESTS FOR PRODUCTION AND/OR FOR INSPECTION

1. **Requests.** Any party may serve upon any other party[1] a Request for Production and/or for Inspection 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.

2. **Contents of Request for Production.** The Request shall set forth the items to be produced or inspected, either by individual item or by category, and describe each item and category with reasonable particularity.

3. **Response and Objections to Requests.** The party upon whom the Request is served shall serve a written Response within 30 days after service of the written request, which shall state, with respect to each item or category of items, that production, inspection or other requested action will be permitted as requested, and the responding party shall thereafter comply with the Request, except only to the extent that the responding party makes objections in writing to particular items, or categories of items, stating specific reasons why such discovery should not be allowed. Responses to requests for production shall each be preceded by the individual request to which the response pertains.

4. **Proof of Service; Filing.** A true copy of the Request and Response, together with proof of the service thereof on all parties as provided in Rule 21a,

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[1]Jim McCartney and Eduardo Rodriguez wanted to keep the current language and procedures of Rule 167 for discovery from nonparties of documents, inspection of things, or enter upon land.

shall be filed promptly in the clerk's office by the party making it, except that any documents produced in response to a Request need not be filed.

5. Production of Documents. 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. If at the time the Response is served a party responding to a Request does not produce the documents or tangible things or make the documents and tangible things available for inspection and copying, the responding party shall state in the Response a date by which the documents or tangible things shall be produced or made available for inspection and copying.

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

7. Time.

a. Service of Request. The Request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the citation and petition upon that party. The Request shall be then served upon every other party to the action. [R 167(2)]

b. Response to Request. The party upon whom the Request is served shall serve a written response and objections, if any, within 30 days after the service of the Request, except that if the Request is served before the

responding party's answer is due,[2] a defendant may serve a written response and objections, if any, within 50 days after service of the citation and petition upon that defendant. The time for making a Response may be shortened or lengthened by the court upon a showing of good cause. [R 167(2)]

8. Order. If objection is made to a Request or to a Response, either party may file a motion and seek relief pursuant to Rules 166b or 215. [R 167(3)]

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[2]Added in order to deal with pre-answer/post-service discovery requests. Previous versions of this rule assumed the Request would be served with suit papers. In practice, sometimes discovery is sent before the answer date, but after service of suit papers.

RULE 167b: PRODUCTION OF DOCUMENTS AND THINGS FROM NONPARTY WITHOUT DEPOSITION

(a) **Request; Scope.** A party may seek inspection and copying of any documents or things within the scope of Rule 166b(2) from a person who is not a party by issuance of a subpoena directing the production of the documents or things when the requesting party does not seek to depose the custodian or other person in possession of the documents or things.

(b) **Procedure.** A party desiring production under this rule shall give notice to every other party, and to the nonparty from whom production or inspection is sought, of the intent to serve a subpoena under this rule at least 10 days before the subpoena is issued. The proposed subpoena shall be attached to the notice and shall state the time, place, and method for production of the documents or things, and the name and address of the person who is to produce the documents or things, if known, and if not known, a general description sufficient to identify the person or the particular class or group to which the person belongs; shall include a designation of the items to be produced; and shall state that the person who will be asked to produce the documents or things has the right to object to the production under this rule and that the person will not be required to surrender the documents or things. If any party serves an objection to production under this rule within 10 days of service of the notice or the person upon whom the subpoena is to be served objects at any time before the production of the documents or things, the documents or things shall not be produced under this rule.

(c) **Subpoena.** If no objection is made under subdivision (b), a subpoena may be issued by any person authorized by Rule 201 for the production of the documents or things in accordance with the notice, and served in accordance with Rule 178. The subpoena shall require production of the documents or things specified in it. The subpoena may give the recipient an option to deliver or mail legible copies of the documents or things to the party serving the subpoena. The person upon whom the subpoena is served may condition the preparation of copies on the payment in advance of the reasonable costs of preparing the copies. The subpoena shall require production only in the county of the residence of the custodian or other person in possession of the documents or things or in the county where the documents or things are located or where the custodian or person in possession usually conducts business.

(d) **Copies Furnished.** If the subpoena is complied with by delivery or mailing of copies as provided in subdivision (c), the party receiving the copies shall furnish a legible copy of each item furnished to any other party who requests it upon the payment of the reasonable cost of preparing the copies.

RULE 167c. ENTRY UPON PROPERTY.

1. Motion. Any party may file a motion seeking permission for entry upon designated land or other property 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. The motion shall state with specific particularity the reasons therefor.

2. Certificate. The motion shall contain a statement that the movant sought the permission of the person in possession or control of the property to enter upon the property reasons stated in the motion.

3. Service. A true copy of the motion and order setting hearing shall be served on the person in possession or control of the property as provided in Rule 21a.

4. Hearing and Order. All parties and the person in possession or control of the property shall have the opportunity to assert objections at the hearing. After proper notice and hearing, the court may enter an order permitting the movant to enter upon the property for the purposes of inspection and measuring, surveying, photographing, testing or sampling the property or any designated object or operation thereon, within the scope of Rule 166b(2)(a).

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11-18-93

November 15, 1993

HAD - Sub C Agenda

Luther H. Soules, III
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Re: Proposed Revision of **TEX. R. CIV. P. 166a**

Dear Luke:

In reviewing the materials for the meeting on November 19-20, I note that the COAJ's proposed revision of Rule 166a is included in the proposals to be considered by the Advisory Committee.

I am taking the liberty of enclosing a copy of an article which I wrote at the request of Pat Hazel, which was published in the June 1991 issue of The Advocate. (I really do live in Fort Worth, not Houston.) It occurred to me that this article might be of some assistance to the Advisory Committee in that it brings together the various arguments for and against change in Rule 166a as well as the reasons for the proposed revisions. I will leave it to your discretion whether you think that the article is worth copying and distributing.

I look forward to seeing you in Austin.

Yours very truly,

Anne Gardner

Anne Gardner

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Enclosure
agg\committee\15

SPg0229

"No Spitting, No Summary Judgments" [1] (Proposed Revision of Rule 166a)

Anne Gardner
~~Houston~~ Fort Worth

Legend has it that the Fifth Circuit Court of Appeals was once so quick to reverse summary judgments that a district judge in New Orleans posted a sign: "No Spitting, No Summary Judgments."[2] For many years, summary judgment was regarded as an extreme remedy in federal courts, to be used sparingly and with great caution. The federal court's hostile attitude discouraged use of the procedure. A similar attitude developed and still persists with respect to summary judgment practice under Texas Rule of Civil Procedure 166a. Recently, the drastic caseload increase in the federal court system has brought about a new and more liberal interpretation of Federal Rule of Civil Procedure 56. Some have called for adoption of a similar approach for Texas summary judgment practice.

As the increasing expense of litigation and backlog of cases in Texas courts continue to undermine the administration of justice, re-examination of the use of summary judgments as an existing procedural tool for judicial efficiency may be timely. After a two-year study of possible ways to streamline the use of Texas summary judgment practice, the State Bar Committee on Administration of Justice voted on March 2, 1991, to recommend a revision of Texas Rule of Civil Procedure 166a to the Supreme Court of Texas and its Rules Advisory Committee.

The Committee chose not to recommend wholesale adoption of the federal approach, but instead, has suggested a number of specific changes based on its study of the problems with the Texas rule. The full text of the proposed revision of the rule is set out in Appendix A at the conclusion of this article, which examines the proposed changes in light of the history and purpose of the rule.

1. The Purpose

The federal and Texas civil rules share a common purpose of securing "the just, speedy, and inexpensive determination of every action," as stated in Federal Rule of Civil Procedure 1. Texas Rule 1 says in 57 words what the federal rule says in 10: its objective is a "just, fair, equitable, and impartial adjudication . . . with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable . . . ."

Originally modeled after Federal Rule 56, the Texas rule on summary judgments was specifically envisioned as a tool to increase judicial efficiency.[3] Its purpose was to eliminate delay and expense.[4] Its function, as articulated by the Supreme Court of Texas, was to eliminate unmeritorious claims and defenses.[5] The intent of the rule was to permit either party to cut through groundless allegations and to obtain early disposition of those actions where a trial would be an empty formality.[6] The rule has never adequately performed its intended purpose.

2. The History

Despite the optimism of the rule's proponents, it is well-documented that an extremely high rate of reversals led to an increasing reluctance by trial courts to use summary judgments. From 1970 through 1976, less than two percent of all civil cases decided were disposed of by summary judgment.[7] In an effort to reduce reversals and encourage the rule's use,[8] the Committee on Administration of Justice previously voted to recommend revisions in 1976.[9] The Committee at that time recommended requiring the non-

movant to provide assistance to the trial judge by narrowing the issues to be decided.[10] Based on these recommendations, with modifications by the Rules Advisory Committee, the Supreme Court amended the rule in 1978, requiring the non-movant to specifically point out objections and to expressly present all issues to the trial court by written motion, answer or other response.[11] Despite the amendment, only 0.76% of civil cases were decided by summary judgment in 1979.[12] The Supreme Court attempted to clarify the rule in its 1979 landmark opinion in *City of Houston v. Clear Creek Basin Authority*.[13]

A study in 1983 revealed that, although the "massive reversal rate" of the early seventies was down, erroneous summary judgments still constituted the second most common reason for reversal of civil cases.[14] Statistics published by the Texas Judicial Council for 1990 show virtually no improvement over previous years.[15] Summary judgments still accounted for less than one percent of all civil cases disposed of by District Courts in Texas last year.[16] The summary judgment rule remains one of token value as an effective tool in the administration of justice.

3. The Proposed Revisions

The Committee studied complaints and criticisms from practicing lawyers and judges. Various reasons were suggested for the lackluster performance of Rule 166a. There is a perceived skepticism by appellate courts regarding summary judgment.[17] Additionally, various procedural complexities account for a disproportionate number of reversals. Some lawyers continue to file late responses or none at all, and pleadings are often amended to raise new claims after a motion has been filed or even after it is heard. In addition, confusion clouds the correct placement of the burden of proof. The proposed revisions attempt to address these concerns.[18]

a. Written Response

Two of the proposed changes deal with the need for and timing of the filing of written responses. The Supreme Court's mandate in *Clear Creek* is that both the reasons for the summary judgment and the objections to it must be in writing and before the trial court at the time of the hearing.[19] Nevertheless, some lawyers continue to delay or to entirely omit the filing of a response. As Judge Hittner and Lynn Liberato have said, "[f]ailing to file a response is not lying behind a log, but laying down your arms."[20] There is some contradiction between *Clear Creek* and the 1978 amendment to Rule 166a(c), which arguably implies that the filing of a "response" is permissible but not mandatory. Uncertainty may also have been generated by an exception in *Clear Creek*, where the Court held that a non-movant needs no answer or written response to contend on appeal that the grounds presented by the movant "are insufficient as a *matter of law* to support summary judgment."[21] The proposed revision would expressly make the filing of a response mandatory.

The non-movant must file a response and counter-evidence no later than seven days before the day of the hearing.[22] Under the current rule, leave of court must be obtained to file a late response.[23] However, the decision to allow a late response is entirely discretionary with the trial court.[24] The Supreme Court has held that a late-filed response will not be considered on appeal unless an order granting leave is affirmatively reflected in the record.[25] Nevertheless, uncertainty exists about when and under what circumstances a late response may be considered. The Committee's recommendation is to make leave of court subject to a showing of good cause like that required for non-identified witnesses under Texas Rule of Civil Procedure 166b.[26] To remove all doubt as to the necessity of filing a written response, the Committee also proposed that Rule 166a(c) be amended to read "shall" instead of "may." With those two changes, the fourth sentence of that section would read: "Except on leave of court for good cause shown, . . . the adverse party, not later than seven days before the hearing, . . . shall file and serve a written response."

b. Amended Pleadings

A third proposed change addresses the problem of late amendments to pleadings. Currently, Rule 166a has no provision for amending pleadings after the motion is filed and prior to the hearing. Amendment of pleadings prior to the hearing is treated as governed by Rule 63.[27] Under that rule, parties may amend their pleadings up to seven days before the trial date, after which leave of court must be obtained for amendment. The Supreme Court has held that leave will be presumed in absence of an order denying amendment.[28] This presumption is the reverse of that governing late-filed responses. Such hidden twists in the jurisprudence of summary judgments compound the problem of excessive reversals.

Serious problems may result when pleadings are amended to add claims or counter-claims after a mo-

n for summary judgment has been filed. A summary judgment is erroneous if it disposes of a claim which was not expressly addressed by the motion.[29] On the other hand, no presumption exists that a summary judgment disposes of claims or parties not addressed in the judgment. Therefore, a summary judgment which fails to dispose of all pleaded claims is interlocutory.[30]

While these rules may be clear to the Supreme Court, they are potential traps for even the most vigilant lawyer. Lack of intimate understanding of these procedural intricacies causes unnecessary delay and expense to courts and litigants alike when it results in reversals or dismissals.[31] The Committee on Administration of Justice has proposed expressly "freezing" the pleadings by treating them in the same manner as responses. Amendments would be allowed only with leave of court and for good cause shown within seven days of the hearing. The Committee has recommended that a new sentence be added to Rule 166a(c) to read: "Amendment to pleadings within seven days of the date of the hearing, or thereafter, may be made only with leave of court and for good cause shown."

c. The Burden of Proof

The fourth change would be a new section specifically addressing the burden of proof of the parties. The placement and extent of the burden of proof in summary judgment proceedings have developed in a piecemeal manner through a series of court decisions. The Supreme Court has held that the burden is always on the movant to establish that there is no genuine issue of fact, and that he is entitled to judgment as a matter of law.[32] This burden is said never to "shift" to the non-movant to come forward with evidence to raise a fact issue unless the movant has established his or her right to summary judgment as a matter of law.[33] The ordinary burdens of proof at trial are immaterial in determining where the burden lies in a motion for summary judgment.[34]

The burden of a plaintiff, as movant, is essentially the same as it would be on a motion for instructed verdict.[35] However, a defendant who moves for summary judgment faces a much heavier burden. The defendant, as movant, must conclusively disprove the plaintiff's cause of action by producing proof that the plaintiff cannot establish at least one element of his cause of action.[36] This is called a "negative" burden on the defendant-movant.[37] Logically, the plaintiff should also face a "negative" burden in moving for summary judgment where an affirmative defense has been pleaded by a defendant. However, here the rule changes. If a defendant wishes to oppose the motion based on an affirmative defense, she must both plead it and produce evidence to raise a fact issue.[38] Some affirmative defenses, however, are not treated as such for summary judgment purposes.[39] The result is more confusion, with more denials and more reversals.

Proponents of change have urged that Texas courts adopt the current federal approach to summary judgments, which the Supreme Court of the United States announced in a 1986 "trilogy" of cases: *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*,[40] *Celotex Corp. v. Catrett*,[41] and *Anderson v. Liberty Lobby, Inc.*[42] Under those decisions, the burden of proof of any movant for summary judgment in federal court mirrors the burden which the movant would bear at trial.[43] The burden of proof is the same for both plaintiffs and defendants as it would be if the movant were seeking an instructed verdict.[44] The moving party has the initial burden to demonstrate the absence of a genuine issue of material fact. However, in *Celotex*, the United States Supreme Court also held that this does not mean that a movant must produce evidence on an issue on which the movant would not have the burden of proof at trial.[45] In that instance, the moving party need only "point out" to the trial court that no evidence supports the non-movant's claim or affirmative defense.[46] The non-movant must then come forward with proof to raise a fact issue.[47]

Despite the similar wording of the federal and Texas rules, the Supreme Court of Texas, in *Casso v. Brand*, rejected an argument that the existing Texas rule should be interpreted to incorporate the federal approach in defamation cases.[48] However, the majority in that decision overruled two of its previous defamation cases and seemed to adopt a more relaxed standard for review of summary judgment testimony of interested witnesses, not only in defamation cases but in all summary judgment cases.[49] In a concurring and dissenting opinion, Justice Gonzales advocated a modified rule for motions by defendants in defamation cases.[50] He would require the defendant to meet its burden initially by a prima facie showing of some evidence of absence of malice, with the burden then "shifting" to the plaintiff to produce evidence to show the existence of malice by clear and convincing evidence.[51] Whether this decision heralds the beginning of a more favorable attitude toward summary judgments, generally, remains to be seen.

After studying the complaints and recommendations put before it, the Committee on Administration of Justice chose not to attempt a revision of Rule 166a

which would adopt the federal approach, *in toto*. The Committee essentially agreed with the observation of Chief Justice Phillips in *Casso*, that summary judgments in federal court are based on different assumptions, with different purposes, than summary judgments in Texas.[52] In fact, the decisions in the three United States Supreme Court decisions signal an entirely new approach to summary judgment practice which extends far beyond the placement of burdens of proof. In addition to its holding in *Celotex* regarding the burden of proof, the United States Supreme Court in *Matsushita* held that, in order to raise a genuine issue of material fact, the non-movant must come forward with evidence which would be sufficient for a jury to find for that party.[53] This may be a higher "threshold" than merely being required to come forward with evidence sufficient to create an issue of fact upon which reasonable minds could differ, as Texas practice requires.[54]

The federal standard also seems to call for a certain amount of qualitative review of the summary judgment evidence by a trial court.[55] In *Matsushita*, the court held that where a claim is "implausible" or makes "no economic sense," the respondents must come forward with more persuasive evidence than would otherwise be necessary.[56] The dissenting opinion in *Matsushita* suggests that the majority's interpretation will allow the trial court to weigh the evidence and make credibility determinations.[57] It is, in any event, unclear what the Court meant, which is an additional reason not to be overly enamored with the current federal approach.

Some commentators contend that, in the process of reforming summary judgment procedure, the United States Supreme Court has turned Federal Rule 56 into a procedure for pre-trial disposition of fact issues, a sort of "bench trial on paper."[58] In fact, the "trilogy" reinterpreting federal summary judgment practice may be only one manifestation of a much broader movement in the federal court system toward pre-trial fact adjudications with deference to decisions of the district courts.[59] This is a drastic departure from prior law and is undoubtedly incompatible with the guarantee of the right to trial of fact issues by a jury, firmly rooted in Texas law.[60]

The specific holdings in *Celotex* regarding the "negative" burden of proof on the non-movant are another matter. The decision was based on the plain meaning of Rule 56 and the underlying purpose of the federal rules.[61] The holdings in that case were not new. The Third Circuit had already reached the same conclusion.[62] Certiorari was granted by the Supreme Court to review the District of Columbia Circuit's decision in *Celotex* because it conflicted with that of the Third Circuit.[63] The Fifth Circuit also independently arrived at the same conclusion in *Fontenot v. Upjohn Co.*, while *Celotex* was pending in the Supreme Court.[64]

The various opinions in these cases set forth many of the arguments which may be made in favor of or against the propositions (a) that the placement of the burden of proof on a motion for summary judgment should mirror that of the parties at trial; (b) that the burden should be the same as that of an instructed verdict for both plaintiff and defendant; and (c) that a non-movant need not produce evidence to conclusively disprove an issue on which the adverse party would have the burden of proof at trial.

The District of Columbia Court of Appeals' decision, which was reversed by the Supreme Court in *Celotex*, rejected the interpretation adopted by the Supreme Court on two principal grounds.[65] First, the intermediate court relied upon the wording of a sentence in Rule 56(c) which had been added in 1963, providing that the non-movant cannot rest upon his pleadings when a motion has been properly made *"and supported"* as provided by the rule.[66] The Court of Appeals read that language to imply that a motion for summary judgment must always be supported by affirmative proof in the form of affidavits or admissible evidence.[67] Secondly, the Court relied upon previous case law and the language in the United States Supreme Court case of *Adicks v. S.H. Kress & Co.*,[68] which held that the 1963 amendment to Federal Rule 56 was not intended to modify the burden of proof of the parties in a summary judgment proceeding.[69]

In response to the argument that a defendant may move for instructed verdict without affirmative supporting evidence at trial, the Court of Appeals in *Celotex* pointed out that there is a difference between an instructed verdict and a summary judgment.[70] In the former instance, the non-movant will have already introduced his evidence whereas, in a summary judgment proceeding, neither party has yet produced the evidence upon which they will rely at trial. Additional arguments against adopting the federal approach in Texas are set forth by the Texas Supreme Court in *Casso*, where the majority observed that the purpose and interpretation of the Texas Rule 166a as it exists today are different from those of the Federal Rule 56, and that summary judgment procedure as it exists in Texas eliminates patently unmeritorious cases while giving due regard for the right to jury trial guaranteed by the Texas Constitution.[71]

While little can be said in favor of adopting the

...n... new federal approach to summary judgment ...rocedure in Texas, there are valid arguments in favor ...f adopting the specific holdings in *Celotex* with respect to the burden of proof. It has been forcefully argued that placing the burden on the moving party to prove a "negative" makes summary judgment impossible in many cases and significantly limits its usefulness in cases where it is most needed.[72] Such an interpretation is not consistent with the purpose of the rule if claims are thereby permitted to go forward which have no factual basis. Additionally, and particularly with the catastrophic cost of litigation in some cases, the rule should be construed with due regard for those who must oppose claims and defenses as well as for those who make them.

At one time, it appears that the rule in Texas was that any movant in a summary judgment proceeding had the burden to establish facts which, if proven at trial, would entitle him to instructed verdict.[73] In *Torres v. Western Cas. & Sur. Co.*, the Supreme Court held, however, that the "instructed verdict test" did not apply to a motion by a defendant, and that he must conclusively disprove the plaintiff's case, as pleaded.[74] Reinstatement of the instructed verdict test for all parties ...ld greatly simplify an extremely complex area of Texas summary judgment practice. Either party may move for an instructed verdict,[75] to disregard a jury finding or for judgment n.o.v.,[76] on the basis that the movant is entitled to judgment based upon legally insufficient evidence to support an essential element of the adverse party's case or affirmative defense. If "no evidence" will entitle a party to judgment as a matter of law in other instances, it is difficult to see why "no evidence" should not also entitle that party to establish his right to judgment as a matter of law on a motion for summary judgment.

The purposes of both the federal and Texas civil rules are virtually identical. That purpose is served by allowing summary judgments against parties who are unable to come forward with any evidence to raise an issue of fact on a claim or defense. Assuming that such a party has had adequate time for discovery, he or she has either a "patently unmeritorious case" or an "untenable defense." Postponing the time of judgment against that party to a later stage of the litigation merely postpones the inevitable, with a resultant waste of time and money for litigants as well as the system as a whole. If a movant can show that there is no evidence ...hatsoever to establish one or more essential elements of a claim on which the opposing party has the burden of proof, then, as expressed by the Fifth Circuit in *Fontenot*, "trial would be a bootless exercise, fated for an inevitable result but at continued expense of the parties, the preemption of a trial date that might have been used for other litigants waiting impatiently in the judicial queue, and a burden on the court and the taxpayers."[77]

There is a recognizable danger that parties will abuse the summary judgment procedure by premature motions, particularly when their opponents will bear the burden of proof at trial. One safeguard against this danger is to lengthen the time that a motion for summary judgment must be on file before it can be heard. Additionally, as the Supreme Court emphasized in *Celotex*, motions for summary judgment should be granted only "after adequate time for discovery."[78] Strict adherence to that admonition would be essential to assure that summary judgments are not misused for harassment purposes. Texas Rule 13 would serve as some protection in this regard. Protection should also be available to non-movants from "railroading" by premature motions under section (g) of the Texas rule which allows the hearing to be continued upon a showing that a non-movant has not had adequate time for discovery or to obtain essential evidence.

The proposed revision of Rule 166a adds a new section (d), separately setting forth the placement and the extent of the burden of proof of each party as established by *Celotex*. The intent of the Committee was to make the burden of each party essentially the same as that on a motion for instructed verdict at trial. The burden on a movant for summary judgment would be the same for both plaintiffs and defendants in all cases. Once a movant's burden has been met, the non-movant would likewise, in all cases, then have the burden to come forward with evidence to raise a genuine issue of material fact on his case or affirmative defense. New Section (d) is set forth in Appendix "A."

CONCLUSION

The proposed revision of Rule 166a has been forwarded by the Committee on Administration of Justice to the Rules Advisory Committee for study and presentation to the Supreme Court some time later this year. As litigation grows daily more complex and more costly, it appears that summary judgment procedure in Texas has become a part of the problem rather than being a part of the solution as it was originally intended to be. The proposed revision is at least a start toward revitalizing and streamlining the rule in the hope of making it an integral part of the Texas rules as a whole, rather than a "disfavored procedural shortcut" as it has been viewed in the past.[79]

ENDNOTES

1. Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 116 F.R.D. 183 (1987).
2. *Id.*
3. McDonald, *Summary Judgments*, 30 Tex. L. Rev. 285, 286 (1952).
4. Hittner & Liberato, *Summary Judgments in Texas*, 20 St. Mary's L.J. 243, 301-05 (1989); McDonald, *supra* n. 3, at 286.
5. *Gulbenkian v. Penn*, 151 Tex. 412, 252 S.W.2d 929, 931 (1952).
6. McDonald, *supra* n. 3, at 286.
7. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 675 (Tex. 1979).
8. *Id.* at 676.
9. *Id.*
10. *Id.*
11. *Id.* at 676-77.
12. Townsend, *Reflections on the Burden of Proof*, 18 The Houston Lawyer 24 (March 1981).
13. 589 S.W.2d 671 (Tex. 1979).
14. Gellis, *Reasons For Case Reversal in Texas: An Analysis*, 16 St. Mary's L.J. 299, 308-09 (1985).
15. *Texas Judicial Council and Office of Judicial Administration*, 62nd Annual Report on Judicial Activity for Period September 1, 1989, to August 31, 1990, p. 167.
16. *Id.*
17. State Bar of Texas Subcommittee on Summary Judgments, Report to Committee on Administration of Justice, April 24, 1990.
18. *Id.* Lack of effective appellate review has also been suggested as a reason why more summary judgments are not granted. A trial court's denial of a summary judgment is interlocutory and not reviewable on appeal, even after final judgment is rendered on the merits of the case. A proposal for amendment to Texas Civil Practice & Remedies Code, section 51.014, along with a proposed revision of Rule 166a, adding a section for appeal from the denial of a summary judgment, is currently under study by the Committee.
19. *Clear Creek*, 589 S.W.2d at 677.
20. *Hittner & Liberato, supra* n. 4, at 275.
21. *Clear Creek*, 589 S.W.2d at 678. The effect of Texas Rule of Appellate Procedure 52(a) in precluding appeal on any ground not presented to the trial court now makes even that exception questionable.
22. Tex. R. Civ. P. 166a(c).
23. Id.
24. *INA of Texas v. Bryant*, 686 S.W.2d 614, 615 (Tex. 1985); *Lawler v. Dallas Statler-Hilton Joint Venture*, 793 S.W.2d 27, 30 (Tex. App.—Dallas 1990, writ denied).
25. *INA v. Bryant*, 686 S.W.2d at 615.
26. *See Morrow v. H.E.B. Inc.*, 714 S.W.2d 297, 297-98 (Tex. 1986). *See*, Livesay, *Summary Judgment Practice: A Plea for Reform*, 3, 4 (unpublished paper).
27. *Wheeler v. Yettie-Kersting Memorial* Hosp., 761 S.W.2d 785, 787 (Tex. App.—Houston [1st Dist.] 1988, writ denied); *Energo Int'l Corp. v. Modern Indus. Housing*, 722 S.W.2d 149, 151 (Tex. App.—Dallas 1986, no writ). In contrast, Rule 166a(c) expressly requires that "permission" be obtained to file amended pleadings or proof after the hearing. Thus, any such late-filed items will not be considered by the appellate court unless the record affirmatively reflects that permission was granted. *See, Rath v. State*, 788 S.W.2d 48, 51 (Tex. App.—Corpus Christi 1990, writ denied) (after judgment); *Wales v. Williford*, 745 S.W.2d 455, 457-458 (Tex. App.—Beaumont 1988, writ denied).
28. *Goswami v. Metropolitan Sav. & Loan Ass'n*, 751 S.W.2d 487, 490 (Tex. 1988).
29. *Chessher v. Southwestern Bell Tel. Co.*, 658 S.W.2d 563, 564 (Tex. 1983).
30. *Teer v. Duddlesten*, 664 S.W.2d 702, 703 (Tex. 1984).
32. *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989); *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985).
33. *Id.*
34. *Hittner & Liberato, supra*, n.4, at 267.
35. *Gulf Colo. & Santa Fe Ry. Co. v. McBride*, 159 Tex. 442, 454, 322 S.W.2d 492, 500 (1958); *Hitner & Liberato, supra*, n. 4, at 268.
36. *Gray v. Bertrand*, 723 S.W.2d 957, 958 (Tex. 1987); *Torres v. Western Cas. & Sur. Co.*, 457 S.W.2d 50, 52 (Tex. 1970).
37. Townsend, *Summary Judgment Practice in State and Federal Court*, 1991 Advanced Civil Trial Short Course G-14 (S.M.U. School of Law, April 24-25, 1991).

8. *Nichols v. Smith*, 507 S.W.2d 518, 520 (Tex. 1974); *Torres v. Western Cas. & Sur. Co.*, 457 S.W.2d at 52-53.
39. *See, e.g., Golden Triangle Energy v. Wickes Lumber*, 725 S.W.2d 439, 440-441 (Tex. Civ. App. — Beaumont 1987, no writ) (affirmative defense pleaded as counter claim); *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 518, n. 2 (Tex. 1988) (burden on defendant movant to establish limitations and also to negate discovery rule pleaded by plaintiff).
40. 475 U.S. 574 (1986). See generally Fitzwater, Johnson and Henry, *Recent Summary Judgment Jurisprudence for the Fifth Circuit, Practitioner*, 5 Fifth Circuit Reporter 769 (May 1988).
41. 477 U.S. 317 (1986).
42. 477 U.S. 242 (1986).
43. *Anderson*, 477 U.S. at 250.
44. *Id.*
45. *Celotex*, 477 U.S. at 324.
46. *Id.* at 325.
47. *Id.*
48. *Casso v. Brand*, 776 S.W.2d at 556-557.
Id. at 559.
50. *Id.* at 563-64.
51. *Id.* at 565. Despite *Casso*, one court of appeals has apparently applied the federal standard in affirming a summary judgment for the defendant in a products liability suit, based on failure of the plaintiff to identify the defendant as manufacturer. *See Gates v. Dow Chemical Co.*, 777 S.W.2d 120, 126 (Tex. App.—Houston [14th Dist.] 1989), *writ granted, judgment vacated*, 783 S.W.2d 589 (Tex. 1989).
52. *Casso v. Brand*, 776 S.W.2d at 555-56.
53. *Matsushita*, 475 U.S. at 587.
54. Childress, *supra*, n. 1, at 186.
55. *Id.*
56. *Matsushita*, 475 U.S. at 587.
57. 475 U.S. at 600-01.
58. Childress, *supra*, n. 1, at 184. *See also* Issachoroff and Lowenstein, *Second Thoughts on Summary Judgment*, 100 YALE L.J. 73, 74 (1991).
59. Issachoroff and Lowenstein, *supra*, n. 58, at 74; Kamp, *Federal Adjudication of Facts, The New Regime*, 39 Defense Law J. 339, 348-56 (1990).
60. Texas Constitution, art. I, § 15, art. V, § 10.
61. *Celotex*, 477 U.S. at 332.
62. *In re: Japanese Elec. Products*, 723 F.2d 238 (1988), *rev'd on other grounds, sub. nom., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).
63. *Celotex*, 477 U.S. at 319.
64. *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1195 (5th Cir. 1986).
65. *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 184 (1985).
66. *Id.* at 184-85.
67. *Id.*
68. 398 U.S. 144 (1970).
69. *Id.* at 159-60.
70. *Catrett*, 756 F.2d at 186-87.
71. *Casso v. Brand*, 776 S.W.2d at 555-57.
72. *Casso v. Brand*, 776 S.W.2d at 559 (Gonzales, J., dissenting); Townsend, *supra*, n. 12, at 26.
73. *Gulf, Colo. & S. F. Ry. Co. v. McBride*, 159 Tex. 442, 454, 322 S.W.2d at 500.
74. 457 S.W.2d at 52.
75. Tex. R. Civ. P. 268.
76. Tex. R. Civ. P. 301.
77. *Fontenot*, 780 F.2d at 1195.
78. *Celotex*, 477 U.S. at 322.
79. *See Casso v. Brand*, 776 S.W.2d at 556.

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TCDRP 16.1

June 22, 1994

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RE: Discovery Subcommitee, Supreme Court Advisory Committee

Gentlemen:

I have been provided with some of the material which is being considered for recommended changes to the Texas Rules of Civil Procedure and I have been asked to give you my comments and concerns. First, I appreciate the opportunity to share my thoughts and I hope that they will be received as constructive criticism.

SPg0237

I. Rule 166b - Discovery.

1. If there is going to be a discovery period, it should not be triggered by deposition dates or document production. This would allow for gamesmanship. I recommend that the discovery period commence 45 days after the appearance by answer or other pleading of the last appearing party. Service of citation is frequently a defendant's first notice of the incident giving rise to the lawsuit and this would give that defendant some time to obtain an understanding of the incident. Also, some thought should be given to providing a reasonable extension of the discovery period if a new party is joined during the discovery period.

2. Six months is too short for many cases. Six months may be adequate for the average case, however, I recommend eight months for the discovery period to allow for the more complex cases.

3. A case should not be allowed to be set for trial for at least sixty (60) days following the completion of the discovery period except upon agreement of the parties. This would also prevent gamesmanship.

I sincerely thank you for considering my views.

Very truly yours,

James D. Guess

James D. Guess

JDG:2934:mja

ER 1993 VOLUME 19, NUMBER 2

re Discovery and C
+ Jury Trial Materials
TRCP 166b

LITIGATION NEWS

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District Court Takes Aim at Deposition Obstruction

Judge says Federal Rules require witnesses, not lawyers, to testify

by Bradley M. Bole, *Associate Editor*

Contending with obstructive deposition tactics is a fact of life for most litigators.

A recent federal district court decision, however, takes aim at such disruptive tactics. The opinion, *Hall v. Clifton Precision*, 1993 WL 316319 (E.D. Pa. 1993), was authored by U.S. District Judge Robert Gawthorp. The opinion:

- Prohibits private attorney-client discussions of testimony during depositions, breaks, and recesses—regardless of who initiates the conference—except for the limited purpose of determining whether a privilege should be asserted;
- Permits deposing counsel to inquire about any witness coaching that might have occurred during any private attorney-client conferences that take place during depositions, breaks, and recesses;
- Prohibits the deponent and his or her counsel from having private discussions during the deposition about documents shown to the witness and provides that documents do not have to be shown to defending counsel in advance of the deposition or at the outset of the deposition;
- Bars all objections that might suggest an answer to the witness and limits objections at depositions to those necessary to assert a privilege as well as those not preserved until trial under the rules;
- Requires the deponent to ask questioning counsel, not his or her own counsel, for clarification of questions; and
- Prohibits instructions not to answer a question unless necessary to preserve a privilege.

"The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a convenient record," Gawthorp states in the opinion. "It is the witness—not the lawyer—who is the witness."

Protecting the integrity of depositions

(continued on page 6—Discovery)

Program Assists Lawyers Facing Client Fee Audits

by Howard Spierer
Associate Editor

As more and more corporations, insurance companies, and government

SPg0239

Discovery

(continued from page 1)

is particularly important because most cases now are resolved as a result of discovery, rather than trial, Gawthorp notes in the opinion. "Depositions are the factual battleground where the vast majority of litigation actually takes place. . . . The pretrial tail now wags the trial dog."

To protect depositions as a tool "to find and fix the truth," counsel at depositions should behave as though they were at trial, Gawthorp concludes. "Counsel should never forget that even though the deposition may be taking place far from the real courtroom, with no black-robed overseer peering down upon them," the Federal Rules of Civil Procedure and counsels' roles as officers of the court require appropriate behavior.

"[S]hould they be tempted to stray," warns Gawthorp, "they should remember that this judge is but a phone call away."

Gawthorp's offer to be available to help resolve discovery disputes may be the aspect of the opinion that litigators will find most praiseworthy, says Edward M. Waller, Jr., Tampa, FL, Co-Chair of the Section of Litigation's Ethics and Professionalism Committee. "What I hear from litigators is that they want the judges to be more active in enforcing the rules," he says.

Complaints about obstructive behavior at depositions seem to be on the rise, Waller says, but so are court-mandated codes of conduct and judicial decisions that specifically address the most common complaints about deposition tactics. "I think things are going to get better," he says, "but we need rulings like this."

Those seeking relief also may be heartened by a proposed revision of Federal Rule of Civil Procedure 30(d) that expressly requires objections to be stated in a "non-argumentative and non-suggestive manner" and prohibits instructions "not to answer" except when necessary to protect a privilege, enforce an order of the court, or seek a protective order.

To control abuse by both taking and defending counsel, the proposed rule revision allows the court to limit the time for a deposition and to extend the time limits when necessary to make up time lost to disruptive behavior during the deposition.

Sanctions, including costs and attorneys' fees, also are expressly allowed to compensate for delays caused by conduct that frustrates "the fair examination of the deponent."

TRCP 166b

1/9/94

Steve Seaman:

Re: 166

If we are to have any constraints on discovery, I think the starting point is to place the burden of relevance on the requesting party. Current decisions compel discovery unless the resisting party shows no relevance. I think this is and always has been nonsensical and illogical. Please consider this idea.

Thankyou,

Jim

Xc SCAC Agenda
COAJ Staff
J. Herbst
David Kettner (Task Force on Discovery)

4543.001 ✓12-16-93 93

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Forward to Luke Soules + members of Discovery subcommittee of SCAC TRCP 166b

FYI AWA

December 10, 1993

Professor Alexander W. Albright
The University of Texas School of Law
727 E. 26th Street
Austin, Texas 78705-3299

Dear Alex:

Since you have joined the discovery subcommittee of the Supreme Court Rules Committee, I thought you might be willing to review a letter from Deborah Hiser, of Advocacy Inc., to the Chief Justice. Debbie was aware of my appointment to the committee and sent me a copy. It pertains to discovery of the mental health records of patients, or former patients, who are not party to the litigation. In her letter, Debbie suggests language for a new discovery rule.

Would you please present this issue to your subcommittee?

If you, or someone else on the subcommittee, would like any more information or would like to speak with Debbie, I know should would be more than willing to discuss this. Her letter refers to the enclosure of a selection of pertinent statutes and cases from other jurisdictions. I did not receive that enclosure, but I have asked Debbie to forward a copy to you.

If there is any way I can help, please let me know.

Sincerely,

STEPHEN YELENOSKY
Staff Attorney

P.S. Deborah C. Hiser
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Austin, Texas 78757-1024

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SPg0242

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October 22, 1993

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

Dear Judge Phillips:

We understand that the Court has appointed a committee to rewrite the Texas Rules of Civil Procedure. In my capacity as an attorney for Advocacy, Incorporated, I have recently been involved in a case which raises a serious problem involving third party access to confidential mental health records. The specific facts of the case are as follows. Plaintiff, a former employee terminated from a state hospital, filed a whistle blower case against the hospital. In the course of discovery, the Plaintiff requested that the Department of Mental Health and Mental Retardation produce copies of a patient's mental health records to prove allegations that he was fired for attempting to report abuse against that patient. The patient is not a party to the lawsuit.

While recognizing the importance of employees in state hospital facilities with knowledge of abuse of patients being able to act on that information without retaliation and/or adverse employment actions, I am extremely concerned with allowing third party access to sensitive mental health information without adequate procedures in place to notify the patient, and to properly protect highly personal and confidential information.

The Texas legislature has recognized the seriousness of improper disclosure of such information. Section 611.004 of the Health and Safety Code sets out circumstances under which confidential mental health information may be disclosed, and provides for injunctive relief and damages for improper disclosure. None of the exceptions to confidentiality apply to cases such as this one, unless the patient has given written consent. There is no requirement under Texas law that a patient receive notice of a party's request for his or her records. Further, even if a patient were to receive such notice, he or she may lack the capacity to make an informed decision as to whether his mental health records should be disclosed.

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Rules 509 and 510 of the Texas Rules of Evidence set out exceptions to the confidentiality of mental health records, and to the physician/patient privilege. Since the person whose records are being requested is not a party to the proceedings raising mental health as a defense, or seeking to substantiate a claim for mental health services, none of the exceptions apply in such cases.

In the case I have described, Advocacy, Incorporated has filed a plea in intervention. However, this case raises general questions about procedural protections in third party requests for access to mental health records as part of discovery. We would like to request that the Court, through the rules committee, consider including in Rule 166b of the Texas Rules of Civil Procedure a provision to handle third party requests for mental health records, including, but not limited to the following:

(1) At least thirty days prior to the production date of mental health records, the party seeking the records shall give personal notice to the person whose records are being sought, and to the individual's physician, which informs the person that

   a. his mental health records are being sought,

   b. that he has the right to object,

   c. that he has the right to seek the services of an attorney in order to protect his rights to privacy and confidentiality, and,

   d. that if he cannot afford an attorney, the court will appoint one.

(2) Prior to production of mental health records, the party making the discovery request shall either obtain the written consent of the person, or, in cases where the person lacks the capacity to given written consent, request that the court appoint an attorney ad litem to represent the patient;

(3) The person whose records are being sought may file a motion to quash or to modify the subpoena at any time prior to the date of production. No witness is required to produce personal records after receipt of notice that the motion was filed, except upon order of the court or by agreement of the parties;

(4) Before ordering that mental health records be produced, the trial court would have to hear all dispositive motions (statute of limitations, jurisdictional challenges, summary judgments) that would resolve the need for disclosure of the records;

(5) a. The mental health records would be submitted to the court for in camera inspection before their production to determine if any privilege applies and if the release of protected information to the requesting party is of such substantial gravity to outweigh the values served by confidentiality. Only the court may examine the records, with the assistance of a physician, if necessary;

b. The mental health records may not be disclosed unless the court finds that the release of protected information to the requesting party is of such substantial gravity to outweigh the values served by confidentiality.

(6) If the court orders disclosure of the records, the records are sealed pursuant to TRCP 76a, section 7, and a protective order is issued limiting the disclosure of the confidential information by the requesting party.

Attached for the committee's review is a selection of statutes and cases from other jurisdictions that provide for protections in third party requests for mental health records. I hope that this information is useful to the committee, and that it will form the basis for modifying the Rule. If the Court or the committee needs any additional information or assistance, I am available to provide such assistance.

This issue if very important to the mental health community and to persons who advocate on behalf of persons with mental illness.

Sincerely,

Deborah C. Hiser
Attorney at Law

DCH/kb
Enclosures

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11-15-93

THE SUPREME COURT OF TEXAS

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November 11, 1993

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed is a letter and attachments that Chief Justice Phillips received from Deborah Hiser of Advocacy, Incorporated.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

SPg0246

November 2, 1993

Ms. Deborah C. Hiser
Advocacy, Incorporated
7800 Shoal Creek Blvd., Suite 171-E
Austin, Texas 78757-1024

Dear Ms. Hiser:

Thank you for your letter to Chief Justice Phillips of October 22 regarding Rule 166b of the Texas Rules of Civil Procedure.

As Justice Nathan Hecht is the Court's liaison in matters regarding rules, I have forwarded your letter and its attachments to him for review.

If you have any further questions, please do not hesitate to write or call (463-1316).

Very truly yours,

Catherine Haggard
Assistant to Chief Justice
Thomas R. Phillips

cc: Justice Nathan Hecht

SPg0247

ADVOCACY, INCORPORATED

Advocating the Legal Rights of Texans with Developmental Disabilities
Implementing the Client Assistance Program for Rehabilitation Clients
Advocating the Legal Rights of Texans with Mental Illness

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512/323-0902 (Fax)

October 22, 1993

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

Dear Judge Phillips:

We understand that the Court has appointed a committee to rewrite the Texas Rules of Civil Procedure. In my capacity as an attorney for Advocacy, Incorporated, I have recently been involved in a case which raises a serious problem involving third party access to confidential mental health records. The specific facts of the case are as follows. Plaintiff, a former employee terminated from a state hospital, filed a whistle blower case against the hospital. In the course of discovery, the Plaintiff requested that the Department of Mental Health and Mental Retardation produce copies of a patient's mental health records to prove allegations that he was fired for attempting to report abuse against that patient. The patient is not a party to the lawsuit.

While recognizing the importance of employees in state hospital facilities with knowledge of abuse of patients being able to act on that information without retaliation and/or adverse employment actions, I am extremely concerned with allowing third party access to sensitive mental health information without adequate procedures in place to notify the patient, and to properly protect highly personal and confidential information.

The Texas legislature has recognized the seriousness of improper disclosure of such information. Section 611.004 of the Health and Safety Code sets out circumstances under which confidential mental health information may be disclosed, and provides for injunctive relief and damages for improper disclosure. None of the exceptions to confidentiality apply to cases such as this one, unless the patient has given written consent. There is no requirement under Texas law that a patient receive notice of a party's request for his or her records. Further, even if a patient were to receive such notice, he or she may lack the capacity to make an informed decision as to whether his mental health records should be disclosed.

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Rules 509 and 510 of the Texas Rules of Evidence set out exceptions to the confidentiality of mental health records, and to the physician/patient privilege. Since the person whose records are being requested is not a party to the proceedings raising mental health as a defense, or seeking to substantiate a claim for mental health services, none of the exceptions apply in such cases.

In the case I have described, Advocacy, Incorporated has filed a plea in intervention. However, this case raises general questions about procedural protections in third party requests for access to mental health records as part of discovery. We would like to request that the Court, through the rules committee, consider including in Rule 166b of the Texas Rules of Civil Procedure a provision to handle third party requests for mental health records, including, but not limited to the following:

(1) At least thirty days prior to the production date of mental health records, the party seeking the records shall give personal notice to the person whose records are being sought, and to the individual's physician, which informs the person that

   a. his mental health records are being sought,

   b. that he has the right to object,

   c. that he has the right to seek the services of an attorney in order to protect his rights to privacy and confidentiality, and,

   d. that if he cannot afford an attorney, the court will appoint one.

(2) Prior to production of mental health records, the party making the discovery request shall either obtain the written consent of the person, or, in cases where the person lacks the capacity to given written consent, request that the court appoint an attorney ad litem to represent the patient;

(3) The person whose records are being sought may file a motion to quash or to modify the subpoena at any time prior to the date of production. No witness is required to produce personal records after receipt of notice that the motion was filed, except upon order of the court or by agreement of the parties;

(4) Before ordering that mental health records be produced, the trial court would have to hear all dispositive motions (statute of limitations, jurisdictional challenges, summary judgments) that would resolve the need for disclosure of the records;

(5) a. The mental health records would be submitted to the court for in camera inspection before their production to determine if any privilege applies and if the release of protected information to the requesting party is of such substantial gravity to outweigh the values served by confidentiality. Only the court may examine the records, with the assistance of a physician, if necessary;

b. The mental health records may not be disclosed unless the court finds that the release of protected information to the requesting party is of such substantial gravity to outweigh the values served by confidentiality.

(6) If the court orders disclosure of the records, the records are sealed pursuant to TRCP 76a, section 7, and a protective order is issued limiting the disclosure of the confidential information by the requesting party.

Attached for the committee's review is a selection of statutes and cases from other jurisdictions that provide for protections in third party requests for mental health records. I hope that this information is useful to the committee, and that it will form the basis for modifying the Rule. If the Court or the committee needs any additional information or assistance, I am available to provide such assistance.

This issue if very important to the mental health community and to persons who advocate on behalf of persons with mental illness.

Sincerely,

Deborah C. Hiser
Attorney at Law

DCH/kb
Enclosures

cc w/encl: Hon. Raul A. Gonzalez
Hon. Jack Hightower
Hon. Nathan L. Hecht
Hon. Lloyd Doggett
Hon. John Cornyn
Hon. Bob Gammage
Hon. Craig T. Enoch
Hon. Rose Spector

Support Awarded

An Alabama appeals court held that a father was required to support his adult mentally retarded daughter. *Skates v. Skates*, 520 So. 2d 525 (Ala. Civ. App. 1988).

The mother and father were divorced in 1981, and the mother was awarded custody of and support for their child. In July 1986, the mother filed a petition requesting that a trial court require the father to support the child in adulthood. The trial court ordered the father to continue supporting his daughter after she reached adulthood, on the condition that the daughter attend rehabilitation or counseling services in order to receive training for suitable employment. It also required the mother to report monthly to the court about her daughter's counseling, rehabilitation and employment. The father appealed.

The appeals court rejected the father's argument that the trial court erred in finding that the daughter's mental disability entitled her to support as an adult. The child, who was classified as trainable mentally retarded, could not keep a job except in a controlled workshop-type environment, and was unable to live alone or take care of herself.

919(a), (d), 1106(a), 2001

Confidentiality of psychiatric records

A state appeals court upheld the release of psychiatric treatment records pursuant to a subpoena, while a trial court quashed a subpoena for the records of a psychiatrist and a psychologist.

Release of Records Upheld

A California appeals court upheld the release of a patient's treatment records pursuant to a subpoena issued in a court proceeding in which the psychiatrist was not involved. *Inabnit v. Berkson*, 245 Cal. Rptr. 525 (Cal. Ct. App. 1988).

Mary Jaynes and her daughter Barbara Inabnit received psychiatric treatment from the defendant. At the time, they were plaintiffs in a lawsuit alleging the wrongful death of Inabnit's father. The plaintiffs sued the psychiatrist, claiming that he negligently released some of their treatment records to the attorney for one of the defendants in the wrongful death action.

The trial court granted the defendant's summary judgment motion since the Confidentiality of Medical Information Act, Cal. Civ. Code §56.10(b)(3), provided that records released pursuant to a subpoena for the production of documents were not subject to the requirement that a patient authorize their release.

The appeals court upheld the lower court, finding that subpoena compelled the defendant to disclose his records. Also, the plaintiffs' failure to claim the psychotherapist-patient privilege constituted a waiver of that privilege. Section 56.10(b)(3) required a health care provider to disclose medical information if the disclosure was compelled by a party in a court proceeding pursuant to a properly issued subpoena.

Here, all of the procedures were followed, including serving a copy of the subpoena on the patients' attorney; providing proof to the physician that the patients were served; and giving notice to the patients that their records were being sought and they had the right to object to the release and seek an attorney's services to protect their privacy rights. The plaintiffs' failure to act to protect against the defendant's release of the treatment records left the defendant in the position of being compelled to release the records.

Subpoena For Release of Records Quashed

A New York trial court ruled improper a subpoena for the records of a psychiatrist and psychologist issued in an investigation of another psychiatrist's professional conduct. *In re A-85-04-38*, 525 N.Y.S.2d 479 (N.Y. Sup. Ct. 1988).

The Board of Professional Medical Conduct subpoenaed a psychiatrist's and psychologist's treatment records. Their patient, who was the alleged victim of the professional misconduct of another psychiatrist, had not initiated the investigation and objected to the release of her records.

The court quashed the subpoena, finding that the records were not critical to the investigation; the alleged misconduct was remote in time to the subsequent treatment; and no relationship was established between the records sought and the allegations being investigated. The patient's right to continued, confidential communications with the professional of her choice outweighed the board's need for the records.

907(a), 1507, 1800

Public housing discrimination

In re Custodio, 527 N.Y.S.2d 333 (N.Y. Sup. Ct. 1987) — A New York appeals court held that a housing authority could investigate and consider a potential tenant's habits and practices, but could not exclude a prospective tenant on the basis of a mental disability. The housing authority requested the medical records of the prospective tenant's wife who had a serious mental disorder. The prospective tenant objected, arguing that the housing authority had no right to inquire into the mental disability or to exclude him from housing on the basis of that disability.

The court found that inquiring into the disability was not equivalent to exclusion, and the housing authority had a duty to know what type of conduct reasonably

SPg0252

p't of Consumer & Regulatory Affairs, 560 A.2d 543 C. Ct. App. 1989).

\ District of Columbia agency decided that Mrs. Hen- had to be discharged, consistent with her needs as ail· ı her prescribed level of care. D.C. Code -14..(a) (1988). However, the law required clear and ıvincing evidence of the need for her discharge. While agency had a medical certificate form that seemed to .cate a change might be desirable, the letter upon .ch the certificate was based concluded there was no ·on Mrs. Henson could not remain where she was. ile it was up to the fact finder to determine the weight ccord the evidence, the agency's failure to even com- ıt on the letter rendered the agency's analysis deficient its face, particularly since the letter normally would y more weight than the certificate.

908(b), 907(a), 2001, 2002

No zoning variance for residential care facility

Missouri appeals court ruled that the owners of a lential care facility for persons with mental disabilities e not entitled to a zoning variance since they had not ven hardship. *Missouri ex rel. Holly Investment Co. Board of Zoning Adjustment of Kansas City*, 771 .2d 19 (Mo. Ct. App. 1989).

he ility's owners had sought a variance after be- ıotified that the facility housed 31 more residents than ısas City's zoning ordinance permitted. Under the or- nce's minimum square footage per occupant require- its, the facility could house 16 rather than its cus- ary 47 residents. The trial court upheld the zoning rd's refusal to issue the variance.

The appeals court affirmed, finding that the facility owners had not presented evidence of "'practical difficulties'" in complying with the zoning ordinance. Mo. Rev. Stat. §89.090.1(3) (1986). The facility's director had testified that 16 residents would provide only one-half the income needed to run the facility, but failed to provide firm data concerning the operating costs. Without that information, the level of economic hardship from complying with the ordinance could not be determined. While economic hardship was not the sole factor to be considered in determining whether real barriers prevented compliance, it was a threshold consideration not answered by the evidence.

919(d), 919(f)(1), 1002(b), 2001, 2004

Psychiatric confidentiality reviewed

Appeals courts in Missouri and Louisiana reviewed cases in which a psychiatrist provided information for a report about a crime his patient allegedly had committed and a psychiatric hospital mistakenly released patients' names.

Missouri Psychiatrist's Anonymous Tip

A Missouri appeals court held that a psychiatrist's call to a private crime reporting service concerning his patient's involvement in an armed robbery did not violate the statutory physician-patient privilege. *Missouri v. Beatty*, 770 S.W.2d 387 (Mo. Ct. App. 1989).

The patient's psychiatric treatment for extreme depression included prescription drugs that caused an energy loss. As a result, the patient lost her job at a restaurant. At a scheduled appointment with her psychiatrist, the patient admitted that she had robbed a service station earlier in the day. The psychiatrist placed an anonymous call to the local Crime Stoppers service and, without identifying his patient, stated that the perpetrator of the robbery had been employed at the restaurant where the patient had worked. This information was relayed to the police, who investigated and eventually arrested the patient. On appeal of her armed robbery conviction, the patient argued that the trial court erred in admitting evidence obtained pursuant to her arrest, which had resulted from the psychiatrist's violation of her right to confidentiality.

The appeals court affirmed the conviction. The psychiatrist had not violated the physician-patient privilege, because the law creating that privilege applied only to a psychiatrist's in-court testimony. Mo. Rev. Stat. §491.060(5) (1986).

Discovery Rights Yield to Patient's Privacy

A Louisiana appeals court enjoined the parties in a billing dispute with a psychiatric hospital from contacting patients whose names accidentally had been released by the hospital. *Jo Ellen Smith Psychiatric Hospital v. Harrell*, 546 So. 2d 886 (La. Ct. App. 1989).

The Lailheugues' son had been a patient at a psychiatric, drug and alcohol treatment facility; his father's insurance policy covered most of his treatment. After the

son's discharge, the hospital contacted the mother concerning an outstanding balance on the hospital bill. The mother requested proof of the balance due and the hospital sent her the insurance register that listed her husband's name and Social Security number, but which also included that information for 38 other patients. The Lailheugues' attorney wrote to the hospital's attorney, stating that the other patients would be contacted if the hospital did not settle the Lailheugues' suit which alleged injuries from the registers having been sent to the 38 other patients. A trial court refused the hospital's application for an injunction prohibiting contact with the other patients.

The appeals court reversed, finding that the 38 other patients' compelling privacy rights outweighed the Lailheugues' right to investigate their claim against the hospital. The Lailheugues' right to discover information to support their claim was broad, but not without limitation, especially where hospital personnel testified that the release of information had been a one-time mistake in violation of hospital policy.

918, 1801

Mental health agency gets tax exemption

An Illinois appeals court held that a private non-profit community mental health agency was entitled to a tax exemption for property owned by its "'holding company.'" ***Community Mental Health Council, Inc. v. Illinois Dep't of Revenue,*** 541 N.E.2d 1330 (Ill. App. Ct. 1989).

The Community Mental Health Council was primarily funded by a state grant that prohibited real estate purchases with grant monies. Thus, to purchase a building to house its headquarters and services, the Council created the Community Mental Health Foundation. The Foundation purchased a building subject to a longstanding lease held by a local telephone company. The telephone company remained in one-third of the building from September 16 through December 31, 1986, but paid full rent, allowing the Council to renovate the building's remaining two-thirds. The state board of tax appeals granted the Council a partial tax exemption on the property for the 1986 time period, but the state department of revenue reversed that decision. A trial court granted the exemption and the revenue department appealed.

The appeals court agreed that the Council was entitled to a charitable tax exemption. To qualify for an exemption, an organization had to own the property and use it for charitable purposes. Ill. Rev. Stat. ch. 20, para. 500.7 (1987). The Council was the equitable owner of the property although the title was in the Foundation's name; the two entities had similar names; the Foundation was created solely to purchase property; the same board members served both entities; and checks written by the Foundation had to be approved by the Council's president and treasurer.

The appeals court also rejected the contention that the property was not being used for charitable purposes because the telephone company was paying the full rent. The Council was "'connected'" to the property through its renovation activities and those activities were undertaken for charitable purposes. The telephone company's allowance of access to the property for renovation constituted a "nonmonetary contribution" to the Council, rather than a profit to the Foundation.

909(b), 2003(c)

Deaf driver's auto insurance cancelled

A Pennsylvania court reversed the state insurance commissioner's decision to review a decision to cancel the automobile insurance policy of a deaf driver who, in renewing the policy, had not disclosed his deafness. ***Erie Insurance Co. v. Foster,*** 560 A.2d 856 (Pa. Commw. Ct. 1989).

The insurance company notified the insured, who was deaf since birth, that it did not intend to renew his car policy since he had misrepresented his hearing impairment on the company's renewal form. He had answered "no" to whether he had any physical or mental disability. The Insurance Department refused the insured's request for review, but the Insurance Commissioner reversed.

The state appeals court found inapplicable the Commissioner's argument that, in Pennsylvania, a permanent disability could not be the reason for refusing to renew an insurance policy. Here, the non-renewal decision was based on the insured's misrepresentation, not his disability. In addition, the Commissioner had erred in deciding that the representation had not involved a material risk, since hearing was material to driving. Finally, the Commissioner had erred in finding that the insured had not known the declaration was false or made it in bad faith. The insured admitted he had deliberately decided not to answer truthfully because he thought he would have been excluded from coverage or forced to pay a higher rate.

909(b)

Total disability insurance denied

A federal district court held that a group disability policy's beneficiary failed to carry his burden of showing that he was totally disabled and entitled to continued benefits. ***Schiller v. Mutual Benefit Life Insurance Co.,*** 713 F. Supp. 1064 (E.D. Tenn. 1989).

In 1984, while employed as a car mechanic, the beneficiary injured his back. His employer's long-term disability insurance policy stated that a person was

in state court for property theft, however. *Waterstraat v. Central State Hospital*, 533 F. Supp. 274 (W.D. Va. 1982). ■

902(c), 919(d)

Security aide at psychiatric hospital dismissed for punching patient

A Pennsylvania court has affirmed an order of the State Civil Service Commission firing a psychiatric security aide at a state hospital for punching a patient in the mouth and knocking out seven of his teeth. The commission's decision was based on the testimony of the patient, another patient and two hospital employees. The fired employee appealed.

The court rejected the argument that the injured patient was not competent to testify and therefore the commission's findings were not supported by substantial evidence. "The general rule is that a person with a mental illness is competent to testify if he is capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue." Here, a hospital psychiatrist testified that the patient "was capable of understanding what happened to him on the day of his injury and was capable of distinguishing truth and falsity." Moreover, nothing in the record indicated that the patient did not understand the court proceedings.

The court also ruled that the commission did not abuse its discretion in refusing to subpoena the two patients' medical records. Under Section 111 of the Mental Health Procedures Act, 50 Pa. Stat. §7111, the records of persons receiving treatment for mental illness are confidential, except for a number of specified exceptions. Since this situation did not fit within any of the exceptions, the commission did not abuse its discretion. *Kakas v. Pennsylvania Department of Public Welfare*, 442 A.2d 1243 (Pa. Commw. Ct. 1982). ■

903(b), 902(d)

Legal research notes: conservator[illegible]

[illegible]

In re Cole, 447 N.Y.S.2d [illegible] — In a suit filed on behalf of [illegible] vation of her estate, a lower court in New [illegible] in part for the petitioners who wanted to be the new con[illegible]. The court found that the original conservators had acted properly in not selling the conservatee's property sooner and in paying taxes, fire insurance and other expenses related to the property. [illegible] while the conservators had been negligent in placing [illegible] simple interest-bearing savings accounts rather than certificates of deposit, it was not done maliciously, so a surcharge was not appropriate.

Poag v. California Attorney General, [illegible] App. 1982) — An appeals court [illegible] decision charging conservators for failing [illegible] property to an offer tendered to the conservatee. Although a surcharge was not supportable legally, reducing the attorney's fees was appropriate given the mistake.

Geppert v. Eddington, 433 N.E.2d 1161 (Ill. App. Ct. 1982) — In Illinois, an appeals court affirmed a ruling that the grandson of an incompetent woman had no interest in his grandmother's [illegible] once the conservatorship he petitioned to revoke was completed and the estate had payed the grandson's claims against the estate. At this point, the grandson no longer had standing to represent his grandmother's interests [illegible].

Willman v. Phelps, 631 S.W.2d 63 (Mo. Ct. App. 1982) — A court of appeals in Missouri reversed a decision that had held that a guardian who withdraws funds from a so-called Totten trust to support an incompetent ward rejects the remaining funds and is estopped from asserting any claims on those funds. It concluded that withdrawal of the funds did not constitute a revocation of the trust. Thus, when the ward died the guardian became the owner of the remaining funds in the trust.

902(c), (d)

Four courts examine questions of competency

The legal proceedings governing mentally disabled persons who participate in the court system, make contracts and exchange property are reviewed in four cases from Tennessee, New York, Illinois and Louisiana.

Court System

An appeals court in Tennessee reversed a decision that granted summary judgment to the defendant in a personal injury case, because the lower court had found that the one-year statute of limitations did not stop running for a mentally disabled plaintiff. In reversing the decision, the appeals court agreed that the trial judge could have decided that the plaintiff had regained her competency, despite a previous adjudication that she was incompetent in a conservatorship proceeding. However, the judge had no authority to set aside the original decree, even though by coincidence he had also been the judge in that first hearing. In addition, the plaintiff did not have to show that the incapacity came before the injury for which the suit was brought, as long as she could show that the disability existed at the time the cause of ac-

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ection Unit, 422 A.2d
A 1980). ■

:09(c), 1502

:es to provide rvices to sabled adult

seeking appropriate ınd/or care and treat- with $5.5 million in a severely developmen- resident of a Connect- has been settled by a mplementing a consent tween the parties. The l be "provided with nd training designed to dependence on others his ability to become a ıdividual in society." *Thorne*, B-80-238 (D. 0, 1980).

to the complaint, John 5 years old and suffers disabling conditions b variously diag- id J schizophrenia, tal retardation, etc." impaired vision and g impairment.

ne defendants, who are al health and mental officials, have en- eat difficulties in find- placement for John. In sent to Johns Hopkins a complete evaluation; overed that he had condition which in- his ability to process nation. Although the opkins concluded that treatment, substantial s could be expected, lacements proved un- Southbury Training ed to carry out the ıg-term program, and Hills Hospital, his cur- , had no suitable pro- s a result, the lawsuit ming violations of the r Developmental ct ction 504 of the ı Act and the Civil

case moved to trial, a settlement was achieved in which the defendants denied any violations of the plaintiffs rights, but nonetheless agreed to a number of programming commitments. Primarily, the parties were concerned with developing a means for John to communicate. It was agreed that he would enter a day program at the Benhaven School and continue to reside — for no longer than six months — at Fairfield Hills until a more appropriate residence could be found elsewhere.

The parties also agreed that the current residential program and any subsequent placement would have to include appropriate hygiene, clothing, leisure time activities, and medical, dental and eyeglass care. All disagreements between the parties would be negotiated first and then, if failure persisted, would be referred to the court, which would retain jurisdiction for as long as five years if necessary. ■

§508(d)

Records of allegedly abused patients released to N.Y. arbitrator in disciplinary proceeding

The clinical records of four residents of the Newark Developmental Center have been ordered to be released to an arbitrator who is conducting a disciplinary proceeding against Eugene Mastracci, a staff person. Mastracci is charged with misconduct toward six residents, and he is facing termination of his employment.

Mastracci's attorney obtained a court order for the release of the clinical records of the four allegedly assaulted residents. After some comments about what type of motion to compel the release of the documents should have been used, the appellate court went on to approve the lower court's order, saying, "clearly, confidentiality, on these facts, must yield to respondent's right to conduct an effective defense to the disciplinary action." Since it is "hazardous to anticipate the use sought for subpoenaed records," the lower court acted properly in not determining which portions of the records would be admissible at the hearing. "That determination was properly left for the arbitrator." *Office of Mental Retardation and Developmental Disabilities v. Mastracci*, 433 N.Y.S.2d 946 (N.Y. App. Div. 1980). For a similar case, *see New York v. Civil Service Employees Assn., Inc.*, 430 N.Y.S.2d 510 (N.Y., Erie County Sup. Ct. 1980), 4 MDLR 419. ■

§904(b)

History of epilepsy and MI bar being airline pilot

Delta Air Lines has won a suit reaffirming that a history of certain disabling conditions constitutes an absolute disqualification from being an airline pilot. These conditions, listed at 14 C.F.R. §§67.13, .15, and .17, include severe personality disorder, psychosis, alcoholism, drug dependence, epilepsy, diabetes and certain heart conditions. These restrictions were adopted in 1959 on the bases that they could cause total or partial incapacity and the ability to predict reoccurrence is wholly inadequate.

Nonetheless, the Federal Air Surgeon has been granting certain exemptions to these disqualifications; the Federal Aviation Administration (FAA) has the authority under 14 C.F.R. §11.27(b) to grant exemptions that are "in the public interest." Thirty to 35 percent of heart conditions are approved (out of about 850 requests per year), and exemptions have been increasingly granted for alcoholism. Nothing in the case indicates that any exception has ever been granted for the other conditions.

The court found that the FAA has improperly interpreted "in the public interest" to mean the interest of the individual applicant for the exemption. Furthermore, merely stating the conclusion that the exemption is in the public interest is inadquate; reasons must be set out

methadone clinic as a permitted use. Both the lower court and the court of appeals concluded that the clinic qualified as a permitted use under the zoning ordinance that allowed professional offices for doctors and dentists. Professional staff, such as doctors and nurses, provided physical and mental health care to patients at the clinic. Moreover, the continuing existence of methadone clinics was encouraged as sound public policy under state law. ***Village of Maywood v. Health, Inc.***, 433 N.E.2d 951 (Ill. App. Ct. 1982).

The New York State Association for Retarded Children was rebuffed in its attempts to challenge an amendment to the state law governing the right of mentally and developmentally disabled persons to purchase and occupy residential property. The allegations of certain due process violations were counterbalanced by the intent of the challenged statute to help mentally and developmentally disabled persons. "We find that, on its face and by NYSARC's own description, the challenged statute is patently designed to encourage the establishment and licensing of community residential facilities for persons formerly served in State institutions and to insure that providers of care establish such facilities with the participation of local communities in site selection." ***DiBiase v. Piscitelli,*** 448 N.Y.S.2d 35 (N.Y. App. Div. 1982).

The Third Circuit has reversed a district court after it dismissed for lack of standing a suit by neighborhood residents against the U.S. Department of Housing and Urban Development opposing planned construction of subsidized housing for the elderly and handicapped. The court held that residents of the particular community in which the project was to be located may challenge HUD's approval mechanisms for funding under the Housing Act of 1959. In addition, a proper claim was raised in the allegation that the proposed housing project was merely an extension of a nearby hospital and not community housing. ***Kirby v. Department of Housing and Urban Development***, 675 F.2d 60 (3d Cir. 1982). ■

904(b), 1507

Worker with epilepsy prevails in Iowa employment discrimination suit

The Supreme Court of Iowa reinstated a decision by the state Civil Rights Commission that an employee who was discharged for having a seizure on the job should get her job back and be reimbursed for the salary she lost. There was substantial evidence that she was discharged because of her epilepsy in violation of Iowa law, Iowa Code Ann. §601A.6, not because she failed to disclose her condition when she was hired. There also was substantial evidence that her discharge had nothing to do with the nature of her employment, since as a cafeteria worker she rarely used hazardous equipment, and it would not have been a significant burden on her employer to change her job to reduce any possible risks. Thus, the lower court overreached when it overruled the commission. ***Foods, Inc. v. Iowa Civil Rights Commission***, No. CE 13-07277 (Iowa, Polk County Dist. Ct., Nov. 20, 1980), 5 MDLR 40. However, in reinstating the commission's decision the high court reduced the employee's award by the amount of unemployment compensation she had received. ***Foods, Inc. v. Iowa Civil Rights Commission***, 318 N.W.2d 162 (Iowa Sup. Ct. 1982). ■

919(d), 1102

New York appeals court allows discovery of psychiatric records

In overruling a lower court, a New York appeals court decided that a patient's psychiatric records must be disclosed to a third party where they are "relevant and material to pending litigation" and the patient authorizes their release. Thus, a hospital, which was not a party to a medical malpractice action brought by the patient against another hospital, may not refuse to release psychiatric records that the defendant hospital needed for discovery purposes. ***Cynthia B. v. New Rochelle Hospital Medical Center***, 50 U.S.L.W. 2683 (N.Y. App. Div. May 3, 1982).

The suit began as an action by Cynthia B. and her husband Stephen B. against a hospital in New Rochelle for "reimbursement of medical expenses and damages for loss of consortium." Damages were sustained when Cynthia allegedly attempted suicide by jumping out of a window of the hospital. Previously she had been confined for detoxification and rehabilitation at New York Hospital, a private facility in Westchester County. After the suit was filed, the New Rochelle hospital demanded and the plaintiffs authorized the release of her medical records at New York Hospital. The request was refused in a letter stating that it was not the policy of New York Hospital to permit disclosure of psychiatric records, even upon authorization by the patient.

New Rochelle Hospital filed a motion to compel disclosure of the plaintiff's hospital records. A referee appointed by the lower court and the court itself found the records to be minimally relevant to the case and potentially prejudicial to the plaintiff and members of her family. The motion was denied, and the defendant hospital appealed.

The appeals court reversed the decision. "Although some of the material is of a sensitive and delicate nature, it does contain matter which is clearly material and relevant to the issues to be tried in the instant litigation and, therefore, the proper subject for discovery and inspection." Confidentiality of psychiatric records accorded by statute, section 33.13 of the New York Mental Hygiene Law, is not absolute. "In a proper case, it must yield to the needs of justice."

In *Gotkin v. Miller*, 379 F. Supp.

SPg0257

Goldberg v. Davis, 602 N.E.2d 812

(E.D.N.Y. 1974), the hospital ırd was not released to the pa- t, but that case is distinguishable ause the records were not needed pending litigation. In that case, ıet Gotkin wanted the materials a book she was writing about her ɔeriences at the hospital.

Here, the plaintiff has waived the ysician-patient privilege with ɔpect to the psychiatric records by ıcing her mental condition into ıue and the defendants need the in- ɔrmation to properly prepare their efense. "The ultimate responsibili- y for any inconvenience or embar- assment resulting from the revela- ion of her hospital records is with he plaintiff, and it is for her alone o balance the distressing conse- quences of such disclosure upon her personal sensibilities against what the effect of noncompliance with the rules will have upon the outcome of her lawsuit." If the records were not released, the plaintiff might be precluded from using testimony of the physician who treated her at New York Hospital. ■

1208, 958

Suspension of handicapped student upheld

A 17-year-old Illinois high school ident, who is learning disabled thus handicapped, was unsuc- ssful in his attempt to have a five- y suspension expunged from his ord. The federal court held that a ıled suspension of the student for ly abusing an instructor was ɔropriate under the Education for Handicapped Children Act. ough it is true that before a ndicapped student can be expelled educational services ter- there must be some finding is dangerous, this does pply here. "It is vividly ap- that there was not expulsion ɔr termination of, special ıon here, but rather a five-day linary interruption for a ıpt offense, which was ably calculated to teach the who obviously knew better, in an effort to avoid repetition and a consequent necessity for more drastic penalties." *Peoria Board of Education v. Illinois Board of Education*, 531 F. Supp. 148 (C.D. Ill. 1982). ■

1210(a), (c), (d), (e), 951, 952, 955, 956

Educating handicapped children under section 504

A federal court decision and nine case-related policy memoranda from the Department of Education's Office for Civil Rights address issues involving the education of handicapped children and adults under the requirements of section 504 of the Rehabilitation Act. The Office for Civil Rights memoranda, which were published just recently, cover the time period from January 1980 through June 1981. *Office for Civil Rights (ED) Policy Memoranda*, Volume 2, Jan.-Dec. 1980; Volume 3, Jan.-June 1981.

Accommodations on a School-sponsored Trip

A physically disabled high school student lost her suit to enjoin the local school district from preventing her from participating in a school-sponsored trip to Spain. Because of her physical limitations due to a congenital limb deficiency and the demanding physical nature of the trip, the federal court concluded that she was not an "otherwise qualified" handicapped individual within the meaning of section 504. In making its determination it noted that courts could consider both the physical qualifications necessary to participate and the "state's *parens patriae* interest in protecting the disabled against physical harm when the state has shown a risk to safety in a particular activity." *Wolff v. South Colonie Central School District*, 534 F. Supp. 758 (N.D.N.Y. 1982).

Grade Placement Decisions

Under section 104.36 of the section 504 regulations, the state is required to give parents an opportunity to contest all educational placement issues, including grade-level retention and promotion decisions, at a due process hearing. Thus, the state erred when it denied a hearing to the parents of a learning disabled child who was not promoted to the next grade level. *OCR Memo*, July 16, 1980.

Impartial Hearing Officer

State procedures that allow one school district to select an employee of another school district to act as a hearing officer do not necessarily violate the requirement that there be an impartial hearing, although this kind of selection process does create the potential for abuses in the identification, evaluation, or educational placement of handicapped children. *OCR Memo*, Feb. 28, 1980.

Intramural Athletic Programs

Section 504 regulations governing physical education and athletics, section 104.37, do not require a school district to establish a new athletic program to accommodate students who are unable to compete in the regular athletic program because they are handicapped. *OCR Memo*, Sept. 10, 1980.

Financial Responsibility for Private Residential Care

Under section 104.33 regulations for section 504, a school district is financially responsible for a parent-initiated placement of a handicapped student in a private institution as soon as it recommends or affirms the placement. Thus, a learning disabled student who was placed in a psychiatric hospital following his arrest on felony charges became entitled to free residential care when the school district recommended that the student remain in the hospital until a proper placement was found. *OCR Letter*, June 30, 1980.

Education in a State Institution

Sections 104.32 and 104.33(a) of the section 504 regulations impose continuing financial and programmatic obligations on school districts for children in state facilities only if the districts placed or referred the children for educational programs

Code, Health-General, s 4-301

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s 4-301 Definitions.

(a) In general. -- In this subtitle the following words have the meanings indicated.

(b) Directory information. -- (1) "Directory information" means information concerning the presence and general health condition of a patient who has been admitted to a health care facility or who is currently receiving emergency health care in a health care facility.

(2) "Directory information" does not include health care information developed primarily in connection with mental health services.

(c) Disclose or disclosure. -- "Disclose or disclosure" means the transmission or communication of information in a medical record, including an acknowledgment that a medical record on a particular patient or recipient exists.

(d) Emergency. -- "Emergency" means a situation when, in the professional opinion of the health care provider, a clear and significant risk of death or imminent serious injury or harm to a patient or recipient exists.

(e) General health condition. -- "General health condition" means the health status of a patient described in terms of "critical", "poor", "fair", "good", "excellent", or terms denoting similar conditions.

(f) Health care. -- "Health care" means any care, treatment, or procedure by a health care provider:

(1) To diagnose, evaluate, rehabilitate, manage, treat, or maintain the physical or mental condition of a patient or recipient; or

(2) That affects the structure or any function of the human body.

(g) Medical record. -- (1) "Medical record" means any oral, written, or other transmission of information that:

(i) Is written in the record of a patient or recipient;

(ii) Identifies or can readily be associated with the identity of a patient or recipient; and

(iii) Relates to the health care of the patient or recipient.

(2) "Medical record" includes any documentation of disclosures of a medical record to any person who is not an employee, agent, or consultant of the health care provider.

(h) Health care provider. -- (1) "Health care provider" means:

(i) A person who is licensed, certified, or otherwise

authorized under the Health Occupations Article to provide health care in the ordinary course of business or practice of a profession or in an approved education or training program; or

(ii) A facility where health care is provided to patients or recipients, including a facility as defined in s 10-101 (e) of this article, a hospital as defined in s 19-301 (f) of this article, a related institution as defined in s 19-301 (l) of this article, a health maintenance organization as defined in s 19-701 (e) of this article, an outpatient clinic, and a medical laboratory.

(2) "Health care provider" includes the agents, employees, officers, and directors of a facility and the agents and employees of a health care provider.

(i) Mental health services. -- (1) "Mental health services" means health care rendered to a recipient primarily in connection with the diagnosis, evaluation, treatment, case management, or rehabilitation of any mental disorder.

(2) For acute general hospital services, mental health services are considered to be the primarily rendered service only if service is provided pursuant to Title 10, Subtitle 6 or Title 12 of this article.

(j) Patient. -- "Patient" means a person who receives health care and on whom a medical record is maintained.

(k) Person in interest. -- "Person in interest" means:

(1) An adult on whom a health care provider maintains a medical record;

(2) A person authorized to consent to health care for an adult consistent with the authority granted;

(3) A duly appointed personal representative of a deceased person;

(4) (i) A minor, if the medical record concerns treatment to which the minor has the right to consent and has consented under Title 20, Subtitle 1 of this article; or

(ii) A parent, guardian, custodian, or a representative of the minor designated by a court, in the discretion of the attending physician who provided the treatment to the minor, as provided in s 20-102 or s 20-104 of this article;

(5) If paragraph (4) of this subsection does not apply to a minor:

(i) A parent of the minor, except if the parent's authority to consent to health care for the minor has been specifically limited by a court order or a valid separation agreement entered into by the parents of the minor; or

(ii) A person authorized to consent to health care for the minor consistent with the authority granted; or

(6) An attorney appointed in writing by a person listed in paragraphs (1), (2), (3), (4), or (5) of this subsection.

(l) Primary provider of mental health services. -- "Primary provider of mental health services" means the designated mental health services provider who:

(1) Has primary responsibility for the development of the mental health treatment plan for the recipient; and

(2) Is actively involved in providing that treatment.

(m) Recipient. -- "Recipient" means a person who has applied for, for whom an application has been submitted, or who has

received mental health services.

(1990, ch. 480, s 2; 1991, ch. 55, s 1; 1993, ch. 5, s 1; ch. 83.)

NOTES, REFERENCES, AND ANNOTATIONS

Effect of Amendments. -- Chapter 5, Acts 1993, approved Mar. 16, 1993, and effective from date of enactment, added "who" to the end of the introductory language of (l) and deleted "who" from the beginning of (l) (1).

Chapter 83, Acts 1993, effective Oct. 1, 1993, inserted "or s 20-104" in (k) (4) (ii).

Editor's Note. -- Section 1, ch. 480, Acts 1990, transferred former ss 4-303 through 4-305 of this article to be present ss 4-401 through 4-403 of this article.

Section 1 of ch. 480 also transferred the subtitle heading for former Subtitle 3 of this title to be the subtitle heading for present Subtitle 4 of this title.

Section 2 of ch. 480 repealed former ss 4-301 and 4-302 of this article, and enacted present ss 4-301 through 4-309 of this article.

Section 2 of ch. 480 also enacted the subtitle heading for present Subtitle 3 of this title.

Section 3 of ch. 480 provides that the act shall take effect July 1, 1991.

Former s 4-301 had been amended by s 1, ch. 55, Acts 1991, approved Apr. 9, 1991, and effective from date of passage.

AIDS patients. -- The protection of patient's privacy was a sufficiently compelling governmental interest to support some limitation on the public's constitutional right of access to the medical records indicating AIDS. Doe v. Shady Grove Adventist Hosp., 89 Md. App. 351, 598 A.2d 507 (1991).

Cited in Weidig v. Crites, 323 Md. 408, 593 A.2d 1094 (1991).

Code, Health General, s 4-301
MD HEALTH GEN s 4-301
END OF DOCUMENT

Code, Health-General, s 4-302

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s 4-302 Confidentiality and disclosure generally.

(a) In general. -- A health care provider shall:

(1) Keep the medical record of a patient or recipient confidential; and

(2) Disclose the medical record only:

(i) As provided by this subtitle; or

(ii) As otherwise provided by law.

(b) Applicability of subtitle. -- The provisions of this subtitle do not apply to information:

(1) Not kept in the medical record of a patient or recipient that is related to the administration of a health care facility, including:

(i) Risk management;

(ii) Quality assurance; and

(iii) Any activities of a medical or dental review committee that are confidential under the provisions of Title 14, Subtitle 6 and Title 4, Subtitle 5 of the Health Occupations Article;

(2) Governed by the federal confidentiality of alcohol and drug abuse patient records regulations, 42 CFR Part 2 and the provisions of s 8-601(c) of this article; or

(3) Governed by the developmental disability confidentiality provisions in ss 7-1008 through 7-1011 of this article.

(c) Directory information. -- A health care provider may disclose directory information about a patient without the authorization of a person in interest, except if the patient has instructed the health care provider in writing not to disclose directory information.

(d) Redisclosure. -- A person to whom a medical record is disclosed may not redisclose the medical record to any other person unless the redisclosure is:

(1) Authorized by the person in interest;

(2) Otherwise permitted by this subtitle;

(3) Permitted under Article 88A, s 6 (b) of the Code; or

(4) Directory information.

(e) Construction of subtitle. -- The provisions of this subtitle may not be construed to constitute an exception to the reporting requirements of Title 5, Subtitle 7 and Title 14, Subtitle 3 of the Family Law Article.

(1990, ch. 480, s 2; 1992, ch. 22, s 1; 1993, ch. 83.)

NOTES, REFERENCES, AND ANNOTATIONS

Effect of Amendments. -- The 1992 amendment, approved Apr. 7, 1992, and effective from date of enactment, substituted "ss 7-1008 through 7-1011" for "ss 7-610 through 7-614" in (b) (3); and substituted "s 6 (b)" for "s 6B" in (d) (3).

The 1993 amendment, effective Oct. 1, 1993, substituted "Subtitle 3" for "Subtitle 2" in (e).

Maryland Law Review. -- For comment, "Doctor-Patient Confidentiality Versus Duty to Warn in the Context of AIDS Patients and Their Partners," see 47 Md. L. Rev. 675 (1988).

For comment, "The AIDS Project: Creating a Public Health Policy-- Rights and Obligations of Health Care Workers," see 48 Md. L. Rev. 93 (1989).

Failure to produce records. -- A mere failure to produce records does not constitute a violation of this section. Davis v. Johns Hopkins Hosp., 330 Md. 53, 622 A.2d 128 (1993).

Code, Health General, s 4-302
MD HEALTH GEN s 4-302
END OF DOCUMENT

Code, Health-General, s 4-303

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s 4-303 Disclosure upon authorization of a person in interest.

(a) In general. -- A health care provider shall disclose a medical record on the authorization of a person in interest in accordance with this section.

(b) Form, terms and conditions of authorization. -- Except as otherwise provided in subsection (c) of this section, an authorization shall:

(1) Be in writing, dated, and signed by the person in interest;

(2) State the name of the health care provider;

(3) Identify to whom the information is to be disclosed;

(4) State the period of time that the authorization is valid, which may not exceed 1 year, except:

(i) In cases of criminal justice referrals, in which case the authorization shall be valid until 30 days following final disposition; or

(ii) In cases where the patient on whom the medical record is kept is a resident of a nursing home, in which case the authorization shall be valid until revoked, or for any time period specified in the authorization; and

(5) Apply only to a medical record developed by the health care provider unless in writing:

(i) The authorization specifies disclosure of a medical record that the health care provider has received from another provider; and

(ii) The other provider has not prohibited redisclosure.

(c) Preauthorized insurance forms. -- A health care provider shall disclose a medical record on receipt of a preauthorized form that is part of an application for insurance.

(d) Revocation of authorization. -- (1) Except in cases of criminal justice referrals, a person in interest may revoke an authorization in writing.

(2) A revocation of an authorization becomes effective on the date of receipt by the health care provider.

(3) A disclosure made before the effective date of a revocation is not affected by the revocation.

(e) Entries in records. -- A copy of the following shall be entered in the medical record of a patient or recipient:

(1) A written authorization;

(2) Any action taken in response to an authorization; and

(3) Any revocation of an authorization.

(1990, ch. 480, s 2.)

Code, Health General, s 4-303
MD HEALTH GEN s 4-303
END OF DOCUMENT

Code, Health-General, s 4-304

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s 4-304 Copies of records; changes in records.

(a) Requests for copies. -- (1) Except as otherwise provided in this subtitle, a health care provider shall comply within a reasonable time after a person in interest requests in writing:

(i) To receive a copy of a medical record; or

(ii) To see and copy the medical record.

(2) If a medical record relates to a psychiatric or psychological problem and the attending health care provider, with any available and feasible input from a primary provider of mental health services, believes disclosure of any portion of the medical record to be injurious to the health of a patient or recipient, the health care provider may refuse to disclose that portion of the medical record to the patient, recipient, or person in interest but, on written request, shall:

(i) Make a summary of the undisclosed portion of the medical record available to the patient, recipient, or person in interest;

(ii) Insert a copy of the summary in the medical record of the patient or recipient;

(iii) Permit examination and copying of the medical record by another health care provider who is authorized to treat the patient or recipient for the same condition as the health care provider denying the request; and

(iv) Inform the patient or recipient of the patient's or recipient's right to select another health care provider under this subsection.

(b) Changes in records. -- (1) A health care provider shall establish procedures for a person in interest to request an addition to or correction of a medical record.

(2) A person in interest may not have any information deleted from a medical record.

(3) Within a reasonable time after a person in interest requests a change in a medical record, the health care provider shall:

(i) Make the requested change; or

(ii) Provide written notice of a refusal to make the change to the person in interest.

(4) A notice of refusal shall contain:

(i) Each reason for the refusal; and

(ii) The procedures, if any, that the health care provider has established for review of the refusal.

(5) If the final determination of the health care provider is

a refusal to change the medical record, the provider:

(i) Shall permit a person in interest to insert in the medical record a concise statement of the reason that the person in interest disagrees with the record; and

(ii) May insert in the medical record a statement of the reasons for the refusal.

(6) A health care provider shall give a notice of a change in a medical record or a copy of a statement of disagreement:

(i) To any individual the person in interest has designated to receive the notice or statement; and

(ii) To whom the health care provider has disclosed an inaccurate, an incomplete, or a disputed medical record within the previous 6 months.

(7) If a health care provider discloses a medical record after an addition, correction, or statement of disagreement has been made, the provider shall include with the medical record a copy of each addition, correction, or statement of disagreement.

(c) Payment of copying costs. -- A health care provider may require a person in interest or any other authorized person who requests a copy of a medical record to pay the cost of copying:

(1) For State facilities regulated by the Department of Health and Mental Hygiene, as provided in s 10-621 of the State Government Article; or

(2) For all other health care providers, the reasonable cost of providing the information requested.

(d) Nonpayment of copying costs. -- Except for an emergency request from a unit of State or local government concerning a child protective services case or adult protective services case, a health care provider may withhold copying until the fee for copying is paid.

(1990, ch. 480, s 2.)

Code, Health General, s 4-304
MD HEALTH GEN s 4-304
END OF DOCUMENT

Code, Health-General, s 4-305

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s 4-305 Disclosures without authorization of person in interest -- In general.

(a) Construction of section. -- This section may not be construed to impose an obligation on a health care provider to disclose a medical record.

(b) Permitted disclosure. -- A health care provider may disclose a medical record without the authorization of a person in interest:

(1) (i) To the provider's authorized employees, agents, medical staff, medical students, or consultants for the sole purpose of offering, providing, evaluating, or seeking payment for health care to patients or recipients by the provider;

(ii) To the provider's legal counsel regarding only the information in the medical record that relates to the subject matter of the representation; or

(iii) To any provider's insurer or legal counsel, or the authorized employees or agents of a provider's insurer or legal counsel, for the sole purpose of handling a potential or actual claim against any provider;

(2) If the person given access to the medical record signs an acknowledgment of the duty under this Act not to redisclose any patient identifying information, to a person for:

(i) Educational or research purposes, subject to the applicable requirements of an institutional review board;

(ii) Evaluation and management of health care delivery systems; or

(iii) Accreditation of a facility by professional standard setting entities;

(3) Subject to the additional limitations for a medical record developed primarily in connection with the provision of mental health services in s 4-307 of this subtitle, to a government agency performing its lawful duties as authorized by an act of the Maryland General Assembly or the United States Congress;

(4) Subject to the additional limitations for a medical record developed primarily in connection with the provision of mental health services in s 4-307 of this subtitle, to another health care provider for the sole purpose of treating the patient or recipient on whom the medical record is kept;

(5) If a claim has been or may be filed by, or with the authorization of a patient or recipient on behalf of the patient or recipient, for covered insureds, covered beneficiaries, or

enrolled recipients only, to third party payors and their agents, if the payors or agents have met the applicable provisions of Title 19, Subtitle 13 of the Health-General Article, including nonprofit health service plans, health maintenance organizations, fiscal intermediaries and carriers, the Department of Health and Mental Hygiene and its agents, the United States Department of Health and Human Services and its agents, or any other person obligated by contract or law to pay for the health care rendered for the sole purposes of:

(i) Submitting a bill to the third party payor;

(ii) Reasonable prospective, concurrent, or retrospective utilization review or predetermination of benefit coverage;

(iii) Review, audit, and investigation of a specific claim for payment of benefits; or

(iv) Coordinating benefit payments in accordance with the provisions of Article 48A of the Code under more than 1 sickness and accident, dental, or hospital and medical insurance policy;

(6) If a health care provider makes a professional determination that an immediate disclosure is necessary, to provide for the emergency health care needs of a patient or recipient;

(7) Except if the patient has instructed the health care provider not to make the disclosure, or if the record has been developed primarily in connection with the provision of mental health services, to immediate family members of the patient or any other individual with whom the patient is known to have a close personal relationship, if made in accordance with good medical or other professional practice; or

(8) To organ and tissue procurement personnel under the restrictions of s 5- 408 of this article at the request of a physician for a patient whose organs and tissues may be donated for the purpose of evaluating the patient for possible organ and tissue donation.

(1990, ch. 480, s 2.)

Code, Health General, s 4-305
MD HEALTH GEN s 4-305
END OF DOCUMENT

Code, Health-General, s 4-306

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s 4-306 Same -- Investigations.

(a) Permitted disclosures. -- A health care provider shall disclose a medical record without the authorization of a person in interest:

(1) To a unit of State or local government, or to a member of a multidisciplinary team assisting the unit, for purposes of investigation or treatment in a case of suspected abuse or neglect of a child or an adult, subject to the following conditions:

(i) The health care provider shall disclose only the medical record of a person who is being assessed in an investigation or to whom services are being provided in accordance with Title 5, Subtitle 7 or Title 14, Subtitle 3 of the Family Law Article;

(ii) The health care provider shall disclose only the information in the medical record that will, in the professional judgment of the provider, contribute to the:

1. Assessment of risk;
2. Development of a service plan;
3. Implementation of a safety plan; or
4. Investigation of the suspected case of abuse or neglect; and

(iii) The medical record may be redisclosed as provided in Article 88A, s 6 of the Code;

(2) Subject to the additional limitations for a medical record developed primarily in connection with the provision of mental health services in s 4-307 of this subtitle, to health professional licensing and disciplinary boards, in accordance with a subpoena for medical records for the sole purpose of an investigation regarding:

(i) Licensure, certification, or discipline of a health professional; or

(ii) The improper practice of a health profession;

(3) To a health care provider or the provider's insurer or legal counsel, all information in a medical record relating to a patient or recipient's health, health care, or treatment which forms the basis for the issues of a claim in a civil action initiated by the patient, recipient, or person in interest;

(4) Notwithstanding any privilege in law, as needed, to a medical review committee as defined in s 14-601 of the Health Occupations Article or a dental review committee as defined in s 4-501 of the Health Occupations Article;

(5) To another health care provider as provided in s 19-308.2

or s 10-807 of this article; or

(6) In accordance with compulsory process, a stipulation by a patient or person in interest, or a discovery request permitted by law to be made to a court, an administrative tribunal, or a party to a civil court, administrative, or health claims arbitration proceeding.

(b) Requests; documentation. -- When a disclosure is sought under this section:

(1) A written request for disclosure or written confirmation by the health care provider of an oral request that justifies the need for disclosure shall be inserted in the medical record of the patient or recipient; and

(2) Documentation of the disclosure shall be inserted in the medical record of the patient or recipient.

(1990, ch. 480, s 2; 1993, ch. 83.)

NOTES, REFERENCES, AND ANNOTATIONS

Effect of Amendments. -- The 1993 amendment, effective Oct. 1, 1993, substituted "Subtitle 3" for "Subtitle 2" in (a) (1) (i); and inserted "or s 10-807" in (a) (5).

Code, Health General, s 4-306
MD HEALTH GEN s 4-306
END OF DOCUMENT

Code, Health-General, s 4-307

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s 4-307 Disclosure of mental health records.

(a) Definitions. -- In this section the following words have the meanings indicated.

(1) "Case management" means an individualized recipient centered service designed to assist a recipient in obtaining effective mental health services through the assessing, planning, coordinating, and monitoring of services on behalf of the recipient.

(2) "Core service agency" means an organization approved by the Mental Hygiene Administration to manage mental health resources and services in a designated area or to a designated target population.

(3) "Director" means the Director of the Mental Hygiene Administration or the designee of the Director.

(4) "Mental health director" means the health care professional who performs the functions of a clinical director or the designee of that person in a health care, detention, or correctional facility.

(b) Governing provisions. -- The disclosure of a medical record developed in connection with the provision of mental health services shall be governed by the provisions of this section in addition to the other provisions of this subtitle.

(c) Permitted disclosures generally. -- When a medical record developed in connection with the provision of mental health services is disclosed without the authorization of a person in interest, only the information in the record relevant to the purpose for which disclosure is sought may be released.

(d) Records relating to groups or families. -- A health care provider may disclose a medical record that relates to and identifies more than one recipient in group or family therapy only:

(1) On the authorization of a person in interest for each recipient;

(2) As provided in this subtitle; or

(3) As otherwise provided by law.

(e) Participants in plans of care service agencies. -- This section may not be construed to prevent the disclosure of a medical record that relates to the provision of mental health services between or among the health care providers that participate in the approved plan of a core service agency for the delivery of mental health services, if a recipient:

(1) Has received a current list of the participating

providers; and

(2) Has signed a written agreement with the core service agency to participate in the client information system developed by the agency.

(f) Rate reviews, audits, health planning, licensures, approvals or accreditations of facilities. -- If an individual given access to a medical record that relates to the provision of mental health services signs an acknowledgment of the duty under this Act not to redisclose personal identifying information about a recipient, this section may not be construed to prevent the disclosure of the medical record for rate review, auditing, health planning, licensure, approval, or accreditation of a facility by governmental or professional standard setting entities.

(g) Health, safety, and protection of recipient or others. -- (1) A health care provider may disclose a medical record without the authorization of a person in interest:

(i) To the medical or mental health director of a juvenile or adult detention or correctional facility if:

1. The recipient has been involuntarily committed under State law or a court order to the detention or correctional facility requesting the medical record; and

2. After a review of the medical record, the health care provider who is the custodian of the record is satisfied that disclosure is necessary for the proper care and treatment of the recipient;

(ii) As provided in s 5-316 of the Courts and Judicial Proceedings Article;

(iii) 1. If a health care provider is a facility as defined in s 10-101 of this article, to a law enforcement agency concerning a recipient who:

A. Has been admitted involuntarily or by court order to the facility; and

B. Is on an unauthorized absence or has otherwise left the facility without being discharged or released;

2. The facility director may disclose to the law enforcement agency identifying information and only such further information that the director believes is necessary to aid the law enforcement agency in locating and apprehending the recipient for the purpose of:

A. Safely returning the recipient to custody; or

B. Fulfilling the provisions of subparagraph (ii) of this paragraph;

(iv) If a health care provider is a facility as defined in s 10-101 of this article, the facility director may confirm or deny the presence in the facility of a recipient to a parent, guardian, next of kin, or any individual who has a significant interest in the status of the recipient if that individual has filed a missing persons report regarding the recipient; and

(v) To allow for the service of process or a court order in a facility when appropriate arrangements have been made with the facility director so as to minimize loss of confidentiality.

(2) When a disclosure is made under this subsection, documentation of the disclosure shall be inserted in the medical record of the recipient.

(h) Transfer of recipient; protection and advocacy system; commitment proceedings; court orders, subpoenas, etc.; death of recipient. -- (1) A health care provider shall disclose a medical record without the authorization of a person in interest:

(i) To the medical or mental health director of a juvenile or adult detention or correctional facility or to another inpatient provider of mental health services in connection with the transfer of a recipient from an inpatient provider, if:

1. The health care provider with the records has determined that disclosure is necessary for the continuing provision of mental health services; and

2. The recipient is transferred:

A. As an involuntary commitment or by court order to the provider;

B. Under State law to a juvenile or adult detention or correctional facility; or

C. To a provider that is required by law or regulation to admit the recipient;

(ii) To the State designated protection and advocacy system for mentally ill individuals under the Federal Protection and Advocacy for Mentally Ill Individuals Act of 1986, as amended, if:

1. The State designated protection and advocacy system has received a complaint regarding the recipient or the director of the system has certified in writing to the chief administrative officer of the health care provider that there is probable cause to believe that the recipient has been subject to abuse or neglect;

2. The recipient by reason of mental or physical condition is unable to authorize disclosure; and

3. A. The recipient does not have a legal guardian or other legal representative who has the authority to consent to the release of health care information; or

B. The legal guardian of the recipient is a representative of a State agency;

(iii) To another health care provider or legal counsel to the other health care provider prior to and in connection with or for use in a commitment proceeding in accordance with Title 10, Subtitle 6 or Title 12 of this article;

(iv) In accordance with a court order, other than compulsory process compelling disclosure, as permitted under s 9-109 (d), s 9-109.1 (d), or s 9- 121 (d) of the Courts and Judicial Proceedings Article, or as otherwise provided by law, to:

1. A court;

2. An administrative law judge;

3. A health claims arbitrator; or

4. A party to a court, administrative, or arbitration proceeding;

(v) In accordance with service of compulsory process or a discovery request, as permitted under s 9-109 (d), s 9-109.1 (d), or s 9-121 (d) of the Courts and Judicial Proceedings Article, or as otherwise provided by law, to a court, an administrative tribunal, or a party to a civil court, administrative, or health claims arbitration proceeding, if:

1. The request for issuance of compulsory process or the

request for discovery filed with the court or administrative tribunal and served on the health care provider is accompanied by a copy of a certificate directed to the recipient, the person in interest, or counsel for the recipient or the person in interest;

2. The certificate shall:

A. Notify the recipient or the person in interest that disclosure of the recipient's medical record is sought;

B. Notify the recipient or the person in interest of the provisions of this subsection or any other provision of law on which the requesting party relies in seeking disclosure of the information;

C. Notify the recipient or the person in interest of the procedure for filing a motion to quash or a motion for a protective order;

D. Be attached to a copy of the request for issuance of compulsory process or request for discovery; and

E. Be mailed to the recipient, the person in interest, or counsel for the recipient or person in interest by certified mail, return receipt requested, on or before the date of filing the request for issuance of compulsory process or the request for discovery;

(vi) 1. In accordance with a subpoena for medical records on specific recipients:

A. To health professional licensing and disciplinary boards for the sole purpose of an investigation regarding licensure, certification, or discipline of a health professional or the improper practice of a health profession; and

B. To grand juries, prosecution agencies, and law enforcement agencies under the supervision of prosecution agencies for the sole purposes of investigation and prosecution of a provider for theft and fraud, related offenses, obstruction of justice, perjury, unlawful distribution of controlled substances, and of any criminal assault, neglect, patient abuse or sexual offense committed by the provider against a recipient, provided that the prosecution or law enforcement agency shall:

i. Have written procedures which shall be developed in consultation with the director to maintain the medical records in a secure manner so as to protect the confidentiality of the records; and

ii. In a criminal proceeding against a provider, to the maximum extent possible, remove and protect recipient identifying information from the medical records used in the proceeding;

2. If a recipient believes that a medical record has been inappropriately obtained, maintained, or disclosed under the provisions of this subparagraph, the recipient may petition the State prosecutor for an investigation of the allegation; and

3. Except in a proceeding relating to payment for the health care of a recipient, the medical record of a recipient and any information obtained as a result of a disclosure under this subparagraph is disclosable, notwithstanding any privilege in law, but may not be used in any proceeding against the recipient; or

(vii) In the event of the death of a recipient, to the office of the medical examiner as authorized under s 5-309 or s 10-714 of this article.

(2) A written request for disclosure or written confirmation of an oral request in an emergency that justifies the need for disclosure shall be inserted in the medical record of the recipient.

(3) Documentation of the disclosure shall be inserted in the medical record of the recipient.

(4) This subsection may not preclude a health care provider, a recipient, or person in interest from asserting in a motion to quash or a motion for a protective order any constitutional right or other legal authority in opposition to disclosure.

(1990, ch. 480, s 2; 1993, ch. 83.)

NOTES, REFERENCES, AND ANNOTATIONS

Effect of Amendments. -- The 1993 amendment, effective Oct. 1, 1993, inserted "s 9-109.1 (d)" in the introductory language of (h) (1) (iv) and (v); and substituted "s 5-309 or s 10-714" for "Title 5" in (h) (1) (vii).

Code, Health General, s 4-307
MD HEALTH GEN s 4-307
END OF DOCUMENT

ANNOTATED CODE OF MARYLAND
HEALTH-GENERAL.
TITLE 4. STATISTICS AND RECORDS.
Subtitle 3. **Confidentiality** of **Medical** Records.

Current through 1993 Regular Session Ch. 642

s 4-308 Liability for good faith actions.

A health care provider, who in good faith discloses or does not disclose a medical record, is not liable in any cause of action arising from the disclosure or nondisclosure of the medical record.

(1990, ch. 480, s 2.)

Code, Health General, s 4-308
MD HEALTH GEN s 4-308
END OF DOCUMENT

Code, Health-General, s 4-309

ANNOTATED CODE OF MARYLAND
HEALTH-GENERAL.
TITLE 4. STATISTICS AND RECORDS.
Subtitle 3. **Confidentiality** of **Medical** Records.

Current through 1993 Regular Session Ch. 642

s 4-309 Refusal to disclose records; violations of subtitle; penalties.

(a) Refusal to disclose records. -- If a health care provider knowingly refuses to disclose a medical record within a reasonable time after a person in interest requests the disclosure, the health care provider is liable for actual damages.

(b) Violations of subtitle. -- A health care provider or any other person is in violation of this subtitle if the health care provider or any other person:

(1) Requests or obtains a medical record under false pretenses or through deception; or

(2) Discloses a medical record in violation of this subtitle.

(c) Criminal penalties. -- A health care provider or any other person who knowingly and willfully violates any provision of this subtitle is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $1,000 for the first offense and not exceeding $5,000 for each subsequent conviction for a violation of any provision of this subtitle.

(d) Civil penalties. -- A health care provider or any other person who knowingly violates any provision of this subtitle is liable for actual damages.

(1990, ch. 480, s 2.)

NOTES, REFERENCES, AND ANNOTATIONS

Cross References. -- See Editor's note to s 4-301 of this article.

Code, Health General, s 4-309
MD HEALTH GEN s 4-309
END OF DOCUMENT

O.R.S. s 192.525

OREGON REVISED STATUTES
TITLE 19 MISCELLANEOUS MATTERS RELATED TO GOVERNMENT AND PUBLIC AFFAIRS

CHAPTER 192. PUBLIC AND **PRIVATE** RECORDS; PUBLIC REPORTS AND MEETINGS
MEDICAL RECORDS

Current through Ch. 973 of the 66th Legislative Assembly (1991)

192.525. State policy concerning medical records.

The Legislative Assembly declares that it is the policy of the State of Oregon to protect both the right of an individual to have the medical history of the individual protected from disclosure to persons other than the health care provider and insurer of the individual who needs such information, and the right of an individual to review the medical records of that individual. It is recognized that both rights may be limited, but only to benefit the patient. These rights of confidentiality and full access must be protected by private and public institutions providing health care services and by private practitioners of the healing arts. The State of Oregon commits itself to fulfilling the objectives of this public policy for public providers of health care. Private practitioners of the healing arts and private institutions providing health care services are encouraged to adopt voluntary guidelines that will grant health care recipients access to their own medical records while preserving those records from unnecessary disclosure.

(1977 c.812 s 1)

NOTES, REFERENCES, AND ANNOTATIONS

192.525

NOTES OF DECISIONS

Defendant hospital's duty of confidentiality did not extend beyond patient to patient's family where facts disclosed did not concern family and did not arise out of any family involvement in patient's treatment. Doe v. Portland Health Centers, Inc., 99 Or App 423, 782 P2d 446 (1989)

O. R. S. s 192.525
OR ST s 192.525
END OF DOCUMENT

O.R.S. s 192.530

OREGON REVISED STATUTES
TITLE 19 MISCELLANEOUS MATTERS RELATED TO GOVERNMENT AND PUBLIC AFFAIRS

CHAPTER 192. PUBLIC AND **PRIVATE** RECORDS; PUBLIC REPORTS AND MEETINGS
MEDICAL RECORDS

Current through Ch. 973 of the 66th Legislative Assembly (1991)

192.530. Health Division to develop guidelines for access to medical records.

The Health Division of the Department of Human Resources and those boards licensing the healing arts that have been established in the division shall assist private health care providers in this state to develop guidelines necessary to fulfill this state's policy of facilitating a patient's access to medical records referring to the patient and limiting disclosure, without the patient's consent, to persons other than the health care provider and insurer of the patient who needs such information. Such guidelines shall be reported to the Sixtieth Legislative Assembly.

(1977 c.812 s 2)

O. R. S. s 192.530
OR ST s 192.530
END OF DOCUMENT

WEST VIRGINIA CODE 1966
CHAPTER 16. PUBLIC HEALTH.
ARTICLE 3C. AIDS-RELATED **MEDICAL** TESTING AND RECORDS **CONFIDENTIALITY** ACT.

NOTES, REFERENCES, AND ANNOTATIONS

Editor's notes. -- For redesignation of department of health as division of health, within the department of health and human resources, see s 5F-2-1.

W. Va. Law Review. -- For article, "Mandatory HIV Testing of Rape Defendants: Constitutional Rights Are Sacrificed in a Vain Attempt to Assist the Victim," see 94 W. Va. L. Rev. 179 (1991).

Code, Ch. 16, Art. 3C, Refs & Annos
WV ST Ch. 16, Art. 3C, Refs & Annos
END OF DOCUMENT

WEST VIRGINIA CODE 1966
CHAPTER 16. PUBLIC HEALTH.
ARTICLE 3C. AIDS-RELATED **MEDICAL** TESTING AND RECORDS **CONFIDENTIALITY** ACT.

s 16-3C-1 Definitions.

When used in this article:

(a) "AIDS" means acquired immunodeficiency syndrome.

(b) "ARC" means AIDS-related complex.

(c) "Bureau" means the bureau of public health.

(d) "Commissioner" means the commissioner of the bureau of public health.

(e) "Department" means the state department of health and human resources.

(f) "Funeral director" shall have the same meaning ascribed to such term in section four [s 30-6-4], article six, chapter thirty of this code.

(g) "Convicted" includes pleas of guilty and pleas of nolo contendere accepted by the court having jurisdiction of the criminal prosecution, a finding of guilty following a jury trial or a trial to a court, and an adjudicated juvenile offender as defined in section three [s 49-5B-3], article five-b, chapter forty-nine of this code.

(h) "Funeral establishment" shall have the same meaning ascribed to such term in section four, article six, chapter thirty of this code.

(i) "HIV" means the human immunodeficiency virus identified as the causative agent of AIDS.

(j) "HIV-related test" means a test for the HIV antibody or antigen or any future valid test approved by the bureau, the federal drug administration or the centers for disease control.

(k) "Health facility" means a hospital, nursing home, clinic, blood bank, blood center, sperm bank, laboratory or other health care institution.

(l) "Health care provider" means any physician, dentist, nurse, paramedic, psychologist or other person providing medical, dental, nursing, psychological or other health care services of any kind.

(m) "Infant" means a person under six years of age.

(n) "Patient" means the person receiving the HIV-related testing.

(o) "Person" includes any natural person, partnership, association, joint venture, trust, public or private corporation or health facility.

(p) "Release of test results" means a written authorization

for disclosure of HIV-related test results that is signed, dated and specifies to whom disclosure is authorized and the time period the release is to be effective.

(q) "Victim" means the person or persons to whom transmission of bodily fluids from the perpetrator of the crimes of sexual abuse, sexual assault, incest or sexual molestation occurred or was likely to have occurred in the commission of such crimes.

(1988, 3rd Ex. Sess., c. 1; 1993, c. 60.)

NOTES, REFERENCES, AND ANNOTATIONS

Effect of amendment of 1993. -- The amendment added present (c), (d), (g), (m), (n), (q); redesignated as present (a) and (b) former (b) and (c); as present (e) former (a); as present (f) former (d); as present (h) to (l) former (e) to (i); as present (o) and (p) former (j) and (k); added "and human resources" in present (e); substituted "bureau," for "department," in present (j); and made minor stylistic changes.

Code, s 16-3C-1
WV ST s 16-3C-1
END OF DOCUMENT

Code, s 16-3C-2

WEST VIRGINIA CODE 1966
CHAPTER 16. PUBLIC HEALTH.
ARTICLE 3C. AIDS-RELATED **MEDICAL** TESTING AND RECORDS **CONFIDENTIALITY** ACT.

Current through Ch. 10 of the Extraordinary Session 71st Legislature (1993)

s 16-3C-2 Testing.

(a) HIV-related testing may be requested by a physician, dentist or the commissioner for any of the following:

(1) When there is cause to believe that the test could be positive;

(2) When there is cause to believe that the test could provide information important in the care of the patient; or

(3) When any person voluntarily consents to the test.

(b) The requesting physician, dentist or the commissioner shall provide the patient with written information in the form of a booklet or pamphlet prepared or approved by the bureau or, in the case of persons who are unable to read, shall either show a video or film prepared or approved by the bureau to the patient, or read or cause to be read to the patient the information prepared or approved by the bureau which contains the following information:

(1) An explanation of the test, including its purpose, potential uses, limitations, the meaning of its results and any special relevance to pregnancy and prenatal care;

(2) An explanation of the procedures to be followed;

(3) An explanation that the test is voluntary and may be obtained anonymously;

(4) An explanation that the consent for the test may be withdrawn at any time prior to drawing the sample for the test and that such withdrawal of consent may be given orally if the consent was given orally, or shall be in writing if the consent was given in writing;

(5) An explanation of the nature and current knowledge of asymptomatic HIV infection, ARC and AIDS and the relationship between the test result and those diseases; and

(6) Information about behaviors known to pose risks for transmission of HIV infection.

(c) A person seeking an HIV-related test who wishes to remain anonymous has the right to do so, and to provide written, informed consent through use of a coded system with no linking or individual identity to the test requests or results. A health care provider who does not provide HIV-related tests on an anonymous basis shall refer such a person to a test site which does provide anonymous testing, or to any local or county health department which shall provide for performance of an HIV-related test and counseling.

(d) At the time of learning of any test result, the patient

shall be provided with counseling or referral for counseling for coping with the emotional consequences of learning any test result. This may be done by brochure or personally, or both.

(e) No consent for testing is required and the provisions of subsection (b) of this section do not apply for:

(1) A health care provider or health facility performing an HIV-related test on the donor or recipient when the health care provider or health facility procures, processes, distributes or uses a human body part (including tissue and blood or blood products) donated for a purpose specified under the uniform anatomical gift act, or for transplant recipients, or semen provided for the purpose of artificial insemination and such test is necessary to assure medical acceptability of a recipient or such gift or semen for the purposes intended;

(2) The performance of an HIV-related test in documented bona fide medical emergencies when the subject of the test is unable to grant or withhold consent, and the test results are necessary for medical diagnostic purposes to provide appropriate emergency care or treatment, except that post-test counseling or referral for counseling shall nonetheless be required. Necessary treatment may not be withheld pending HIV test results; or

(3) The performance of an HIV-related test for the purpose of research if the testing is performed in a manner by which the identity of the test subject is not known and may not be retrieved by the researcher.

(f) Mandated testing:

(1) The performance of any HIV-related testing that is or becomes mandatory shall not require consent of the subject but will include counseling.

(2) The court having jurisdiction of the criminal prosecution shall order that an HIV-related test be performed on any persons convicted of any of the following crimes or offenses:

(i) Prostitution; or

(ii) Sexual abuse, sexual assault, incest or sexual molestation.

(3) HIV-related tests performed on persons convicted of prostitution, sexual abuse, sexual assault, incest or sexual molestation shall be confidentially administered by a designee of the bureau or the local or county health department having proper jurisdiction. The commissioner may designate health care providers in regional jail facilities to administer HIV-related tests on such convicted persons if he or she deems it necessary and expedient.

(4) When the director of the department knows or has reason to believe, because of medical or epidemiological information, that a person, including, but not limited to, a person such as an IV drug abuser, or a person who may have a sexually transmitted disease, or a person who has sexually molested, abused or assaulted another, has HIV infection and is or may be a danger to the public health, he may issue an order to:

(i) Require a person to be examined and tested to determine whether the person has HIV infection;

(ii) Require a person with HIV infection to report to a qualified physician or health worker for counseling; and

(iii) Direct a person with HIV infection to cease and desist from specified conduct which endangers the health of others.

(5) A person convicted of such offenses shall be required to undergo HIV- related testing and counseling immediately upon conviction and the court having jurisdiction of the criminal prosecution shall not release such convicted person from custody and shall revoke any order admitting the defendant to bail until HIV-related testing and counseling have been performed. The HIV-related test result obtained from the convicted person is to be transmitted to the court and, after the convicted person is sentenced, made part of the court record. If the convicted person is placed in the custody of the division of corrections, the court shall transmit a copy of the convicted person's HIV- related test results to the division of corrections. The HIV-related test results shall be closed and confidential and disclosed by the court and the bureau only in accordance with the provisions of section three [s 16-3C-3] of this article.

(6) A person charged with prostitution, sexual abuse, sexual assault, incest or sexual molestation shall be informed upon initial court appearance by the judge or magistrate responsible for setting the person's condition of release pending trial of the availability of voluntary HIV-related testing and counseling conducted by the bureau.

(7) The prosecuting attorney shall inform the victim, or parent or guardian of the victim, at the earliest stage of the proceedings of the availability of voluntary HIV-related testing and counseling conducted by the bureau and that his or her best health interest would be served by submitting to HIV-related testing and counseling. HIV-related testing for the victim shall be administered at his or her request on a confidential basis and shall be administered in accordance with the centers for disease control guidelines of the United States public health service in effect at the time of such request. The victim who obtains an HIV-related test shall be provided with pre- and post-test counseling regarding the nature, reliability and significance of the HIV-related test and the confidential nature of the test. HIV-related testing and counseling conducted pursuant to this subsection shall be performed by the designee of the commissioner of the bureau or by any local or county health department having proper jurisdiction.

(8) If a person receives counseling or is tested under this subsection and is found to be HIV infected, the person shall be referred by the health care provider performing the counseling or testing for appropriate medical care and support services. The local or county health departments or any other agency providing counseling or testing under this subsection shall not be financially responsible for medical care and support services received by a person as a result of a referral made under this subsection.

(9) The commissioner of the bureau or his or her designees may require an HIV test for the protection of a person who was possibly exposed to HIV infected blood or other body fluids as a result of receiving or rendering emergency medical aid or who possibly received such exposure as a funeral director. Results of such a

test of the person causing exposure may be used by the requesting physician for the purpose of determining appropriate therapy, counseling and psychological support for the person rendering emergency medical aid including good samaritans, as well as for the patient, or individual receiving the emergency medical aid.

(10) If an HIV-related test required on persons convicted of prostitution, sexual abuse, sexual assault, incest or sexual molestation results in a negative reaction, upon motion of the state, the court having jurisdiction over the criminal prosecution may require the subject of the test to submit to further HIV-related tests performed under the direction of the bureau in accordance with the centers for disease control guidelines of the United States public health service in effect at the time of the motion of the state.

(11) The costs of mandated testing and counseling provided under this subsection and pre- and post-conviction HIV-related testing and counseling provided the victim under the direction of the bureau pursuant to this subsection shall be paid by the bureau.

(12) The court having jurisdiction of the criminal prosecution shall order a person convicted of prostitution, sexual abuse, sexual assault, incest or sexual molestation to pay restitution to the state for the costs of any HIV- related testing and counseling provided the convicted person and the victim, unless the court has determined such convicted person to be indigent.

(13) Any funds recovered by the state as a result of an award of restitution under this subsection shall be paid into the state treasury to the credit of a special revenue fund to be known as the "HIV testing fund" which is hereby created. The moneys so credited to such fund may be used solely by the bureau for the purposes of facilitating the performance of HIV-related testing and counseling under the provisions of this article.

(g) Premarital screening:

(1) Every person who is empowered to issue a marriage license shall, at the time of issuance thereof, distribute to the applicants for the license, information concerning acquired immunodeficiency syndrome (AIDS) and inform them of the availability of HIV-related testing and counseling. The informational brochures shall be furnished by the bureau.

(2) A notation that each applicant has received the AIDS informational brochure shall be placed on file with the marriage license on forms provided by the bureau.

(h) The commissioner of the bureau may obtain and test specimens for AIDS or HIV infection for research or epidemiological purposes without consent of the person from whom the specimen is obtained if all personal identifying information is removed from the specimen prior to testing.

(i) Nothing in this section is applicable to any insurer regulated under chapter thirty-three [s 33-1-1 et seq.] of this code: Provided, That the commissioner of insurance shall develop standards regarding consent for use by insurers which test for the presence of the HIV antibody.

(j) Whenever consent of the subject to the performance of HIV-related testing is required under this article, any such consent obtained, whether orally or in writing, shall be deemed to

be a valid and informed consent if it is given after compliance with the provisions of subsection (b) of this section.

(1988, 3rd Ex. Sess., c. 1; 1993, c. 60.)

NOTES, REFERENCES, AND ANNOTATIONS

Effect of amendment of 1993. -- The amendment substituted "commissioner" for "director" and "bureau" for "department," throughout; in (b), added "written" before "information," and substituted "pamphlet" for "printed information;" rewrote (f)(3); added (f)(5) to (f)(13); redesignated as present (g) to (j) former (h) to (k); and made minor stylistic changes.

Mandatory testing. -- Subdivision (f)(2) contemplates that county and municipal health officers perform the compulsory HIV tests on persons convicted of the sex-related offenses of prostitution, sexual abuse, sexual assault, incest or molestation. Such testing should take place prior to the defendant being released from the custody of local authorities to serve his or her sentence in a regional jail facility. Op. Att'y Gen., February 25, 1992, No. 20, Vol. 64.

Subdivision (f)(2) should be construed in connection with ss 16-2-1, 16-2A-3, 16-2A-5, 16-3C-8 and 16-4-5, and be interpreted as requiring that the county and municipal health officers perform the mandatory HIV tests on persons convicted of sex-related offenses. Op. Att'y Gen., February 25, 1992, No. 20, Vol. 64.

Code, s 16-3C-2
WV ST s 16-3C-2
END OF DOCUMENT

AUTHORIZED FOR EDUCATIONAL USE ONLY

Code, s 16-3C-3

WEST VIRGINIA CODE 1966
CHAPTER 16. PUBLIC HEALTH.
ARTICLE 3C. AIDS-RELATED **MEDICAL** TESTING AND RECORDS **CONFIDENTIALITY** ACT.

Current through Ch. 10 of the Extraordinary Session 71st Legislature (1993)

s 16-3C-3 Confidentiality of records; permitted disclosure; no duty to notify.

(a) No person may disclose or be compelled to disclose the identity of any person upon whom an HIV-related test is performed, or the results of such a test in a manner which permits identification of the subject of the test, except to the following persons:

(1) The subject of the test;

(2) The victim of the crimes of sexual abuse, sexual assault, incest or sexual molestation at the request of the victim or the victim's legal guardian, or of the parent or legal guardian of the victim if the victim is an infant where disclosure of the HIV-related test results of the convicted sex offender are requested;

(3) Any person who secures a specific release of test results executed by the subject of the test;

(4) A funeral director or an authorized agent or employee of a health facility or health care provider if the funeral establishment, health facility or health care provider itself is authorized to obtain the test results, the agent or employee provides patient care or handles or processes specimens of body fluids or tissues and the agent or employee has a need to know such information: Provided, That such funeral director, agent or employee shall maintain the confidentiality of such information;

(5) Licensed medical personnel or appropriate health care personnel providing care to the subject of the test, when knowledge of the test results is necessary or useful to provide appropriate care or treatment, in an appropriate manner: Provided, That such personnel shall maintain the confidentiality of such test results. The entry on a patient's chart of an HIV-related illness by the attending or other treating physician or other health care provider shall not constitute a breach of confidentiality requirements imposed by this article;

(6) The bureau or the centers for disease control of the United States public health service in accordance with reporting requirements for a diagnosed case of AIDS, or a related condition;

(7) A health facility or health care provider which procures, processes, distributes or uses: (A) A human body part from a deceased person with respect to medical information regarding that person; (B) semen provided prior to the effective date of this

article for the purpose of artificial insemination; (C) blood or blood products for transfusion or injection; or (D) human body parts for transplant with respect to medical information regarding the donor or recipient;

(8) Health facility staff committees or accreditation or oversight review organizations which are conducting program monitoring, program evaluation or service reviews so long as any identity remains anonymous; and

(9) A person allowed access to said record by a court order which is issued in compliance with the following provisions:

(i) No court of this state may issue such order unless the court finds that the person seeking the test results has demonstrated a compelling need for the test results which cannot be accommodated by other means. In assessing compelling need, the court shall weigh the need for disclosure against the privacy interest of the test subject and the public interest;

(ii) Pleadings pertaining to disclosure of test results shall substitute a pseudonym for the true name of the test subject of the test. The disclosure to the parties of the test subject's true name shall be communicated confidentially in documents not filed with the court;

(iii) Before granting any such order, the court shall, if possible, provide the individual whose test result is in question with notice and a reasonable opportunity to participate in the proceedings if he or she is not already a party;

(iv) Court proceedings as to disclosure of test results shall be conducted in camera unless the subject of the test agrees to a hearing in open court or unless the court determines that the public hearing is necessary to the public interest and the proper administration of justice; and

(v) Upon the issuance of an order to disclose test results, the court shall impose appropriate safeguards against unauthorized disclosure, which shall specify the person who may have access to the information, the purposes for which the information may be used and appropriate prohibitions on future disclosure.

(b) No person to whom the results of an HIV-related test have been disclosed pursuant to subsection (a) of this section may disclose the test results to another person except as authorized by said subsection.

(c) Whenever disclosure is made pursuant to this section, except when such disclosure is made to persons in accordance with subdivisions (1) and (6), subsection (a) of this section, it shall be accompanied by a statement in writing which includes the following or substantially similar language: "This information has been disclosed to you from records whose confidentiality is protected by state law. State law prohibits you from making any further disclosure of the information without the specific written consent of the person to whom it pertains, or as otherwise permitted by law. A general authorization for the release of medical or other information is NOT sufficient for this purpose."

(d) Notwithstanding the provisions set forth in subsections (a) through (c) of this section, the use of HIV test results to inform individuals named or identified as sex partners or contacts

or persons who have shared needles that they may be at risk of having acquired the HIV infection as a result of possible exchange of body fluids, is permitted. The name or identity of the person whose HIV test result was positive is to remain confidential. Contacts or identified partners may be tested anonymously at the state bureau of public health's designated test sites, or at their own expense by a health care provider or an approved laboratory of their choice. A cause of action will not arise against the bureau, a physician or other health care provider from any such notification.

(e) There is no duty on the part of the physician or health care provider to notify the spouse or other sexual partner of, or persons who have shared needles with, an infected individual of their HIV infection and a cause of action will not arise from any failure to make such notification. However, if contact is not made, the bureau will be so notified.

(1988, 3rd Ex. Sess., c. 1; 1993, c. 60.)

NOTES, REFERENCES, AND ANNOTATIONS

Effect of amendment of 1993. -- The amendment substituted "bureau" for "department," throughout; added (a)(2) and redesignated as present (a)(3) to (a)(9), former (a)(2) to (a)(8); substituted "(1) and (6)" for "(1), (3), (4), (5), (6) and (7)," in (c); added "public" in the third sentence of (d); and made minor stylistic changes.

Editor's notes. -- Concerning the reference in (a)(7) to "the effective date of this article," Acts 1988, 3rd Ex. Sess., c. 1, which enacted this article, took effect September 1, 1988.

Award of damages for failure to disclose. -- Damages for emotional distress may be recovered by a plaintiff against a hospital based upon the plaintiff's fear of contracting acquired immune deficiency syndrome (AIDS) if: the plaintiff is not an employee of the hospital but has a duty to assist hospital personnel in dealing with a patient infected with AIDS; the plaintiff's fear is reasonable; the AIDS-infected patient physically injures the plaintiff and such physical injury causes the plaintiff to be exposed to AIDS; and the hospital has failed to follow a regulation which requires it to warn the plaintiff of the fact that the patient has AIDS despite the elapse of sufficient time to warn. Johnson v. West Virginia Univ. Hosps., 413 S.E.2d 889, 6 A.L.R.5th 1069 (W. Va. 1991).

Code, s 16-3C-3
WV ST s 16-3C-3
END OF DOCUMENT

WEST VIRGINIA CODE 1966
CHAPTER 16. PUBLIC HEALTH.
ARTICLE 3C. AIDS-RELATED **MEDICAL** TESTING AND RECORDS **CONFIDENTIALITY** ACT

s 16-3C-4 Substituted consent.

(a) If the person whose consent is necessary under this article for HIV- related testing or the authorization of the release of test results is unable to give such consent or authorization because of mental incapacity or incompetency, the consent or authorization shall be obtained from another person in the following order of preference:

(1) A person holding a durable power of attorney for health care decisions;

(2) The person's duly appointed legal guardian;

(3) The person's next-of-kin in the following order of preference: spouse, parent, adult child, sibling, uncle or aunt, and grandparent.

(b) The person's inability to consent shall not be permitted to result in prolonged delay or denial of necessary medical treatment.

(c) The information required to be provided to the patient pursuant to subsections (b) and (d), section two [s 16-3C-2(b) and (d)] of this article, shall be provided to the person giving substituted consent hereunder.

(1988, 3rd Ex. Sess., c. 1.)

Code, s 16-3C-4
WV ST s 16-3C-4
END OF DOCUMENT

Code, s 16-3C-5

WEST VIRGINIA CODE 1966
CHAPTER 16. PUBLIC HEALTH.
ARTICLE 3C. AIDS-RELATED **MEDICAL** TESTING AND RECORDS **CONFIDENTIALITY** ACT.

Current through Ch. 10 of the Extraordinary Session 71st Legislature (1993)

s 16-3C-5 Remedies and penalties.

(a) Any person aggrieved by a violation of this article has right of action in the circuit court and may recover for the violation:

(1) Against any person who recklessly violates a provision of this article, liquidated damages of one thousand dollars or actual damages, whichever is greater; or

(2) Against any person who intentionally or maliciously violated a provision of this article, liquidated damages of ten thousand dollars or actual damages, whichever is greater; and

(3) Reasonable attorney fees; and

(4) Such other relief, including an injunction, as the court may consider appropriate.

(b) Any action under this article is barred unless the action is commenced within five years after the violation occurs.

(c) Nothing in this article limits the rights of the subject of an HIV- related test to recover damages or other relief under any other applicable law.

(d) Nothing in this article may be construed to impose civil liability for disclosure of an HIV-related test result in accordance with any reporting guidelines or requirements of the department or the centers for disease control of the United States public health service.

(1988, 3rd Ex. Sess., c. 1.)

Code, s 16-3C-5
WV ST s 16-3C-5
END OF DOCUMENT

Code, s 16-3C-6

WEST VIRGINIA CODE 1966
CHAPTER 16. PUBLIC HEALTH.
ARTICLE 3C. AIDS-RELATED **MEDICAL** TESTING AND RECORDS **CONFIDENTIALITY** ACT.

Current through Ch. 10 of the Extraordinary Session 71st Legislature (1993)

s 16-3C-6 Prohibiting certain acts; HIV tests results.

(a) A positive HIV test report, or the diagnosis of AIDS related complex (ARC), or the diagnosis of the AIDS syndrome or disease, may not constitute a basis upon which to deny the individual so diagnosed, access to quality health care: Provided, That this subsection does not apply to insurance.

(b) No student of any school or institution of higher learning, public or private, may be excluded from attending the school or institution of higher learning, or from participating in school sponsored activities, on the basis of a positive HIV test, or a diagnosis of ARC, or AIDS syndrome or disease. Exclusion from attendance or participation, as described above, shall be determined on a case by case basis, in consultation with the individual's parents, medical care provider, health authorities, school or institution administrators or medical advisors, in accordance with policies and guidelines which may have been established by the entities. Exclusion may only be based on the student representing an unacceptable risk as agreed to by the department for the transmission of the HIV to others because of the stage or nature of the illness.

(1988, 3rd Ex. Sess., c. 1.)

Code, s 16-3C-6
WV ST s 16-3C-6
END OF DOCUMENT

Code, s 16-3C-7

WEST VIRGINIA CODE 1966
CHAPTER 16. PUBLIC HEALTH.
ARTICLE 3C. AIDS-RELATED **MEDICAL** TESTING AND RECORDS **CONFIDENTIALITY** ACT.

Current through Ch. 10 of the Extraordinary Session 71st Legislature (1993)

s 16-3C-7 Department of corrections to conduct AIDS related study.

The commissioner of the department of corrections is authorized and directed to conduct a study at penal institutions (including jails administered by counties and municipalities) to determine whether it would be prudent and reasonable to offer or require of each inmate at such institutions testing, educational classes or counseling related to AIDS and HIV infections. This shall be done in consultation with the department of health. The commissioner shall complete the study and present the findings and recommendations in a report to be filed with the director of the department of health, the President of the Senate and the Speaker of the House of Delegates within six months of the effective date of this article [Sept. 1, 1988].

(1988, 3rd Ex. Sess., c. 1.)

Code, s 16-3C-7
WV ST s 16-3C-7
END OF DOCUMENT

Code, s 16-3C-8

WEST VIRGINIA CODE 1966
CHAPTER 16. PUBLIC HEALTH.
ARTICLE 3C. AIDS-RELATED **MEDICAL** TESTING AND RECORDS **CONFIDENTIALITY** ACT.

Current through Ch. 10 of the Extraordinary Session 71st Legislature (1993)

s 16-3C-8 Administrative implementation.

(a) The commissioner of the bureau shall immediately implement and enforce the provisions of this article, and shall adopt rules to the extent necessary for further implementation of the article. The rules proposed by the bureau pursuant to this article may include procedures for taking appropriate action with regard to health care facilities or health care providers which violate this article or the rules promulgated hereunder. The provisions of the state administrative procedures act apply to all administrative rules and procedures of the bureau pursuant to this article, except that in case of conflict between the state administrative procedures act and this article, the provisions of this article shall control.

(b) The bureau shall promulgate rules to assure adequate quality control for all laboratories conducting HIV tests and to provide for a reporting and monitoring system for reporting to the bureau all positive HIV tests results.

(1988, 3rd Ex. Sess., c. 1; 1993, c. 60.)

NOTES, REFERENCES, AND ANNOTATIONS

Effect of amendment of 1993. -- The amendment substituted "bureau" for "department," throughout, and "commissioner" for "director" in the first sentence of (a).

Construction. -- Section 16-3C-2(f)(2) should be construed in connection with this section and ss 16-2-1, 16-2A-3, 16-2A-5 and 16-4-5, and be interpreted as requiring that the county and municipal health officers perform the mandatory HIV tests on persons convicted of sex-related offenses. Op. Att'y Gen., February 25, 1992, No. 20, Vol. 64.

Code, s 16-3C-8
WV ST s 16-3C-8
END OF DOCUMENT

Code, s 16-3C-9

WEST VIRGINIA CODE 1966
CHAPTER 16. PUBLIC HEALTH.
ARTICLE 3C. AIDS-RELATED **MEDICAL** TESTING AND RECORDS **CONFIDENTIALITY** ACT.

Current through Ch. 10 of the Extraordinary Session 71st Legislature (1993)

s 16-3C-9 Individual banking of blood by health care providers for elective surgery or medical procedures.

Any person may, in contemplation of elective surgery or other elective medical procedures for which a blood transfusion may be required, request the health care provider conducting such surgery or medical procedure, or any private, public or nonprofit blood bank, to make or cause to be made appropriate provisions to store and bank that individual's blood for use during such surgery or medical procedure. The health care provider or the private, public or nonprofit blood bank shall, upon such request, store and bank a person's blood and the health care provider shall use such blood in the elective surgery or medical procedure to the extent such blood is available.

(1988, 3rd Ex. Sess., c. 1.)

Code, s 16-3C-9
WV ST s 16-3C-9
END OF DOCUMENT

West's Ann.Cal.Civ.Code s 56

WEST'S ANNOTATED CALIFORNIA CODES
CIVIL CODE
DIVISION 1. PERSONS
PART 2.6. **CONFIDENTIALITY** OF **MEDICAL** INFORMATION
CHAPTER 1. DEFINITIONS

Current through the 1991-1992 legislative sessions

s 56. Short title

This part may be cited as the Confidentiality of Medical Information Act.

1982 Main Volume Credit(s)

(Added by Stats.1981, c. 782, s 2.)

HISTORICAL AND STATUTORY NOTES

1982 Main Volume Historical and Statutory Notes

s 1 of Stats.1981, c. 782, provides:

"The Legislature hereby finds and declares that persons receiving health care services have a right to expect that the confidentiality of individual identifiable medical information derived by health service providers be reasonably preserved. It is the intention of the Legislature in enacting this act, to provide for the confidentiality of individually identifiable medical information, while permitting certain reasonable and limited uses of that information."

Former s 56, added by Stats.1979, c. 773, p. 2645, s 1, identical to present section, was repealed by Stats.1981, c. 782, s 1.5.

Former s 56, enacted 1872, amended by Stats.1921, c. 233, p. 333, s 1; Stats.1929, c. 607, p. 1017, s 1; Stats.1945, c. 1145, p. 2185, s 1; Stats.1967, c. 601, p. 1947, s 1, relating to the required age for consenting to and consummating marriage, was repealed by Stats.1969, c. 1608, p. 3313, s 3. For disposition of subject matter, see Table preceding repealed ss 87 to 182 in Part 3, post.

Derivation: Former s 56, added by Stats.1979, c. 773, p. 2645, s 1.

CROSS REFERENCES

1993 Pocket Part Cross References

Professional photocopiers, see Business and Professions Code s 22450 et seq.

LAW REVIEW COMMENTARIES

1993 Pocket Part Law Review Commentaries

California's Insurance Information and Privacy Protection Act. Brian David Cochren (March 1981) 4 Los Angeles Lawyer 14.

West's Ann. Cal. Civ. Code s 56
CA CIVIL s 56
END OF DOCUMENT

West's Ann.Cal.Civ.Code s 56.05

WEST'S ANNOTATED CALIFORNIA CODES
CIVIL CODE
DIVISION 1. PERSONS
PART 2.6. **CONFIDENTIALITY** OF **MEDICAL** INFORMATION
CHAPTER 1. DEFINITIONS

Current through the 1991-1992 legislative sessions

s 56.05. Definitions

For purposes of this part:

(a) "Authorization" means permission granted in accordance with Section 56.11 or 56.21 for the disclosure of medical information.

(b) "Medical information" means any individually identifiable information in possession of or derived from a provider of health care regarding a patient's medical history, mental or physical condition, or treatment.

(c) "Patient" means any natural person, whether or not still living, who received health care services from a provider of health care and to whom medical information pertains.

(d) "Provider of health care" means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code; any person licensed pursuant to the Osteopathic Initiative Act or the Chiropractic Initiative Act; any person certified pursuant to Division 2.5 (commencing with Section 1797) of the Health and Safety Code; any clinic, health dispensary, or health facility licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code; and any group practice prepayment health care service plan regulated pursuant to the Knox- Keene Health Care Service Plan Act of 1975, Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code.

1982 Main Volume Credit(s)

(Added by Stats.1981, c. 993. 1982 Pocket Part Credit(s)

(Amended by Stats.1984, c. 1391, s 3.)

HISTORICAL AND STATUTORY NOTES

1993 Pocket Part Historical and Statutory Notes

1984 Amendment. Substituted, in subd. (d), "certified pursuant to Division 2.5 (commencing with Section 1797)" for "licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2"; and, also in subd. (d), substituted "Knox-Keene Health Care Service Plan Act of 1975" for "Knox-Keene Health Care Service Plan Act".

1982 Main Volume Historical and Statutory Notes

Main Volume Text

s 56.05. Definitions

For purposes of this part:

(a) "Authorization" means permission granted in accordance with Section 56.11 or 56.21 for the disclosure of medical information.

(b) "Medical information" means any individually identifiable information in possession of or derived from a provider of health care regarding a patient's medical history, mental or physical condition, or treatment.

(c) "Patient" means any natural person, whether or not still living, who received health care services from a provider of health care and to whom medical information pertains.

(d) "Provider of health care" means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code; any person licensed pursuant to the Osteopathic Initiative Act or the Chiropractic Initiative Act; any person licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; any clinic, health dispensary, or health facility licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code; and any group practice prepayment health care service plan regulated pursuant to the Knox- Keene Health Care Service Plan Act, Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code.

(Added by Stats.1981, c. 782, s 2.)

Main Volume Historical and Statutory Notes

Former s 56.05, added by Stats.1979, c. 773, p. 2645, s 1, setting forth definitions, was repealed by Stats.1981, c. 782, s 1.5.

Derivation: Former s 56.05, added by Stats.1979, c. 773, p. 2645, s 1.

LIBRARY REFERENCES

1982 Main Volume Library References

Words and Phrases (Perm.Ed.)

West's Ann. Cal. Civ. Code s 56.05
CA CIVIL s 56.05
END OF DOCUMENT

West's Ann.Cal.Civ.Code s 56.10

This document has been amended. Use UPDATE to retrieve the amending document(s). See SCOPE for more information.

WEST'S ANNOTATED CALIFORNIA CODES
CIVIL CODE
DIVISION 1. PERSONS
PART 2.6. **CONFIDENTIALITY** OF **MEDICAL** INFORMATION
CHAPTER 2. DISCLOSURE OF MEDICAL INFORMATION BY PROVIDERS

Current through the 1991-1992 legislative sessions

s 56.10. Authorization; necessity; exceptions

(a) No provider of health care shall disclose medical information regarding a patient of the provider without first obtaining an authorization, except as provided in subdivision (b) or (c).

(b) A provider of health care shall disclose medical information if the disclosure is compelled by any of the following:

(1) By a court pursuant to an order of that court.

(2) By a board, commission, or administrative agency for purposes of adjudication pursuant to its lawful authority.

(3) By a party to a proceeding before a court or administrative agency pursuant to a subpoena, subpoena duces tecum, notice to appear served pursuant to Section 1987 of the Code of Civil Procedure, or any provision authorizing discovery in a proceeding before a court or administrative agency.

(4) By a board, commission, or administrative agency pursuant to an investigative subpoena issued under Article 2 (commencing with Section 11180) of Chapter 2 of Part 1 of Division 3 of Title 2 of the Government Code.

(5) By an arbitrator or arbitration panel, when arbitration is lawfully requested by either party, pursuant to a subpoena duces tecum issued under Section 1282.6 of the Code of Civil Procedure, or any other provision authorizing discovery in a proceeding before an arbitrator or arbitration panel.

(6) By a search warrant lawfully issued to a governmental law enforcement agency.

(7) When otherwise specifically required by law.

(c) A provider of health care may disclose medical information as follows:

(1) The information may be disclosed to providers of health care or other health care professionals or facilities for purposes of diagnosis or treatment of the patient. This includes, in an emergency situation, the communication of patient information by radio transmission between emergency medical personnel at the scene of an emergency, or in an emergency medical transport vehicle, and emergency medical personnel at a health facility licensed pursuant to Chapter 2 (commencing with Section 1200) of Division 2 of the

Health and Safety Code.

(2) The information may be disclosed to an insurer, employer, health care service plan, hospital service plan, employee benefit plan, governmental authority, or any other person or entity responsible for paying for health care services rendered to the patient, to the extent necessary to allow responsibility for payment to be determined and payment to be made. If (A) the patient is, by reason of a comatose or other disabling medical condition, unable to consent to the disclosure of medical information and (B) no other arrangements have been made to pay for the health care services being rendered to the patient, the information may be disclosed to a governmental authority to the extent necessary to determine the patient's eligibility for, and to obtain, payment under a governmental program for health care services provided to the patient. The information may also be disclosed to another provider as necessary to assist the other provider in obtaining payment for health care services rendered by that provider to the patient.

(3) The information may be disclosed to any person or entity that provides billing, claims management, medical data processing, or other administrative services for providers or for any of the persons or entities specified in paragraph (2). However, no information so disclosed shall be further disclosed by the recipient in any way which would be violative of this part.

(4) The information may be disclosed to organized committees and agents of professional societies or of medical staffs of licensed hospitals, or to licensed health care service plans, or to professional standards review organizations, or to utilization and quality control peer review organizations as established by Congress in Public Law 97-248 in 1982, or to persons or organizations insuring, responsible for, or defending professional liability which a provider may incur, if the committees, agents, plans, organizations, or persons are engaged in reviewing the competence or qualifications of health care professionals or in reviewing health care services with respect to medical necessity, level of care, quality of care, or justification of charges.

(5) The information in the possession of any provider of health care may be reviewed by any private or public body responsible for licensing or accrediting the provider of health care. However, no patient identifying medical information may be removed from the premises except as expressly permitted or required elsewhere by law.

(6) The information may be disclosed to the county coroner in the course of an investigation by the coroner's office.

(7) The information may be disclosed to public agencies, clinical investigators, health care research organizations, and accredited public or private nonprofit educational or health care institutions for bona fide research purposes. However, no information so disclosed shall be further disclosed by the recipient in any way which would permit identification of the patient.

(8) A provider of health care that has created medical information as a result of employment-related health care services to an employee conducted at the specific prior written request and

expense of the employer may disclose to the employee's employer that part of the information which:

(A) Is relevant in a law suit, arbitration, grievance, or other claim or challenge to which the employer and the employee are parties and in which the patient has placed in issue his or her medical history, mental or physical condition, or treatment, provided it may only be used or disclosed in connection with that proceeding.

(B) Describes functional limitations of the patient that may entitle the patient to leave from work for medical reasons or limit the patient's fitness to perform his or her present employment, provided that no statement of medical cause is included in the information disclosed.

(9) Unless the provider is notified in writing of an agreement by the sponsor, insurer, or administrator to the contrary, the information may be disclosed to a sponsor, insurer, or administrator of a group or individual insured or uninsured plan or policy which the patient seeks coverage by or benefits from, if the information was created by the provider of health care as the result of services conducted at the specific prior written request and expense of the sponsor, insurer, or administrator for the purpose of evaluating the application for coverage or benefits.

(10) The information may be disclosed to a group practice prepayment health care service plan by providers which contract with the plan and may be transferred among providers which contract with the plan, for the purpose of administering the plan. Medical information may not otherwise be disclosed by a health care service plan except in accordance with the provisions of this part.

(11) Nothing in this part shall prevent the disclosure by a provider of health care to an insurance institution, agent, or support organization, subject to Article 6.6 (commencing with Section 791) of Part 2 of Division 1 of the Insurance Code, of medical information if the insurance institution, agent, or support organization has complied with all requirements for obtaining the information pursuant to Article 6.6 (commencing with Section 791) of Part 2 of Division 1 of the Insurance Code.

(12) The information relevant to the patient's condition and care and treatment provided may be disclosed to a probate court investigator engaged in determining the need for an initial conservatorship or continuation of an existent conservatorship, if the patient is unable to give informed consent, or to a probate court investigator, probation officer, or domestic relations investigator engaged in determining the need for an initial guardianship or continuation of an existent guardianship.

(13) When the disclosure is otherwise specifically authorized by law.

1982 Main Volume Credit(s)

(Added by Stats.1981, c. 993. Pocket Part Credit(s).

(Amended by Stats.1983, c. 1246, s 1; Stats.1984, c. 442, s 1; Stats.1984, c. 967, s 2; Stats.1986, c. 633, s 1; Stats.1990, c. 911 (S.B.2328), s 1; Stats.1991, c. 591 (A.B.1179), s 1;

Stats.1992, c. 427 (A.B.3355), s 9; Stats.1992, c. 572 (S.B.1455), s 1.)

HISTORICAL AND STATUTORY NOTES

1993 Pocket Part Historical and Statutory Notes

1983 Amendment. Added the second sentence to subd. (c)(1).

Sections 46 and 47 of Stats.1983, c. 1246 provide:

"Section 45 of this act shall become operative July 1, 1984."

"Section 1 and Sections 3 to 45, inclusive, of this act are intended by the Legislature only as a recompilation of existing law, and it is not the intent of the Legislature to affect pending litigation regarding the scope, validity, or constitutionality of the Medical Malpractice Reform Act as enacted by Chapters 1 and 2 of the 1975 Second Extraordinary Session."

1984 Amendment. Added, to subd. (c)(4), "or to licensed health care service plans," and "or to utilization and quality control peer review organizations as established by Congress in Public Law 97-248 in 1982,"; and also added to subd. (c)(4) "plans" between "agents" and "organizations".

Amendment of this section by s 1 of Stats.1984, c. 967, failed to become operative under the provisions of s 3 of that Act.

Effect of amendment of section by two or more acts at the same session of the legislature, see Government Code s 9605.

1986 Legislation

The 1986 amendment added subd. (c)(12).

1990 Legislation

The 1990 amendment, in subd. (c)(1), substituted "Chapter 2" for "Division 2" and inserted "Division 2 of"; and added subd. (c)(13) relating to disclosures authorized by law.

1991 Legislation

The 1991 amendment in subd. (c)(2), inserted the second sentence authorizing disclosure of medical records to a governmental authority where the patient is, by reason of a comatose or other disabling medical condition, unable to consent, and no other arrangements have been made for payment.

1992 Legislation

The 1992 amendment, in subd. (c)(12), added "or to a probate court investigator, probation officer, or domestic relations investigator engaged in determining the need for an initial

guardianship or continuation of an existent guardianship".

Section affected by two or more acts at the same session of the legislature, see Government Code s 9605.

Subordination of legislation by Stats.1992, c. 427 (A.B.3355), see Historical and Statutory Notes under Bus. & Prof. C. s 472.3.

1982 Main Volume Historical and Statutory Notes

Main Volume Text

s 56.10. Authorization; necessity; exceptions

(a) No provider of health care shall disclose medical information regarding a patient of the provider without first obtaining an authorization, except as provided in subdivision (b) or (c).

(b) A provider of health care shall disclose medical information if the disclosure is compelled by any of the following:

(1) By a court pursuant to an order of that court.

(2) By a board, commission, or administrative agency for purposes of adjudication pursuant to its lawful authority.

(3) By a party to a proceeding before a court or administrative agency pursuant to a subpoena, subpoena duces tecum, notice to appear served pursuant to Section 1987 of the Code of Civil Procedure, or any provision authorizing discovery in a proceeding before a court or administrative agency.

(4) By a board, commission, or administrative agency pursuant to an investigative subpoena issued under Article 2 (commencing with Section 11180) of Chapter 2 of Part 1 of Division 3 of Title 2 of the Government Code.

(5) By an arbitrator or arbitration panel, when arbitration is lawfully requested by either party, pursuant to a subpoena duces tecum issued under Section 1282.6 of the Code of Civil Procedure, or any other provision authorizing discovery in a proceeding before an arbitrator or arbitration panel.

(6) By a search warrant lawfully issued to a government law enforcement agency.

(7) When otherwise specifically required by law.

(c) A provider of health care may disclose medical information as follows:

(1) The information may be disclosed to providers of health care or other health care professionals or facilities for purposes of diagnosis or treatment of the patient.

(2) The information may be disclosed to an insurer, employer, health care service plan, hospital service plan, employee benefit plan, governmental authority, or any other person or entity responsible for paying for health care services rendered to the patient, to the extent necessary to allow responsibility for payment to be determined and payment to be made. The information may also be disclosed to another provider as necessary to assist the other provider in obtaining payment for health care services rendered by that provider to the patient.

(3) The information may be disclosed to any person or entity that provides billing, claims management, medical data processing, or other administrative services for providers or for any of the persons or entities specified in paragraph (2). However, no information so disclosed shall be further disclosed by the recipient in any way which would be violative of this part.

(4) The information may be disclosed to organized committees and agents of professional societies or of medical staffs of licensed hospitals, or to professional standards review organizations, or to persons or organizations insuring, responsible for, or defending professional liability which a provider may incur, if the committees, agents, organizations, or persons are engaged in reviewing the competence or qualifications of health care professionals or in reviewing health care services with respect to medical necessity, level of care, quality of care, or justification of charges.

(5) The information in the possession of any provider of health care may be reviewed by any private or public body responsible for licensing or accrediting such provider of health care. However, no patient identifying medical information may be removed from the premises except as expressly permitted or required elsewhere by law.

(6) The information may be disclosed to the county coroner in the course of an investigation by the coroner's office.

(7) The information may be disclosed to public agencies, clinical investigators, health care research organizations, and accredited public or private nonprofit educational or health care institutions for bona fide research purposes. However, no information so disclosed shall be further disclosed by the recipient in any way which would permit identification of the patient.

(8) A provider of health care that has created medical information as a result of employment-related health care services to an employee conducted at the specific prior written request and expense of the employer may disclose to the employee's employer that part of the information which:

(A) Is relevant in a law suit, arbitration, grievance, or other claim or challenge to which the employer and the employee are parties and in which the patient has placed in issue his or her medical history, mental or physical condition, or treatment, provided it may only be used or disclosed in connection with that proceeding.

(B) Describes functional limitations of the patient that may entitle the patient to leave from work for medical reasons or limit the patient's fitness to perform his or her present employment, provided that no statement of medical cause is included in the information disclosed.

(9) Unless the provider is notified in writing of an agreement by the sponsor, insurer, or administrator to the contrary, the information may be disclosed to a sponsor, insurer, or administrator of a group or individual insured or uninsured plan or policy which the patient seeks coverage by or benefits from, if the information was created by the provider of health care as the result of services conducted at the specific prior written request

and expense of the sponsor, insurer, or administrator for the purpose of evaluating the application for coverage or benefits.

(10) The information may be disclosed to a group practice prepayment health care service plan by providers which contract with the plan and may be transferred among providers which contract with the plan, for the purpose of administering the plan. Medical information may not otherwise be disclosed by a group practice prepayment health care service plan except in accordance with the provisions of this part.

(11) Nothing in this part shall prevent the disclosure by a provider of health care to an insurance institution, agent, or support organization, subject to Article 6.6 (commencing with Section 791) of Part 2 of Division 1 of the Insurance Code of medical information if the insurance institution, agent, or support organization has complied with all requirements for obtaining the information pursuant to Article 6.6 (commencing with Section 791) of Part 2 of Division 1 of the Insurance Code.

(Added by Stats.1981, c. 782, s 2.)

Main Volume Historical and Statutory Notes

Former s 56.10, added by Stats.1979, c. 773, p. 2645, s 1, amended by Stats.1981, c. 143, s 1, relating to similar subject matter, was repealed by Stats.1981, c. 782, s 1.5. See, now, this section and ss 56.11, 56.12.

Derivation: Former s 56.10, added by Stats.1979, c. 773, p. 2645, s 1, amended by Stats.1981, c. 143, s 1.

Former ss 56.15, 56.16, 56.24, added by Stats.1979, c. 773, p. 2645, s 1.

Former s 56.29, added by Stats.1981, c. 106, s 1.

WEST'S CALIFORNIA CODE FORMS

1982 Main Volume West's California Code Forms

See West's California Code Forms, Civil.

LAW REVIEW COMMENTARIES

1993 Pocket Part Law Review Commentaries

Confidentiality of genetic information. (1982) 30 U.C.L.A.Law Rev. 1283.

Ethical problems for physicians raised by AIDS and HIV infection: Conflicting legal obligations of confidentiality and disclosure. Bruce A. McDonald, 22 U.C.Davis L.Rev. 557 (1989).

Review of selected 1991 California legislation. 23 Pac.L.J. 687 (1992).

Toward a uniform right to medical records: A proposal for a model patient access and information practices statute. (1983) 30 U.C.L.A.Law Rev. 1349.

LIBRARY REFERENCES

1993 Pocket Part Library References

Witnesses k208(1).
C.J.S. Witnesses ss 293, 312.

ANNOTATIONS

NOTES OF DECISIONS

Deceased patients 1
Instructional or professional purpose 3
Subpoenas 2

1. Deceased patients

Medical records of person who dies in private nursing home are not available, without consent of personal representative, to private persons who wish to investigate cause of death but who bear no legal or familial relationship to deceased. 69 Ops.Atty.Gen. 14, 2-13-86.

2. Subpoenas

This section allows licensed physician to release records pertaining to psychiatric treatment furnished to patient without patient's authorization when production of records is compelled by subpoena duces tecum issued in judicial proceeding in which physician is not a party, and when copies of subpoena and affidavit, accompanied by notice to patient or patient's attorney, have been served in accordance with C.C.P. s 1985.3. Inabnit v. Berkson (App. 5 Dist.1988) 245 Cal.Rptr. 525, 199 C.A.3d 1230.

3. Instructional or professional purpose

Plastic surgeon's use of patient's pictures in connection with article regarding surgeon's practice was use for "instructional or professional purpose," within meaning of authorization signed by patient prior to his surgery; accordingly, surgeon did not breach any fiduciary duty to patient sufficient to render debt nondischargeable, even assuming that any such fiduciary duty existed. In re Karlin, 9th Cir.BAP (Cal.)1989, 112 B.R. 319, affirmed 940 F.2d 1534.

West's Ann. Cal. Civ. Code s 56.10
CA CIVIL s 56.10
END OF DOCUMENT

West's Ann.Cal.Civ.Code s 56.105

WEST'S ANNOTATED CALIFORNIA CODES
CIVIL CODE
DIVISION 1. PERSONS
PART 2.6. **CONFIDENTIALITY** OF **MEDICAL** INFORMATION
CHAPTER 2. DISCLOSURE OF MEDICAL INFORMATION BY PROVIDERS

Current through the 1991-1992 legislative sessions

s 56.105. Professional negligence actions; settlement or compromise; authorization to disclose medical records to persons or organizations defending professional liability

Whenever, prior to the service of a complaint upon a defendant in any action arising out of the professional negligence of a person holding a valid physician's and surgeon's certificate issued pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code, a demand for settlement or offer to compromise is made on a patient's behalf, the demand or offer shall be accompanied by an authorization to disclose medical information to persons or organizations insuring, responsible for, or defending professional liability that the certificate holder may incur. The authorization shall be in accordance with Section 56.11 and shall authorize disclosure of that information that is necessary to investigate issues of liability and extent of potential damages in evaluating the merits of the demand for settlement or offer to compromise.

Notice of any request for medical information made pursuant to an authorization as provided by this section shall be given to the patient or the patient's legal representative. The notice shall describe the inclusive subject matter and dates of the materials requested and shall also authorize the patient or the patient's legal representative to receive, upon request, copies of the information at his or her expense.

Nothing in this section shall be construed to waive or limit any applicable privileges set forth in the Evidence Code except for the disclosure of medical information subject to the patient's authorization. Nothing in this section shall be construed as authorizing a representative of any person from whom settlement has been demanded to communicate in violation of the physician- patient privilege with a treating physician except for the medical information request.

The requirements of this section are independent of the requirements of Section 364 of the Code of Civil Procedure.

1993 Pocket Part Credit(s)

(Added by Stats.1985, c. 484, s 1.)

West's Ann. Cal. Civ. Code s 56.105

CA CIVIL s 56.105
END OF DOCUMENT

West's Ann.Cal.Civ.Code s 56.11

WEST'S ANNOTATED CALIFORNIA CODES
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PART 2.6. **CONFIDENTIALITY** OF **MEDICAL** INFORMATION
CHAPTER 2. DISCLOSURE OF MEDICAL INFORMATION BY PROVIDERS

Current through the 1991-1992 legislative sessions

s 56.11. Authorization; form and contents

An authorization for the release of medical information by a provider of health care shall be valid if it:

(a) Is handwritten by the person who signs it or is in typeface no smaller than 8-point type.

(b) Is clearly separate from any other language present on the same page and is executed by a signature which serves no other purpose than to execute the authorization.

(c) Is signed and dated by one of the following:

(1) The patient. A patient who is a minor may only sign an authorization for the release of medical information obtained by a provider of health care in the course of furnishing services to which the minor could lawfully have consented under Part 1 (commencing with Section 25) or Part 2.7 (commencing with Section 60) of Division 1 of the Civil Code.

(2) The legal representative of the patient, if the patient is a minor or an incompetent. However, authorization may not be given under this subdivision for the disclosure of medical information obtained by the provider of health care in the course of furnishing services to which a minor patient could lawfully have consented under Part 1 (commencing with Section 25) or Part 2.7 (commencing with Section 60) of Division 1 of the Civil Code.

(3) The spouse of the patient or the person financially responsible for the patient, where the medical information is being sought for the sole purpose of processing an application for health insurance or for enrollment in a nonprofit hospital plan, a health care service plan, or an employee benefit plan, and where the patient is to be an enrolled spouse or dependent under the policy or plan.

(4) The beneficiary or personal representative of a deceased patient.

(d) States the specific uses and limitations on the types of medical information to be disclosed.

(e) States the name or functions of the provider of health care that may disclose the medical information.

(f) States the name or functions of the persons or entities authorized to receive the medical information.

(g) States the specific uses and limitations on the use of the medical information by the persons or entities authorized to receive the medical information.

(h) States a specific date after which the provider of health care is no longer authorized to disclose the medical information.

(i) Advises the person signing the authorization of the right to receive a copy of the authorization.

1982 Main Volume Credit(s)

(Added by Stats.1981, c. 782, s 2.)

HISTORICAL AND STATUTORY NOTES

1982 Main Volume Historical and Statutory Notes

Derivation: Former s 56.10, added by Stats.1979, c. 773, p. 2645, s 1, amended by Stats.1981, c. 143, s 1.

LIBRARY REFERENCES

1993 Pocket Part Library References

Witnesses k208(1).
C.J.S. Witnesses ss 293, 312.

West's Ann. Cal. Civ. Code s 56.11
CA CIVIL s 56.11
END OF DOCUMENT

West's Ann.Cal.Civ.Code s 56.12

WEST'S ANNOTATED CALIFORNIA CODES
CIVIL CODE
DIVISION 1. PERSONS
PART 2.6. **CONFIDENTIALITY** OF **MEDICAL** INFORMATION
CHAPTER 2. DISCLOSURE OF MEDICAL INFORMATION BY PROVIDERS

Current through the 1991-1992 legislative sessions

s 56.12. Copy of authorization to patient or signatory on demand

Upon demand by the patient or the person who signed an authorization, a provider of health care possessing the authorization shall furnish a true copy thereof.

1982 Main Volume Credit(s)

(Added by Stats.1981, c. 782, s 2.)

HISTORICAL AND STATUTORY NOTES

1982 Main Volume Historical and Statutory Notes

Derivation: Former s 56.10, added by Stats.1979, c. 773, p. 2645, s 1, amended by Stats.1981, c. 143, s 1.

West's Ann. Cal. Civ. Code s 56.12
CA CIVIL s 56.12
END OF DOCUMENT

West's Ann.Cal.Civ.Code s 56.13

WEST'S ANNOTATED CALIFORNIA CODES
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CHAPTER 2. DISCLOSURE OF MEDICAL INFORMATION BY PROVIDERS

Current through the 1991-1992 legislative sessions

s 56.13. Further disclosure by recipient of medical information

A recipient of medical information pursuant to an authorization as provided by this chapter or pursuant to the provisions of subdivision (c) of Section 56.10 may not further disclose that medical information except in accordance with a new authorization that meets the requirements of Section 56.11, or as specifically required or permitted by other provisions of this chapter or by law.

1982 Main Volume Credit(s)

(Added by Stats.1981, c. 782, s 2.)

HISTORICAL AND STATUTORY NOTES

1982 Main Volume Historical and Statutory Notes

Derivation: Former s 56.16, added by Stats.1979, c. 773, p. 2645, s 1.

LIBRARY REFERENCES

1993 Pocket Part Library References

Witnesses k208(1).
C.J.S. Witnesses ss 293, 312.

West's Ann. Cal. Civ. Code s 56.13
CA CIVIL s 56.13
END OF DOCUMENT

West's Ann.Cal.Civ.Code s 56.14

WEST'S ANNOTATED CALIFORNIA CODES
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CHAPTER 2. DISCLOSURE OF MEDICAL INFORMATION BY PROVIDERS

Current through the 1991-1992 legislative sessions

s 56.14. Communication of limitations of authorization to recipient of medical information

A provider of health care that discloses medical information pursuant to an authorization required by this chapter shall communicate to the person or entity to which it discloses the medical information any limitations in the authorization regarding the use of the medical information. No provider of health care that has attempted in good faith to comply with this provision shall be liable for any unauthorized use of the medical information by the person or entity to which the provider disclosed the medical information.

1982 Main Volume Credit(s)

(Added by Stats.1981, c. 782, s 2.)

HISTORICAL AND STATUTORY NOTES

1982 Main Volume Historical and Statutory Notes

Derivation: Former s 56.15, added by Stats.1979, c. 773, p. 2645, s 1.

West's Ann. Cal. Civ. Code s 56.14
CA CIVIL s 56.14
END OF DOCUMENT

West's Ann.Cal.Civ.Code s 56.15

WEST'S ANNOTATED CALIFORNIA CODES
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CHAPTER 2. DISCLOSURE OF MEDICAL INFORMATION BY PROVIDERS

Current through the 1991-1992 legislative sessions

s 56.15. Cancellation or modification of authorization; written notice

Nothing in this part shall be construed to prevent a person who could sign the authorization pursuant to subdivision (c) of Section 56.11 from cancelling or modifying an authorization. However, the cancellation or modification shall be effective only after the provider of health care actually receives written notice of the cancellation or modification.

1982 Main Volume Credit(s)

(Added by Stats.1981, c. 782, s 2.)

HISTORICAL AND STATUTORY NOTES

1982 Main Volume Historical and Statutory Notes

Former s 56.15, added by Stats.1979, c. 773, p. 2645, s 1, relating to conditions for disclosure of medical information, was repealed by Stats.1981, c. 782, s 1.5. See, now, ss 56.10, 56.14.

West's Ann. Cal. Civ. Code s 56.15
CA CIVIL s 56.15
END OF DOCUMENT

West's Ann.Cal.Civ.Code s 56.16

WEST'S ANNOTATED CALIFORNIA CODES
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CHAPTER 2. DISCLOSURE OF MEDICAL INFORMATION BY PROVIDERS

Current through the 1991-1992 legislative sessions

s 56.16. Release of limited information on specific patient; written request by patient to prohibit

Unless there is a specific written request by the patient to the contrary, nothing in this part shall be construed to prevent a provider, upon an inquiry concerning a specific patient, from releasing at its discretion any of the following information: the patient's name, address, age, and sex; a general description of the reason for treatment (whether an injury, a burn, poisoning, or some unrelated condition); the general nature of the injury, burn, poisoning, or other condition; the general condition of the patient; and any information that is not medical information as defined in subdivision (c) of Section 56.05.

1982 Main Volume Credit(s)

(Added by Stats.1981, c. 782, s 2.)

HISTORICAL AND STATUTORY NOTES

1982 Main Volume Historical and Statutory Notes

Former s 56.16, added by Stats.1979, c. 773, p. 2645, s 1, relating to nondisclosure of individually identifiable medical information without authorization, was repealed by Stats.1981, c. 782, s 1.5. See, now, ss 56.10, 56.13.

Derivation: Former s 56.18, added by Stats.1979, c. 773, p. 2645, s 1.

West's Ann. Cal. Civ. Code s 56.16
CA CIVIL s 56.16
END OF DOCUMENT

West's Ann.Cal.Civ.Code s 56.17

WEST'S ANNOTATED CALIFORNIA CODES
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DIVISION 1. PERSONS
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CHAPTER 2. DISCLOSURE OF MEDICAL INFORMATION BY PROVIDERS

Current through the 1991-1992 legislative sessions

Repealed

ss 56.17 to 56.19. Repealed by Stats.1981, c. 782, s 1.5

HISTORICAL AND STATUTORY NOTES

1982 Main Volume Historical and Statutory Notes

The repealed sections, added by Stats.1979, c. 773, p. 2645, s 1, related to responsibility and liability for securing release from applicant for health insurance, to release of information on specific patient by hospital or health care facility, and patient's right of access to his or her own medical information.

For disposition of subject matter of repealed sections, see Table preceding s 56.

West's Ann. Cal. Civ. Code s 56.17
CA CIVIL s 56.17
END OF DOCUMENT

West's Ann.Cal.Civ.Code s 56.18

WEST'S ANNOTATED CALIFORNIA CODES
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Current through the 1991-1992 legislative sessions

Repealed

ss 56.17 to 56.19. Repealed by Stats.1981, c. 782, s 1.5

HISTORICAL AND STATUTORY NOTES

1982 Main Volume Historical and Statutory Notes

The repealed sections, added by Stats.1979, c. 773, p. 2645, s 1, related to responsibility and liability for securing release from applicant for health insurance, to release of information on specific patient by hospital or health care facility, and patient's right of access to his or her own medical information.

For disposition of subject matter of repealed sections, see Table preceding s 56.

West's Ann. Cal. Civ. Code s 56.18
CA CIVIL s 56.18
END OF DOCUMENT

West's Ann.Cal.Civ.Code s 56.19

WEST'S ANNOTATED CALIFORNIA CODES
CIVIL CODE
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CHAPTER 2. DISCLOSURE OF MEDICAL INFORMATION BY PROVIDERS

Current through the 1991-1992 legislative sessions

Repealed

ss 56.17 to 56.19. Repealed by Stats.1981, c. 782, s 1.5

HISTORICAL AND STATUTORY NOTES

1982 Main Volume Historical and Statutory Notes

The repealed sections, added by Stats.1979, c. 773, p. 2645, s 1, related to responsibility and liability for securing release from applicant for health insurance, to release of information on specific patient by hospital or health care facility, and patient's right of access to his or her own medical information.

For disposition of subject matter of repealed sections, see Table preceding s 56.

West's Ann. Cal. Civ. Code s 56.19
CA CIVIL s 56.19
END OF DOCUMENT

WEST'S ANNOTATED CALIFORNIA CODES
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CHAPTER 3. USE AND DISCLOSURE OF MEDICAL INFORMATION BY EMPLOYERS

GENERAL NOTES

1982 Main Volume General Notes

< Chapter 3 was added by Stats.1981, c. 782, s 2. >

West's Ann.Cal.Civ.Code s 56.20

WEST'S ANNOTATED CALIFORNIA CODES
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PART 2.6. **CONFIDENTIALITY** OF **MEDICAL** INFORMATION
CHAPTER 3. USE AND DISCLOSURE OF MEDICAL INFORMATION BY EMPLOYERS

Current through the 1991-1992 legislative sessions

s 56.20. Confidentiality; prohibition of discrimination due to refusal to sign authorization; prohibition of disclosure exceptions

(a) Each employer who receives medical information shall establish appropriate procedures to ensure the confidentiality and protection from unauthorized use and disclosure of that information. These procedures may include, but are not limited to, instruction regarding confidentiality of employees and agents handling files containing medical information, and security systems restricting access to files containing medical information.

(b) No employee shall be discriminated against in terms or conditions of employment due to that employee's refusal to sign an authorization under this part. However, nothing in this section shall prohibit an employer from taking such action as is necessary in the absence of medical information due to an employee's refusal to sign an authorization under this part.

(c) No employer shall use, disclose, or knowingly permit its employees or agents to use or disclose medical information which the employer possesses pertaining to its employees without the patient having first signed an authorization under Section 56.11 or Section 56.21 permitting such use or disclosure, except as follows:

(1) The information may be disclosed if the disclosure is compelled by judicial or administrative process or by any other specific provision of law.

(2) That part of the information which is relevant in a lawsuit, arbitration, grievance, or other claim or challenge to which the employer and employee are parties and in which the patient has placed in issue his or her medical history, mental or physical condition, or treatment may be used or disclosed in connection with that proceeding.

(3) The information may be used only for the purpose of administering and maintaining employee benefit plans, including health care plans and plans providing short-term and long-term disability income, workers' compensation and for determining eligibility for paid and unpaid leave from work for medical reasons.

(4) The information may be disclosed to a provider of health care or other health care professional or facility to aid the diagnosis or treatment of the patient, where the patient or other

person specified in subdivision (c) of Section 56.21 is unable to authorize the disclosure.

(d) If an employer agrees in writing with one or more of its employees or maintains a written policy which provides that particular types of medical information shall not be used or disclosed by the employer in particular ways, the employer shall obtain an authorization for such uses or disclosures even if an authorization would not otherwise be required by subdivision (c).

1982 Main Volume Credit(s)

(Added by Stats.1981, c. 782, s 2.)

HISTORICAL AND STATUTORY NOTES

1982 Main Volume Historical and Statutory Notes

Former s 56.20, added by Stats.1979, c. 773, p. 2645, s 1, relating to inapplicability of Information Practices Act of 1977, was repealed by Stats.1981, c. 782, s 1.5. See, now, s 56.29.

LAW REVIEW COMMENTARIES

1993 Pocket Part Law Review Commentaries

Monitoring employees for genetic alteration: Is state regulation essential? (1984) 15 Pacific L.J. 349.

Toward a uniform right to medical records: A proposal for a model patient access and information practices statute. (1983) 30 U.C.L.A.Law Rev. 1349.

West's Ann. Cal. Civ. Code s 56.20
CA CIVIL s 56.20
END OF DOCUMENT

West's Ann.Cal.Civ.Code s 56.21

WEST'S ANNOTATED CALIFORNIA CODES
CIVIL CODE
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PART 2.6. **CONFIDENTIALITY** OF **MEDICAL** INFORMATION
CHAPTER 3. USE AND DISCLOSURE OF MEDICAL INFORMATION BY EMPLOYERS

Current through the 1991-1992 legislative sessions

s 56.21. Authorization for disclosure by employer

An authorization for an employer to disclose medical information shall be valid if it:

(a) Is handwritten by the person who signs it or is in typeface no smaller than 8-point type.

(b) Is clearly separate from any other language present on the same page and is executed by a signature which serves no purpose other than to execute the authorization.

(c) Is signed and dated by one of the following:

(1) The patient, except that a patient who is a minor may only sign an authorization for the disclosure of medical information obtained by a provider of health care in the course of furnishing services to which the minor could lawfully have consented under Part 1 (commencing with Section 25) or Part 2.7 (commencing with Section 60) of Division 1.

(2) The legal representative of the patient, if the patient is a minor or incompetent. However, authorization may not be given under this subdivision for the disclosure of medical information which pertains to a competent minor and which was created by a provider of health care in the course of furnishing services to which a minor patient could lawfully have consented under Part 1 (commencing with Section 25) or Part 2.7 (commencing with Section 60) of Division 1.

(3) The beneficiary or personal representative of a deceased patient.

(d) States the limitations, if any, on the types of medical information to be disclosed.

(e) States the name or functions of the employer or person authorized to disclose the medical information.

(f) States the names or functions of the persons or entities authorized to receive the medical information.

(g) States the limitations, if any, on the use of the medical information by the persons or entities authorized to receive the medical information.

(h) States a specific date after which the employer is no longer authorized to disclose the medical information.

(i) Advises the person who signed the authorization of the right to receive a copy of the authorization.

1982 Main Volume Credit(s)

(Added by Stats.1981, c. 782, s 2.)

HISTORICAL AND STATUTORY NOTES

1982 Main Volume Historical and Statutory Notes

Former s 56.21, added by Stats.1979, c. 773, p. 2645, s 1, relating to applicability of prohibitions or limitations of Information Practices Act of 1977, was repealed by Stats.1981, c. 782, s 1.5. See, now, s 56.29.

LIBRARY REFERENCES

1993 Pocket Part Library References

Witnesses k208(1).
C.J.S. Witnesses ss 293, 312.

West's Ann. Cal. Civ. Code s 56.21
CA CIVIL s 56.21
END OF DOCUMENT

West's Ann.Cal.Civ.Code s 56.22

WEST'S ANNOTATED CALIFORNIA CODES
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Current through the 1991-1992 legislative sessions

s 56.22. Copy of authorization to patient or signatory

Upon demand by the patient or the person who signed an authorization, an employer possessing the authorization shall furnish a true copy thereof.

1982 Main Volume Credit(s)

(Added by Stats.1981, c. 782, s 2.)

HISTORICAL AND STATUTORY NOTES

1982 Main Volume Historical and Statutory Notes

Former s 56.22, added by Stats.1979, c. 773, p. 2645, s 1, relating to applicability c. 714, s 46 relating to disclosure of medical information regarding patient in conformance with this part if Information Practices Act of 1977 was applicable, was repealed by Stats.1981, c. 782, s 1.5. See, now, s 56.29.

West's Ann. Cal. Civ. Code s 56.22
CA CIVIL s 56.22
END OF DOCUMENT

West's Ann.Cal.Civ.Code s 56.23

WEST'S ANNOTATED CALIFORNIA CODES
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CHAPTER 3. USE AND DISCLOSURE OF MEDICAL INFORMATION BY EMPLOYERS

Current through the 1991-1992 legislative sessions

s 56.23. Communication of limitations of authorization to person to whom disclosure made

An employer that discloses medical information pursuant to an authorization required by this chapter shall communicate to the person or entity to which it discloses the medical information any limitations in the authorization regarding the use of the medical information. No employer that has attempted in good faith to comply with this provision shall be liable for any unauthorized use of the medical information by the person or entity to which the employer disclosed the medical information.

1982 Main Volume Credit(s)

(Added by Stats.1981, c. 782, s 2.)

LIBRARY REFERENCES

1993 Pocket Part Library References

Witnesses k208(1).
C.J.S. Witnesses ss 293, 312.

West's Ann. Cal. Civ. Code s 56.23
CA CIVIL s 56.23
END OF DOCUMENT

West's Ann.Cal.Civ.Code s 56.24

WEST'S ANNOTATED CALIFORNIA CODES
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DIVISION 1. PERSONS
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CHAPTER 3. USE AND DISCLOSURE OF MEDICAL INFORMATION BY EMPLOYERS

Current through the 1991-1992 legislative sessions

s 56.24. Cancellation or modification of authorization

Nothing in this part shall be construed to prevent a person who could sign the authorization pursuant to subdvision (c) of Section 56.21 from cancelling or modifying an authorization. However, the cancellation or modification shall be effective only after the employer actually receives written notice of the cancellation or modification.

1982 Main Volume Credit(s)

(Added by Stats.1981, c. 782, s 2.)

HISTORICAL AND STATUTORY NOTES

1982 Main Volume Historical and Statutory Notes

Former s 56.24, added by Stats.1979, c. 773, p. 2645, s 1, relating to release of medical information to employers, was repealed by Stats.1981, c. 782, s 1.5. See, now, s 56.10.

LIBRARY REFERENCES

1982 Main Volume Library References

Hospitals k5.
Witnesses k208(1).
C.J.S. Hospitals s 7.
C.J.S. Witnesses ss 293, 312.

West's Ann. Cal. Civ. Code s 56.24
CA CIVIL s 56.24
END OF DOCUMENT

West's Ann.Cal.Civ.Code s 56.245

WEST'S ANNOTATED CALIFORNIA CODES
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CHAPTER 3. USE AND DISCLOSURE OF MEDICAL INFORMATION BY EMPLOYERS

Current through the 1991-1992 legislative sessions

s 56.245. Further disclosure by recipient of medical information

A recipient of medical information pursuant to an authorization as provided by this chapter may not further disclose such medical information unless in accordance with a new authorization that meets the requirements of Section 56.21, or as specifically required or permitted by other provisions of this chapter or by law.

1982 Main Volume Credit(s)

(Added by Stats.1981, c. 782, s 2.)

LIBRARY REFERENCES

1993 Pocket Part Library References

Witnesses k208(1).
C.J.S. Witnesses ss 293, 312.

West's Ann. Cal. Civ. Code s 56.245
CA CIVIL s 56.245
END OF DOCUMENT

West's Ann.Cal.Civ.Code s 56.25

WEST'S ANNOTATED CALIFORNIA CODES
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DIVISION 1. PERSONS
PART 2.6. **CONFIDENTIALITY** OF **MEDICAL** INFORMATION
CHAPTER 4. RELATIONSHIP OF CHAPTERS 2 AND 3

Current through the 1991-1992 legislative sessions

s 56.25. Disclosure by employer who is provider of health care

(a) An employer that is a provider of health care shall not be deemed to have violated Section 56.20 by disclosing, in accordance with Chapter 2 (commencing with Section 56.10), medical information possessed in connection with providing health care services to the provider's patients.

(b) An employer shall not be deemed to have violated Section 56.20 because a provider of health care that is an employee or agent of the employer uses or discloses, in accordance with Chapter 2 (commencing with Section 56.10), medical information possessed by the provider in connection with providing health care services to the provider's patients.

(c) A provider of health care that is an employer shall not be deemed to have violated Section 56.10 by disclosing, in accordance with Chapter 3 (commencing with Section 56.20), medical information possessed in conncetion with employing the provider's employees. Information maintained by a provider of health care in connection with employing the provider's employees shall not be deemed to be medical information for purposes of Chapter 3 (commencing with Section 56.20), unless it would be deemed medical information if received or maintained by an employer that is not a provider of health care.

1982 Main Volume Credit(s)

(Added by Stats.1981, c. 782, s 2.)

HISTORICAL AND STATUTORY NOTES

1982 Main Volume Historical and Statutory Notes

Former s 56.25, added by Stats.1979, c. 773, p. 2645, s 1, amended by Stats.1980, c. 1025, s 1, relating to exemptions from provisions of part, was repealed by Stats.1981, c. 782, s 1.5. See, now, s 56.30.

LIBRARY REFERENCES

1993 Pocket Part Library References

Witnesses k208(1).

C.J.S. Witnesses ss 293, 312.

West's Ann. Cal. Civ. Code s 56.25
CA CIVIL s 56.25
END OF DOCUMENT

West's Ann.Cal.Civ.Code s 56.26

WEST'S ANNOTATED CALIFORNIA CODES
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PART 2.6. **CONFIDENTIALITY** OF **MEDICAL** INFORMATION
CHAPTER 5. USE AND DISCLOSURE OF MEDICAL INFORMATION BY THIRD PARTY ADMINISTRATORS

Current through the 1991-1992 legislative sessions

s 56.26. Prohibition; exceptions; inapplicability of section

(a) No person or entity engaged in the business of furnishing administrative services to programs which provide payment for health care services shall knowingly use, disclose, or permit its employees or agents to use of [FN1] disclose medical information possessed in connection with performing administrative functions for such a program, except as reasonable necessary in connection with the administration or maintenance of the program, or as required by law, or with an authorization.

(b) An authorization required by this section shall be in the same form as described in Section 56.21, except that "third party administrator" shall be substituted for "employer" wherever it appears in Section 56.21.

(c) This section shall not apply to any person or entity that is subject to the Insurance Information Privacy Act or to Chapter 2 (commencing with Section 56.10) or Chapter 3 (commencing with Section 56.20).

1982 Main Volume Credit(s)

(Added by Stats.1981, c. 782, s 2.)

[FN1] So in enrolled bill.

HISTORICAL AND STATUTORY NOTES

1982 Main Volume Historical and Statutory Notes

Former s 56.26, added by Stats.1980, c. 384, s 1, relating to inapplicability of part to investigation of on-the-job accident or illness, was repealed by Stats.1981, c. 782, s 1.5. See, now, s 56.30.

West's Ann. Cal. Civ. Code s 56.26
CA CIVIL s 56.26
END OF DOCUMENT

West's Ann.Cal.Civ.Code s 56.27

WEST'S ANNOTATED CALIFORNIA CODES
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CHAPTER 6. RELATIONSHIP TO EXISTING LAW

Current through the 1991-1992 legislative sessions

s 56.27. Employer that is insurance institution, agent or support organization; disclosure not in violation of s 56.20

An employer that is an insurance institution, insurance agent, or insurance support organization subject to the Insurance Information and Privacy Protection Act, Article 6.6 (commencing with Section 791) of Part 2 of Division 1 of the Insurance Code, shall not be deemed to have violated Section 56.20 by disclosing medical information gathered in connection with an insurance transaction in accordance with that act.

1982 Main Volume Credit(s)

(Added by Stats.1981, c. 782, s 2.)

West's Ann. Cal. Civ. Code s 56.27
CA CIVIL s 56.27
END OF DOCUMENT

West's Ann.Cal.Civ.Code s 56.28

WEST'S ANNOTATED CALIFORNIA CODES
CIVIL CODE
DIVISION 1. PERSONS
PART 2.6. **CONFIDENTIALITY** OF **MEDICAL** INFORMATION
CHAPTER 6. RELATIONSHIP TO EXISTING LAW

Current through the 1991-1992 legislative sessions

s 56.28. Patient's right to access

Nothing in this part shall be deemed to affect existing laws relating to a patient's right of access to his or her own medical information, or relating to disclosures made pursuant to Section 1158 of the Evidence Code, or relating to privileges established under the Evidence Code.

1982 Main Volume Credit(s)

(Added by Stats.1981, c. 782, s 2.)

HISTORICAL AND STATUTORY NOTES

1982 Main Volume Historical and Statutory Notes

Derivation: Former s 56.19, added by Stats.1979, c. 773, p. 2645, s 1.

West's Ann. Cal. Civ. Code s 56.28
CA CIVIL s 56.28
END OF DOCUMENT

West's Ann.Cal.Civ.Code s 56.29

WEST'S ANNOTATED CALIFORNIA CODES
CIVIL CODE
DIVISION 1. PERSONS
PART 2.6. **CONFIDENTIALITY** OF **MEDICAL** INFORMATION
CHAPTER 6. RELATIONSHIP TO EXISTING LAW

Current through the 1991-1992 legislative sessions

s 56.29. Information Practices Act of 1977; applicability

(a) Nothing in Chapter 1 (commencing with Section 1798) of Title 1.8 of Part 4 of Division 3 shall be construed to permit the acquisition or disclosure of medical information regarding a patient without an authorization, where the authorization is required by this part.

(b) The disclosure of medical information regarding a patient which is subject to subdivision (b) of Section 1798.24 shall be made only with an authorization which complies with the provisions of this part. Such disclosure may be made only within the time limits specified in subdivision (b) of Section 1798.24.

(c) Where the acquisition or disclosure of medical information regarding a patient is prohibited or limited by any provision of Chapter 1 (commencing with Section 1798) of Title 1.8 of Part 4 of Division 3, the prohibition or limit shall be applicable in addition to the requirements of this part.

1982 Main Volume Credit(s)

(Added by Stats.1981, c. 782, s 2.)

HISTORICAL AND STATUTORY NOTES

1982 Main Volume Historical and Statutory Notes

Former s 56.29, added by Stats.1981, c. 106, s 1, relating to disclosures by health care providers to insurance institutions, agents or support organizations, was repealed by Stats.1981, c. 782, s 1.5. See, now, s 56.10.

Derivation: Former ss 56.20, 56.21, 56.22, added by Stats.1979, c. 773, p. 2645, s 1.

West's Ann. Cal. Civ. Code s 56.29
CA CIVIL s 56.29
END OF DOCUMENT

West's Ann.Cal.Civ.Code s 56.30

This document has been amended. Use UPDATE to retrieve the amending document(s). See SCOPE for more information.

WEST'S ANNOTATED CALIFORNIA CODES
CIVIL CODE
DIVISION 1. PERSONS
PART 2.6. **CONFIDENTIALITY** OF **MEDICAL** INFORMATION
CHAPTER 6. RELATIONSHIP TO EXISTING LAW

Current through the 1991-1992 legislative sessions

s 56.30. Exemptions from limitations of this part

< Text of section operative until Jan. 1, 1994. >

The disclosure and use of the following medical information shall not be subject to the limitations of this part:

(a) (Mental health and developmental disabilities) Information and records obtained in the course of providing services under Division 4 (commencing with Section 4001), Division 4.1 (commencing with Section 4400), Division 4.5 (commencing with Section 4500), Division 5 (commencing with Section 5000), Division 6 (commencing with Section 6000), or Division 7 (commencing with Section 7100) of the Welfare and Institutions Code.

(b) (Public social services) Information and records which are subject to Sections 10850, 14124.1, and 14124.2 of the Welfare and Institutions Code.

(c) (State health services, communicable diseases, developmental disabilities) Information and records maintained pursuant to Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of the Health and Safety Code and pursuant to Division 4 (commencing with Section 3000) of the Health and Safety Code.

(d) (Licensing and statistics) Information and records maintained pursuant to Division 2 (commencing with Section 1200) and Division 9 (commencing with Section 10000) of the Health and Safety Code; pursuant to Chapter 3 (commencing with Section 1200) of Division 2 of the Business and Professions Code; and pursuant to Section 222.26, 224.70, or 226.35 of the Civil Code.

(e) (Medical survey, workers' safety) Information and records acquired and maintained or disclosed pursuant to Sections 1380 and 1382 of the Health and Safety Code and pursuant to Division 5 (commencing with Section 6300) of the Labor Code.

(f) (Industrial accidents) Information and records acquired, maintained, or disclosed pursuant to Division 1 (commencing with Section 50), Division 4 (commencing with Section 3201), Division 4.5 (commencing with Section 6100), and Division 4.7 (commencing with Section 6200) of the Labor Code.

(g) (Law enforcement) Information and records maintained by a health facility which are sought by a law enforcement agency

under Chapter 3.5 (commencing with Section 1543) of Title 12 of Part 2 of the Penal Code.

(h) (Investigations of employment accident or illness) Information and records sought as part of an investigation of an on-the-job accident or illness pursuant to Division 5 (commencing with Section 6300) of the Labor Code or pursuant to Section 2950 of the Health and Safety Code.

(i) (Alcohol or drug abuse) Information and records subject to the federal alcohol and drug abuse regulations (Part 2 (commencing with Section 2.1) of subchapter A of Chapter 1 of Title 42 of the Code of Federal Regulations) or to Section 11977 of the Health and Safety Code dealing with narcotic and drug abuse.

(j) (Patient discharge data) Nothing in this part shall be construed to limit, expand, or otherwise affect the authority of the California Health Facilities Commission to collect patient discharge information from health facilities pursuant to Section 441.18 of the Health and Safety Code.

(k) Medical information and records disclosed to, and their use by, the Insurance Commissioner, the Division of Industrial Accidents, the Workers' Compensation Appeals Board, or the Department of Insurance.

1982 Main Volume Credit(s)

(Added by Stats.1981, c. 993. Pocket Part Credit(s)

(Amended by Stats.1990, c. 1363 (A.B.3532), s 1, operative July 1, 1991.)

< For text of section operative Jan. 1, 1994, see s 56.30, post. >

West's Ann. Cal. Civ. Code s 56.30
CA CIVIL s 56.30
END OF DOCUMENT

West's Ann.Cal.Civ.Code s 56.30

This document has been amended. Use UPDATE to retrieve the amending document(s). See SCOPE for more information.

WEST'S ANNOTATED CALIFORNIA CODES
CIVIL CODE
DIVISION 1. PERSONS
PART 2.6. **CONFIDENTIALITY** OF **MEDICAL** INFORMATION
CHAPTER 6. RELATIONSHIP TO EXISTING LAW

Current through the 1991-1992 legislative sessions

s 56.30. Exemptions from limitations of this part

< Text of section operative Jan. 1, 1994. >

The disclosure and use of the following medical information shall not be subject to the limitations of this part:

(a) (Mental health and developmental disabilities) Information and records obtained in the course of providing services under Division 4 (commencing with Section 4001), Division 4.1 (commencing with Section 4400), Division 4.5 (commencing with Section 4500), Division 5 (commencing with Section 5000), Division 6 (commencing with Section 6000), or Division 7 (commencing with Section 7100) of the Welfare and Institutions Code.

(b) (Public social services) Information and records which are subject to Sections 10850, 14124.1, and 14124.2 of the Welfare and Institutions Code.

(c) (State health services, communicable diseases, developmental disabilities) Information and records maintained pursuant to Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of the Health and Safety Code and pursuant to Division 4 (commencing with Section 3000) of the Health and Safety Code.

(d) (Licensing and statistics) Information and records maintained pursuant to Division 2 (commencing with Section 1200) and Division 9 (commencing with Section 10000) of the Health and Safety Code; pursuant to Chapter 3 (commencing with Section 1200) of Division 2 of the Business and Professions Code; and pursuant to Section 8608, 8706, 8817, or 8909 of the Family Code.

(e) (Medical survey, workers' safety) Information and records acquired and maintained or disclosed pursuant to Sections 1380 and 1382 of the Health and Safety Code and pursuant to Division 5 (commencing with Section 6300) of the Labor Code.

(f) (Industrial accidents) Information and records acquired, maintained, or disclosed pursuant to Division 1 (commencing with Section 50), Division 4 (commencing with Section 3201), Division 4.5 (commencing with Section 6100), and Division 4.7 (commencing with Section 6200) of the Labor Code.

(g) (Law enforcement) Information and records maintained by a health facility which are sought by a law enforcement agency

under Chapter 3.5 (commencing with Section 1543) of Title 12 of Part 2 of the Penal Code.

(h) (Investigations of employment accident or illness) Information and records sought as part of an investigation of an on-the-job accident or illness pursuant to Division 5 (commencing with Section 6300) of the Labor Code or pursuant to Section 2950 of the Health and Safety Code.

(i) (Alcohol or drug abuse) Information and records subject to the federal alcohol and drug abuse regulations (Part 2 (commencing with Section 2.1) of subchapter A of Chapter 1 of Title 42 of the Code of Federal Regulations) or to Section 11977 of the Health and Safety Code dealing with narcotic and drug abuse.

(j) (Patient discharge data) Nothing in this part shall be construed to limit, expand, or otherwise affect the authority of the California Health Facilities Commission to collect patient discharge information from health facilities pursuant to Section 441.18 of the Health and Safety Code.

(k) Medical information and records disclosed to, and their use by, the Insurance Commissioner, the Division of Industrial Accidents, the Workers' Compensation Appeals Board, or the Department of Insurance.

1982 Main Volume Credit(s)

(Added by Stats.1981, c. 993. Pocket Part Credit(s)

(Amended by Stats.1990, c. 1363 (A.B.3532), s 1, operative July 1, 1991; Stats.1992, c. 163 (A.B.2641), s 5, operative Jan. 1, 1994.)

< For text of section operative until Jan. 1, 1994, see s 56.30, ante. >

LAW REVISION COMMISSION COMMENT

1993 Pocket Part Law Revision Commission Comment

1992 Amendment

Subdivision (d) of Section 56.30 is amended to substitute references to the Family Code provisions that replaced the former Civil Code provisions. [22 Cal.L.Rev.Comm.Reports 1 (1992)]

HISTORICAL AND STATUTORY NOTES

1993 Pocket Part Historical and Statutory Notes

1990 Legislation

The 1990 amendment, in subd. (d), substituted "Sections 222.26, 224.70, or 226.35" for "Section 224s".

1992 Legislation

The 1992 amendment made changes to conform with the enactment

of the Family Code by Stats.1992, c. 162.

1982 Main Volume Historical and Statutory Notes

Main Volume Text

s 56.30. Exemptions from limitations of this part

The disclosure and use of the following medical information shall not be subject to the limitations of this part:

(a) (Mental health and developmental disabilities) Information and records obtained in the course of providing services under Division 4 (commencing with Section 4001), Division 4.1 (commencing with Section 4400), Division 4.5 (commencing with Section 4500), Division 5 (commencing with Section 5000), Division 6 (commencing with Section 6000), or Division 7 (commencing with Section 7100) of the Welfare and Institutions Code.

(b) (Public social services) Information and records which are subject to Sections 10850, 14124.1, and 14124.2 of the Welfare and Institutions Code.

(c) (State health services, communicable diseases, developmental disabilities) Information and records maintained pursuant to Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of the Health and Safety Code and pursuant to Division 4 (commencing with Section 3000) of the Health and Safety Code.

(d) (Licensing and statistics) Information and records maintained pursuant to Division 2 (commencing with Section 1200) and Division 9 (commencing with Section 10000) of the Health and Safety Code; pursuant to Chapter 3 (commencing with Section 1200) of Division 2 of the Business and Professions Code; and pursuant to Section 224s of the Civil Code.

(e) (Medical survey, workers' safety) Information and records acquired and maintained or disclosed pursuant to Sections 1380 and 1382 of the Health and Safety Code and pursuant to Division 5 (commencing with Section 6300) of the Labor Code.

(f) (Industrial accidents) Information and records acquired, maintained, or disclosed pursuant to Division 1 (commencing with Section 50), Division 4 (commencing with Section 3201), Division 4.5 (commencing with Section 6100), and Division 4.7 (commencing with Section 6200) of the Labor Code.

(g) (Law enforcement) Information and records maintained by a health facility which are sought by a law enforcement agency under Chapter 3.5 (commencing with Section 1543) of Title 12 of Part 2 of the Penal Code.

(h) (Investigations of employment accident or illness) Information and records sought as part of an investigation of an on-the-job accident or illness pursuant to Division 5 (commencing with Section 6300) of the Labor Code or pursuant to Section 2950 of the Health and Safety Code.

(i) (Alcohol or drug abuse) Information and records subject to the federal alcohol and drug abuse regulations (Part 2 (commencing with Section 2.1) of subchapter A of Chapter 1 of Title 42 of the Code of Federal Regulations) or to Section 11977 of the Health and Safety Code dealing with narcotic and drug abuse.

(j) (Patient discharge data) Nothing in this part shall be construed to limit, expand, or otherwise affect the authority of the California Health Facilities Commission to collect patient discharge information from health facilities pursuant to Section 441.18 of the Health and Safety Code.

(k) Medical information and records disclosed to, and their use by, the Insurance Commissioner, the Division of Industrial Accidents, the Workers' Compensation Appeals Board, or the Department of Insurance.

(Added by Stats.1981, c. 782, s 2.)

Main Volume Historical and Statutory Notes

Former s 56.30, added by Stats.1979, c. 773, p. 2645, s 1, relating to compensatory, and civil damages for violations and recovery of attorneys' fees and costs in actions was repealed by Stats.1981, c. 782, s 1.5. See, now, s 56.35.

Derivation: Former s 56.25, added by Stats.1979, c. 773, p. 2645, s 1, amended by Stats.1980, c. 1025, s 1.

Former s 56.26, added by Stats.1980, c. 384, s 1.

WEST'S CALIFORNIA CODE FORMS

1982 Main Volume West's California Code Forms

See West's California Code Forms, Civil.

LIBRARY REFERENCES

1993 Pocket Part Library References

Witnesses k211(1).
C.J.S. Witnesses s 295.

1982 Main Volume Library References

Hospitals k3.
Physicians and Surgeons k18.110.
C.J.S. Hospitals s 5.
C.J.S. Physicians and Surgeons s 67.

West's Ann. Cal. Civ. Code s 56.30
CA CIVIL s 56.30
END OF DOCUMENT

West's Ann.Cal.Civ.Code s 56.35

WEST'S ANNOTATED CALIFORNIA CODES
CIVIL CODE
DIVISION 1. PERSONS
PART 2.6. **CONFIDENTIALITY** OF **MEDICAL** INFORMATION
CHAPTER 7. VIOLATIONS

Current through the 1991-1992 legislative sessions

s 56.35. Compensatory and punitive damages; attorneys' fees and costs

In addition to any other remedies available at law, a patient whose medical information has been used or disclosed in violation of Section 56.10 or 56.20 or subdivision (a) of Section 56.26 and who has sustained economic loss or personal injury therefrom may recover compensatory damages, punitive damages not to exceed three thousand dollars ($3,000), attorneys' fees not to exceed one thousand dollars ($1,000), and the costs of litigation.

1982 Main Volume Credit(s)

(Added by Stats.1981, c. 782, s 2.)

HISTORICAL AND STATUTORY NOTES

1982 Main Volume Historical and Statutory Notes

Derivation: Former s 56.30, added by Stats.1979, c. 773, p. 2645, s 1.

LAW REVIEW COMMENTARIES

1993 Pocket Part Law Review Commentaries

Toward a uniform right to medical records: A proposal for a model patient access and information practices statute. (1983) 30 U.C.L.A.Law Rev. 1349.

West's Ann. Cal. Civ. Code s 56.35
CA CIVIL s 56.35
END OF DOCUMENT

West's Ann.Cal.Civ.Code s 56.36

WEST'S ANNOTATED CALIFORNIA CODES
CIVIL CODE
DIVISION 1. PERSONS
PART 2.6. **CONFIDENTIALITY** OF **MEDICAL** INFORMATION
CHAPTER 7. VIOLATIONS

Current through the 1991-1992 legislative sessions

s 56.36. Misdemeanors

Any violation of the provisions of this part which results in economic loss or personal injury to a patient is punishable as a misdemeanor.

1982 Main Volume Credit(s)

(Added by Stats.1981, c. 782, s 2.)

HISTORICAL AND STATUTORY NOTES

1982 Main Volume Historical and Statutory Notes

Derivation: Former s 56.31, added by Stats.1979, c. 773, p. 2645, s 1, amended by Stats.1980, c. 676, s 40.

West's Ann. Cal. Civ. Code s 56.36
CA CIVIL s 56.36
END OF DOCUMENT

West's Ann.Cal.Civ.Code s 56.37

WEST'S ANNOTATED CALIFORNIA CODES
CIVIL CODE
DIVISION 1. PERSONS
PART 2.6. **CONFIDENTIALITY** OF **MEDICAL** INFORMATION
CHAPTER 7. VIOLATIONS

Current through the 1991-1992 legislative sessions

s 56.37. Waivers unenforceable and void

Any waiver by a patient of the provisions of this part, except as authorized by Section 56.11 or 56.21 or subdivision (b) of Section 56.26, shall be deemed contrary to public policy and shall be unenforceable and void.

1982 Main Volume Credit(s)

(Added by Stats.1981, c. 782, s 2.)

HISTORICAL AND STATUTORY NOTES

1982 Main Volume Historical and Statutory Notes

Derivation: Former s 56.32, added by Stats.1979, c. 773, p. 2645, s 1.

West's Ann. Cal. Civ. Code s 56.37
CA CIVIL s 56.37
END OF DOCUMENT

299k15(9)

245 Cal.Rptr. 525
(Cite as: 199 Cal.App.3d 1230, 245 Cal.Rptr. 525)

Barbara J. INABNIT, a Minor, etc., et al., Plaintiffs and Appellants,
v.
Richard P. BERKSON, Defendant and Respondent.

No. F006573.
Court of Appeal, Fifth District.
March 29, 1988.
Certified for Partial Publication [FN*].

FN* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts I through III. Review Denied June 22, 1988.

Patient and her mother brought suit against psychiatrist for damages resulting from his allegedly unauthorized and negligent disclosure of their medical records. The Superior Court, Tulare County, Kenneth E. Conn, J., granted summary judgment in favor of psychiatrist, and patient and mother appealed. The Court of Appeal, Hamlin, J., held that: (1) Confidentiality of Medical Information Act section allows licensed physician to release records pertaining to psychiatric treatment furnished to patient without patient's authorization when production of records is compelled by subpoena duces tecum issued in judicial proceeding in which physician is not a party, and when copies of subpoena and affidavit, accompanied by notice to patient or patient's attorney, have been served in accordance with Code of Civil Procedure section, and (2) where patient and her mother, through their attorneys, received notice pursuant to Act that psychiatrist's records were being sought by defendant in wrongful death action by patient and her mother, but they failed to take any action to claim psychotherapist-patient privilege, they waived that privilege within meaning of Evidence Code section, leaving psychiatrist in position of being compelled under provisions of Act to disclose the records.

Affirmed.

[1] PHYSICIANS AND SURGEONS k15(9)
299k15(9)
Confidentiality of Medical Information Act section allows licensed physician to release records pertaining to psychiatric treatment furnished to patient without patient's authorization when production of records is compelled by subpoena duces tecum issued in judicial proceeding in which physician is not a party, and when copies of subpoena and affidavit, accompanied by notice to patient or patient's attorney, have been served in accordance with Code of Civil Procedure section. West's Ann.Cal.Civ.Code s 56 et seq.; West's Ann.Cal.C.C.P. s 1985.3.

[2] WITNESSES k212
410k212
Disclosure of subpoenaed medical records by psychotherapists was controlled by Confidentiality of Medical Information Act section

even before that special category was added to list of witnesses in 1986. West's Ann.Cal.C.C.P. ss 1985.3, 1985.3(a)(1).
[2] WITNESSES k214.5
410k214.5
Disclosure of subpoenaed medical records by psychotherapists was controlled by Confidentiality of Medical Information Act section even before that special category was added to list of witnesses in 1986. West's Ann.Cal.C.C.P. ss 1985.3, 1985.3(a)(1).

[3] WITNESSES k212
410k212
That medical provider whose records were subpoenaed by wrongful death defendant was both physician and psychiatrist did not compel finding that Confidentiality of Medical Information Act section, before its 1986 amendment to specifically include psychotherapists, did not require his production of the records, even though privilege for psychiatric communications and records is broader in scope than physician-patient privilege; legislature meant from date it originally enacted Act in 1980 that subpoenaing of any records of any physician should trigger duty on subpoenaing party to give notice to consumer before requiring production of those records. West's Ann.Cal.C.C.P. s 1985.3.

[4] WITNESSES k219(5)
410k219(5)
Where patient and her mother, through their attorneys, received notice pursuant to Confidentiality of Medical Information Act section that psychiatrist's records of treatment of patient and mother were being sought by defendant in wrongful death action by patient and her mother, but they failed to take any action to claim psychotherapist-patient privilege, they waived that privilege within meaning of Evidence Code section, leaving psychiatrist in position of being compelled under provisions of Act to disclose the records. West's Ann.Cal.C.C.P. s 1985.3; West's Ann.Cal.Civ.Code s 56.10(b)(3); West's Ann.Cal.Evid.Code ss 912, 912(a), 1014, 1014 comment.

***1231 **526** Fielder & Fielder, Scott Fielder and Hugh Fielder, Visalia, for plaintiffs and appellants.

Borton, Petrini & Conron, George Martin and J. David Petrie, Visalia, for defendant and respondent.

HAMLIN, Associate Justice.

Plaintiffs Barbara J. Inabnit, a minor, by and through her guardian ad litem Mary Jaynes, Mary Jaynes, Jenny Gonzales, Charles O. Inabnit, Jr., Donald L. Inabnit and Mildred Inabnit appeal from the summary judgment in favor of defendant Richard P. Berkson and against them in their action for damages resulting from defendant's unauthorized and negligent disclosure of the medical records of plaintiffs Barbara Inabnit and her mother, Mary Jaynes.

[1] This appeal presents for our review one aspect of the Confidentiality of Medical Information Act (Civ.Code, s 56 et seq.) (the Act). The issue before us is whether a licensed physician may release his records pertaining to psychiatric treatment furnished a patient without that patient's authorization when the production

of those records is compelled by a subpoena *1232 duces tecum issued in a judicial proceeding in which the physician is not a party. We conclude that such release is proper when copies of the subpoena and affidavit, accompanied by the notice to the patient or the patient's attorney, have been served, as in this case, in accordance with Code of Civil Procedure section 1985.3. We will affirm the judgment.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

On September 27, 1984, plaintiffs filed a complaint against Richard P. Berkson, **527 M.D., alleging that sometime in 1983 defendant, a psychiatrist, had been engaged by Mary Jaynes to treat her daughter, Barbara J. Inabnit, for depression occasioned by the loss of Barbara's father and for the associated anxieties. As part of his professional services, defendant also interviewed and counseled Mary Jaynes and was treating her as well as her daughter. The complaint alleged that at the time of the treatment plaintiffs herein were plaintiffs in another lawsuit in the same court for the wrongful death of Barbara Inabnit's father (wrongful death action). The complaint further alleged that defendant, with knowledge of the pending wrongful death action, in early 1984 negligently released to the attorney for one of the defendants in that action certain private, confidential and privileged interview notes (medical records) having to do with his counseling sessions with plaintiffs Barbara Inabnit and Mary Jaynes. Such negligent release of the medical records allegedly caused plaintiffs' wrongful death cause of action to diminish in value in an amount not yet ascertained.

Defendant answered plaintiffs' complaint, alleging that his disclosure of the medical records was lawful and pursuant to a subpoena duces tecum issued and served pursuant to Code of Civil Procedure section 1985.3. He raised several affirmative defenses, including the bar of Civil Code section 56.10, subdivision (b)(3), [FN1] consent and estoppel.

FN1. At all times pertinent to this action, Civil Code section 56.10, subdivision (b)(3) provided: "(b) A provider of health care shall disclose medical information if the disclosure is compelled by any of the following: [P] ... [P] (3) By a party to a proceeding before a court or administrative agency pursuant to a subpoena, subpoena duces tecum, notice to appear served pursuant to Section 1987 of the Code of Civil Procedure, or any provision authorizing discovery in a proceeding before a court or administrative agency." Further references to Section 56.10 and its subdivisions are to Civil Code section 56.10 and its subdivisions.

Defendant moved for summary judgment on the basis that Section 56.10, subdivision (b)(3), provides an exception to the psychotherapist-patient privilege, that he released the medical records pursuant to a subpoena duces tecum as that provision contemplates when the requirements of Code of Civil Procedure section 1985.3 [FN2] have been satisfied. **528 Thus defendant *1233 contends he did not breach any duty toward plaintiffs that would support any of the causes of action alleged in plaintiffs' complaint.

FN2. In 1983 and 1984 Code of Civil Procedure section 1985.3 provided in pertinent part: "(a) For purposes of this section, the following definitions apply: [P] (1) 'Personal records' means the original or any copy of books, documents or other writings pertaining to a consumer and which are maintained by any 'witness' which is a physician, ... [P] (2) 'Consumer' means any individual ... which has ... used the services of such witness.... [P] (3) 'Subpoenaing party' means the person or persons causing a subpoena duces tecum to be issued or served in connection with any civil action or proceeding pursuant to this code, ... [P] (b) The date specified in a subpoena duces tecum for the production of personal records shall not be less than 15 days from the date the subpoena is issued. Prior to the date called for in the subpoena duces tecum for the production of personal records, the subpoenaing party shall serve or cause to be served on the consumer whose records are being sought a copy of the subpoena duces tecum, of the affidavit supporting the issuance of the subpoena, and of the notice described in subdivision (e). Such service shall be made both: [P] (1) To the consumer personally, or at his or her last known address, ... or, if he or she is a party, to his or her attorney of record. [P] (2) Not less than 10 days prior to the date for production specified in the subpoena duces tecum, plus the additional time provided by Section 1013 if service is by mail. [P] (c) Prior to the production of the records, the subpoenaing party shall do either of the following: [P] (1) Serve or cause to be served upon the witness a proof of personal service or of service by mail attesting to compliance with subdivision (b). [P] (2) Furnish the witness a written authorization to release the records signed by the consumer or by his or her attorney of record. The witness may presume that any attorney purporting to sign such authorization on behalf of the consumer acted with the consent of the consumer. [P] ... [P] (e) Every copy of the subpoena duces tecum and affidavit served on a consumer or his or her attorney in accordance with subdivision (b) shall be accompanied by a notice, in a typeface designed to call attention to the notice, indicating that (1) records about the consumer are being sought from the witness named on the subpoena; (2) if the consumer objects to the witness furnishing the records to the party seeking the records, the consumer must file papers with the court prior to the date specified for production on the subpoena; and (3) if the party who is seeking the records will not agree in writing to cancel or limit the subpoena, an attorney should be consulted about the consumer's interest in protecting his or her rights of privacy. If a notice of taking of deposition is also served, that other notice may be set forth in a single document with the notice required by this subdivision. [P] (f) Any consumer whose personal records are sought by a subpoena duces tecum may, prior to the date for production, bring a motion under Section 1987.1 to quash or modify the subpoena duces tecum. Notice of the bringing of that motion shall be given to the witness prior to production. No witness shall be required to produce personal records after receipt of notice that such a motion has been brought, except upon order of the court in which the action is pending or by agreement of the parties, witnesses, and consumers affected. [P] ..." Further

references to Section 1985.3 and its subdivisions are to Code of Civil Procedure section 1985.3 and its subdivisions as they read in 1984.

In support of his motion for summary judgment, defendant submitted a declaration that he was informed and believed that a subpoena duces tecum was served on his office on December 29, 1983, and that the copying of plaintiffs' medical records was done pursuant to that subpoena duces tecum. Defendant later filed a supplementary declaration that amended his previous declaration by changing the date on which the subpoenaed documents were copied from December 29, 1983, to January 10, 1984. In the latter declaration, defendant declares that, "The records which I produced for copying on January 10, 1984, were being produced in response to a subpoena duces tecum...."

*1234 Along with a memorandum of points and authorities in opposition to the motion for summary judgment, plaintiffs filed on October 17, 1985, the declaration of Hugh B. Fielder, an attorney for plaintiffs both in the underlying wrongful death action and in the negligence action. On the preceding day, plaintiffs' attorney had filed a demand that the original transcript of defendant's April 11, 1985, deposition be lodged with the trial court. Fielder admitted he had designated defendant as an expert witness in the wrongful death action, and that he had been served with a copy of the subpoena of defendant's medical records in accordance with Section 1985.3. Copies of several pages of defendant's deposition were attached, raising the question whether at the time he allowed his medical records to be copied defendant had been aware that there was a subpoena for them. The declaration of Mary Jaynes was also filed on October 17, 1985, setting forth that she had never given defendant permission to release the documents.

On December 16, 1985, the trial court ruled on defendant's motion for summary judgment, stating in part: "I am persuaded that the provisions of Civil Code, section 56.10, is [sic] specific and unequivocal in requiring a health care provider to disclose medical information if the disclosure is compelled pursuant to a subpoena duces tecum. The statute makes an express exception to the provision requiring an authorization from the patient. [P] I find, therefore, that defendant's conduct cannot be the basis for any liability to plaintiffs and the defendant is entitled to summary judgment in his favor. [P] Defendant's motion is granted." An order granting summary judgment and summary judgment for defendant were filed on December 19, 1985.

On December 31, 1985, plaintiffs filed a document entitled "Notice of Appeal of Ruling on Summary Judgment." The ruling on the summary judgment is not appealable. However, the body of plaintiffs' notice recites that the ruling was entered on or about December 19, 1985, the date upon which the judgment was filed. Since the notice of appeal was timely as to the judgment and the parties have fully briefed the issues on appeal without objection, we elect to treat this as an appeal from the judgment that followed the ruling on summary judgment.

I.-III. [FN**]

FN** See footnote *, ante.

*1235 IV.

Waiver of the Psychotherapist-Patient Privilege

Defendant contends that as a matter of law under Section 56.10, subdivision (b)(3), he, as a licensed physician practicing psychiatry, **529 was not required to assert the psychotherapist-patient privilege before turning over his records pursuant to a subpoena duces tecum issued in the wrongful death judicial proceeding.

First, defendant points out that as a licensed physician he is, by definition in then effective Civil Code section 56.05, subdivision (d), a provider of health care within the meaning of Section 56.10.

Second, the medical records that were released by defendant's employees constituted "medical information regarding a patient of the provider."

Section 56.10 in the very first subdivision (a) recognizes the equivalent of a psychotherapist-patient privilege when it states: "No provider of health care shall disclose medical information regarding a patient of the provider without first obtaining an authorization, except as provided in subdivision (b) or (c)." Thus Section 56.10 does not purport to modify or conflict with the psychotherapist-patient privilege established by Evidence Code section 1014 before Section 56.10 was originally enacted in 1981. Instead, Section 56.10 specifies two carefully crafted exceptions to the requirement of patient authorization. The exception with which we are concerned, subdivision (b)(3), provides: "(b) A provider of health care shall disclose medical information if the disclosure is compelled by any of the following: "... "(3) By a party to a proceeding before a court or administrative agency pursuant to a subpoena, subpoena duces tecum, notice to appear served pursuant to Section 1987 of the Code of Civil Procedure, or any provision authorizing discovery in a proceeding before a court or administrative agency." Section 1985.3 governs the procedure for serving a subpoena duces tecum of personal records of one who has used the services of a "witness" who was a physician.

The first requirement of Section 1985.3 for the issuance of a subpoena duces tecum of the personal records of a consumer is that the subpoenaing party serve a copy of the subpoena duces tecum on the consumer or his attorney. The details of this requirement are stated in subdivision (b)(1) set forth in footnote 2 above.

*1236 Here, the subpoenaing party complied with the requirements of Section 1985.3, subdivision (b)(1), by serving plaintiffs' attorneys with a copy of the subpoena duces tecum, the affidavit in support of its issuance, and the notice specified in subdivision (e).

The production of the records was to have taken place on December 29, 1983. The required documents were served on plaintiffs' attorneys on December 14, 1983, which complies with the 10 days plus 5 days for mailing notice requirement of subdivision (b)(2).

The second requirement of Section 1985.3 is that the witness be provided with a proof of service indicating that the consumer

has been advised of the issuance of the subpoena duces tecum. This requirement, set forth in subdivision (c)(1), was also satisfied.

The final requirement for the subpoenaing party (stated in subdivision (e)) is that such party notify the consumer (1) that his or her records are being sought from the witness, (2) that the consumer has a right to object, and (3) that the consumer has the right to seek the services of an attorney in order to protect his rights of privacy.

Similarly, this requirement was met. A notice of taking deposition was served upon plaintiffs' attorneys by the subpoenaing party. Paragraph No. 3 of the notice of taking deposition specifically complies with the exact notice requirements of subdivision (e).

Section 1985.3 not only sets forth the requirements to be satisfied by the subpoenaing party but it also specifies in subdivision (f) what the consumers, such as plaintiffs in this case, can do if they object to the production of their personal records pursuant to the subpoena. Plaintiffs simply did nothing to protect against defendant's production of his records pertaining to his psychiatric treatment of plaintiffs.

****530** [2] Plaintiffs attempt to excuse their failure to protect against defendant's production of his records by pointing out that records maintained by psychotherapists were not controlled by Section 1985.3 until that specific category was added to the list of witnesses in subdivision (a)(1) of that section in 1986 (Stats.1986, ch. 605, s 1, p. 226). They contend there could have been no legislative purpose in such a specific addition to the list of witnesses if psychotherapists were already covered. As applied to this case, plaintiffs' argument is flawed. Since the 1986 amendment adds "psychotherapist, as ***1237** defined in Section 1010 of the Evidence Code," [FN3] an examination of that definition leaves little doubt that the 1986 amendment was intended to add many to those already embraced within the category of providers of health care as defined in Civil Code section 56.05. Only subdivision (a) of Evidence Code section 1010 mentions persons who practice psychiatry, and that mention appears to have been made to provide a description of another addition: "(a) A person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation who devotes, or is reasonably believed by the patient to devote, a substantial portion of his or her time to the practice of psychiatry." More significantly, by including all psychotherapists, as defined in Evidence Code section 1010, as health providers, the 1986 amendment added to those covered by Section 1985.3, licensed psychologists, clinical social workers, school psychologists with a credential, and marriage, family and child counselors. Their addition was a significant legislative purpose for the 1986 amendment.

FN3. In 1986 Evidence Code section 1010 provided: "As used in this article, 'psychotherapist' means: [P] (a) A person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation who devotes, or is reasonably believed by the patient to devote, a substantial portion of his or her time to the practice of psychiatry. [P] (b) A person

licensed as a psychologist under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code. [P] (c) A person licensed as a clinical social worker under Article 4 (commencing with Section 9040) of Chapter 17 of Division 3 of the Business and Professions Code, when he or she is engaged in applied psychotherapy of a nonmedical nature. [P] (d) A person who is serving as a school psychologist and holds a credential authorizing such service issued by the state. [P] (e) A person licensed as a marriage, family and child counselor under Chapter 13 (commencing with Section 4980) of Division 2 of the Business and Professions Code."

[3] Plaintiffs then assert that defendant's production of records was not compelled by Section 1985.3 before the above-mentioned amendment to that section in 1986 simply because he was both a physician and a psychiatrist. They contend that defendant was excluded from the coverage of Section 1985.3 in 1983 and 1984 because he treated plaintiffs in his capacity as a psychotherapist and only psychotherapeutic records were requested and obtained. According to plaintiffs, that makes a difference because the Legislature has granted to patients of psychiatrists a privilege much broader in scope than the ordinary physician-patient privilege. We disagree. That the privilege for psychiatric communications and records is broader in scope than the physician-patient privilege does not suggest that Section 1985.3 in referring to the records maintained by a physician meant anything other than all the records of a physician without regard to his specialty. Certainly it is reasonable to believe the Legislature meant from the date it originally enacted Section 1985.3 in 1980 that the subpoenaing of any records of any physician should trigger a duty on the subpoenaing party to give notice to the consumer before requiring the production of those records.

[4] ***1238** Section 56.10, subdivision (b)(3), a part of the Act, states that a provider of health care such as defendant shall disclose medical information about a patient he has treated if the disclosure is compelled by a party to a proceeding before a court pursuant to a subpoena duces tecum. The Act was enacted with full knowledge of the existence of the psychotherapist- patient privilege provided by Evidence Code section 1014. In fact, Civil Code section 56.28, a part of the Act, states that nothing in the Act shall be deemed to affect existing laws relating to privileges established under the Evidence Code.

****531** This general limitation stated in Section 56.28 requires us to consider the provisions of the Evidence Code relating to the psychotherapist- patient privilege before deciding the effect of Section 56.10 in this case.

Evidence Code section 1014 provides in relevant part: "Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by: "(a) The holder of the privilege [the patient, or in the case of Barbara J. Inabnit, a minor, her guardian under the provisions of Evidence Code section 1013]; "(b) A person who is

authorized to claim the privilege by the holder of the privilege; or "(c) The person who was the psychotherapist at the time of the confidential communication, ... "...

Under the provisions of Evidence Code section 1015, the psychotherapist who received or made a communication subject to the privilege is required to claim the privilege whenever he is present when the communication is sought to be disclosed. However, the privilege established by Evidence Code section 1014 is, by the express provisions of that section, subject to section 912 of that code, which provides for waiver of the privilege with respect to a communication protected by such privilege if the holder of the privilege has consented to such disclosure. The same section provides that consent to disclosure may be manifested by conduct of the holder of the privilege indicating consent to disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege. (Evid.Code, s 912, subd. (a).)

Here, plaintiffs, through their attorneys, received notice pursuant to Section 1985.3 that defendant's records of treatment of plaintiffs were being ***1239** sought in the wrongful death action and of what they could do to protect against unwanted disclosure. In this circumstance, plaintiffs' failure to take any action whatsoever to claim the psychotherapist-patient privilege constituted a waiver of the privilege within the meaning of Evidence Code section 912, subdivision (a). Such waiver left defendant in the position of being compelled under the provisions of Section 56.10, subdivision (b)(3) to disclose his medical records.

We believe the conclusion we have reached in no way threatens or interferes with the intended purpose of the psychotherapist-patient privilege: to encourage "the fullest revelation of the most intimate and embarrassing details of the patient's life." (See legis. committee com., 29B West's Ann.Evid.Code (1966 ed.) s 1014, p. 621.) We merely recognize that compliance with the notice requirements of Section 1985.3 sets the stage for a waiver of the privilege by the failure of the holder (or one authorized to act for the holder) to act in any reasonable way to claim the privilege.

We note that the Act has not yet been interpreted by an appellate court in conjunction with Section 1985.3. It is far from clear how the Legislature intended these statutes to relate one to the other. The Legislature will, we are confident, act promptly to provide further clarification if we have not discerned its true purpose and intent in enacting these two statutes.

Since defendant's production of plaintiffs' medical records was compelled by the subpoena duces tecum served upon him, defendant breached no duty to plaintiffs. The trial court did not err in granting summary judgment in favor of defendant and against plaintiffs.

The judgment is affirmed and defendant is awarded his costs on appeal against plaintiffs.

WOOLPERT, Acting P.J., and PETTITT, J. [FN*], concur.

FN* Retired judge of the superior court, sitting under assignment by the Chairperson of the Judicial Council.
END OF DOCUMENT

4743.001 6-23-94 wpd

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TRCP 166c

June 22, 1994

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Mr. John H. Marks
LIDDELL, SAPP, ZIVLEY, HILL & LaBOON
2200 Ross Avenue - Suite 900
Dallas, Texas 75201

RE: Discovery Subcommitee, Supreme Court Advisory Committee

Gentlemen:

I have been provided with some of the material which is being considered for recommended changes to the Texas Rules of Civil Procedure and I have been asked to give you my comments and concerns. First, I appreciate the opportunity to share my thoughts and I hope that they will be received as constructive criticism.

SPg0356

II. Rule 166c - Modification of Discovery by Agreement and by Court Order.

1. Modification by agreement - this is a good idea. I particularly like the provision making agreements regarding an oral deposition enforceable.

2. Modification by court order - you should not allow the court to shorten the discovery period or trial setting schedule unless all parties agree. If you allow the court to shorten the time periods by court order, you are opening the door for abuse through influence and favoritism.

3. I strongly oppose the recommended provision for "side". If one plaintiff sues five defendants under this provision, the plaintiff would get five times as many hours of depositions as each defendant. That is simply not fair. Each party should have the same amount of time for depositions. Defendants' interests are frequently different.

I sincerely thank you for considering my views.

Very truly yours,

James D. Guess

James D. Guess

JDG:2934:mja

MEMORANDUM

TO: Justice Hecht March 8, 1994

FROM: Lee Parsley

RE: TEX. R. CIV. P. 166c

I have been contacted by a paralegal employed by the Office of the Attorney General regarding attorneys who are hiring persons who are not certified shorthand reporters to take depositions under the argument that it is allowed by Rule 166c. Texas Rule of Civil Procedure 166c, in part:

> Unless the court orders otherwise, the parties may by written agreement (1) provide that depositions may be taken before <u>any person</u>, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions . . .

TEX. R. CIV. P. 166c [emphasis added].

Section 52.021 of the Government Code provides that "A person may not engage in shorthand reporting in this state unless the person is certified as a shorthand reporter by the supreme court." TEX. GOV. CODE ANN. § 52.021(b) (Vernon 1988). The Legislature amended section 52.021, effective September 1, 1993, and it now further provides:

> Except as provided by Section 52.031 and by Section 20.001, Civil Practice and Remedies Code, all depositions conducted in this state <u>must be recorded by a certified shorthand reporter</u>.

TEX. GOV. CODE ANN. § 52.021(f) (Vernon Supp. 1994) [emphasis added].

The exception in section 52.031 allows a noncertified reporter to take a deposition only if a certified reporter is unavailable, as follows:

> (a) A noncertified shorthand reporter may be employed until a certified shorthand reporter is available.
>
> (b) A noncertified shorthand reporter may report an oral deposition only if:
>
> > (1) the noncertified shorthand reporter delivers an affidavit to the parties or to their counsel present at the deposition stating that a certified

shorthand reporter is not available; or

(2) the parties or their counsel stipulate on the record at the beginning of the deposition that a certified shorthand reporter is not available.

TEX. GOV. CODE ANN. § 52.031 (Vernon 1988)

The exception in section 20.001 applies only if it is a deposition on written questions, as follows:

(a) A deposition on written questions[1] of a witness who is alleged to reside or to be in this state may be taken by:

(1) a clerk of a district court;

(2) a judge or clerk of a county court; or

(3) a notary public of this state.

TEX. CIV. PRAC. & REM. CODE ANN. § 20.001 (Vernon Supp. 1994).

Under Chapter 52 of the Government Code, the Attorney General has a duty to prosecute anyone violating of the act.

Should the SCAC review Rule 166c to see if it needs to be revised in light of recent revisions to Chapter 52 of the Government Code and to section 20.001 of the Civil Practice and Remedies Code?

---

[1] Section 20.001 was also amended by the Legislature in its most recent session. The only difference is that "on written questions" was added to the first sentence. Thus, a notary public, clerk, or judge can no longer take a deposition unless it is a deposition on written questions.

4749.001 6-23-94 SD Wnd

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TRCP 165

June 22, 1994

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Mr. John H. Marks
LIDDELL, SAPP, ZIVLEY, HILL & LaBOON
2200 Ross Avenue - Suite 900
Dallas, Texas 75201

RE: Discovery Subcommitee, Supreme Court Advisory Committee

Gentlemen:

I have been provided with some of the material which is being considered for recommended changes to the Texas Rules of Civil Procedure and I have been asked to give you my comments and concerns. First, I appreciate the opportunity to share my thoughts and I hope that they will be received as constructive criticism.

SPg0360

III. Rule 168 - Interrogatories.

1. I suggest a provision be added allowing the party to supplement answers to interrogatories regarding designation of persons with knowledge of relevant facts and with regard to experts without requiring the parties verification of the supplemental answers. These decisions are made by a lawyer and the lawyer's signature should be sufficient.

   Also, I do not like "contention" interrogatories because they only provide a source of disagreement. I recommend elimination of "contention" interrogatories and require parties to rely on the pleadings and discovery generally for the position of the various parties.

I sincerely thank you for considering my views.

Very truly yours,

James D. Guess

JDG:2934:mja

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L. F. SAEGERT (1921-1974)
O. E. THRELKELD (1904-1984)

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SBOT Staff

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TRCP 169

June 30, 1994

Hon. David E. Keltner
Haynes & Boone
801 Cherry St., Suite 1300
San Antonio, Texas 76102-4706

Dear David:

In response to the discovery rule change material in the June 1994 issue of *The Advocate*, I offer the following suggestion regarding requests for admission.

A practice has developed over the last 10 years of attorneys sending requests for admission, consisting of each allegation in a pleading. The discovery request is not used as it was intended - to remove the necessity of proving uncontroverted matters at trial - but as a device to trip up one's opponent who may fail to respond timely or sufficiently. In my humble opinion, a lawyer should send a request for admission only on those matters which he in good faith believes may be uncontested. I would suggest therefore that a "good faith belief" requirement be added as a prerequisite to sending requests for admissions.

Best personal regards.

Sincerely yours,

James S. Frost

JSF/ca
cc: Justice Nathan Hecht
Hon. Luke Soules
Hon. Shelby Sharpe
Hon. Doyle Curry

4543.001 6-23-94 LMS Wpd

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TRCP 170

June 22, 1994

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Dallas, Texas 75201

RE: Discovery Subcommitee, Supreme Court Advisory Committee

Gentlemen:

I have been provided with some of the material which is being considered for recommended changes to the Texas Rules of Civil Procedure and I have been asked to give you my comments and concerns. First, I appreciate the opportunity to share my thoughts and I hope that they will be received as constructive criticism.

IV. Rule 170 - EXPERT WITNESSES.

1. Designation of expert witnesses. Your current sixty (60) day period and fifteen day period is not sufficient time. This is too short. I recommend that the Plaintiff designate the plaintiff's experts ninety (90) days before the end of the discovery period. The defendant should have the opportunity to take the deposition of plaintiff's expert and the defendant should then be required to designate the defendant's experts within thirty (30) of the date of the last deposition of plaintiff's expert. I AM OPPOSED TO THE ENTIRE CONCEPT OF AN ARBITRARY NUMBER OF HOURS OF DEPOSITION DISCOVERY. I recognize that the proposed provisions are aimed at abusers of the process, however, I do not think we should build into the system such arbitrary rules merely to take care of the occasional abuser. I believe that the occasional abuser should be dealt with by the court on motion. IN OTHER WORDS, WE SHOULD CONTROL THE OCCASIONAL ABUSER AND NOT CREATE HEADACHES FOR ALL WITH ARBITRARY RULES TO BE CONCERNED WITH IN ALL CASES.

I sincerely thank you for considering my views.

Very truly yours,

James D. Guess

James D. Guess

JDG:2934:mja

TRCP 176 & 181

STEPHEN JON MOSS

ATTORNEY AND COUNSELOR AT LAW

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LICENSED IN:
Texas, Oklahoma, Colorado, Washington, D.C.,
U.S. Court of Military Appeals
U.S. Court of Indian Appeals

MEMBERSHIPS:
College of the State Bar of Texas
Texas Trial Lawyers Association
Oklahoma Trial Lawyers Association

February 6, 1994

Supreme Court of Texas
ATTN: E. Lee Parsley, Staff Attorney
P.O. Box 12248
Austin, Texas 78711

RE: Submission of Suggestion for Use by Texas Agencies & Supreme Court of Texas
Control No. 454-94-003

Dear Mr. Parsley:

Enclosed is a copy of the suggested rule that George Petras and I submitted to the Texas Department of Insurance on January 31, 1994, which is referenced above. The suggested rule implementation is available not only to TDI, but all Texas agencies that have contested cases, and the Supreme Court of Texas. Successful implementation could save about $50.00 per subpoena costs upon each party in a contested case for hearings, trials and depositions. The rule would allow notice in lieu of a subpoena upon a party. Since the many state agencies conduct thousands of proceedings each year the savings to the state could be substantial. Also, substantial savings could be realized by regular parties to state actions, and the Texas Attorney General.

Please let us know if you have any questions.

Sincerely,

Stephen Jon Moss

Encl.

STATE EMPLOYEE INCENTIVE PROGRAM
EMPLOYEE SUGGESTION FORM

FOR COORDINATOR USE
Control No. 454-94-003
Date agency received 01-31-94
Received by [illegible]
Date TIPC received

(Please Type or Print Legibly)

NAME (First and Last) (Name of Contact Person if Group Submission)	SOCIAL SECURITY NUMBER
Stephen Jon Moss George Petras	548-98-9752 144-42-8596

If this is an appeal, enter the original control number:

AGENCY/DEPARTMENT
Texas Department of Insurance

DIVISION UNIT/OFFICE	CITY
Legal Services	Austin

JOB TITLE	OFFICE TELEPHONE NO.
Attorney V Attorney VI	475-2979 475-1825

HOME ADDRESS: (Street or Box, City, State, Zip)
11000 Onion Creek Court Austin, Texas 78747
3600 Sandoval Court Austin, Texas 78732

AGENCY AFFECTED: Please indicate which agency(ies) could implement this suggestion.
Texas Department of Insurance, Office of Administrative Hearings, and all others that have contested case hearings.

READ CAREFULLY:

☐ The evaluator(s) of your suggestion may better understand your suggestion by discussing it with you; they must know who you are in order to contact you. If you object to the evaluator(s) knowing who you are, and wish to remain anonymous to them, check this box.

Return this form to your agency coordinator.

SIGNATURE (Suggestion not acceptable if unsigned)
"I have read the conditions and terms listed on the reverse side of this form and agree to abide by each of them. Furthermore, I hereby relinquish all claims which may be attached to the recommendations described below. My submission of a suggestion and/or acceptance of any award shall not form the basis of a claim against the Texas Incentive and Productivity Commission or the State of Texas."

X [signature] Date: 1-31-94
1/31/94

For Group Suggestions, all suggesters must sign. Attach an additional form if necessary.
Please attach a typed list of co-suggesters along with their addressess and social security numbers.

Signatures

DESCRIBE THE PROBLEM, CURRENT METHOD OR PROCEDURE
(Summarize here. Attach additional pages as needed.)

Issuance of subpoena's: See attached memorandum.

YOUR PROPOSED SOLUTION
(Summarize here. Attach additional details on separate page if necessary.)

Promulgate rules for issuance of notice to party's in lieu of subpoena: See attached memorandum.

DESCRIBE THE SAVINGS OR REVENUES WHICH SHOULD OCCUR
(Be specific. Attach additional pages as needed.)

State agencies would save about $50.00 for each party in each contested case for hearings, trials, and depositions: See attached memorandum.

SPg0366

TO: Terri Chaney, Program Administrator
Texas Incentive and Productivity Commission

FROM: Stephen Jon Moss, Staff Attorney, Texas Department of Insurance
George Petras IV, Staff Attorney, Texas Department of Insurance

DATE: January 31, 1994

RE: Suggestion for Texas Agencies to Impliment Rule Requiring Appearance of Contested Case Party for Hearing, Trial, or Deposition in Lieu of Subpoena

---

The following is a suggestion submitted by Stephen Jon Moss and George Petras, Staff Attorneys for the Texas Department of Insurance, for the implementation of rules by Texas Agencies for the promulgation of Rules requiring the appearance of parties to contested cases upon notice, in lieu of service of subpoena's, which will save the state of Texas an average cost of $50.00 per subpoena for each party in each contested case, for both appearance at hearings, or trials, and depositions.

PROBLEM OR CURRENT METHOD OR PROCEDURE:

In each contested case brought by each state agency, or brought by an individual or entity before a state agency, it is often necessary to have the presence of a respondent or party, respectively, available for the hearing on the merits or at deposition for presentation of evidence purposes. Currently, the only method available at most agencies is the issuance and service of a subpoena for the appearance, which averages a cost of $50.00 per subpoena. The failure to issue a subpoena often results in the failure of a party opponent to the state to appear, and results in the inability of the state to introduce evidence adverse to the non-state party, or to obtain evidence against a non-state party. Hence, in order to assure the availability of the non-state party for the introduction or obtaining of evidence, a cost of at least $50.00 for a subpoena is incurred by the state.

PROPOSED SOLUTION:

Each Texas State Agency, including the State Office of Administrative Hearings, the Texas Department of Insuarance, the Public Utilities Commission, the Texas Railroad Commission, the State Board of Medical Examiners, the State Board of Pharmacy, and others, should promulgate a rule allowing for the issuance of notice to a party for appearance at a hearing, trial or deposition in lieu of the issuance of a subpoena. Each agency is allowed to promulgate such a rule pursuant to TEX. GOV. CODE Section 2001.004 (1), which provides that each state agency shall "adopt rules of practice stating the practice and requirements of all available formal and informal procedures" before state agencies. It is proposed that a rule substantially equivalent to the following would be sufficient to implement this cost saving suggestion:

The testimony of a party who could be subpoenaed may be compelled by a notice in lieu of subpoena served upon such party or such party's representative demanding that the party appear at hearing, trial or deposition, or such party's representative to require such party to appear at hearing, trial or deposition noticed. If the party is a corporation or other organization, the testimony of any person deposable on its behalf may be compelled by like notice. The notice shall be served at least five (5) days prior to the noticed hearing, trial or deposition. The

sanctions of TEX. R. CIV. P. 215 shall apply for the failure of such noticed party to appear as noticed to such notice in lieu of subpoena.

(Source: Modified New Jersey Rule of Civil Procedure 1:9-1.)

SAVINGS OR REVENUES WHICH SHOULD OCCUR:

A savings of about $50.00 in direct cost for each previously required subpoena should be realized. The large number of Texas State Agencies that engage in contested cases would directly benefit from the implementation of the above proposed rule or a substantially equivalent rule. Thousands of cases are initiated by the state or adverse parties to the state, and the savings to the state on the cost of issuing and serving subpoena's would be substantial. There is no increase in cost on behalf of an agency in the issuance of a notice to appear verses the preparation of a subpoena for issuance.

Additionally, advocation of such a rule implementation by the Texas Supreme Court, which regulates rules of Civil Procedure that are currently being revised, would result in a substantial savings to the Attorney General of the State of Texas in state civil cases.

The above proposed rule, or its substantial equivalent, could also be implemented by legislation in the next or subsequent session.

MEMORANDUM

TO: Justice Hecht March 8, 1994

FROM: Lee Parsley

RE: TRCP 177 & 201

TRCP 177 and 201

I have received a call from a process server in Houston who is troubled by the application of the new witness fee requirement of TEX. CIV. PRAC. & REM. CODE §22.001. He has been in conflict with the District Clerk in Harris County about whether the ten dollar ($10.00) witness fee requirement of §22.001 applies to a subpoena for a deposition under TRCP 201. The process server claims that it applies only to a subpoena for a court appearance under TRCP 177 and not to a subpoena for a deposition appearance under TRCP 201. The District Clerk disagrees.

Should we ask the SCAC to look into any possible problem in this regard?

4543.001 6-23-94 LHS hnd

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June 22, 1994

TRCP 20

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San Antonio, Texas 78205-2230

Mr. John H. Marks
LIDDELL, SAPP, ZIVLEY, HILL & LaBOON
2200 Ross Avenue - Suite 900
Dallas, Texas 75201

RE: Discovery Subcommitee, Supreme Court Advisory Committee

Gentlemen:

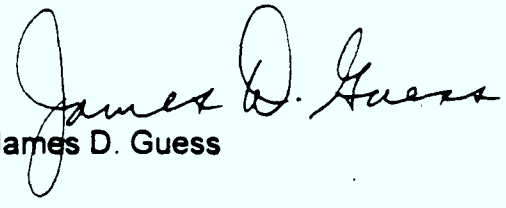
I have been provided with some of the material which is being considered for recommended changes to the Texas Rules of Civil Procedure and I have been asked to give you my comments and concerns. First, I appreciate the opportunity to share my thoughts and I hope that they will be received as constructive criticism.

V. Rule 200 - Depositions.

1. Time limitations. See my comments above. If there are to be any limitations, they must be the same for all parties and not be determined by "sides".

I sincerely thank you for considering my views.

Very truly yours,



James D. Guess

JDG:2934:mja

SPg0371

Sam Judge Hecht

Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 21, 1994

Honorable Don Henderson
Chair, Committee on Jurisprudence
Texas State Senate
P.O. Box 12068
Austin, Texas 78711-2068

Re: Whether a "videographer" who is also a notary public may conduct an oral deposition

Dear Senator Henderson:

We have designated your request for an opinion from our office as RQ-709. Please refer to that number in future correspondence with us about this issue.

By copy of this letter we are notifying those listed below of your request and asking them to submit briefs if they would care to do so. If you are aware of other interested parties, please let us know as soon as possible.

Sincerely,

Sarah J. Shirley
Chair, Opinion Committee

SJS/MRC/dabu

Ref.: RQ-709
ID# 26888

cc: R. Eric Hirtriter
Court Reporters Certification Board
Supreme Court of Texas
Texas Court Reporters Association

SPg0372

MEMORANDUM

TO: **Interested Parties**
FROM: **Sarah J. Shirley, Chair, Opinion Committee**
SUBJECT: **Attached Opinion Request**

If you wish to submit a brief regarding the attached opinion request, please do so within thirty days of the date on the attached acknowledgement letter. If you are interested in receiving briefs submitted by other interested parties, in order to expedite receipt of those briefs, I suggest that you contact those parties directly and request that they provide you with a copy of their submission.

Thank you for your cooperation.

DON HENDERSON
DISTRICT 7

P.O. BOX 12068
AUSTIN, TEXAS 78711-2068
(512) 463-0107
TDD (512) 475-3758

7915 FM 1960 WEST, NO. 202
HOUSTON, TEXAS 77070-5707
(713) 469-1977

The Senate of The State of Texas

COMMITTEES
JURISPRUDENCE
CHAIRMAN
INTERGOVERNMENTAL RELATIONS
STATE AFFAIRS

9

June 3, 1994

SJS
FILE # ML-36888-1
I.D.# 20888

Attorney General Office
Opinion Committee
300 West 15th Street, 12th Floor
William A. Clements Building
Austin, Texas 78701

RQ-709

To Whom It May Concern:

I received a letter from a constituent requesting an opinion on Rules 406.016 and 202 and the Attorney General's opinion on whether or not a videographer, that has become a notary public, can conduct oral deposition without a court reporter present and have everything be "official and admissable"?

I would appreciate an opinion on this question that Mr. R. Eric Hirtriter has posed.

Thank you for your assistance on this matter.

Sincerely yours,

Don Henderson

Don Henderson

DH/zh

enclosure

MAY 23 1994

May 15, 1994

Mr. Don Henderson
District 7, Texas Senator
7915 Fm 1960 West
Houston, Texas 77070
(713) 469-1977

Dear Mr. Henderson,

I am a videographer. I videotape the oral testimony in depositions. I have done some research in order to find out how I can replace the Certified Court Reporter in the depositions. I would need to be able to 1) swear in the witness at a depostion, 2) notarize/certify what was said is what was videotaped, and 3) notarize/certify the copies of documents/exhibits that are presented during the deposition. I firmly believe that this would reduce the cost of insurance to the consumer by reducing the price that attorneys would have to pay for a video and a certified court reporter to be present at every deposition. The certified court reporter charges are approximately double that of the videographers. I believe that most cases are settled before going to trial, therefore there would only be a need to make a transcript from the video if the case went to trial. It is my understanding that according to the following statutes and opinion, that if I become a Notary Public, I can do so. Is my understanding correct? I have cited portions of rules below and have enclosed them to facilitate your review.

> According to Texas Government Rule #406.016, Notary Public: Notaries have the same authority as a county clerk to administer oaths, take depositions, certify copies of documents, ... [See attached]
>
> According to Texas Rules of Civil Procedure, Rule 202, Non-stenographic recordings: lawyers may use videotape depositions, without leave of the court and may be presented at trial in lieu of a stenographic transcript, subject to certain rules, one of which states: non-stenographic recording shall not dispense with the requirements of a stenographic transcript of the deposition unless the court shall so order on motion and notice before the deposition is taken ...(1)(e). [See attached]
>
> According to the Attorney General opinion No. JM-110 (1984) notaries public are authorized to take written depositions in non-stenographic form. [See attached]

Therefore, are rules 406.016 and 202 and the AG's opinion sufficient to enable a videographer, that has become a Notary Public, to conduct oral depositions without a court reporter present and have everything conducted there be "official" and admissible?

If not, please inform me of additional steps to take, or what the state of the law needs to be for a videographer to legally take depositions without a Certified Court Reporter being present and certify the evidence given in the deposition?

Your assistance is greatly appreciated.

Sincerely,

R. Eric Hirtriter

R. Eric Hirtriter
17442 Northhagen Drive
Houston, Texas 77084
(713) 616-848

4543.001 6-23-94 LMS hhd

TEXAS ASSOCIATION OF DEFENSE COUNSEL

400 West 15th Street, Suite 315, Austin, Texas 78701 512/476-5225 Fax 512/476-5384

Office of the President
James D. "Bo" Guess
Groce, Locke & Hebdon
1800 Frost Bank Tower
100 W. Houston St.
San Antonio, TX 78205
210/246-5612
210/246-5999 FAX

TRCP 202

June 22, 1994

Mr. Stephen D. Susman
SUSMAN GODFREY
5100 First Interstate Bank Plaza
1000 Louisiana
Houston, Texas 77002-5096

Mr. David E. Keltner
HAYNES AND BOONE
1300 Burnett Plaza
801 Cherry Street
Fort Worth, Texas 76102

Mr. Luther H. Soules, III
SOULES & WALLACE, P.C.
100 Houston Street - 15th Floor
San Antonio, Texas 78205-2230

Mr. John H. Marks
LIDDELL, SAPP, ZIVLEY, HILL & LaBOON
2200 Ross Avenue - Suite 900
Dallas, Texas 75201

RE: Discovery Subcommitee, Supreme Court Advisory Committee

Gentlemen:

I have been provided with some of the material which is being considered for recommended changes to the Texas Rules of Civil Procedure and I have been asked to give you my comments and concerns. First, I appreciate the opportunity to share my thoughts and I hope that they will be received as constructive criticism.

SPg0377

VI. Rule 202 - Non-stenographic depositions.

1. I have some strong objections to the proposed rule. I think that telephonic depositions should be taken by agreement of the parties only. I think that video depositions are fine; however, the party taking the deposition and wanting the video should also be required to have a stenographic record made. Also, the video recording should not be a part of court costs. Video depositions are frequently presented as evidence at trial and this defeats the purpose of a discovery deposition. Further, it is practically impossible to use a video only deposition for impeachment purposes and present the impeachment in context. Therefore, the written record is very necessary in all depositions.

I sincerely thank you for considering my views.

Very truly yours,

James D. Guess

James D. Guess

JDG:2934:mja

4747.001 6-23-94 Lms Whd

TEXAS ASSOCIATION OF DEFENSE COUNSEL

400 West 15th Street, Suite 315, Austin, Texas 78701 512/476-5225 Fax 512/476-5384

Office of the President
James D. "Bo" Guess
Groce, Locke & Hebdon
1800 Frost Bank Tower
100 W. Houston St.
San Antonio, TX 78205
210/246-5612
210/246-5999 FAX

June 22, 1994

TRCP 204

Mr. Stephen D. Susman
SUSMAN GODFREY
5100 First Interstate Bank Plaza
1000 Louisiana
Houston, Texas 77002-5096

Mr. David E. Keltner
HAYNES AND BOONE
1300 Burnett Plaza
801 Cherry Street
Fort Worth, Texas 76102

Mr. Luther H. Soules, III
SOULES & WALLACE, P.C.
100 Houston Street - 15th Floor
San Antonio, Texas 78205-2230

Mr. John H. Marks
LIDDELL, SAPP, ZIVLEY, HILL & LaBOON
2200 Ross Avenue - Suite 900
Dallas, Texas 75201

RE: Discovery Subcommitee, Supreme Court Advisory Committee

Gentlemen:

I have been provided with some of the material which is being considered for recommended changes to the Texas Rules of Civil Procedure and I have been asked to give you my comments and concerns. First, I appreciate the opportunity to share my thoughts and I hope that they will be received as constructive criticism.

VII. Rule 204 - Examination, cross-examination and Objections.

1. I strongly object to your proposed Section IV. I realize that your proposed Section IV is aimed at controlling "Rambo" tactics; however, you are again attempting to place rules upon the entire process because of the occasional abuser. The occasional abuser should be dealt with by the court in the particular case where the abuse is occurring. It is ridiculous to prevent a party from conferring with their witness. Further, proper objections should be permitted without limitation. Again, if abuse is occurring, the court should deal with that abuse in that case only. I have been practicing trial law for 25 years and it is my experience that the problems described in the committee's footnote are a very rare occurrence.

2. It is also my understanding that this committee or another committee is considering requiring automatic disclosures of persons with knowledge of relevant facts and expert witnesses within a short time period following appearance in the lawsuit. First, I think that any requirement in this regard should at least require a letter request from the opposing party. Second, and of much more importance, I feel very strong that only identification of persons with knowledge of relevant facts should be required. The diligent attorney or party should not be required to do the work of their opposing party by providing copies of statements and full disclosure of the facts known by a particular witness or person. This is totally contrary to the adversary process. I do not want our profession to become a practice of technicians. I do not want the trial lawyer replaced by a computer.

   Further, identification of expert witnesses is not practical at this early stage of a lawsuit.

I sincerely thank you for considering my views.

Very truly yours,

James D. Guess

JDG:2934:mja

MJD

Michael J. Domingue Court Reporting Service, Inc.

7227 Birchtree Forest Dr.
Houston, Texas 77088
(713)869-9800 • Fax 659-4162

May 11, 1994

Mr. Luther Soules, III
Chairman, Supreme Court Advisory Committee
Soules & Wallace
Frost Bank Tower
100 West Houston Street
San Antonio, Texas 78205--1457

RE: PROPOSED CHANGES TO RULES 205 AND 206, TEXAS RULES OF CIVIL PROCEDURE

Dear Mr. Soules:

Court reporters throughout the State of Texas have been having formidable problems since the inception of these two Rules in 1984. Up until this time, our attempts have been futile in getting the Rules modified. Our hope is that you can see the impossibility of our complying with these Rules and make a recommendation in the Advisory Committee for changes.

Enclosed you will find several affidavits from owners of court reporting firms in Houston, Texas. These are but a few of the problems encountered every day in trying to comply with the Rules and preserve the integrity of the Record. By reading the affadivits attached, you will hopefully see the impossibility imposed upon court reporters in trying to protect the Record.

I feel that the Federal Rules of Civil Procedure have come up with the solution to Rule 205 of the State Rules.

FEDERAL RULE (30)(e) states:

> REVIEW BY WITNESS; CHANCES; SIGNING. IF REQUESTED BY THE DEPONENT OR A PARTY BEFORE COMPLETION OF THE DEPOSITION, THE DEPONENT SHALL HAVE 30 DAYS AFTER BEING NOTIFIED BY THE OFFICER THAT THE TRANSCRIPT OR RECORDING IS AVAILABLE IN WHICH TO REVIEW THE TRANSCRIPT OR RECORDING AND, IF THERE ARE CHANGES IN FORM OR SUBSTANCE, TO SIGN A STATEMENT RECITING SUCH CHANGES AND THE REASONS GIVEN BY THE DEPONENT FOR MAKING THEM. THE OFFICER SHALL INDICATE IN THE CERTIFICATE PRESCRIBED BY SUBDIVISION (f)(1) WHETHER ANY REVIEW WAS REQUESTED AND, IF SO, SHALL APPEND ANY CHANGES MADE BY THE DEPONENT DURING THE PERIOD ALLOWED.

The above Rule accomplishes the same end result as Rule 205 of the State Rule without the possibility of having the record altered, lost, obliterated, not returned, missing exhibits and missing pages of testimony, etc.

Also please find enclosed an Order published in the Texas Supreme Court Journal, Vol. 36, page 895, February 5, 1993 upholding an Order of the Honorable Don Wittig, Judge, February 4, 1993.

This Order changes the wording of Rule 206 of the State Rules to read "....make transcripts of pertinent depositions available for inspection and photocopying at (requesting party's) expense during normal working hours."

The current Rule 206 states,"...make the original deposition transcript available for inspection or photocopying by any other party to the suit."

I believe you can appreciate the reluctance of the custodial attorney to hand over the sealed original deposition to any party to the lawsuit especially since the Rule is very ambiguous as to time and place of inspection, at whose expense; what is reasonable notice, etc. I believe the Supreme Court realized these problems too in approving the Order of the Honorable Don Wittig. For some reason this chance did not appear in the new 1994 Texas Rules of Civil Procedure.

I appreciate your time in listening to our problems, and I know I speak for all court reporters in saying that I know that you feel the same as we do when it comes to the absolute necessity of protecting the integrity of the Record.

If needed, I would be willing to appear in front of the Discovery Committee to answer any questions regarding the above.

Sincerely,

Michael J. Domingue

MJD/rm

Enclosures

NO. D-3328

IN THE SUPREME COURT OF TEXAS

THERESA BARBERO,
Relator
v.
THE HONORABLE DON WITTIG,
Respondent

AFFIDAVIT

STATE OF TEXAS :
:
COUNTY OF HARRIS :

BEFORE ME, the undersigned authority on this day personally appeared Vickie C. MacNaughton, and after being duly sworn deposed as follows:

My name is Vickie C. MacNaughton. I am an adult. I reside at Houston, Harris County, Texas. I have been a certified court reporter licensed by the State of Texas for 21 years. I own and operate Sunbelt Reporting Services, Inc. at 6750 West Loop South, Suite 870, Houston, Texas. I am fully aware of my obligation to protect the integrity of a deposition transcript. I would like to relate problems and issues I have encountered in my efforts to comply with Rules 205 and 206, Tex.R.Civ.P.

At the request of attorneys of record in a case, we have released original depositions to witnesses and/or attorneys for reading and signing by the witness, against our better judgment and our interpretation of Rules 205 and 206. Our experience has been the depositions are seldom returned to our office for final processing and delivery as required by the rules. Additionally, the taking attorney is put to the task of ordering a second original deposition on trial day, as the original cannot be located for filing.

Those times when the original depositions are returned as we request under the rules, we find they have been taken apart, pages of the deposition and/or exhibits are missing, marks have been made on the original and signature has not been properly executed as requested.

We feel we have responsibility under the rules to preserve the integrity of the record and be sure the transcripts are true and accurate. Releasing original depositions into the hands of the witness and/or attorney for the witness puts these original transcripts at risk for being altered and/or lost, at a cost to the taking attorney to return the original transcript to a true and accurate record.

In the case of original exhibits being released to the witness, we have had exhibits (one-of-a-kind) lost and to date the attorneys are having difficulty with the case because of the lost exhibits.

EXHIBIT 1

Since we no longer file original depositions with the Court, we attempt as the officer of the court to preserve the record, but releasing originals does not preserve the record.

I have read the foregoing statement and the averments therein are true and correct and within my personal knowledge.

Affiant

Subscribed and sworn to before me, the undersigned authority on this 18th day of March, 1993.

B. CHARLES
Notary Public
STATE OF TEXAS
My Comm Exp JULY 12, 1995

Notary Public in and for
State of Texas, County of Harris

NO. D-3328
IN THE SUPREME COURT OF TEXAS

THERESA BARBERO,
Relator
vs.
THE HONORABLE DON WITTIG,
Respondent

AFFIDAVIT

STATE OF TEXAS:
COUNTY OF HARRIS:

Before me, the undersigned authority on this day personally appeared W. MARY TRUMAN, and after being duly sworn deposed as follows:

My name is W. MARY TRUMAN. I am over 21 years of age and reside in Houston, Harris County, Texas. I have been a certified court reporter for 23 years and own and operate Truman Allen Court Reporting, 99 Detering, Suite 255, Houston, Texas 77007.

In an attempt to comply with Rule 206 regarding Certification (iv) "that the deposition...was submitted on a specified date to the witness...for examination, signature and return"; (v) "that changes...in the transcript...are attached"; (vii) "that the original deposition...was delivered...to the attorney"; and (viii) "that a copy of the certificate was served on all parties" cannot be accomplished when the original deposition is not in the possession of the court reporter.

Rule 206.2 Delivery appears to set the timing for the release of the original by stating "...after certification, (the deposition officer)...shall thereafter deliver...such deposition transcript."

The problems encountered when releasing the deposition prior to signature and certification have been:

1. corrections, additions, modifications made directly on the original transcript, in one instance a black marker was used to obliterate entire answers as well as the questions.
2. original transcripts, as well as exhibits are often not returned
3. the witness has not signed the deposition and/or it has not been notarized
4. pages are missing or are not in proper order.

All of these items prohibit the court reporter from verifying the integrity of the deposition transcript.

I have read the foregoing Affidavit and the statements contained therein are true and correct and within my personal knowledge.

W. mary Truman
W. MARY TRUMAN

SUBSCRIBED AND SWORN TO before me, the undersigned authority, on the 18th day of March, 1993.

SPg0385

Lisa Gonzale
Notary Public in and for the State of Texas, County of Texas

EVA GONZALEZ
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
JULY 24, 1995

NO. D-3328

IN THE SUPREME COURT OF TEXAS

THERESA BARBERO,
Relator

V.

THE HONORABLE DON WITTIG,

Respondent

AFFIDAVIT

STATE OF TEXAS *
*
COUNTY OF HARRIS *

BEFORE ME, the undersigned authority on this day personally appeared David C. Ross, and after being duly sworn deposed as follows:

> My name is David Ross. I am an adult. I reside at 314 Oakdale Place, League City, Galveston County, Texas 77573. I have been a certified court reporter licensed by the state of Texas for 15 years. I own and operate Ross Reporting Services, Inc. at 10851 Scarsdale, Suite 630, Houston, Harris County, Texas 77089. I am fully aware of my obligation to protect the integrity of a deposition transcript. I would like to relate problems and issues I have encountered in my efforts to comply with Rules 205 and 206, Tex.R.Civ.P.
>
> It is the responsibility of the court reporter to certify the integrity of the original transcript, pursuant to Rule 205(ii). It has been my experience that when we are forced to relinquish custody and control of the original transcript prior to it being delivered to the custodial attorney, that on occasion we have had original exhibits removed from the transcript, we have had pages of the transcript missing, markings and obliterations on the transcript, and, of course, oftentimes, the transcript is not returned to the reporting service. It is impossible for the reporter to certify the integrity of a transcript that has been taken from his/her control and circulated to

EXHIBIT 3

possibly numerous individuals. In the instances where the original transcript is not returned, the rules provide that a certified copy shall be signed by the deposition officer. It does not designate who shall bear this cost, and almost without exception, no party will assume the cost for this additional burden and expense to the court reporter. Rule 206.5 provides for the court reporter to be paid for copies of the transcript; however, when we are forced to relinquish control of the original transcript to parties who have not purchased copies, this effectively negates the purpose of Rule 206.5

I have read the foregoing statement and the averments therein are true and correct and within my personal knowledge.

Affiant

SUBSCRIBED AND SWORN TO before me, the undersigned authority on this the 18th day of March, 1993.

JANET M. SMITH
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
MARCH 5, 1995

Notary Public in and for
State of Texas, County of
Harris

NO. D-3328

IN THE SUPREME COURT OF TEXAS

THERESA BARBERO,

Relator

vs.

THE HONORABLE DON WITTIG,

Respondent

AFFIDAVIT

THE STATE OF TEXAS §

COUNTY OF HARRIS §

BEFORE ME, the undersigned authority on this day personally appeared BARBARA ANZILOTTI, President of a & a court reporters & video specialties, and after being duly sworn, deposed and stated:

My name is Barbara Anzilotti. I am over the age of twenty-one years and capable of making an affidavit. I reside in Houston, Harris County, Texas, and have for 26 years. I have been a certified court reporter licensed by the state of Texas, for a period of 19 years. I own and operate a & a court reporters and video specialties at 1201 Louisiana Street, Suite 3434, Houston, Texas 77002-5603.

I am fully aware of my obligation to protect the integrity of a deposition transcript. However, in the past I have encountered problems, and would like to relate issues I have had to deal with in my effort to comply with Rules 205 and 206, Tex.R.Civ.P., specifically:

I have found during twenty-four years of reporting experience, that when an original is released with exhibits, the product is removed from its binder and

EXHIBIT 4

replaced with pages missing or inserted incorrectly both in the deposition and the exhibits. I am then asked to provide a complete set of documents, which I am unable to do, since the original was not in my possession.

On numerous occasions in my early reporting career, when I was releasing the original to the witness for signature, I have been contacted by attorneys, paralegals and secretaries about a case they had going to trial and they needed to have the original deposition filed as soon as possible. Since I had not retained the original deposition in my office, I was unable to furnish the original deposition and exhibits, if any.

For these reasons, for the past eight years, I have made it a policy not to release any originals. It is extremely rare that it is not possible for a witness to come to my office, or the office of one of the attorneys, to read and sign their deposition.

Barbara Anzilotti

BARBARA ANZILOTTI

SUBSCRIBED AND SWORN TO BEFORE ME on this the 17th day of March, 1993, to certify which witness my hand and seal office.

June M. White

NOTARY PUBLIC
STATE OF TEXAS

NOTARY PUBLIC STATE OF TEXAS
JUNE M. WHITE
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
FEB. 9, 1997

NO. D-3328

IN THE SUPREME COURT OF TEXAS

THERESA BARBERO,

Relator

v.

THE HONORABLE DON WITTIG,

Respondent

AFFIDAVIT

THE STATE OF TEXAS :

COUNTY OF JEFFERSON :

BEFORE ME, the undersigned authority, on this day personally appeared NELL McCALLUM, and after being duly sworn deposed as follows:

My name is NELL McCALLUM. I am an adult. I reside at 725 Thomas Road, Beaumont, Jefferson County, Texas. I have been a certified court reporter licensed by the State of Texas since the date of the inception of the CSR Bill in 1978. I own and operate Nell

EXHIBIT 5

McCallum & Associates, Inc., with offices located at 2615 Calder, Suite 111, Beaumont, Texas, and 2900 Smith, Suite 104, Houston, Texas. I am fully aware of my obligation to protect the integrity of a deposition transcript. I would like to relate problems and issues I have encountered in my efforts to comply with Rules 205 and 206 of the Texas Rules of Civil Procedure.

It is our firm policy that the original transcript of all depositions remains in the custody of our firm until such time as either the witness has read and signed his deposition or the appropriate time has passed for compliance with Rule 205. On occasion attorneys have entered into an agreement on the record that the original transcript will be released for signature, as set out in Rule 206, Section 4. On those occasions we have encountered a number of problems, some of which I will set out below:

Once the original transcript leaves our possession, there is no way to ensure that the deponent will comply with our request to return the deposition to us. On numerous occasions we have received last-minute phone calls from panicked attorneys, legal assistants, and secretaries asking why a certificate

has not been filed with the State Court for a deposition which was sent to the witness for signature. There have been numerous occasions when the deponent has simply returned the original to his counsel and a secretary or legal assistant has filed it away. It is the officer's responsibility to see that corrections are submitted to all parties involved. This is impossible if the officer (court reporter) never receives these corrections. If exhibits are included with this original transcript, these are never seen again. Oftentimes these are the original records of an entity and perhaps of some nature that cannot be duplicated. Likewise, if the certificate is not filed, then the costs for this deposition never turn up on the taxable cost in the Clerk's office, thereby penalizing our client who took the deposition.

On other occasions we have had transcripts returned to us which have been totally rewritten on the face of the original transcript, rather than corrections having been made on an errata sheet. Rule 205 provides as follows: "No erasures or obliterations of any kind are to be made to the original testimony as transcribed by the deposition officer." It is impossible for the deposition officer to comply with

this provision once control of the original transcript is out of the officer's hands.

Rule 205 provides that if the original deposition transcript is not returned within 20 days, a copy of the transcript shall be signed by the deposition officer, and certain facts set out. It is extremely difficult to turn around and charge the attorney taking the deposition for yet another copy of this transcript a month or so down the road. We have had numerous complaints when this has been necessary. Likewise, it is not the deposition officer's responsibility to provide unlimited copies of the transcript at no additional cost simply because the deponent failed to do as requested.

As I mentioned before, certification must be filed by the deposition officer. How can this officer swear to the authenticity of those facts set forth in Rule 206 if the original transcript has been out of their control and wandered throughout the city, state, or country? Many times the original transcripts have been returned to us mutilated, pages shuffled, unbound, marked on throughout, coffee-stained, etc. In these days of high-tech computerization, there is no way to

ensure that the transcript is a "true record of the testimony given by the witness" without the officer reviewing the transcript once again. At this point who is going to pay for the reporter's services? Surely it is not requested that the reporter do this, again, free of charge. We have likewise had many irate clients when the subject of this charge has been brought up.

A reporter's ability to collect a reasoable fee for services rendered will be compromised if the Court determines that a reporter is required to relinquish the original transcript before payment for services rendered.

In conclusion, Rule 206, Section 5, states: "Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition transcript to any party or to the deponent." Our clients have no problem with our maintaining control of their original transcripts and, in fact, in most instances insist that we do so. The hard feelings and problems over cost arise when we are forced to once again charge these same clients when a deponent, or the attorney for a deponent, fails to do as he was directed by Rules 205 and 206 of the Texas Rules of Civil Procedure.

I have read the foregoing statement, and the averments therein are true and correct and within my personal knowledge.

Neil McCallum

AFFIANT

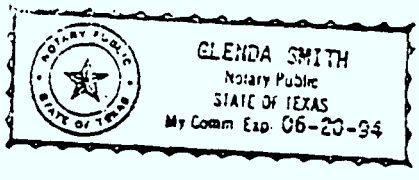
SWORN AND SUBSCRIBED TO before me, the undersigned authority, on this 17th day of March, 1993.

Glenda Smith

NOTARY PUBLIC

for the State of Texas

My Commission Expires: 6-20-94



NO. D-3328

IN THE SUPREME COURT OF TEXAS

THERESA BARBERO,

Relator

V.

THE HONORABLE DON WITTIG,

Respondent

AFFIDAVIT

STATE OF TEXAS *
*
COUNTY OF HARRIS *

BEFORE ME, the undersigned authority on this day personally appeared Michael J. Domingue, and after being duly sworn deposed as follows:

My name is Michael J. Domingue. I am an adult. I reside at 7227 Birch Tree Forest, Houston, Texas. I have been a certified court reporter licensed by the state of Texas for 16 years. I own and operate Michael J. Domingue Court Reporting Service at 909 Fannin, Suite 570, Houston, Texas. I am fully aware of my obligation to protect the integrity of a deposition transcript. I would like to relate problems and issues I have encountered in my efforts to comply with Rules 205 and 206, Tex. R. Civ. P.

Rule 205 is interpreted by some to mean that the original deposition transcript must be "sent" to the witness or their attorney.

When I have tried this in the past the deposition will come back with erasures and obliterations, will come back after the required time has expired, come back with pages missing or will not come back at all. In most of these cases I am obligated to produce an "extra copy" to take the place of the original. This copy is made at my expense.

I feel this Rule should read "When the testimony is fully transcribed, the deposition officer shall send written notice to

the witness and all parties attending the deposition that the original deposition is available for reading, correcting and signing..."

Rule 206 (2) states in part "The custodial attorney shall... make the original deposition transcript available for inspection or photocopying by any other party to the suit."

An attorney may avoid compliance with Rule 206.5 by demanding a copy of the deposition transcript before it is received by the custodial attorney. This demand could come while the court reporter retains custody of the original deposition transcript in an effort to get signature, make changes and copy and collate the exhibits. It is impossible for a court reporter to attest to the vitality of the original deposition transcript and documents attached if, on demand, the court reporter must relinquish the original.

Section (5) under this same rule states "Upon payment... the officer shall furnish a copy..."

Rule 205 is very ambiguous.

Rule 206 contradicts itself.

This is the first I've seen of a professional person being forced to release his product without being paid.

I feel changes are urgently needed in these two Rules to allow good working relationships to continue between Court Reporters and Attorneys, to allow Court Reporters to continue to serve the legal community and to allow Court Reporters to preserve their profession by being able to charge for their services.

I have read the foregoing statement and the averments therein are true and correct and within my personal knowledge.

Affiant

SUBSCRIBED AND SWORN TO before me, the undersigned authority on this 18th day of March, 1993.

SANDRA RENEE GREEN
NOTARY PUBLIC
State of Texas
Comm. Exp. 10-11-96

Sandra Renee Green
Notary Public in and for
State of Texas, County of Harris

NO. D-3328
IN THE SUPREME COURT OF TEXAS

THERESA BARBERO,
Relator
v.
THE HONORABLE DON WITTIG,
Respondent

AFFIDAVIT

STATE OF TEXAS (
(
COUNTY OF HARRIS (

BEFORE ME, the undersigned authority on this day personally appeared AL FARRACK, and after being duly sworn deposed as follows:

My name is Al Farrack. I am an adult. I reside at 1066 Candlelight, Houston, Texas 77018. I have been a certified court reporter licensed by the State of Texas for 20 years. I own and operate United Reporting, Inc. Reporting Service at 7407 Old Katy Road, Houston, Texas 77024. I am fully aware of my obligation to protect the integrity of a deposition transcript. I would like to relate problems and issues I have encountered in my efforts to comply with Rules 205 and 206, Tex.R.Civ.P.

Releasing the original transcript has caused my office to get calls from the custodial attorney wanting the original for trial when it was never returned to our office. We further encounter problems with original exhibits not being returned to our office. On occasion original transcripts are lost and are never found.

I have read the foregoing statement and the averments therein are true and correct and within my personal knowledge.

Affiant

SUBSCRIBED AND SWORN TO before me, the undersigned authority on this 17th day of March, 1993.

Notary Public in and for
State of Texas, County of
Harris

GLENNA L WILLIAMS
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
MAY 13, 1993

EXHIBIT 7

NO. D-3328

IN THE SUPREME COURT OF TEXAS

THERESA HARBERO,

Relator

v.

THE HONORABLE DON WITTIG,

Respondent

AFFIDAVIT

STATE OF TEXAS:

COUNTY OF HARRIS:

I, the undersigned, am over 21 years of age, of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

My name is Carol L. Davis. I reside at 11902 Kimberley, Houston, Texas 77024. I have been a certified court reporter licensed by the State of Texas for 20 years. I own and operate Carol Davis Reporting, Records & Video, Inc. at 7715 Westview, Houston, Texas 77055. I am fully aware of my obligation to protect the integrity of a deposition transcript. The following problems are encountered in my efforts to comply with Rules 205 and 206, Tex.R.Civ.P.

1. Original depositions are lost, never returned and not available at the time of trial.

2. Duplicate originals must be furnished at someone's expense.

3. Original depositions are returned unbound and missing pages. Testimony can be altered.

4. Deponents return depositions signed but not notarized and extra time and expense is involved in returning the depositions to them to be completed.

5. Exhibits, when bound under a separate cover, are not returned with the deposition.

EXHIBIT 8

The foregoing statement is true and correct and within my personal knowledge.

Carol L. Davis

SUBSCRIBED AND SWORN TO before me, the undersigned authority, on this the 8th day of March, 1993.

JOYCE J. LEITKO
Notary Public
STATE OF TEXAS
My Comm. Exp. Nov. 21, 1993

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

AFFIDAVIT

STATE OF TEXAS :
COUNTY OF HARRIS:

BEFORE ME, the undersigned authority on this day personally appeared Vickie Probst and Dave O'Neal, and after being duly sworn deposed as follows:

My name is Vickie Probst. I am an adult. I reside at 7522 Pin Oak, Humble, Tx. I have been a certified court reporter licensed by the State of Texas for 13 years.

My name is Dave O'Neal. I am an adult. I reside at 2809 Greenbriar, Houston, Tx. I have been a certified court reporter licensed by the State of Texas for 28 years.

We own and operate O'Neal-Probst Associates, Inc. at 1415 Louisiana, Suite 1400, Houston, Tx. 77002. We are fully aware of our obligation to protect the integrity of a deposition transcript. We would like to relate problems and issues we have encountered in our efforts to comply with Rules 205 and 206, Texas Rules of Civil Procedure:

Once an original leaves the reporter's custody, it is not possible, as an officer of the court, that a reporter can attest to the integrity of that original any longer, or to the authenticity of it.

Many original transcripts have original exhibits attached, and it is not possible to replace an original exhibit that has been lost or defaced.

Originals have been returned defaced, scribbling through testimony so as not to be able to see what the record previously said. Coffee and other substances have stained and ruined the originals. Pages have been missing totally out of originals that have been taken apart for copying.

Originals have been lost or not returned at all, and efforts to retrieve them are time-consuming and costly.

EXHIBIT 9

We have read the foregoing statement and the averments therein are true and correct and within our personal knowledge.

Affiant - Vickie Probst

Affiant - Dave O'Neal

SUBSCRIBED AND SWORN TO before me, the undersigned authority on this 17th day of March, 1993.

Notary Public in and for
State of Texas

LINDA TROMBATORE
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
DEC. 31, 1993

No. D-3328

IN THE SUPREME COURT OF TEXAS

THERESA BARBERO,
Relator
V
THE HONORABLE DON WITTIG,
Respondent

AFFIDAVIT

STATE OF TEXAS
COUNTY OF HARRIS

BEFORE ME, the undersigned authority on this day personally appeared

Kay Schwartz, and after being duly sworn deposed as follows:

My name is Kay Schwartz. I am an adult. I reside at 1111 Hermann Dr., Houston, Tx. 77004. I have been a certified court reporter licensed by the state of Texas for 15 years. I own and operate Allied Court Reporters, Inc. at 808 Travis, 1310 Esperson Bldg., Houston, Texas 77002. I am fully aware of my obligation to protect the integrity of a deposition transcript. I would like to relate problems and issues I have encountered in my efforts to comply with Rules 205 and 206, Tex.R. Civ. P.

The original is not returned at all. The original is returned too late for use at trial by taking attorney. The original has been taken apart, obviously copied, and returned with missing pages.

I have read the foregoing statement and the averments therein are true and correct and within my personal knowledge.

Kay Schwartz
Affiant

SUBSCRIBED AND SWORN TO before me, the undersigned authority on this 18th day of March, 1993.

INEZ K. ESKOWITZ
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
JUNE 10, 1994

Inez K. Eskowitz
Notary Public in and for
State of Texas, County of Harris

SPg0403

EXHIBIT 10

IN THE SUPREME COURT OF TEXAS

THERESA BARBERO, Relator	)( )(	
vs.	)(	NO. D-3328
THE HONORABLE DON WITTIG, Respondent	)( )(	

AFFIDAVIT

STATE OF TEXAS :

COUNTY OF HARRIS:

BEFORE ME, Arlene Rodriguez, the undersigned Notary Public in and for the State of Texas, County of Harris, on the 18th day of March 1993 personally appeared DIANE S. RICHER, and after being duly sworn deposed as follows:

My name is Diane S. Richer. I am over 21 years old and have been a court reporter who has worked in the freelance court reporting field since 1974. I reside at 502 Bolton Place, Houston, Texas. I have been a certified court reporter licensed by the State of Texas since 1975. I am one of the owners of Continental Court Reporters, Inc. at One West Loop South, Suite 822, Houston, Texas.

As a freelance court reporter for 19 years and owner of a freelance court reporting firm for 16 of those years, I am fully aware of my obligations to protect the integrity of all deposition transcripts, whether it be a deposition that I have reported or a deposition reported by one of the reporters that contracts with our reporting firm.

At this point I would like to relate the problems that I have encountered in my efforts to comply with Rules 205 and 206 of the Texas Rules of Civil Procedure:

Once the original deposition transcript and exhibits leave our office and are sent to the custodial attorney, I cannot

control what happens to that original. If the custodial attorney is required to open the sealed original deposition so that it may be copied by someone in his office, I can no longer certify that that deposition transcript is the same transcript that left our offices in a sealed envelope.

When original deposition transcripts and exhibits are copied, oftentimes pages are lost or misplaced, causing much grief for the attorney who has paid for the original deposition because now he has an incomplete deposition which he cannot file with the Court.

The whole point in having an unbiased officer of the Court report the deposition is to ensure that it be an accurate transcript produced by a third party who has no interest in the lawsuit. Rules 205 and 206 then instructs the unbiased third party to send the original transcript to the custodial attorney who is representing one side of the lawsuit, who may then have to open the sealed original transcript and exhibits so that another party to the case may inspect and have photocopied at his expense the original transcript. And the fee that may be charged for the photocopying by the custodial attorney is "an amount not to exceed the reasonable and customary fees charged by the court reporting service which prepared the original transcript" in the first place.

The attorney who wants a copy of the original deposition should order the copy from the court reporting service, thereby eliminating the chance of the original deposition being tampered with and remaining sealed so that I as an officer of the Court may keep my certification of the original deposition intact.

I have only addressed one problem with this procedure.

I have read the foregoing statement and it is true and correct and within my personal knowledge.

Diane S. Ruiter
Affiant

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority on this the 18th day of March 1993.

ARLENE RODRIGUEZ
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
DEC.13, 1994

Arlene Rodriguez
Notary Public in and for the
State of Texas, County of Harris

LEX
Court Reporting Services, Inc.
1901 Lexington Street
Houston, Texas 77098

NO. D-3328

IN THE SUPREME COURT OF TEXAS

THERESA BARBERO,

Relator

vs.

THE HONORABLE DON WITTIG,

Respondent

AFFIDAVIT

STATE OF TEXAS *
*
COUNTY OF HARRIS *

BEFORE ME, the undersigned authority on this day personally appeared, SANDRA M. MIEROP, and after being duly sworn deposed as follows:

My name is Sandra M. Mierop. I am over 21 years of age. My business address is 1901 Lexington Street, Houston, Texas 77098. I have been a certified shorthand reporter licensed by the Supreme Court of Texas for 11 years. I own and operate LEX Court Reporting Services, Inc. located at 1901 Lexington Street, Houston, Texas 77098. I am fully aware of my obligation to protect the integrity of a deposition transcript. I would like to relate problems and issues I have encountered in my efforts to comply with Rules

EXHIBIT 12

Office (713) 524-0040 Facsimile (713) 524-7770

205 and 206, Texas Rules of Civil Procedure.

(1) When we release original depositions, oftentimes they are not returned to our office.

(2) When the original deposition is returned, the witnesses have often written in the original deposition.

(3) It becomes necessary for the reporter to reread the deposition before filing to certify that it is true and accurate.

(4) On several occasions original depositions were returned to our office unbound, disheveled, with pages missing.

I have read the foregoing affidavit. It is true and correct and within my personal knowledge.

Affiant

SUBSCRIBED AND SWORN TO before me, the undersigned authority on this 8th day of March, 1993.

STEVE MIEDZWIADOK
Notary Public, State of Texas
My Commission Expires 3-22-94

Notary Public in and for the
State of Texas
County of Harris

P-1
BBYX

NO. 91-21803

THERESA BARBERO	)	IN THE DISTRICT COURT OF
	)	
VS.	)	HARRIS COUNTY, T E X A S
	)	
TEXAS SCHOOL OF BUSINESS, INC.	)	125TH JUDICIAL DISTRICT

O R D E R

The attorney for Texas School of Business, Inc., is ordered to make transcripts of pertinent depositions available for inspection and photocopying at Theresa Barbero's expense during normal working hours. Order of 12-7-92 vacated.

SIGNED this _____ day of FEB 4 1993, 1993.

JUDGE DON WITTIG

DW:mm

V7180 P0809

RECORDER'S MEMORANDUM:
This instrument is of poor quality and not satisfactory for photographic recordation; and/or alterations were present at the time of filming.

681-2735

SPg0408

ORDERS ON APPLICATIONS FOR WRIT OF ERROR

THE FOLLOWING APPLICATIONS FOR WRIT OF ERROR ARE DENIED:

D-3128—LEGACY PARTNERS, LTD. v. CENTRAL APPRAISAL DISTRICT OF COLLIN COUNTY; from Collin County; 5th district (05-91-01701-CV, RULE 90, 07-21-92)
(Justice Enoch not sitting)

D-3234—CULLEN CENTER BANK & TRUST, TRUSTEE OF THE BETTY ANNE FRANKE TRUST v. TEXAS COMMERCE BANK, N.A., ALLEN L. JOGGERST AND C.W. SUNDAY, CO-TRUSTEES OF THE LOUISE JARRETT MORAN TRUST; from Harris County; 14th district (A14-92-00235-CV, 841 SW2D 116, 11-05-92)

D-3315—P.T. EICHELBERGER, JR., M.D., and LOUIS B. HUGHES, M.D. v. JULES BALETTE, M.D., ET AL.; from Harris County; 14th district (C14-91-00879-CV, 841 SW2D 508, 11-05-92)
as supplemented
petitioners' motion for judicial notice overruled

D-3432—JAMES W. LEE, INDEPENDENT ADMINISTRATOR WITH WILL ANNEXED OF THE ESTATE OF EUNICE R. BEAVERS, DECEASED v. JOSEPH E. ASHMORE, JR.; from Dallas County; 5th district (05-91-02101-CV, RULE 90, 12-21-92)
2 applications
(Justice Enoch not sitting)

D-3436—JOSEPH MARINO v. TANA ADAMO, SAM ADAMO, R. P. "SKIP" CORNELIUS, ADAMO & CORNELIUS, GENE MICHAEL REBESCHER and WORLD FIBERS, INC.; from Harris County; 10th district (10-92-00168-CV, RULE 90, 11-25-92)

D-3439—DAVID B. LAWLER v. TRANSPORATION INSURANCE COMPANY; from Harris County; 14th district (B14-91-01334-CV, RULE 90, 10-15-92)

D-3444—ESSEX CRANE RENTAL CORPORATION v. ESTEVAN COAL CORPORATION; from Brazoria County; 10th district (10-92-00118-CV, RULE 90, 12-09-92)

D-3455—ROBERT E. STEWART v. VICTOR L. SOEFJE; from Wilson County; 4th district (04-92-00127-CV, _____ SW2D _____, 12-23-92)

D-3479—WANDA CUTHBERTSON, INDEPENDENT EXECUTRIX OF THE ESTATE OF MARTHA CUTHBERTSON STEVENSON, DECEASED v. OVERTON PARK NATIONAL BANK, GUARDIAN FOR ESTATE OF EDWIN E. STEVENSON; from Parker County; 2nd district (02-92-00054-CV, RULE 90, 12-29-92)

D-3491—J.D., A MINOR v. THE STATE OF TEXAS, and STEVEN C. HILBIG, CRIMINAL DISTRICT ATTORNEY OF BEXAR COUNTY, TEXAS; from Bexar County; 4th district (04-92-00102-CV, RULE 90, 12-09-92)

D-3503—MARK ALVAN METZGER, JR. v. HOUSTON POLICE DEPARTMENT ET AL.; from Harris County; 14th district (C14-92-00090-CV, _____SW2D_____, 12-17-92)

D-3562—CITY OF COLLEYVILLE ET AL. v. MARIE POWELL; from Tarrant County; 2nd district (02-92-00044-CV, RULE 90, 12-29-92)
3 applications

D-3568—121 SHELL VENTURE, A TEXAS JOINT VENTURE, ET AL. v. THE STATE OF TEXAS; from Denton County; 2nd district (02-91-00233-CV, RULE 90, 12-30-92)

D-3584—CARL JACK SMITH, JR. v. RUTH MARIE SMITH; from Denton County; 2nd district (02-91-00251-CV, RULE 90, 01-20-93)
Respondent's motion to dismiss overruled

D-3606—PHILIP E. OSBORNE and SANDRA S. OSBORNE v. CHRIS A. BALL; from Eastland County; 11th district (11-92-00043-CV, RULE 90, 01-28-93)

D-3609—C.P. HILLIARD, H.A. MOORE, and W.E. BESS v. HALL FINANCIAL GROUP, INC., SUCCESSOR TO MAY PETROLEUM, INC., E M NOMINEE PARTNERSHIP COMPANY, and QUINOCO CONSOLIDATED PARTNERS; from Dallas County; 5th district (05-91-01942-CV, RULE 90, 01-14-93)

D-3624—J.O. LOCHRIDGE GENERAL CONTRACTORS, INC. v. WILLIAM MORGAN, DEREK L. BLACKWELL, RONALD G. KIRIPOLSKY, JUDY G. KIRIPOLSKY, ROBERT J. TYREE, JR., SUSAN M. TYREE, ALLAN S. WATTSON, RITA WATTSON, THE R.A. WATTSON COMPANY, GARY V. PIZZITOLA and ALBERTA K. PIZZITOLA; from Dallas County; 5th district (05-91-01813-CV, _____ SW2D _____, 01-25-93)
(Justice Enoch not sitting)

D-3634—JIM NYERGES v. DECLA V. NICHOLS D/B/A NICHOLS ROOFING; from Midland County; 8th district (08-92-00252-CV, RULE 90, 02-24-93)

D-3646—THE LaGRONE COMPANY, INC. and RON LaGRONE v. BANK ONE, TEXAS, N.A.; from Dallas County; 5th district (05-91-02092-CV, RULE 90, 02-03-93)

THE FOLLOWING APPLICATION FOR WRIT OF ERROR IS DISMISSED FOR WANT OF JURISDICTION:

D-3448—ROBERT WILLIAM DORAN v. DALLAS COUNTY CHILD PROTECTIVE SERVICES UNIT OF TEXAS DEPARTMENT OF HUMAN SERVICES; from Dallas County; 5th district (05-91-01814-CV, RULE 90, 12-30-92)

THE FOLLOWING JOINT MOTION TO DISMISS APPLICATION FOR WRIT OF ERROR (PURSUANT TO SETTLEMENT) IS GRANTED:

D-3458—STATE FARM FIRE AND CASUALTY COMPANY v. LARRY PRICE and EMALU PRICE; from Randall County; 7th district (07-91-00245-CV, 845 SW2D 427, 12-31-92)
application for writ of error dismissed

ORDERS ON MOTIONS

THE FOLLOWING MOTION FOR REHEARING OF A CAUSE IS GRANTED:

D-3328—THERESA BARBERO v. THE HONORABLE DON WITTIG, JUDGE (motion for rehearing on behalf of Texas School of Business)
Opinion and Judgment of February 3, 1993 withdrawn Stay Order issued February 5, 1993 vacated relator's motion for enforcement of stay order overruled relator's motion for sanctions overruled motion for leave to file petition for writ of mandamus overruled

THE FOLLOWING MOTIONS FOR REHEARING OF CAUSES ARE OVERRULED:

D-0872—THE STATE OF TEXAS AND THE GENERAL LAND OFFICE OF THE STATE OF TEXAS v. FLAG-REDFERN OIL COMPANY; from Travis County; 3rd district (03-89-00258-CV, _____ SW2D _____, 12-19-90)
(36 Tex. Sup. Ct. Jour. 646.)

D-0874—THE STATE OF TEXAS, THE GENERAL LAND OFFICE OF THE STATE OF TEXAS,

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that an answer does not comply with the requirements of Rule 169, it may order either that the matter is admitted or that an amended answer be served. The provisions of paragraph d of subdivision 1 of this rule apply to the award of expenses incurred in relation to the motion.

c. *Expenses on Failure to Admit.* If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 169 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 169(1), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

5. **Failure to Respond to or Supplement Discovery.** A party who fails to respond to or supplement his response to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in a response or supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter, unless the trial court finds that good cause sufficient to require admission exists. The burden of establishing good cause is upon the party offering the evidence and good cause must be shown in the record.

6. **Exhibits to Motions and Responses.** Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents.

(Amended Dec. 5, 1983, eff. April 1, 1984; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Source: Art. 3768, unchanged.

This is a new rule effective April 1, 1984. Rule 170 is deleted because this rule covers conduct in violation of Rule 167. The revisions to Rule 168, the deletion of Rule 170, and the provisions of new Rule 215 are intended to clarify under what circumstances the most severe sanctions authorized under the rules are imposable. New Rule 215 retains the conclusion reached in *Lewis v. Illinois Employers Ins. Co. of Wausau*, 590 S.W.2d 119 (Tex. 1979), and extends such rule to cover all discovery requests, except requests for admissions. New Rule 215 leaves to the discretion of the court whether to impose sanctions with or without an order compelling discovery, so that the court will be free to apply the proper sanction or order based upon the degree of the discovery abuse involved.

This rule is rewritten to gather all discovery sanctions into a single rule. It includes specific provisions concerning the consequences of failing to comply with Rule 169, and spells out penalties imposable upon a party who fails to supplement discovery responses. It provides for sanctions for those who seek to make discovery in an abusive manner.

Comment on 1988 Change: This amendment states that the party offering the evidence has the burden of establishing good cause for any failure to supplement discovery before trial and provides a manner for making a record for discovery hearings.

Comment to 1990 change: To require notice and hearing before an imposition of sanctions under paragraph 3, and to specify that such sanctions be appropriate.

RULES 215a TO 215c. [REPEALED]

(Repealed Dec. 5, 1983, eff. April 1, 1984.)

Notes and Comments

For subject matter of former rules 215a, 215b, and 215c, see, now, rules 215, 203, and 202, respectively.

SECTION 10. THE JURY IN COURT

RULE 216. REQUEST AND FEE FOR JURY TRIAL

a. Request. No jury trial shall be had in any civil suit, unless a written request for a jury trial is filed with the clerk of the court a reasonable time before the date set for trial of the cause ~~on the non-jury docket~~, but not less than thirty days in advance.

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

(Amended March 31, 1941, eff. Sept. 1, 1941; Sept. 20, 1941, eff. Dec. 31, 1941; Oct. 12, 1949, eff. March 1, 1950; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Source: Arts. 2124 and 2125.

Comment to 1990 change: Additional fees for jury trials may be required by other law, e.g., Texas Government Code § 51.604.

77 Please consider this deletion. Should not a setting for jury trial proceed non-jury if no fee has been paid? See Ricardo (CC writ applied for) 1993 WL 52 1042.

SCHOOL OF LAW
THE UNIVERSITY OF TEXAS AT AUSTIN

727 East 26th Street · Austin, Texas 78705-3299 · (512) 471-5151
Telecopier Number (512) 471-6988

4543.001 LHS hnd

7-5-94 SRB

TRCP 221-236

HLD - Supp Agenda.

July 1, 1994

Paula Sweeney
Misko Howie & Sweeney
Turtle Creek Centre, Suite 1900
Dallas, TX 75219

Re: Proposed changes to rules concerning jury selection

Dear Paula:

My notes from the May Supreme Court Advisory Committee meeting indicate that I promised to send you a copy of some rules drafted by the Recodification Task Force concerning jury selection. I enclose a copy of a memo I sent to the Task Force with proposed rules to replace current Rules 221-236. As the notes reflect, my review of the current rules and statutes indicated that what we have now is severely outdated and unnecessarily complicated.

These revisions include the "jury shuffle" (Rule B). Interestingly, there was an article about the jury shuffle in the June *Bar Journal* proposing its abolition. I enclose a copy. The Task Force really didn't get into the merits of having it or not. Your committee might want to consider whether it is something we want to keep or abolish.

The proposed rules also include a rule for the *Batson* procedure (Rule E(3)). At the time, we didn't want to go further than the U.S. Supreme Court, so limited it to racial discrimination. Of course, the Supreme Court recently held that gender discrimination in exercising peremptory strikes is also unconstitutional, so I have made a quick attempt to rewrite the proposed rule to broaden its scope.

You will notice that the memo refers to Judge Lynn Hughes' draft of the admonitory instructions. As I recall, he did a "plain language" rewrite, but I can't find it in my files. By copy of this letter I am asking Bill Dorsaneo to send you a copy if he has it. If need be, I'm sure we can get a copy from Lynn.

I have all this on my computer if you want me to send you a disk. Just tell me what program you use.

I look forward to seeing you at the July SCAC meeting.

Very truly yours,

Alex Wilson Albright

cc: Bill Dorsaneo
Luke Soules
Justice Nathan Hecht
Lee Parsley

3. Discriminatory challenges prohibited. After the clerk has announced to the parties the composition of the jury, but before the remainder of the jury panel has been dismissed and the jury is sworn, any party may object to any other party's peremptory challenges on the ground that they were made in violation of the Equal Protection Clause of the United States Constitution. The party making the objection must present prima facie evidence of facts tending to show that the challenges were made in violation of the Constitution. If the objecting party satisfies its burden of prima facie proof, the party that excercised the challenges may present evidence of a neutral explanation for the challenges. The party objecting to the peremptory challenges has the burden of proving by a preponderance of the evidence that the challenges were made with intentional discrimination. The court shall use its discretion in sustaining or overruling the challenge. Upon sustaining the challenge, the court within its discretion may reinstate the juror stricken on the basis of race or call a new jury panel.

Unconstitutionally stricken juror

MEMORANDUM

To: Task Force on Revising the Texas Rules of Civil Procedure

From: Alex Albright

Date: June 16, 1993

Re: Current Rules 221-236: Jury Selection: Revision following meeting of May 8

= =

Proposed Rule A: Challenging the Assembly of the Jury Panel

Any party that will be tried to a jury may challenge the jury panel on the ground that the jurors summoned were not selected randomly or according to law. This challenge must be made either in writing or orally on the record before peremptory challenges are exercised, setting forth distinctly the grounds for the challenge. When such a challenge is made, the court shall hear evidence and make a decision without delay. If the challenge is sustained, the challenged jury panel shall be discharged, and other jurors shall be summoned according to law.

Notes: The source of this proposed rule is current Rules 221 and 222. As written, these rules provide a procedure allowing parties to challenge the method by which persons were chosen for jury lists and summoned to be on the panel for the week "upon the ground that the officer summoning the jury has acted corruptly, and has willfully summoned jurors known to be prejudiced . . . or biased." The Government Code (§ 62.001-014) provide the methods for making up the jury pool and assembling jury lists from that pool. It makes sense to allow a challenge to the method by which the jury list is assembled, but it does not make sense to limit the challenge to the grounds set forth in the current rule.

Proposed Rule B: Seating the Jury Panel

The jury panel for a particular case shall be listed and be seated in the order in which the names are chosen from the jury list. Upon demand by any party prior to examination of the jury panel, the judge of the court to which the panel is assigned may have the names of the members of the jury panel redrawn at random, and the jury panel shall be relisted and reseated in the order in which the names are redrawn. This can be done only once in each case [for each jury chosen???].

Notes: Current Rules 223, 224, and 225 are concerned with assembling the jury panel (athough the titles of Rules 223 and 224 mistakenly indicate that they concern assembling the "jury list"). Gov't Code §§62.015, .016, and .017 actually cover the method whereby jury panels are chosen. Therefore, the references in the Rulesto these procedures are deleted here. The statutes do not deal with the "jury shuffle, however." Interestingly, the rules allow a shuffle only in counties governed by the laws providing for interchangable juries. The proposed rule allows a jury shuffle in all counties. Rule 225 concerning summoning talesman should be deleted because it is covered in the statutes.

Proposed Rule C: Swearing in, instructing, and examining the jury panel.

1. Oath. Before examination of the jury panel, the jurors shall be administered this oath: "Do you solemnly swear or affirm that you will give true answers to all questions asked you about your qualifications as a juror?"

2. Instructions. After the members of the panel have been sworn and before they are examined, the judge shall instruct them, with the modifications that the circumstances of the case may require, as follows:

[insert instructions from L. Hughes draft]

3. Examination. The court shall permit the parties to examine and may itself examine the members of the jury panel to elicit facts that will enable the parties to challenge jurors in accordance with these rules and applicable law.

Notes: Current rule 226, with minor changes. Part 3 is a new rule. There is currently no Texas rule describing the voir dire examination. Current Rule 230 concerns voir dire examination, but seems unnecessary.

Proposed Rule ___: Challenges for cause.

Any party may orally challenge a panel member for cause alleging some fact that by law disqualifies that juror to serve as a juror, or that in the opinion of the court renders that juror unfit to sit on the jury. In deciding the challenge, the court shall consider the juror's answers to questions asked as well as other evidence. If the challenge is sustained, the juror shall be discharged from the case. If successful challenges reduce the number of prospective jurors to less than twenty-four in the district court or twelve in the county court, additional jurors shall be summoned.

Notes: This proposed rule combines current Rules 227, 228, 229, and 231.

Proposed Rule E: Peremptory challenges.

1. Grounds. Upon completion of the court's determination of challenges for cause, any party may make peremptory challenges to a juror by striking that juror's name from a list furnished by the clerk. A peremptory challenge is made to a juror without assigning any reason therefor. After the exercise of peremptory challenges, the parties shall deliver their completed lists to the clerk. The clerk shall identify the first twelve names on the panel in the district court, or six in the county court, that have not been struck by any party, who shall constitute the jury.

2. Number and Apportionment. Each side (plaintiff and defendant) to a civil case shall be entitled to six peremptory challenges in a case tried in the district court, and to three in the county court. If there are multiple parties on any one side, the trial court shall determine before the exercise of peremptory challenges whether the parties on the same side are antagonistic with respect to any issue to be submitted to the jury. Each antagonistic party is entitled to its own peremptory challenges. Upon the motion of any party made prior to the exercise of peremptory challenges, the trial judge shall use its discretion to apportion the number of peremptory challenges so that no party or side is given unfair advantage as a result of the the alignment of the litigants, the determination of antagonism, and the award of peremptory challenges.

3. Challenges based on race prohibited. After the clerk has announced to the parties the composition of the jury, but before the remainder of the jury panel has been dismissed and the jury is sworn, any party may object to any other party's peremptory challenges on the ground that they were made on the basis of race. The party making the objection must present prima facie evidence of facts tending to show that the challenges were made on the basis of race. If the objecting party satisfies its burden of prima facie proof, the party that excercised the challenges may present evidence of a racially neutral explanation for the challenges. The party objecting to the peremptory challenges has the burden of proving by a preponderance of the evidence that the challenges were made on the basis of race. The court shall use its discretion in sustaining or overruling the challenge. Upon sustaining the challenge, the court within its discretion may reinstate the juror stricken on the basis of race or call a new jury panel.

Notes: Parts 1 and 2 of this rule are simplified versions of current Rules 233 and 234. Part 3 is new, and codifies the Batson/Edmundson *procedure. There are two issues addressed in the proposed rule: (1) when error must be preserved; and (2) the standard of review on appeal. I have written a rule that requires the objection be made before the panel is dismissed, so that it gives the trial judge the choice of reinstating the stricken juror or calling a new panel.* See Henry v. State, *729 S.W.2d 732 (Tex.Cr.App. 1987) (coming to the*

opposite decision before the Code was amended). The Code of Criminal Procedure requires the judge to call a new panel, and thus allows the objection to be made anytime before the jury is sworn. I have written the abuse of discretion standard of review into this rule. The cases use the federal "clearly erroneous" standard, which really has no place in Texas civil procedure. See Lott v. City of Fort Worth, *840 S.W.2d 146 (Tex. App. -- Ft. Worth 1992). [At our last meeting, we discussed putting this part of the rule with section 1 instead of as a separate subsection. I think it makes part 1 overly complicated, and is better as its own section.]*

Proposed Rule F: Oath and Instructions to Jury

1. Oath. The jury shall be administered this oath: "Do you solemnly swear or affirm that you will return a verdict according to the law in the court's instructions and to the evidence admitted before you?"

2. Instructions. After the jury has been sworn, the judge shall instruct them, with the modifications that the circumstances of the case may require, as follows:

[Insert admonitory instructions from L. Hughes draft here]

Notes: Current Rule 236 and 226a with minor changes.

DISPOSITION TABLE

Current Rule	Proposed Rule
221	A
222	A
223	B
224	deleted
225	deleted
226	C(1)
226a	C(2), F(2), and rule concerning admonitory instructions in charge
227	D
228	D
229	D
230	deleted
231	D
232	E(1)
233	E(2)
234	E(1)
235	deleted
236	F(1)

The Texas Jury Shuffle

A Question of Constitutionality

By Donna M. Bobbitt

Texas is the only state which incorporates the eccentric process of the jury shuffle into its rules of criminal and civil procedure.[1] Any litigant, after seeing the order in which the jury panel is seated, may request that the names of the jurors be shuffled and the panel reseated in a new and random order.[2] The Texas Court of Criminal Appeals has described the shuffle as a procedure intended to assure the random selection and seating of prospective jurors.[3] In practice, the shuffle is used to reconfigure the seating positions of the jury panel to enhance the opportunity to select members of particular racial or gender groups during the *voir dire* process. Although the jury shuffle is unique to Texas and firmly rooted in its history, this quaint procedure appears to be on a collision course with recent U.S. Supreme Court decisions which have condemned *voir dire* procedures which operate to discriminate against potential jurors on the basis of race.[4]

The historical derivation of the jury shuffle is rarely elucidated in the judicial decisions which mandate its use. When the process was incorporated into the modern Code of Criminal Procedure, the stated purpose was to give recognition to a commonly used practice and to provide uniformity of procedure throughout the state.[5] The jury shuffle is part of both the Texas Rules of Civil Procedure[6] and the Texas Code of Criminal Procedure[7] although it is used more extensively in criminal trials.[8] The rule is applied in a mandatory fashion in both litigation arenas, but the court of criminal appeals has held that a violation of its rule mandates reversal without the need to show harm, while the Supreme Court of Texas subjects the civil rule to the application of the harmless error doctrine.[9]

Recently the court of criminal appeals has used strict application of the jury shuffle rule to require reversal of two capital murder convictions, bringing the procedure for the first time into the public awareness.[10] In these cases the court stated that the purpose of the jury shuffle was to assure the random selection and seating of prospective jurors.[11] These general statements of purpose parallel the judicial statements made in reference to the peremptory challenge: to secure a fair and impartial jury. Yet the U.S. Supreme Court has altered the very nature of the peremptory strike because of its inherent ability to be used as a vehicle for racial discrimination in the *voir dire* process.[12] If the nature of the peremptory challenge must be fundamentally changed to protect against its discriminatory use, a serious question arises regarding the future of the Texas procedure of shuffling jury panels before the *voir dire* process begins.

The supreme court has swiftly progressed in what it has termed its "unceasing efforts" to eradicate racial discrimination in the jury selection process.[13] Since 1880, the court has made great strides toward eliminating discriminatory procedures used to select potential jurors from the general community.[14] In 1986, the court began a systematic process to discover and control racial discrimination in the *voir dire* procedures used to select a single jury from the general venire.[15] The landmark *Batson* decision outlawed a prosecutor's racially motivated criteria in the exercise of peremptory strikes in a criminal trial. The court held that the equal protection rights of a criminal defendant were abridged when the state used its challenges intentionally to remove members of the defendant's race from the jury panel.[16]

In following years, the U.S. Supreme Court changed the focus of its concern from the equal protection rights of the criminal defendant to the equal protection rights of the juror excused from the panel on the basis of race.[17] In holding that even a private civil litigant was forbidden to exercise peremptory challenges in a discriminatory fashion, the court determined that the offending litigant held the status of a state actor because the *voir dire* procedure itself was state sanctioned and the juror was actually excused by action of the trial judge.[18] The attorney opposing such a forbidden use of the peremptory strike was held to have standing to present the issue on behalf of the challenged juror, who would face insurmountable obstacles in pressing the claim on his or her own behalf.[19]

In 1992, the court considered the most difficult issue in securing the eradication of discrimination in the peremptory strike procedure when it held that even a criminal defendant, cloaked in Sixth Amendment protections and in open opposition to the state in a criminal trial, was precluded from exercising peremptory challenges in a discriminatory fashion.[20] This decision and the recent ruling applying these principles to strikes based on gender as well as race have made it clear that the supreme court will no longer tolerate discrimination in the jury selection process.[21]

To ensure compliance, the supreme court established a procedure for uncovering discrimination that changed the very nature of the peremptory strike.[22] If any party could inferentially establish that the opposition had used peremptory strikes to purposefully discriminate, the offending party was required to enunciate racially neutral explanations for each of the challenged strikes.[23] The ancient practice of freely striking prospective jurors was defined by the fact that the strike required no articulable basis.[24] Yet now when a proper equal protection objection is presented, a litigant must state the basis of the challenge in his or her effort to establish that it was not racially motivated. The very nature of the peremptory challenge has changed because of the depth of the supreme court's commitment to remove discrimination in the jury selection process. It has even

been suggested by a member of the court that the peremptory challenge should be removed from the process altogether because of its inherent ability to be used to discriminate on the basis of race.[25]

Like the peremptory challenge, the purpose of the Texas jury shuffle is to assure the selection of a fair and impartial jury. Yet a procedure laudable on its face, when used for a discriminatory purpose, will not survive constitutional scrutiny. The inherent danger of the jury shuffle, like that of the peremptory challenge, must be gleaned from its implementation.

The timing of the request is crucial. It need not be made until the jury panel is seated in the courtroom. The decisions are clear that the defendant has a right to see the jury panel seated in the proper sequence before deciding whether to exercise the right to shuffle.[26] A defendant cannot intelligently exercise his or her right to shuffle without seeing the panelists seated in the order in which they will be called.[27] Even if the trial judge has himself ordered a shuffle of the panel before it is seated in the courtroom, it is reversible error to deny the defendant's request for a second shuffle after seeing the panel seated.[28]

After a visual inspection of the panel, a party must move to shuffle before the *voir dire* process begins or the right to have the panel shuffled is waived. Many cases have addressed the issue of exactly when *voir dire* begins. The answer appears to be when the state's counsel begins his or her statement and questioning of the venire.[29] Judges may make introductory comments and test the panel for qualifications and exemptions before counsel makes his or her election.[30] Once any specific information about the case is given or elicited by counsel, the right to request a shuffle is forfeited.[31] Indeed, a request by counsel for the opportunity to review juror information cards and biographical information before deciding whether to exercise the right to shuffle is properly denied.[32]

The rules do not require the moving party to justify or explain his or her desire for a shuffle. If timely request is made, the trial court must order the shuffle. Failure to comply in a criminal trial will require reversal of the conviction without a showing that the failure constituted harmful error. Thus a litigant need never articulate what he hoped to achieve through the procedure, and courts rarely address the reasons underlying the use of the jury shuffle.

In *Yanez v. State*,[33] however, Judge Teague writing for the court of criminal appeals, made several interesting references to the reasons that defense counsel justifiably felt the need for a shuffle. The issue addressed in the case was the timeliness of the defendant's request. In holding that the request was timely and that failure to grant a shuffle was reversible error, the court addressed the racial balance of the panel. The court noted that both the defendant and his counsel had Mexican-American surnames and that there were only four Mexican-Americans on the jury panel of 46 persons. These prospective jurors occupied positions numbered 25, 38, 42, and 45. Judge Teague noted that counsel's request to shuffle was reasonable because in the natural order of things, prospective juror number 25 was the only Mexican-American who had a reasonable chance of being seated on the jury.[34]

The right to shuffle rests solely upon a visual inspection of the panel. Counsel must be allowed to see the order of seating and is allowed to know no more about the jurors before deciding whether to shuffle. The *Yanez* court recognized that a reasonable purpose of the jury shuffle procedure is to assist counsel in arranging the racial composition of the panel before the elimination process of *voir dire* begins. A party wishing to seat a jury without members of a particular race, may enter the courtroom to find a significant number of those individuals seated in the front of the panel. Upon that perception, he is entitled under the present procedural law to shuffle the seating arrangement in the hope of placing a larger number of members of that racial group toward the back of the panel where in the ordinary course of events, they will not be reached after the exercise of peremptory challenges. Conversely, the procedure may be used in the hope of reconfiguring the panel to place visually preferred veniremen earlier in the seating arrangement to increase the probability that they will be selected. The most apparent visual perceptions are based upon race and gender.

Considering the supreme court's mandate that discrimination in the jury selection process will no longer be tolerated, the shuffle procedure becomes highly suspect.[35] The general panel of prospective jurors is now selected and seated in a manner which meets the randomness and neutrality tests established by the supreme court. The jury shuffle procedure is a mechanism which allows the demographic patterns to be skewed without the qualifying statistical analysis which validated the general pool selection. The very fact that the shuffle request requires no explanation allows it to be a subtle mechanism to subvert the court's mandate under *Batson*. A procedure which can fundamentally change the complexion of a panel without justification is vulnerable to the same constitutional challenge as the peremptory strike.

The supreme court has spoken eloquently about the harm suffered by a juror peremptorily excused on the basis of race.[36] Can the personal harm be any less, if an attempt is made to place an individual in the back of the panel because of his or her racial status, making the use of the peremptory strike unnecessary to effect his or her removal?

Arguably, the shuffle in an individual case may be requested in an attempt to reconfigure the jury for a purpose other than one based upon race. Yet if the reason is racially motivated, the request is made in violation of the equal protection clause. Both peremptory challenges and motions to shuffle have been historically interpreted as an absolute right requiring no motivational explanation. This is clearly no longer the case with the peremptory challenge. If it appears that the strike may have been racially motivated, racially neutral reasons for its exercise must be articulated. Similarly, if it were to appear from the record in the case that members of a particular racial group occupied early seating positions among the panel, the motion to shuffle should at the very least be accompanied by proof of racially neutral reasons for the request. Such a requirement is the logi-

cal extension of the supreme court's determination that *voir dire* procedures not be used to effect purposeful discrimination.

Some scholars and jurists now argue that the peremptory challenge should be eliminated altogether because of its inherent ability to be used in a discriminatory fashion. The Texas jury shuffle procedure clearly occupies a similar position. As the ancient traditions of jury selection continue to change in response to the equal protection rights of prospective jurors, the unique and historically imbedded jury shuffle procedure used in Texas may not survive.

---

1 Tex R Civ P 223, Tex Code Crim Proc Ann art. 35.11 (Vernon 1993); Jeffrey B Keck and William Randall Johnson, *Criminal Procedure, Trial and Appeal*, 40 Sw L J 615 (1986)

2 *Yanez v. State*, 677 S.W.2d 62 (Tex. Crim. App 1984)

3 *Jones v. State*, 833 S.W.2d 146 (Tex Crim App 1992). Such language is used by Judges McCormick and Overstreet in the dissenting opinion filed in *Chappel v. State*, 850 S.W.2d 508 (Tex. Crim. App. 1993).

4. *Batson v. Kentucky*, 476 U.S. 79 (1986); *Edmonson v. Leesville Concrete Co.*, 500 U.S 614 (1991); *Powers v. Ohio*, 499 U.S. 400 (1991); *Georgia v. McCollum*, 112 S Ct. 2348 (1992).

5 John F. Onion, Special Commentary — 1965, Tex. Code Crim. Proc. Ann. art 35.11 (Vernon's 1989)

6 Rule 223 of the *Texas Rules of Civil Procedure* provides in pertinent part: ... after such assignment to a particular court, the trial judge of such court, upon the demand prior to voir dire examination by any party or attorney in the case reached for trial in such court, shall cause the names of such assigned jury panel in such case to be placed in a receptacle, shuffled, and drawn, and such names shall be transcribed in the order drawn on the jury list from which the jury is to be selected to try such case. There shall be only one shuffle and drawing by the trial judge in each case

7 Article 35.11 of the *Texas Code of Criminal Procedure* provides: The trial judge on the demand of the defendant or his attorney or of the state's counsel, shall cause a sufficient number of jurors from which a jury may be selected to try the case to be randomly selected from the members of the general panel drawn or assigned as jurors in the case. The clerk shall randomly select the jurors by a computer or other process of random selection and shall write or print the names, in the order selected, on the jury list from which the jury is to be selected to try the case. The clerk shall deliver a copy of the list to the state's counsel and to the defendant or his attorney

8 Historically, the same rule was used in both criminal and civil cases: the "Interchangeable Jury Law" Act approved March 15, 1917, 35th Leg., R.S. ch. 78, 1917 Tex. Gen. Laws, Local & Spec. 147. Since the promulgation of the Rules of Civil Procedure in 1939 and the Code of Criminal Procedure in 1925, the Supreme Court of Texas and the Texas Court of Criminal Appeals now look to their corresponding rule and apply their own construction without regard to the other court's views on the matter. *S— C— v. State*, 715 S.W. 2d 379 (Tex. App. — San Antonio 1986, writ ref'd n.r.e.)

9. *S— C— v. State*, 715 S.W. 2d 379 (Tex. App — San Antonio 1986, writ ref'd n.r.e.) citing *Rivas v. Liberty Mut. Ins. Co.*, 480 S.W.2d 610 (Tex. 1972).

10. *Chappel v. State*, 850 S.W.2d 508 (Tex. Crim. App 1993); *Rodriguez v. State*, No. 71,273 (Tex. Crim. App., June 23, 1993) (Not published).

11. *Chappel*, 850 S.W.2d 508.

12. *Batson v. Kentucky*, 476 U.S. 79 (1986).

13 *Id.* at 85

14 *Id.* n. 3, citing e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Neal v. Delaware*, 103 U.S. 370 (1881); *Norris v. Alabama*, 294 U.S. 587 (1935); *Hollins v. Oklahoma*, 295 U.S. 394 (1935) (per curium); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Avery v. Georgia*, 345 U.S. 554 (1953); *Hernandez v. Texas*, 347 U.S. 475 (1954); *Whitus v. Georgia*, 385 U.S. 545 (1967); *Jones v. Georgia*, 389 U.S. 24 (1967) (per curium); *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320 (1970); *Castaneda v. Partida*, 430 U.S. 482 (1977); *Rose v. Mitchell*, 443 U.S. 545 (1979); *Vasquez v. Hillery*, 474 U.S. 254 (1986).

15. *Batson*, 476 U.S. 79.

16. *Id.*

17. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991). The Texas Supreme Court adopted the holding of *Edmonson* in *Powers v. Palacios*, 813 S.W.2d 489 (Tex. 1991).

18. *Edmonson*, 500 U.S. 614.

19. *Id.*; *Powers v. Ohio*, 499 U.S.400 (1991).

20 *Georgia v. McCollum*, 112 S. Ct. 2348 (1992).

21. *J.E.B. v. T.B.*, __ U.S. __ No 92-1239 (Apr. 19, 1994).

22. *Batson*, 476 U.S. 79.

23. *Id.*; *Keeton v. State*, 749 S.W.2d 861 (Tex. Crim. App 1988).

24. In his dissenting opinion in *Batson*, Chief Justice Burger, joined by Justice Rehnquist, discussed the "very old credentials" of the peremptory challenge and the "widely held belief that peremptory challenge is a necessary part of trial by jury." *Swain v. Alabama*, 380 U.S. 202, 217 (1965). The procedure was used by the Romans in criminal cases as early at 104 B.C. It has been a part of the jury trial in England since 1305 and used in this country as early as 1790. *Batson*, 476 U.S. at 119.

25. In his concurrence in *Batson*, Justice Marshall wrote: "The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely." *Batson*, 476 U.S. at 102-103

26 *Stark v. State*, 657 S.W.2d 115 (Tex. Crim App 1983); *Eldridge v. State*, 666 S.W.2d 357 (Tex App — Dallas 1984, pet ref'd)

27 *Scott v. State*, 805 S.W.2d 612 (Tex. App. — Austin 1991, no pet.).

28 *Id.*

29 *Williams v. State*, 719 S.W.2d 573 (Tex. Crim App 1986).

30 *Yanez v. State*, 677 S.W.2d 62 (Tex. Crim. App. 1984)

31 *Griffin v. State*, 481 S.W.2d 838 (Tex. Crim. App 1972).

32. *Davis v. State*, 782 S.W.2d 211 (Tex. Crim App. 1989).

33 *Yanez*, 677 S.W.2d 62

34. *Id.* at 64, 65

35 The discriminatory nature of the shuffle procedure has only been challenged once in this state. In *Urbano v. State*, 808 S.W.2d 519 (Tex. App — Houston [14th Dist.] 1991, no pet.), appellant argued that the trial court should have conducted a *Batson* hearing following the state's request for a jury shuffle. Quoting from the court's opinion:

> "Appellant cites no authority extending the *Batson* holding to encompass a jury shuffle. As an intermediate appellate court, we are not inclined [sic] make the type of broad expansion of law appellant seeks. We are even less inclined to do so here, since appellant failed to exercise the remedy available to him at trial. Appellant had the absolute right to demand the jury to be re-shuffled after being brought into the courtroom, and failed to do so."

It should be noted that the opinion in *Urbano* was handed down two months before the supreme court's opinion in *Edmonson* broadly expanded the high court's condemnation of discrimination in the jury selection process.

36 "The very fact that [members of a particular race] are singled out and expressly denied ... all right to participate in the administration of law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand on them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others. *Straunder, supra*, 100 U.S. at 308." *Powers v. Ohio*, 111 St. Ct. at 1369. "A venireman excluded from jury service because of race suffers a profound personal humiliation heightened by its public character." *Id.* at 1372.

Donna M. Bobbitt is assistant professor of legal studies at the University of Houston-Clear Lake. She served as a briefing attorney with the First Court of Appeals and has engaged in the private practice of appellate law. She received her B.A. from Rice University and J.D. from the University of Houston Law Center, where she recently directed the Legal Research and Writing Program.

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December 21, 1993

Hon. Nathan Hecht
Supreme Court Liaison to Advisory Committee
P.O. Box 12248
Austin, TX 78711

Re: God-tests for Jurors

Dear Mr. Hecht:

The ACLU of Texas has received several requests for assistance on the part of people who were not allowed to sit on a jury because they were atheists. The state Legal Panel of the ACLU of Texas has instructed me to write to you urging that there be a change in TRCP §§ 226 and 236 so that prospective jurors and those selected to hear a case are no longer required to agree to the oaths in question before sitting as a juror.

As it now reads, prior to *voir dire*, prospective jurors must swear to give true answers using the phrase "so help you God." Once selected a juror must swear to render a true verdict also with the phrase "so help you God." For a person who does not believe in God or who does not believe in taking oaths and who is not a hypocrite, this oath is impossible to take, and it is thus impossible for such a person to ever be on a jury.

The current practice among judges and clerks appears to be mixed. While some clerks and judges will seat a juror who agrees to tell the truth or render a true verdict rather than taking the oath, others refuse to allow a person to be part of the jury pool or sit on a petit jury. Section § 236 (OATH TO JURY) gives some discretion in the precise form of the oath through the wording "[t]he jury shall be sworn by the court or under its direction, in substance, as follows:" *emphasis added.* However, §226 (OATH TO JURY PANEL) gives no such discretion and the words of the oath must be given as written.

No person may be disqualified for service on a petit jury based upon any religious opinion they may or may not hold. (Tex. Gov. Code Ann. §62.102) Nor may a person be exempted based upon his or her lack of belief in a God or in their inability to take an oath because of religious reasons. Nonetheless, the honest atheists and those who take the Biblical injunction against swearing literally, cannot in good conscience take an oath to God, and they will be

exempted from jury service when faced with a clerk or judge who will not bend the wording of the oath to include them.

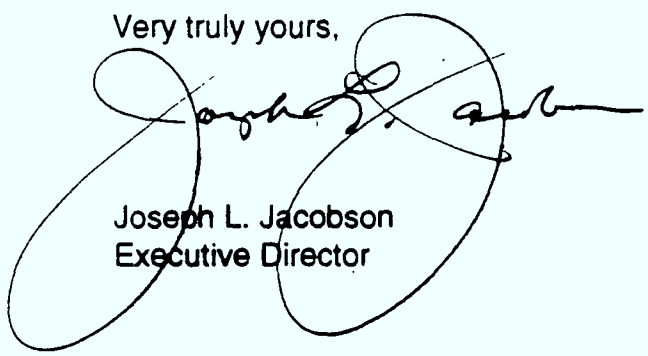
Surely the dictates of justice requires only that the jury selection process be endowed with solemnity, that a statement be agreed to by jurors that will insure seriousness of the occasion and impress upon them the importance of their service and the necessity of honesty on their part. A minor alteration in the wording of the oath could do this as would the creation of a second oath or affirmation that could be given upon request. Judges are not required to swear to God to uphold the law, lawyers may not be required to swear to God before becoming members of the bar, and witnesses are no longer required to swear to God to tell the truth before their testimony is taken. Surely the promise of truthfulness of the witness and of faithfulness of the judge and lawyers is as important to the judical process as the juror's truthfulness and fidelity.

The current requirement of a religious test to be a juror is incompatible with the basic American notion that no religious test be demanded to hold public office. According to the judge's oral instructions to a newly sworn jury, as required by Texas law (TRCP §236a), jurors are, in fact, public officers. While there is no formal requirement that each juror states that he or she believes a particular set of religious principles, the fact remains that the nature of the oath precludes many people, believers and non believers, from sitting on a Texas jury.

In a society that prides itself on its pluralism, diversity and equality for all before the law, it is simply wrong to prohibit an entire class of citizens from participation in an important civil duty and responsibility because of their belief system. It is a wrong that can be easily remedied.

We are confident that an acceptable solution can be found, and we urge you to take this matter under consideration.

Very truly yours,



Joseph L. Jacobson
Executive Director

January 6, 1994

Mr. Joseph L. Jacobson
ACLU Texas
P. O. Box 8342
Dallas TX 75205

Dear Mr. Jacobson:

Thank you for your suggested change in the Texas Rules of Civil Procedure. I have sent a copy to Luther H. Soules of San Antonio, Chairman of the Court's Rules Advisory Committee. The Committee will be meeting throughout 1994 to consider the next changes to be made in our rules of procedure, and I assure you that your suggestion will be considered by the Committee in due course. I am grateful for your interest in our rules.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

xc: Luther H. Soules III

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April 26, 1994

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Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed is a letter from Charles Spain regarding TRCP 329b and TRAP 41.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

SPg0425

CHARLES A. SPAIN, JR.
Court of Appeals for the Third District of Texas
Post Office Box 12547
Capitol Station
Austin, Texas 78711-2547

Staff Attorney
Telephone: (512) 463-1733

April 25, 1994

The Honorable Nathan Hecht
Justice
The Supreme Court of Texas
Supreme Court Building Room 104
201 West 14th Street
Austin, Texas 78701

Re: Texas Rule of Civil Procedure 329b and Texas Rule of Appellate Procedure 41

Dear Justice Hecht:

Yet another letter for the rules "in box."

In a thirty-day appeal (no motion for new trial filed), Texas Rule of Civil Procedure 329b(f) eliminates the ability of the trial court to change the judgment for the sole purpose of giving the potential appellant another bite at the apple to perfect an appeal when the potential appellant has failed to file a timely perfecting instrument. This occurs because the trial court's jurisdiction (thirty days after the signing of the final judgment) is the same as the deadline to file the perfecting instrument. Tex. R. Civ. P. 329b(d); Tex. R. App. P. 41(a)(1). The potential appellant's only remedy is to tender to the court of appeals a motion for extension of time to file the perfecting instrument. Tex. R. App. P. 41(a)(2).

In a ninety-day appeal (motion for new trial filed), the potential appellee has until the ninetieth day to file the perfecting instrument. Tex. R. App. P. 41(a)(1). The trial court, however, has jurisdiction over the case until the one-hundred-and-fifth day if the motion for new trial is overruled on the seventy-fifth day. Tex. R. Civ. P. 329b(e). The potential appellant, therefore, has two remedies: (1) tender to the court of appeals a motion for extension of time to file the perfecting instrument and (2) request the trial court to render a new judgment to restart the appellate timetables. There is, of course, case law that says the trial court cannot render a new judgment for the sole purpose of restarting the appellate timetables, but this can easily become a subjective analysis depending on how the second judgment is worded. *Anderson v. Casebolt*, 493 S.W.2d 509 (Tex. 1973) (note that second judgment in *Anderson* was apparently signed outside period of trial court's jurisdiction).

If this is indeed a problem worth fixing, one solution would be to change the deadline for ruling on the motion for new trial from the seventy-fifth day to the sixtieth day. *See* Tex. R. Civ. P. 329b(c). This would make the trial court's jurisdiction expire on the day the perfecting instrument is due, i.e., the ninetieth day.

Respectfully,

enclosure

4543.001

JEFFREY S. MAHL
ATTORNEY AT LAW
108 W. LOSOYA/P.O. BOX 1191
DEL RIO, TEXAS 78841

(210) 775-4723

March 23, 1994

Mr. Luther H. Soules III, Chairman
The Supreme Court Advisory Committee
State Bar of Texas
175 E. Houston, 10th Floor
Two Republic Bank Plaza
San Antonio, Texas 78205-2230

HHD
SCAC Scan
Expedite
Jan Pauley

Re: Rules 2 and 523 Tx.R.Civ.P.

Dear Mr. Soules:

Mr. James S. Sharpe, of the Court Rules Committee suggested that I write you to suggest that your committee consider a textual change to Rules 2 and 523 which would resolve a situation which I have encountered. If my reading of both Rules 2 and 523 is correct, all civil proceedings in justice court are governed by the Texas Rules of Civil Procedure unless it is specifically provided otherwise by law or rules.

Unfortunately, it is the interpretation of a certain Justice of the Peace in the county where I practice that the Texas Rules do not apply when Justices of the Peace sit as judges in small claims court. It is my impression from this judge that in small claims court no rules apply.

The specific situation was this. I found myself defending a client who was sued in small claims court for over $4,000 on a alleged oral contract. After conducting some limited discovery it was clear that the claim was baseless and the plaintiff non-suited. I moved for a hearing for attorney's fees and was instructed that "[t]the Small Claims Court is not bound by TRCP rules." My motion was denied without hearing. A copy of the Court's letter is enclosed.

Under such an interpretation, a situation is created where individuals can be hailed into court, incur costs of defense and have no recourse to at least recover their costs. I believe that a textural change to rule 2 and 523 making reference to small claims courts or other clarifying language will resolve this issue for me and any others who find themselves in a like situation.

Your committee's kind attention to this matter will be greatly appreciated.

Yours truly,

Jeffrey S. Mahl

JSM/rr
enclosure

JAN 0 7 1994

COUNTY OF VAL VERDE

JUSTICE OF THE PEACE PRECINCT 3

GERALD L. PRATHER
P. O. BOX 828

DEL RIO, TEXAS 78840

PHONE 210 774-7511
210 774-7512

January 5, 1994

Mr. Jeffrey Mahl, Attorney At Law
108 West Losoya,
Del Rio, Texas 78840

RE: Cause No. 1412
AMANDY WENNER VS SAM SALEM

Dear Mr. Mahl,

Concerning your letter requesting a hearing on your prior motion with regards to attorney's fees: I refer you to Rule 2 of TRCP which lists the Courts that are controlled by the TRCP rules. You will note the Small Claims Court is not listed. The Small Claims Court, which hears Small Claims Suits, is a separate and distinct court from Justice Court, which hears all other Civil Suits.

Cause No. 1412 was filed as a Small Claims Suit. The Small Claims Court is not bound by TRCP rules.

Therefore, your motion for attorney's fees and your request for a hearing are hereby denied.

Respectfully,

Gerald L. Prather
Justice of the Peace, Pct. 3

HID
50/60 Subc TRCP 571-, 23
Agenda
Staffs
J. Hecht flier

facsimile
TRANSMITTAL

to: Luther H. Soules III
company: Soules & Waliace
fax #: 224-7073
re: TRCP 571
date: March 10, 1994
pages: 4 page(s) total, including this cover sheet

message:

Luke-- I'm afraid the rule amendments may come too late for Mr. Almahrabi . . . .

Sarah

From the desk of...

Sarah B. Duncan
Denton McKamie & Navarro
123 Kennedy Avenue
San Antonio Texas 78209

210/829-4511
Fax: 210/829-4153

record on appeal are the requests for admissions Newman served on Utica, the most pertinent one of which follows:

> *REQUEST FOR ADMISSION NO. 21:* That there was one or more employees of [Newman's] employer herein of the same or similar employment class as [Newman] who worked at least 210 days during the year immediately preceding the date of [Newman's] injury on or about the 29th day of September, 1988[,] and who did such work in Houston, Harris County, Texas, or in a neighboring community.

To this inquiry Utica responded, "Denied." Newman cites this court to *Texas Employer's Insurance Association v. Miller*, 596 S.W.2d 621, 625 (Tex.Civ.App.—Waco 1980, no writ), where the Waco Court of Appeals discussed a request for admission, similar to number 21, which was denied by the defendant, while detailing evidence of the second wage rate prong allowing the plaintiff to proceed to the just and fair wage rate prong. However, the Waco Court of Appeals specifically wrote that "moreover, the evidence is undisputed" that the employee "did not work as much as 210 days during the year immediately preceding the injury, or that there was any employee of the same class who worked." *Miller*, 596 S.W.2d at 625. The *Miller* court found some evidence of other employees of the same class upon which to base its opinion.[3] In the present case, however, the record is absolutely silent as to any other employees of the same class. There is no stipulation, no testimony, and no documentary evidence with even the slightest mention of the them. Although we agree that this type of issue must be viewed liberally, we cannot find some evidence where there is none.

[3–5] We determine that when an answering party denies or refuses to make an admission of fact, such refusal is nothing more than a refusal to admit a fact. It is not evidence of any fact except the fact of refusal. *See American Communications Telecommunications, Inc. v. Commerce North Bank*, 691 S.W.2d 44, 48 (Tex.App.—San Antonio 1985, writ ref'd n.r.e.); *Carbonit Houston, Inc. v. Exchange Bank*, 628 S.W.2d 826, 829 (Tex.App.—Houston [14th Dist.] 1982, no writ). Thus, Utica's answer of "denied" to request for admission number 21 is not legal and competent evidence to satisfy the second wage rate prong. Even if we treat Utica's response as an admission, it would not help Newman. The "second prong" under article 8309, § 1 does not limit the relevant inquiry to employees of the *injured worker's employer*. Rather, the scope extends to employees of the same class, in the same or similar employment, in the same neighboring place, employed by the injured employee's employer or *any other employer*. *Burleson Indep. Sch. Dist. v. Johnston*, 598 S.W.2d 35, 38 (Tex.Civ.App.—Waco 1980, no writ). Newman presented no evidence with regard to the existence or nonexistence, of the relevant type of employee employed by someone *other than* Newman's employer. She failed to meet her burden of proof.

We overrule Newman's first point of error.

Because of our disposition in the first point of error we decline to review the second and third points of error.

We affirm the trial court's judgment.

Aby M. ALMAHRABI, Appellant,

v.

Ronald L. BOOE and Ronald Salcido, Appellee.

No. 08–93–00078–CV.

Court of Appeals of Texas, El Paso.

Nov. 10, 1993.

Rehearing Overruled Jan. 26, 1994.

Defendant appealed from $5,000 justice court default judgment entered against him.

3. It should be noted that the Beaumont Court of Appeals followed the analysis of *Miller* in *Standard Fire Insurance Co. v. Morgan*, 718 S.W.2d 880, 881 (Tex.App.—Beaumont 1986), *rev'd on other grounds*, 745 S.W.2d 310 (Tex.1987). Upon review of the Beaumont court's opinion by the Texas Supreme court's opinion, there is a significant factual difference from this case. The supreme court points out in *Morgan* that the defendant failed to timely serve the answers on the plaintiff; thus the answers were deemed admitted under Tex.R.Civ.P. 169(1).

The County Court at Law Number Two of El Paso County, John Fashing, J., dismissed appeal for untimely payment of costs of appeal, and defendant appealed. The Court of Appeals, Barajas, J., held that $10,000 bond was insufficient to cover costs, as required to perfect appeal.

Dismissed.

1. Justices of the Peace ⇐159(7)

Appellant's $10,000 appeal bond, which was double amount of judgment in justice court, was insufficient to cover costs of appeal, as required to perfect appeal from judgment. Vernon's Ann.Texas Rules Civ.Proc., Rule 573.

2. Justices of the Peace ⇐154

Compliance with each requirement to perfect appeal to county or district court from justice court is jurisdictional, and only compliance with each requirement will act to perfect appeal. Vernon's Ann.Texas Rules Civ.Proc., Rule 573.

3. Appeal and Error ⇐393

Supersedeas bond may serve as cost bond to perfect appeal if it is sufficient to secure costs. Vernon's Ann.Texas Rules Civ. Proc., Rule 143a.

Richard C. White, El Paso, for appellant.

Richard Gonzalez, Miranda & Boyaki, El Paso, for appellee.

Before OSBORN, C.J., and KOEHLER and BARAJAS, JJ.

OPINION

BARAJAS, Justice.

This is an appeal from the trial court's order of dismissal of an attempted appeal from the justice court. The attempted appeal was dismissed due to Appellant's failure to pay the required costs of appeal within 20 days after being notified to do so by the El Paso County Clerk's office pursuant to Rule 143a of the Texas Rules of Civil Procedure. In his sole point of error, Appellant challenges the trial court's order of dismissal. We dismiss the attempted appeal.

I. *PROCEDURAL HISTORY*

Ronald Booe and Ronald Salcido, Appellees, filed suit against Aby Almahrabi, Appellant, in justice court seeking damages in the amount of $5,000. Appellant was duly cited, but failed to appear at the trial, resulting in a default judgment of $5,000, plus $40 in costs being rendered in favor of Appellees on September 9, 1992. Appellant then attempted to appeal this judgment to the County Court at Law Number Two and obtain a *de novo* review. *See* TEX.R.CIV.P. 574b.

On September 21, 1992, in an attempt to perfect his appeal to the county court at law, Appellant properly filed the requisite $10,000 appeal bond in the justice court. On September 24, 1992, Appellant was notified by the county clerk's office that the costs of the appeal must be paid to the county clerk's office within 20 days from the date of the notice, or the appeal would be deemed not perfected pursuant to Rule 143a.[1] The costs of the appeal were not tendered to the county clerk's office until November 6, 1992, some 39 days after the notice was received by the attorney's office.

On November 9, 1992, Appellant filed his Motion to Retain Appeal. In response, Appellees filed their Motion to Dismiss Appeal. On December 10, 1992, after hearing both motions, the trial court found that the payment of costs in accordance with TEX. R.CIV.P. 143a is a jurisdictional prerequisite; therefore, Appellant's appeal was deemed not perfected and the trial court was without jurisdiction to entertain the appeal.

II. *DISCUSSION*

[1] The sole issue in this appeal is whether under the facts of the instant case, Appellant's appeal bond in the amount of $10,000 is sufficient to perfect the appeal from the justice court to the county court at law. Appellant asserts that his $10,000 appeal bond filed with the justice court is sufficient to cover the costs of appeal and thus, is all that is

1. The record establishes that notice was sent to Appellant's attorney, via certified mail, and received on September 28, 1992. The amount of the costs specified in the notice was $110.

required by the Texas Rules of Civil Procedure to otherwise perfect the appeal.

[2] In order to perfect an appeal to the county or district court from a justice court, an appellant must:

(1) file an appeal bond as required by Rule 571 or file an affidavit of inability to pay under Rule 572; and

(2) pay to the county clerk, within 20 days after being notified to do so by the county clerk, the costs on appeal as required by Rule 143a.

Compliance with each of the above requirements is jurisdictional, and as the language in Rule 573 indicates, only compliance therewith will act to perfect the appeal.[2] *See* TEX.R.CIV.P. 573; *Depue v. Henderson*, 801 S.W.2d 178, 179 (Tex.App.—Houston [14th Dist.] 1990, no writ); *Farmer v. McGee Services, Inc.*, 704 S.W.2d 927, 928–29 (Tex.App.—Tyler 1986, no writ); *Meyers v. Belford*, 550 S.W.2d 359, 360 (Tex.Civ.App.—El Paso 1977, no writ).

The record in the instant case demonstrates that judgment was entered against Appellant in the amount of $5,000 in the justice court. Consequently, as a preliminary matter in attempting to perfect his appeal, Appellant was required to file within ten days from the date of judgment, a bond, with two or more good and sufficient sureties, to be approved by the justice, in double the amount of the judgment, payable to the Appellee.[3] As noted above, the record shows that Appellant properly filed a $10,000 appeal bond on September 21, 1992. However, in order to perfect his appeal, it was incumbent on Appellant to pay the county clerk, within 20 days after being notified to do so by the clerk, the costs on appeal in the amount of $110. The record in the instant case shows that Appellant failed to pay the required and requested costs within the 20–day period as provided by TEX.R.CIV.P. 143a.[4]

Appellant contends that the $10,000 appeal bond, which is analogous to a supersedeas bond, was sufficient to satisfy both Rules 571 and 143a. We disagree.

[3] A supersedeas bond may serve as a cost bond, if it is sufficient to secure the costs. *Young v. Kilroy Oil Co. of Texas*, 673 S.W.2d 236, 242 (Tex.App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.) (decided under old Texas Rule of Civil Procedure 356, now Texas Rule of Appellate Procedure 47[a]). The $10,000 bond filed by Appellant in this case is double the amount of the judgment in the justice court. This satisfies Rule 571, but is insufficient to cover the costs of appeal as required by Rule 143a. Appellant is $110 short. Accordingly, we hold that the trial court was without jurisdiction to hear the attempted appeal and was correct in finding that Appellant failed to comply with TEX.R.CIV.P. 143a. Further, the trial court was correct in finding that the appeal had not been perfected. Insofar as the county court at law was without jurisdiction to entertain Appellant's appeal, this Court is likewise without jurisdiction. Accordingly, the attempted appeal is dismissed for want of jurisdiction.

2. TEX.R.CIV.P. 573 provides as follows:

> When the bond, or the affidavit in lieu thereof, provided for in the rules applicable to justice courts, has been filed and the previous requirements have been complied with, the appeal shall be held to be perfected. TEX.R.CIV.P. 573. [Emphasis added].

3. TEX.R.CIV.P. 571 provides in pertinent part as follows:

> The party appealing, his agent or attorney, shall within ten days from the date a judgment or order overruling motion for new trial is signed, file with the justice a bond, with two or more good and sufficient sureties, to be approved by the justice, in double the amount of the judgment, payable to the appellee, conditioned that appellant shall prosecute his appeal to effect, and shall pay off and satisfy the judgment which may be rendered against him on appeal;.... TEX.R.CIV.P. 571. [Emphasis added].

4. TEX.R.CIV.P. 143a provides as follows:

> If the appellant fails to pay the costs on appeal from a judgment of a justice of the peace or small claims court within twenty (20) days after being notified to do so by the county clerk, the appeal shall be deemed not perfected and the county clerk shall return all papers in said cause to the justice of the peace having original jurisdiction and the justice of the peace shall proceed as though no appeal had been attempted. TEX.R.CIV.P. 143a. [Emphasis added].

4543 001 5-9-94 LHS

KLEBERG COUNTY COURT AT LAW
MARTIN J. CHIUMINATTO, JR.
Judge
KLEBERG COUNTY COURTHOUSE
P.O. Box 1556, Kingsville, Texas 78364
(512) 595-8565 - (512) 595-8525 / Fax

MILLY RAND-SMITH
Court Coordinator/
Court Recorder

May 4, 1994

Mr. Luther "Luke" Soules
Chair, Supreme Court Advisory Committee
Soules and Wallace
100 W. Houston Street, Suite 1500
San Antonio, Texas 78205-1457

Re: Proposed Rule Change
Rule 609(d) Juvenile
Adjudications of the
Texas Rules of Civil
Evidence

Dear Mr. Soules:

By way of introduction, I have the honor and privilege of serving as the Chair of the Juvenile Justice Committee of the Judicial Section of the State Bar of Texas. Our committee has been meeting regarding several changes to Title III of the Texas Family Code.

I am authorized to propose the following amendment to Rule 609(d) of the Texas Rules of Civil Evidence:

> (d) **Juvenile Adjudications.** Evidence of juvenile adjudications is not admissible under this rule, <u>except for proceedings conducted pursuant to Title III, Family Code, in which the witness is a party,</u> unless required to be admitted by the Constitution of the United States or Texas.

The suggested change would add the language which is underlined. The recommendation is consistent with Sectin 51.13 (b),Family Code, which reads as follows:

> "The adjudication or disposition of a child or evidence adduced in a hearing under this title may be used only in subsequent procedings under this title in which the child is a party or in subsequent sentencing proceedings in criminal court against the child to the extent permitted by the Texs Code of Criminal Procedure, 1965."

The suggested change would allow a juvenile's prior adjudications and dispositions to be used to impeach the juvenile only in subsequent proceedings in which the juvenile is a party. A juvenile's prior adjudications and dispositions could not be used to impeach the juvenile in any other proceeding in which the juvenile is merely a witness "unless required to be admitted by the Constitution of the United States or Texas."

Should you or your committee have any questions, please do not hesitate to call me at your convenience.

Respectfully submitted,

Martin J. Chiuminatto, Jr.

MJC/mrs
cc: The Honorable Nathan Hecht, Justice, Texas Supreme Court, P.O. Box 12248, Austin, Texas 78711
cc: The Hon. Eric G. Andell, Justice, 1st Court of Appeals, 1307 San Jacinto, 10th Floor, Houston, TX 77002
cc: The Hon. Harold C. Gaither, Jr., Judge, 304th District Court, 600 Commerce, 6th Floor, Dallas, TX 75202
cc: The Hon. Berta Alicia Mejia, Judge, 315th District Court, 1115 Congress, 4th Floor, Houston, TX 77002
cc: The Hon. Scott D. Moore, Judge, 323rd District Court, 2701 Kimbo Road, Fort Worth, TX 76111
cc: The Hon. Gladys M. Oakley, Judge, County Court at Law, One E. Main Street, Bellville, TX 77418
cc: The Hon. John J. Specia, Jr., Judge, 225th District Court, Bexar County Courthouse, San Antonio, TX 78205
cc: The Hon. Al Walvoord, Judge, County Court at Law, 200 W. Wall, Midland, TX 79701
cc: The Hon. Darlene A. Whitten, Judge, County Court at Law #1, 210 S. Woodrow Lane, Denton, TX 76205
cc: The Hon. Neel Richardson, Chair, Judicial Section, State Bar of Texas, P.O. Box 12487, Austin, TX 78711
cc: The Hon. Tricia Hall, Texas Center for the Judiciary, Inc., P.O. Box 12487, Austin, TX 78711
cc: The Hon. Bernard Licarione, Ph.D., Executive Director, Texas Juvenile Probation Commission, P.O.Box 13547, Austin,TX 78711
cc: The Hon. Scott K. Stevens, Attorney at Law, P.O. Box 946, Belton, TX 76513
cc: The Hon. Ray Willoughby, Joint Interim Committee, P.O.Box 12068, Capitol Station, Austin, TX 78711
cc: The Hon. Lisa Capers, Texas Juvenile Probation Commission, P.O. Box 13547, Captiol Station, Austin, TX 78711

OLDENETTEL & SADBERRY, P. C.
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
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November 15, 1993

By Telecopier

TRCP 684

Charles L. Babcock, Esq.
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Houston, TX 77210-4771

Anne L. Gardner, Esq.
Shannon Gracey Ratliff & Miller
201 Main Street, Suite 2200
Fort Worth, TX 76102-9990

Honorable Paul Heath Till
Justice of the Peace
Precinct 5, Place 1
6000 Chimney Rock, Suite 102
Houston, TX 77081

RE: Subcommittee on TRCP 523 - 734

Greetings:

I have received a response from our colleague, Anne Gardner, and I believe she has resolved the issue. If you would refer to procedure rule 14c, it appears that rule's provisions provide the appropriate provision for depositing cash in lieu of bond, and it appears that the rule applies across the board, including TROs and temporary injunctions. I appreciate Anne's work in finding this rule, and apologize to you that I did not find it personally.

It would appear the only remaining question is whether there should be some reference to procedure rule 14c in any of the other rules such as procedure rule 684, or at least in the advisory notes accompanying such rule, to avoid any confusion in the future. If you have any comments along these lines, feel free to let me know. Otherwise, if you agree with these observations, it appears that our work for the time being is done, and that there is no further necessity of addressing this matter as a Subcommittee prior to the meeting of the full Committee.

Again, much appreciation to Anne and to all of you for your willingness to work, and I look forward to our continued service.

Please let me know if anything has been overlooked or if you have any additional comments or questions.

Best regards.

Yours sincerely,

Anthony J. Sadberry (by SKB)

Anthony J. Sadberry

AJS/stb

cc: Luther H. Soules, III, Esq.
Chairman

4543.001

LHS

11-15-93

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		FAX NO.:
TO:	Charles L. Babcock, Esq.	(713) 752-4221
	Anne L. Gardner, Esq.	(817) 336-3735
	Hon. Paul Heath Till	(713) 666-7983
	Luther H. Soules, III, Esq.	(210) 224-7073

FROM: Anthony J. Sadberry

MATTER: Subcommittee on TRCP 523 - 734

If you have problems during transmission, please call 713/622-9220.

Number of Pages (including this page): 3

MESSAGE TO RECIPIENT:

Attorney: AJS Client: Sum Matter: _____

Date: November 15, 1993 Time: _____

Operator: Susie

FAX Message

cc LHS
Eng. HHD
11-15-93
4545 CCI

CLARENCE A. GUITTARD
GUITTARD, HYDEN & GUITTARD, P.C.
4849 Greenville Avenue, Suite 680
University at Greenville
Dallas, Texas 75206

DATE:	November 15, 1993
TO:	Luther H. Soules, III, Esq.
COMPANY:	Soules & Wallace
FAX PHONE #:	(210)224-7073
FROM:	Judge Clarence A. Guittard
SUBJECT:	Texas Rules of Appellate Procedure
# of Pages (including this cover sheet):	9

Message:

HHD –
Agenda.

State Rules of the Appellate Advocacy and Practice Section Recommendations

If you do not receive all pages, please call back immediately.

Voice: (214) 692-7868 Fax: (214) 692-7897

4543 001 UHS
11-18-93 MHD
SF

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November 15, 1993

VIA FACSIMILE (210) 224-7073

Luther H. Soules, III, Esq.
100 West Houston Street, Suite 1500
San Antonio, Texas 78205-1457

Re: Texas Rules of Appellate Procedure

Dear Luke:

For the past two years I have served as chair of the Committee on State Rules of the Appellate Advocacy and Practice Section of the State Bar. Last year we submitted to the Supreme Court a report recommending certain amendments to the appellate rules. I hope that a copy of that report has been referred to you. This year the committee met several times and is preparing a report with additional recommendations, including some modifications of last year's report. All these recommendations will be embodied in this year's cumulative report, which will represent at least three years of the committee's work. They also include proposed amendments to several of the Texas Rules of Civil Procedure of particular concern to appellate lawyers.

We were hoping to have these recommendations ready for action for the Advisory Committee at it first meeting, but the final draft has not yet been circulated to the entire membership for their comments and approval. It should be ready for consideration by the Advisory Committee within a few weeks.

So that you and the Advisory Committee may be informed concerning our proposed amendments, I give you a summary of the major proposals in the 1992 report and additional proposals to be included in the cumulative report.

1992 Proposals

1. **Rights of Absent Parties.** The Committee recommends amendments to various rules for the purpose of clarifying which parties to the trial court's judgment are parties to the appeal, bound by the judgment of the appellate court, and entitled to notice of filings in and orders of the appellate court.

2. **Review on Partial Record. TRAP 53(d).** This rule would be

clarified to provide expressly that the presumption of completeness of the record arising when the appellant appeals on a partial statement of facts and files a statement of the points to be relied on applies to points complaining of factual or legal sufficiency of the evidence to support a fact finding.

3. Findings and Conclusions. TRCP 297(b), 298, 329b(f). Because of uncertainty of the effect of findings and conclusions filed after expiration of the trial court's plenary power over the judgment, these rules have been clarified to provide expressly that expiration of the plenary power does not affect the court's authority to file findings and conclusions. Although such findings and conclusions do not in themselves change the judgment, they may support a timely motion to correct, modify, or reform the judgment or a ground for reversal on appeal.

Also, the proposed amendment to Rule 298 would extend the time for filing a request for amended findings and conclusions from ten to twenty days.

4. Date of Receiving Notice of Judgment. TRCP 306a(5). This rule would be amended to incorporate the sentence recently added to TRCP 5(b)(5) providing that the court's order under TRCP 306a should expressly recite a finding of the date on which the movant received notice of the judgment.

5. Dismissal for Noncompliance with Local Rules. TRAP 1(b). An addition to this rule would provide that no appeal should be dismissed for noncompliance with a local rule without notice and a reasonable opportunity to comply.

6. Signing, Filing, Service, etc. TRAP 4, 121. These rules have been extensively revised to codify and clarify various provisions applying to filings generally in the appellate courts, including original proceedings. Requirements for the record in original proceedings have been clarified.

7. Leading Counsel. TRAP 4(b) (new). This proposal would permit a party to designate leading counsel on whom papers may be served and to whom notices may be given. In the absence of such a designation, the first attorney whose signature appears would be treated as leading counsel. **TRAP 91 and 132(c)** would be amended to allow clerks to send copies of notices, orders, and opinions to leading counsel only. This would substantially reduce the mailing burden on appellate clerks, as well as on opposing counsel.

8. Computation--Inaccessibility of Clerk. TRAP 5. This proposal would extend the time for filing when the last day of the filing period would fall on a day when the clerk's office is closed

for any reason, such as extreme weather or a non-statutory holiday. A certificate by the clerk would provide proof.

9. Amicus Curiae--Identification of Client. TRAP 20. An amicus curiae would be required to identify the client on whose behalf the brief is tendered.

10. Contest of Pauper's Affidavit--Swearing. TRAP 40(a)(3)(C). Because of uncertainty as to whether the contest must be sworn to, alternative proposals are presented to resolve this question. This matter was included in the report of last year's committee and is now embodied in alternative drafts.

11. Notice of Limitation of Appeal--Caption. TRAP 40(a)(4). This proposal would require any document containing a notice of limitation of appeal to be expressly so entitled.

12. Cross-Appeals. TRAP 40a (new). This proposal would clarify the requirements for a cross-appeal against an appellant, a co-appellee, or any other party to the trial court's judgment.

13. Time for Appeal--Motion to Modify. This rule would be amended to conform to TRCP 329(g) by including the filing of a motion to modify, correct, or reform the judgment as an event extending the time to file an appeal.

14. Bond--Names of Parties. TRAP 46(a). A requirement that the bond or certificate of deposit list the names of all appellants and appellees would resolve any uncertainty as to who is a party to the appeal.

15. Certificate of Deposit--Content. TRAP 46(b). This proposal would prescribe the contents of a certificate in lieu of bond, in accordance with existing law.

16. Contents of Transcript. TRAP 51(a). This proposal would routinely include in the transcript any motion to correct, modify, or reform the judgment because Rule 329b(g) provides that such a motion, like a motion for new trial, extends the appellate timetable. This rule would also be amended to include routinely the notice of filing of appeal, any request by a nonparty for copies of briefs, orders, and opinions, and any notice of cross-appeal if filed in the trial court.

17. Original Papers in Lieu of Transcript. TRAP 51(e) (new). This proposal would permit the appellant, on motion, notice, and order of the trial court, to appeal on the original papers and thus avoid the expense of copies for the transcript. The papers would be arranged, numbered, indexed, bound and certified in the same

manner as any other transcript. Loss of the transcript is rare and if it occurs copies could be substituted from the parties' files.

(The 1993 report makes this the preferred procedure for preparing the transcript, with an option of requiring copies on motion.)

18. Briefs--Addresses of Parties. TRAP 74(a), 131(a). This proposal would relieve the appellant or petitioner of the burden to list in the brief or application the addresses of parties represented by counsel and, in the case of a party not represented, would allow the attorney to certify that he or she has made a diligent inquiry but has been unable to discover the address.

19. Successive Application for Writ of Error--Time. TRAP 130(c). This rule would be amended to provide alternatively that a successive application may be filed within ten days after the filing of any previous application because if an extension has been granted for the original application, the forty-day period after the order overruling the motion for rehearing may allow less than ten days for filing the successive application.

20. Remand to Court of Appeals--Factual Sufficiency. This amendment would clarify the requirements for obtaining a remand to the court of appeals for consideration of factual sufficiency points not previously considered.

21. Orders Directing Form of Transcript and Statement of Facts Following TRAP 51 and 53. These orders would be revised and would adopt generally the format now required in criminal cases by the Court of Criminal Appeals.

1993 Proposals

22. Suspension of Rules. TRAP 2(b). This rule, which gives the appellate court authority in criminal cases to suspend the requirements and provisions of any rule in a particular case, would be amended to apply to civil cases.

23. Form of Papers Filed. TRAP 4(d). This rule would be amended to prescribe the requirements for copying, typeface, footnotes, binding, etc., of papers, including briefs.

24. Evidence on Motions. TRAP 19(d). A motion based on facts within the personal knowledge of the attorney signing the motion would not need to be verified.

25. Perfection of Appeal and Security for Costs. TRAP 40, 41, 46. The Committee proposes to abolish the requirement of a

bond or other security for costs on appeal and to provide instead for the appellant to pay the clerk and court reporter for the transcript and statement of facts, or make satisfactory arrangements for such payment, before the record is filed. The appeal would be perfected by filing and serving a notice of appeal identifying the appellants and the appellees. A file-stamped copy of the notice would be filed in the appellate court by the clerk of the trial court.

26. Parties to the Appeal. TRAP 40. The notice of appeal would list all parties to the trial court's judgment and would identify the appellants and the appellees. The notice would be served on all parties to the trial court's judgment. Those not listed as appellants or appellees would not be parties to the appeal, unless named in a later notice. Parties to the trial court's judgment not named as appellants or appellees would not be sent copies of papers filed in or orders issued by the appellate court unless they serve and file a request for such copies, and they would not be bound by the judgment of the appellate court. Liberal provision would be made for amendment of the notice. (A minority report will be submitted on this proposal.)

27. Original Papers. TRAP 51. This proposal would permit the appellant to appeal on the original papers and thus avoid the expense of copies for the transcript. The papers would be arranged, numbered, indexed, bound, and certified in the same manner as any other transcript. The trial court, on motion and notice, would have discretion to order that copies be used. Copies would be supplied from the parties' files in the rare case of loss of the transcript. On disposition of the appeal, the papers would be sent back to the trial court.

28. Filing Appellate Record. TRAP 12, 51, 53. The responsibility for filing the transcript and statement of facts would be transferred from the appellant to the court reporter and the clerk of the trial court, who would be responsible to the appellate court. A copy of the notice filed with the appellate court would advise that court of the pendency of the appeal.

29. Record on Appeal. TRAP 50, 55. The record on appeal would consist of all papers filed in the trial court, but only those designated by the parties would be included in the transcript. Any other papers designated by any party or by the trial or appellate court would be certified in a supplemental transcript and transferred to the appellate court by the clerk of the trial court on informal request of any party or of the trial or the appellate court.

30. Party Not Participating in Trial. TRAP 41, 45, 54a .

Rule 45, allowing a writ of error within six months of judgment by a party not participating in the trial, would be repealed and Rule 41 would be amended to allow such a party to file a notice of appeal within six months of judgment.

31. Suspension of Enforcement of Judgment. TRAP 47(b). The trial court would have authority to suspend enforcement of a money judgment on a showing that posting the amount of a supersedeas bond or deposit would cause irreparable damage to the judgment debtor and no substantial harm to the judgment creditor by an order adequately protecting the judgment creditor against any loss occasioned by the appeal.

32. Contents of Transcript. TRAP 51(a). Instead of "live pleadings," which may be difficult for the clerk to identify, this rule would direct the clerk to include the last petition and answer and any supplement thereto and would expressly allow the clerk to consult informally with the attorneys concerning the pleadings to be included.

33. Briefs. TRAP 74. Instead of points of error, the appellant would be permitted to include in his brief a statement of the issues presented, expressed in the terms and circumstances of the case, in short and concise form and without argument or repetition. This rule would also be amended to allow briefs to include a summary of the argument.

34. Briefs, Cross-Appeals. TRAP 74. If an appellee's brief contains cross-points seeking relief from the trial court's judgment, the limit would be seventy-five pages. Alternatively, the appellee may file a separate brief in a cross-appeal, subject to the rules for an appellant's brief.

35. Appellant's Brief in Reply. TRAP 74. The appellant may file a brief in reply to the appellee's brief, limited to twenty-five pages, within twenty-five days of the filing of the appellee's brief. Such a brief may contain a reply to a cross-appeal.

36. Modification of Time for Filing Briefs. TRAP 74(n). This rule would be amended to provide that a motion for extension of time to file a brief may be filed as of right within fifteen days of the date the brief is due.

37. Damages for Delay. TRAP 84. This rule would be amended to adopt the federal rule that the appellate court may assess such damages for delay as it considers appropriate and just.

38. Reconsideration by Court of Appeals. TRAP 101, 131(e). Rule 101, which now provides an opportunity for the court of

appeals to review its opinion and judgment in criminal cases on filing a petition for discretionary review, would be amended to apply also to civil cases on filing an application for writ of error. Rule 131(e) would also be conformed to the practice in criminal cases by abolishing the requirement of a motion for rehearing as a condition of further review.

39. Designation of Respondent in Original Proceedings. TRAP 121(a)(2). In original proceedings in the appellate court, the real party in interest, rather than the judge, court, tribunal, or other public official, would be designated as respondent.

40. Execution Superseded. TRCP 634. This rule would be amended to make clear that the filing and approval of a supersedeas bond prevents any further attempts to enforce a judgment, whether or not an execution has been levied..

41. Post-Judgment Garnishment. TRCP 659-79. Various clarifying amendments to these rules are recommended.

The above summary of the Committee's 1993 recommendations is tentative and incomplete, but it indicates the scope of the Committee's proposals. Various minor and clarifying amendments to other rules are also recommended.

The various proposals for amendment of the appellate rules submitted to the Advisory Committee have not been transmitted to the State Rules Committee of the Appellate Practice and Advocacy Section, but that Committee, if so requested, will put these proposals on its agenda for 1994.

Yours respectfully,

Clarence A. Guittard

Clarence A. Guittard

cc: See Attached List

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January 10, 1994

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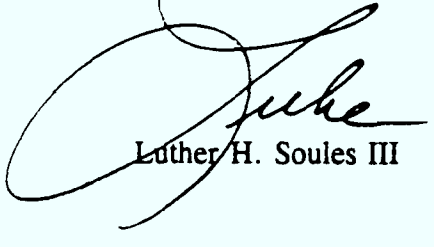
Dallas, Texas 75275-0016

Honorable Clarence A. Guittard
Guittard, Hyden & Guittard
4849 Greenville Avenue, Suite 680
Dallas, Texas 75206

Dear Professor Dorsaneo and Judge Guittard:

Enclosed is a copy of the opinion in *Borden, Inc. v. Guerra* which, at page 526 footnote 5, identifies a current appellate problem describing it as "a ridiculous waste of judicial resources." Do you see a way to fix this problem?

Very truly yours,



Luther H. Soules III

LHSIII:gc
Enclosure
Doc # 11092.01
cc: Justice Nathan L. Hecht

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(512) 328-5511 TELEFAX (512) 327-4105
HOUSTON, TEXAS OFFICE: 1360 POST OAK BLVD., SUITE 1500
HOUSTON, TEXAS 77056-3020
(713) 297-0500 TELEFAX (713) 297-0555

AFFILIATED OFFICE, MONTERREY, MEXICO
CORRESPONDENT OFFICE AUSTRALIA

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

ture lost wages and employment benefits exceeded the amount requested by appellee in his pleadings. However, appellants have waived this point of error.

The amount of the remittitur requested from the trial court does not conform with the amount of the remittitur requested from this Court. In their Motion to Modify, Correct or Reform Judgment, Motion for New Trial, and Motion for Judgment Notwithstanding the Verdict, appellants asked the trial court for a $260,000 remittitur. However, they ask this Court for only a $50,000 remittitur. This discrepancy occurs because the grounds for the remittitur requested from the trial court are not the same as the argument for remittitur on appeal. Because of this discrepancy, appellants have presented nothing for appellate review. *Allsup*, 808 S.W.2d at 655; *Bennie*, 735 S.W.2d at 285.

Appellants also failed to preserve error for appellate review because they failed to object with sufficient particularity to allow the trial judge to make an informed ruling. TEX.R.APP.P. 52(a); *McKinney*, 772 S.W.2d at 74. Appellants' Motion to Modify, Correct or Reform Judgment is confusing and misleading. By this Motion, appellants argued to the trial court that the damages for past and future lost wages and employment benefits under appellee's *fraud* claim exceeded the amount sought by appellee in his *second* amended original petition. In fact, the damages award in question flowed from the wrongful discharge claim, not the fraud claim. In addition, appellee's sixth amended original petition, not his second amended original petition, constituted his live pleadings for trial. Moreover, by the time of trial, an objection directing the trial court's attention to appellee's second amended original petition was meaningless, since superseded petitions are fully replaced by amended petitions, except to the extent they are incorporated by reference. TEX.R.CIV.P. 65.

Finally, in their Motion for Judgment Notwithstanding the Verdict and to Disregard Jury Findings, appellants argued to the trial court that no pleadings support the jury's responses to questions 2(1) and 2(2) because appellee pleaded for a maximum of $100,000. However, as stated earlier, a motion for judgment notwithstanding the verdict does not preserve error caused by an award of damages in excess of the amount pleaded. TEX.R.CIV.P. 324(b)(4); *Pipgras*, 832 S.W.2d at 367.[5]

We hold that appellants waived their right to complain about the variance between the award of future lost wages and the amount pleaded. Appellants' fifth point of error is overruled.

5. Rule 324(b)(4) states:

> (b) **Motion for new trial required.** A point in a motion for new trial is a prerequisite to the following complaints on appeal:
>
> • • • • • •
>
> (4) A complaint of inadequacy or excessiveness of the damages found by the jury.

Nothing could be clearer, and this Court is bound to follow the rule.

However, applying Rule 324(b)(4) to a complaint that the damages exceed those pleaded produces bizarre results. A trial court cannot render judgment in excess of the pleaded amount, and yet, here it has. The trial court could have granted the motion j.n.o.v., and we would be in error to reverse the trial court for granting such a timely motion. However, since the trial court denied the motion, appellants are required to take the additional step of requesting a new trial on the issue. To what result? Granting the parties a new trial because the judgment did not conform to the pleadings is a ridiculous waste of judicial resources. And should the trial court deny the motion, then how does this court review the case? Can we render a decision on the issue preserved by motion for new trial? Or shouldn't we rather only reverse and remand since we are actually reviewing only the denial of the motion for new trial, and "you only get what you ask for."

Finally, excepting a claim of damages in excess of pleadings from the ambit of Rule 324 will not defeat the purpose of Rule 324. Every other situation covered by Rule 324 addresses questions of fact. Such questions are not best presented to an appellate court. The rule drafters correctly determined that such deficiencies should be brought to the attention of the trial court, which is in the best position to evaluate the claim and grant immediate relief without the parties going to the expense of the appeals process. Furthermore, an affirmative answer to such a question would require remand to the fact finder to resolve those unanswered issues. However, the present situation raises no fact questions. The pleadings are simply inadequate to cover the damages awarded. Why this legal, procedural issue may not be brought in this Court is a question that only the Supreme Court can explain, and we hope they do so in the near future

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711

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FAX: (512) 463-1365

CHIEF JUSTICE
THOMAS R. PHILLIPS

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JACK HIGHTOWER
NATHAN L. HECHT
LLOYD DOGGETT
JOHN CORNYN
BOB GAMMAGE
CRAIG ENOCH
ROSE SPECTOR

CLERK
JOHN T. ADAMS

EXECUTIVE ASS'T
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T
NADINE SCHNEIDER

December 20, 1993

HHP
SCAC. Subc.
Agenda
✓ COAJ Staff

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed is a letter from Charles Spain regarding the Texas Rules of Appellate Procedure.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

CHARLES ADKIN SPAIN, JR.
Court of Appeals for the Third District of Texas
Post Office Box 12547
Capitol Station
Austin, Texas 78711-2547

Staff Attorney
Telephone: (512) 463-1733

December 3, 1993

The Honorable Nathan Hecht
Justice
The Supreme Court of Texas
Supreme Court Building Room 104
201 West 14th Street
Austin, Texas 78701

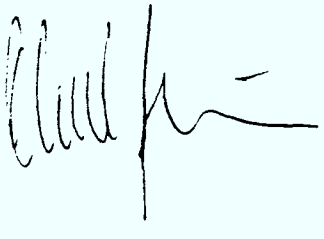
Re: Texas Rules of Appellate Procedure, et cetera

Dear Justice Hecht:

First, my thanks to you and the Court for publishing the proposed amendments to the Rules Governing Admission to the Bar of Texas in the *Texas Register*. 18 Tex. Reg. 8999 (1993). In my opinion, it would be desirable for the Court to publish *all* orders of general applicability (including approval of local rules, rules governing electronic recording of the statement of facts, et cetera) in the *Register* so the rules can be found somewhere other than the clerk's office.

Second, perhaps Professor Dorsaneo's committee could consider the use of the term "file" in the Texas Rules of Appellate Procedure. It appears to me that a party "tenders" a document for filing, while it is the clerk of the appellate court who actually "files" the document. I do not believe that the Rules currently require the clerk to file every item tendered. This is picky, I know, but picky often matters in procedural disputes.

Respectfully,



MEMORANDUM

TO: Justice Hecht March 8, 1994

FROM: Lee Parsley

RE: TRAP 4(b) & TRCP 5

TRAP 4(b) and TRCP 5

Both Texas Rule of Appellate Procedure 4(b) and Texas Rule of Civil Procedure 5 provide that a document deposited in the United States mail, properly addressed and stamped, is deemed to have been filed on time if deposited in the mail on or before the last day for filing the document and received by the court within ten days.

One of the Deputy Clerks told me that they often receive documents (especially motions for rehearing) which were delivered to a private mail service (*i.e.* Federal Express, Airborne Express, etc.) on the due date but which arrived at the Court the day after the due date. He asked if these were timely filed under TRAP 4(b) since TRAP 4(b) (and TRCP 5) provide that the document must have been "sent to the proper clerk by first-class United States mail . . .." Although I did not opine as to the timeliness of the filing, it does point up a possible problem in the rules.

Should we have the SCAC look at the advisability of expanding TRAP 4(b) and TRCP 5 to include methods of delivery other than first class United States mail?

4543.001

4-14-94

hnd

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL. (512) 463-1312
FAX (512) 463-1365

April 13, 1994

HHD
Scott TRAP Task Force
Agenda
Scott Luke staff

TRAP 5(e)

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed is a copy of a letter from Charles Spain regarding the Texas Rules of Appellate Procedure.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

CHARLES A. SPAIN, JR.
Court of Appeals for the Third District of Texas
Post Office Box 12547
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Austin, Texas 78711-2547

Staff Attorney
Telephone: (512) 463-1733

April 7, 1994

The Honorable Nathan Hecht
Justice
The Supreme Court of Texas
Supreme Court Building Room 104
201 West 14th Street
Austin, Texas 78701

Re: Texas Rules of Appellate Procedure

Dear Justice Hecht:

Here are three more suggestions regarding the rules:

First, Texas Rule of Appellate Procedure 74(a) requires the clerk to notify "the parties to the trial court's final judgment or their counsel, if any, of the judgment and *all orders* of the court of appeals." (Emphasis added). Does the supreme court really intend for notice to be sent to all parties to the trial court's final judgment on matters such as granting a motion for extension of time to file the record? I doubt any of the courts of appeals currently send postcard notices on orders on routine motions to all parties to the trial court's final judgment. If this is the rule, we need to comply, but it seems like a great deal of effort, paper, and postage for not much. In addition, as my final point discusses, how does the clerk send notice to everyone concerning orders that are rendered before the briefs are filed?

Second, perhaps Texas Rule of Appellate Procedure 5(e) could be amended to allow an alternative to notice by first-class mail. The Third Court uses interagency mail to notify the attorney general, saving the state quite a bit of money in postage.

Finally, I believe the Texas Rules of Appellate Procedure should be amended to require the parties to file a docketing statement. I understand that the State Bar Appellate Practice Section has recommended such an amendment, but I have not seen a copy of the specific proposal.

Beginning in spring 1993, the staff attorneys at the Third Court have screened cases for

jurisdiction when the transcript is tendered for filing. The single biggest task in this process has turned out to be determining who are the appellants and appellees, who are the "other parties to the trial court's final judgment," and who are all of the aforementioned parties' attorneys. It is a ***big*** pain, and we get no help from the attorneys. Texas Rule of Appellate Procedure 74(a) requires the parties to furnish this information when their briefs are filed, but it is fairly worthless to us at that point in time since we have already ferreted out the information on our own about two months earlier.

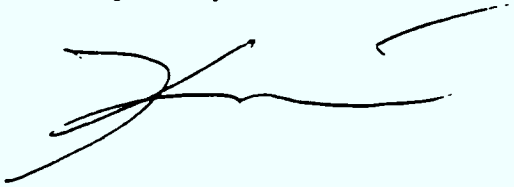
A surprisingly large number of appeals are disposed of on jurisdictional grounds before the briefs are tendered. We are not really giving procedural due process if we wait until the briefs are tendered to assemble an accurate mailing list for notices. In my opinion, Rule 74(a) just does not work. Providing a list of parties and attorneys as a part of the principal pleading works, of course, in both the trial court and supreme court because the petition and answer and the application for writ of error and response are usually the first documents tendered; this is not the case in the court of appeals.

I have attached a suggestion for a docketing statement that would provide the clerk of the court of appeals with all the essential information for docketing a cause on the case management system. Such a docketing statement would have to arrive before or concurrent with the transcript (or any motion for extension of time to file the perfecting instrument or transcript) to be of actual use. I feel certain that the parties will not provide the clerk with this information voluntarily; the supreme court will have to require it.

Forcing counsel to file such a statement would not only make docketing the appeal accurately much easier for the clerk, but also and more importantly force counsel to think about what they are doing and, thus, avoid many of the time consuming "you forgot to include *x* in the transcript" letters that the clerk's office sends.

Thank you for your continued receptiveness to suggestions.

Respectfully,



enclosure

COURT OF APPEALS THIRD DISTRICT OF TEXAS

CIVIL DOCKETING STATEMENT

3-9___-_____-C_V_

☐ Original proceeding: _____ (type)
☐ Petition for writ of error
☐ Accelerated appeal

Appellant 1:_____
Designated attorney in charge for appellant:_____
State Bar of Texas number:_____
Firm (if any):_____
Address:_____
Office telephone:_____
Telecopier:_____

Appellant 2:
Designated attorney in charge for appellant:_____
State Bar of Texas number:_____
Firm (if any):_____
Address:_____
Office telephone:_____
Telecopier:_____

(attach additional sheets as necessary if more than two appellants)

Appellee 1:_____
☐ Designated attorney in charge for appellee:_____
or
☐ Trial attorney for appellee:_____

State Bar of Texas number:_____
Firm (if any):_____
Address:_____
Office telephone:_____
Telecopier:_____

Appellee 2:_____
☐ Designated attorney in charge for appellee:_____
or
☐ Trial attorney for appellee:_____

State Bar of Texas number:_____
Firm (if any):_____
Address:_____
Office telephone:_____
Telecopier:_____

(attach additional sheets as necessary if more than two appellees)

Other, nonappealing parties to trial court's final judgment:_____

☐ Designated attorney in charge for other party:_____

State Bar of Texas number:_____

Firm (if any):_____

Address:_____

Office telephone:_____

Telecopier:_____

(attach additional sheets as necessary if more than one other party)

Trial court (in which cause was filed): ☐ _____ (list number) District Ct. ☐ County Ct.

☐ County Ct. at Law No. _____ ☐ Probate Ct. No. _____

County:_____

Trial court cause no.:_____

Trial court judge (who signed final judgment):_____

Trial court reporter:_____

Trial to: ☐ Court ☐ Jury

Type of case (consult list available from Clerk's office):_____

Perfecting instrument: ☐ Appeal bond ☐ Certificate of cash deposit ☐ Notice of appeal

Dates	Transcript (if known)
Trial court's final judgment signed:_____	p._____
Motion for new trial filed:_____	p._____
Overruled:_____	p._____
Request for findings of fact and conclusions of law filed:_____	p._____
Perfecting instrument filed in trial court:_____	p._____
Motion for extension of time filed:_____	p._____
Supersedeas bond filed:_____	p._____
Affidavit of inability to pay cost of appeal or give security filed:_____	p._____
Notice sent:_____	p._____
Contest filed:_____	p._____
Motion for extension of time for hearing on contest filed:_____	p._____
Motion for extension of time for hearing on contest signed:_____	p._____
Order ruling on contest signed:_____	p._____
Notice of limitation of appeal filed:_____	p._____
Order from trial court re original papers and exhibits:_____	p._____

Submitted by:_____

State Bar of Texas number:_____

Counsel for:_____

Date:_____

Signature:_____

Notes: Complete this statement and, *before the transcript or any motions are tendered for filing*, tender the statement in person or mail it to Clerk, Court of Appeals for the Third District of Texas, Post Office Box 12547, Austin, Texas 78711-2547. The Clerk will not docket a civil appeal based solely on receipt of this statement, but providing this information will help the Clerk to docket the appeal accurately and promptly. Submission of this statement by counsel will constitute an appearance. Thank you for your assistance.

CODES FOR CIVIL CAUSES
CASE MANAGEMENT SYSTEM

Code	Description
ADMIN	Administrative law
ASSAULT	Assault & battery
AUTO	Automobile
BILL-REV	Bill of review
BILLS	Bills & notes
CERT	Certiorari
CHILD	Child custody/adoption/termination
CON-LAW	Constitutional law
CONDEMN	Condemnation
CONSUMER	Consumer protection/DTPA
CONTRACT	Contract
CORP	Corporations & partnerships
CRED-RTS	Creditors rights
DEC-J	Declaratory judgment
DIVORCE	Divorce
DWOP	Dismissal for want of prosecution
ELECTION	Election contest
EXECUTE	Execution
F-ENTRY	Forcible entry & detainer
FORFEIT	Forfeiture
GUARDIAN	Guardianship
HABEAS	Habeas corpus
INJ	Injunction
INS	Insurance
INTENT	Intentional tort, other
JUV-ADJ	Juvenile adjudication
LANDLORD	Landlord & tenant
LIBEL	Libel & slander
LIEN	Lien
MALPRAC	Malpractice
MANDAMUS	Mandamus/prohibition
MENTAL	Mental illness
NEGL	Negligence tort, other
NUISANCE	Nuisance
OIL-GAS	Oil & gas
PROBATE	Probate
PROD-LIA	Products liability
QUO	Quo warranto
REAL	Real estate
RECEIVER	Receivers
SANCTION	Sanctions
SCHOOL	Schools
SEC-TRAN	Secured transactions
SUM-J	Summary judgment
TAX	Tax
TRESPASS	Trespass
TRUST	Trusts
USURY	Usury
WILLS	Wills
WKR-COMP	Worker's compensation
WRIT	Writ of error
WRONG-D	Wrongful death & survival
ZONING	Zoning

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LHS
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THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
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FAX (512) 463-1365

TRAP 40

November 16, 1993

HHD
Agenda

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed is a letter from District Clerk W. H. Moore regarding the Rules of Appellate Procedure, a copy of which has been sent to Judge Guittard.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

W.H. MOORE, DISTRICT CLERK
HAYS COUNTY COURTHOUSE, ROOM 304
SAN MARCOS, TEXAS 78666
(512) 353-4346

HON. NATHAN HECHT, JUSTICE
SUPREME COURT OF TEXAS
P. O. BOX 12248
AUSTIN, TEXAS 78711

DEAR SIR;

I RECENTLY SPOKE TO BONNIE WOLBRUECK, DISTRICT CLERK OF WILLIAMSON, COUNTY, TEXAS, WHO TOLD ME THAT SHE IS ON AN ADVISORY COMMITTEE FOR THE POSSIBLE REVISION OF THE RULES OF APPELLATE PROCEDURE. SHE ADVISED, AS HAVE OTHER PERSONS, THAT I SHOULD ADDRESS MY CONCERNS TO YOU REFERENCE TWO AREAS IN THE RULES OF APPELLATE PROCEDURE.

AS THE DISTRICT CLERK OF HAYS COUNTY, I PREPARE ALL APPEALS THAT COME FROM THE DISTRICT COURTS OF MY COUNTY. WE HAVE A LARGE VOLUME OF PAPER THAT PASSES THROUGH OUR OFFICE AND THERE ARE OCCASIONS WHEN IT IS EXTREMELY DIFFICULT TO READ IT ALL AND DETERMINE WHAT IS ACTUALLY DESIRED BY THE ATTORNEYS. THERE ARE OCCASIONS WHEN BONDS ARE POSTED THAT ARE NOT APPEAL BONDS, AND THERE ARE TIMES WHEN FINDINGS OF FACTS AND CONCLUSION OF LAW ARE REQUESTED THAT ARE NOT APPEALS. THERE IS A POSSIBILITY THAT AN APPEAL IS DESIRED BUT WE DO NOT RECOGNIZE THAT FACT. THIS IS ESPECIALLY TRUE WHEN WE RECEIVE NO DESIGNATION OF RECORD OR NOTICE OF ITEMS TO BE INCLUDED IN THE TRANSCRIPT ON APPEAL.

I WOULD ASK THAT CONSIDERATION BE GIVEN TO REQUIRING THE RULES OF APPELLATE PROCEDURE, IN REGARD TO CIVIL CASES, TO READ THAT WRITTEN NOTICE OF APPEAL BE FILED AT THE SAME TIME AS THE POSTING OF THE

BOND. A WRITTEN NOTICE OF APPEAL WOULD INDICATE THE INTENTION OF THE ATTORNEY HAVING BEEN MADE AWARE OF THEIR INTENTION, THE CLERK WOULD BE ABLE TO PREPARE AND FILE THE TRANSCRIPT IN A TIMELY MANNER AND NOT HAVE IT COME TO HIS ATTENTION WHEN THE ATTORNEY CALLED TO CHECK ON THE PROGRESS BEING MADE ON THE PREPARATION OF THE TRANSCRIPT.

A DESIGNATION OF RECORD ON APPEAL IS OF THE UTMOST IMPORTANCE. THE RULES OF APPELLATE PROCEDURE STATE THAT THE ATTORNEY MAY FILE A DESIGNATION OF RECORD BUT THEY ARE NOT REQUIRED TO DO SO. WITHOUT A DESIGNATION OF RECORD, THE CLERK IS REQUIRED TO INCLUDE THE LIVE PLEADINGS ON WHICH THE CASE WAS HEARD. THIS CAUSES THE CLERK TO PRACTICE LAW OR TO ATTEMPT TO GUESS WHAT INSTRUMENTS ARE OF THE MOST IMPORTANCE TO THE ATTORNEY AND UPON WHICH HE IS BASING HIS APPEAL. A DESIGNATION OF RECORD ON APPEAL, OR NOTICE TO INCLUDE INSTRUMENTS IN THE TRANSCRIPT, WOULD PUT AN END TO THAT GUESSING GAME AND EXPEDITE THE PREPARATION AND FILING OF THE FINISHED TRANSCRIPT IN THE PROPER APPEALS COURT. A NOTICE OF APPEAL NEED BE NO MORE THAN ONE PAGE TITLED 'NOTICE OF APPEAL' AND STATE THAT FACT ALONG WITH THE DUE DATE IN THE COURT OF APPEALS.

YOUR CONSIDERATION IS MOST APPRECIATED AND IF I MAY BE OF ASSISTANCE IN ANY WAY, PLEASE LET ME KNOW

YOURS TRULY,

W. H. MOORE

XC: BONNIE WOLBURECK
DISTRICT CLERK
WILLIAMSON, CO.

W. H. MOORE, DISTRICT CLERK
ROOM 304 HAYS COUNTY COURTHOUSE
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June 23, 1994

Luke Soules
Chair, Supreme Court Advisory Committee
Soules & Wallace
10th Floor, 175 E. Houston Street
San Antonio, Texas 78205-2230

Re: Revisions to the Rules of Appellate Procedure

Dear Mr. Soules:

Justice Guittard spoke recently to the Appellate Section of the Dallas Bar Association about the work of the Committee on the Appellate Rules. He suggested that if we had any suggestions to drop you a note.

When the Committee considers the amendments to Rule 41, I think the Committee should clarify whether filing a Request for Findings of Fact and Conclusions of Law following a grant of *summary judgment* extends the appellate time tables. There is recent disagreement on this question. *Compare Algie Linwood v. NCNB of Texas,* No. 05-92-00196-CV, 1994 WL 23892 (Tex. App. — Dallas, Feb. 1, 1994, n.w.h.) (deadlines not extended), *with, Chavez v. The Housing Authority of the City of El Paso,* No. 08-93-00422-CV, 1994 WL 62812 (Tex. App. — El Paso, Mar. 3, 1994, n.w.h.) (deadlines extended).

My personal opinion is to follow the El Paso case, as it removes one more trap from the TRAP.

Very truly yours,

Alan B. Rich

ABR/at

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4-28-94

LHS hhd

THE SUPREME COURT OF TEXAS

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CHIEF JUSTICE
THOMAS R. PHILLIPS

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JACK HIGHTOWER
NATHAN L. HECHT
LLOYD DOGGETT
JOHN CORNYN
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CRAIG ENOCH
ROSE SPECTOR

CLERK
JOHN T. ADAMS

EXECUTIVE ASST.
WILLIAM L. WILLIS

ADMINISTRATIVE ASST.
NADINE SCHNEIDER

April 26, 1994

HHD
SCAC Sub Cs
Agenda
SBOT Court Rules Staff

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed is a letter from Charles Spain regarding TRCP 329b and TRAP 41.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

CHARLES A. SPAIN, JR.
Court of Appeals for the Third District of Texas
Post Office Box 12547
Capitol Station
Austin, Texas 78711-2547

Staff Attorney
Telephone: (512) 463-1733

April 25, 1994

The Honorable Nathan Hecht
Justice
The Supreme Court of Texas
Supreme Court Building Room 104
201 West 14th Street
Austin, Texas 78701

Re: Texas Rule of Civil Procedure 329b and Texas Rule of Appellate Procedure 41

Dear Justice Hecht:

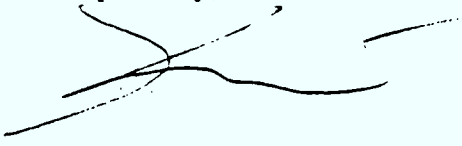
Yet another letter for the rules "in box."

In a thirty-day appeal (no motion for new trial filed), Texas Rule of Civil Procedure 329b(f) eliminates the ability of the trial court to change the judgment for the sole purpose of giving the potential appellant another bite at the apple to perfect an appeal when the potential appellant has failed to file a timely perfecting instrument. This occurs because the trial court's jurisdiction (thirty days after the signing of the final judgment) is the same as the deadline to file the perfecting instrument. Tex. R. Civ. P. 329b(d); Tex. R. App. P. 41(a)(1). The potential appellant's only remedy is to tender to the court of appeals a motion for extension of time to file the perfecting instrument. Tex. R. App. P. 41(a)(2).

In a ninety-day appeal (motion for new trial filed), the potential appellee has until the ninetieth day to file the perfecting instrument. Tex. R. App. P. 41(a)(1). The trial court, however, has jurisdiction over the case until the one-hundred-and-fifth day if the motion for new trial is overruled on the seventy-fifth day. Tex. R. Civ. P. 329b(e). The potential appellant, therefore, has two remedies: (1) tender to the court of appeals a motion for extension of time to file the perfecting instrument and (2) request the trial court to render a new judgment to restart the appellate timetables. There is, of course, case law that says the trial court cannot render a new judgment for the sole purpose of restarting the appellate timetables, but this can easily become a subjective analysis depending on how the second judgment is worded. *Anderson v. Casebolt*, 493 S.W.2d 509 (Tex. 1973) (note that second judgment in *Anderson* was apparently signed outside period of trial court's jurisdiction).

If this is indeed a problem worth fixing, one solution would be to change the deadline for ruling on the motion for new trial from the seventy-fifth day to the sixtieth day. *See* Tex. R. Civ. P. 329b(c). This would make the trial court's jurisdiction expire on the day the perfecting instrument is due, i.e., the ninetieth day.

Respectfully,



enclosure

4543.001

FARRIS & GREEN,

L.L.P.

ATTORNEYS AND COUNSELORS AT LAW

1300 WEST LYNN AVE.
SUITE 201
AUSTIN, TEXAS 78703-3997
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James E. Farris
Board Certified -- Family Law
Texas Board of Legal Specialization

Fellow -- American Academy of
Matrimonial Lawyers

Janice L. Green
Board Certified -- Family Law
Texas Board of Legal Specialization

June 27, 1994

Mr. Luke Soules
Chair, Advisory Committee of the Supreme Court
Soules and Wallace
100 West Houston, 15th Floor
San Antonio, Texas 78205-1457

RE: Proposal to Abolish Appeal by Writ of Error in TRAP 45

Dear Mr. Soules:

I was very distressed to learn at the Appellate Practice Section Annual Meeting at the State Bar Convention last week of the proposal to abolish to Writ of Error practice in TRAP 45.

The proponents of the abolishment seemed to summarize their position as, "Why should someone who appears have only thirty days to appeal while someone who does not appear has six month?"

I would submit that this argument no more accurately touches upon the need for the Writ of Error practice than would an observation such as, "If the error is so blatant that it appears on the face of the record, the time for appeal should be nine months and not merely six months."

In my experience which has been exclusively family law for a considerable number of years, two circumstances seem to be commom to these Writ of Error situations: (1) the parties were still living together at the time of filing for divorce, at the time of service of citation, at the time of the divorce, at the time of the receipt of notice of the divorce, and at the time well past the thirty day period for appeal when the Respondent realized this was a "serious matter" (usually by the occurrence of something such as a "Well, I am moving out, taking all this stuff, and you can't get my retirement or anything else," or by the Sheriff's arrival to execute on the judgment); and (2) the party named on the citation was not the Respondent.

In response to the former-Respondent's attorney's questions of, "Why didn't you do something about this?" the following are typical responses: "She didn't sue me, she sued my father. That's his name"; "They put our daughter's name on the citation and not mine"; "He's filed for divorce five times before and never went through with it"; "We were living together/sleeping together/having sexual relations together the entire time."

I would submit that the Writ of Error practice in TRAP 45 should not be a abolished but instead left as it is.

Additionally, the threat of the six-month Writ of Error practice is singularly responsible for compelling many trial courts' following the mandates of the Texas Family Code and making a record in parent-child relationship cases so that an absent party could determine why he or she lost custody of the child, was denied regular visitation with the child, etc.

Writ of Error cases holding that such orders could be set aside six months later in default cases have compelled the now-customary making of a record in such cases.

Thank you for considering my position regarding this which I hope you will relay to the Committee.

Very truly yours,

James E. Farris

JEF/sc

cc: Mr. Brian Webb, Chair, Family Law Counsel of the Family Law Section, State Bar of Texas

4543.001

BASKIN & NOVAKOV
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6-20-94
SB

June 17, 1994

HHD, SCAC Supc - Appellate Sect Staff SBOT J. Hedtke

Luther H. Soules, III
Chairman, The Supreme Court Advisory Committee
c/o Soules & Wallace
100 West Houston, Suite 1500
San Antonio 78205

RE: Tex. R. App. P. 45

Dear Mr. Soules:

Clarence Guittard spoke yesterday to the Appellate Practice Section of the Dallas Bar Association concerning the proposed amendments to the rules of appellate procedure. I understood from his comments that the current version of the amendments propose to eliminate Tex. R. App. P. 45 without providing a new means of perfecting a direct attack on a judgment. I am a young attorney practicing generally in the area of commercial litigation. Because of my concern about this proposal, I am writing to respectfully offer to you and your committee my views in opposition to this idea.

My opposition is based solely on my experience as one Texas practitioner. Although my normal practice does not involve Rule 45, I had occasion to use it when an out of state client called me five months after a no-answer default judgment was rendered against it in a rural county. The record contained jurisdictional deficiencies as a result of failures to follow the Texas Rules of Civil Procedure and the long arm requirements. In addition, the pleadings were insufficient to support the judgment. It appeared that one or more of these matters would constitute error "apparent from the face of the record."

It was doubtful, however, that the client could meet the more difficult standards associated with a bill of review. Moreover, the bill of review would have been presented to a court presumably sympathetic to local counsel who had obtained the judgment in the first place.

As a result of this experience, I believe that there needs to be some manner of direct attack on a judgment, which does not require a party who does not participate in a trial to meet the standards of a bill of review. Six months to a year would seem to be a reasonable time to permit such an attack. Several people in the section meeting yesterday voiced similar concerns and we discussed various alternatives. It did not appear that any one alternative was particularly attractive. Based on my experience, however limited, I believe that Rule 45 should not be eliminated if no alternative is substituted in its place.

We all appreciate the time and effort that you and your committee have put into the proposed amendments.

Very truly yours,

Ronald R. Davis

RRD:rrd

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

Loyce L. CLICK, Sarah Click Troup, Joyce Click Holton, George Wayne Click, and The Estate of George Click, Deceased, Relators,

v.

Katherine TYRA, District Clerk, Harris County, Texas, Respondent.

No. B14-93-00884-CV.

Court of Appeals of Texas, Houston (14th Dist.).

Dec. 9, 1993.

Rehearing Denied Jan. 27, 1994.

Plaintiffs in asbestos action brought original proceeding seeking writ of mandamus compelling district clerk to prepare and file transcript in appeal of their case. The Court of Appeals, Sears, J., held that district clerk had no authority to require cash payment of costs of appellate transcript after appeal bond or cash deposit in lieu thereof had been filed.

Mandamus granted.

1. Appeal and Error ⇐371

District clerk could not require advance payment of costs of preparing transcript for appeal before preparing transcript, where appeal bond or cash deposit in lieu of appeal bond had been filed. V.T.C.A., Government Code § 51.318.

2. Appeal and Error ⇐373(1)

Filing cost bond is necessary and jurisdictional step in perfecting appeal. Rules App.Proc., Rule 40(a).

3. Appeal and Error ⇐387(1), 619

District clerk must accept appeal bond for perfection of appeal and once she does, she has duty to deliver transcript. V.T.C.A., Government Code § 51.318; Rules App. Proc., Rule 51(c).

4. Statutes ⇐214

Statute regarding fees due when service is requested from district clerk should be construed in harmony with Texas Rules of Appellate Procedure, since statute and rules pertain to same subject, have same general purpose, and relate to same conduct. V.T.C.A., Government Code § 51.318; Rules App.Proc., Rule 51(a).

5. Appeal and Error ⇐373(1), 388

Purpose of appeal bond or cash deposit in lieu of bond is to ensure that clerk's costs of preparing transcripts are paid. Rules App.Proc., Rule 46.

6. Mandamus ⇐16(1)

Petition for writ of mandamus to compel district court to prepare and file transcript in appeal was not rendered moot by district clerk's filing of transcript in case after petition was filed, where issue of requiring payment of costs of producing transcript in addition to appeal bond or cash deposit in lieu thereof was recurring problem, and district clerk appeared to believe that she was acting with clear authority. Rules App.Proc., Rule 46.

7. Appeal and Error ⇐781(4)

"Capable of repetition yet evading review" exception to mootness doctrine applies where act challenged is of such short duration that appellant cannot obtain review before issue becomes moot and there is reasonable expectation that same complaining party would be subjected to same action against.

See publication Words and Phrases for other judicial constructions and definitions.

8. Mandamus ⇐16(1)

District clerk's attempt to require advance payment for transcripts in addition to filing cash deposit in lieu of appeal bond was capable of repetition yet evading review, where district clerk could have short-circuited any attempt to challenge her actions by simply filing transcript after petition for writ of mandamus had been filed. Rules App. Proc., Rule 46.

9. Mandamus ⇐57(1)

Writ of mandamus petitioners had clear right to relief to prevent district clerk from requiring advance payment for costs of transcript in addition to cash deposit in lieu of appeal bond, where requiring advance pay-

ment for transcri
precluded by Rule
Rules App.Proc.,

Richard N. Cour

Thomas W. Tay
Nobles, Houston,
for respondent.

Before MURPH
DRAUGHN, JJ.

OPINIO
FOR

SEARS, Justice

The Motion for
the original opini
opinion is issued

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ment for transcript after bond was filed is precluded by Rules of Appellate Procedure. Rules App.Proc., Rules 46, 49(a).

Richard N. Countiss, Houston, for relators.

Thomas W. Taylor, Lynne Liberato, Jeff Nobles, Houston, David L. Tolin, Beaumont, for respondent.

Before MURPHY, SEARS and DRAUGHN, JJ.

OPINION ON MOTION FOR REHEARING

SEARS, Justice.

The Motion for Rehearing is Overruled, the original opinion is withdrawn, and this opinion is issued on rehearing.

In this original proceeding, Relators seek a Writ of Mandamus compelling Katherine Tyra, the District Clerk of Harris County, to prepare and file the transcript in the appeal of their case, now pending before this court. To protect our appellate jurisdiction and to insure the integrity of the appellate process, we granted leave to file. We now hold that Relators have a clear right to relief, and we grant the writ of mandamus.

This proceeding arose in Cause No. 90-04994, styled *Loyce Click, et al. v. Fibreboard Corp., et al.*, an asbestos case that was tried before a jury in the 281st District Court. At trial, the court granted Defendants' Motion for Instructed Verdict and rendered judgment for the defendants. Relators, plaintiffs in the case, timely perfected their appeal by filing a cash deposit of one thousand dollars, in lieu of an appeal bond, pursuant to TEX.R.APP.P. 46(b). They also filed a designation of transcript with the District Clerk's office. A few days later, Relators' attorney was informed by the District Clerk that the cost of preparing the transcript was $150.00, and that Relators would have to pay this fee before the District Clerk would prepare the transcript. Relator's attorney protested that the cash deposit covered such fees. The District Clerk still refused to prepare the transcript without advance payment of her costs, citing TEX. GOV'T CODE ANN. § 51.318 (Vernon 1988) and (Vernon Supp.1993). Relators filed the Writ of Mandamus to compel the District Clerk to prepare the transcript.

[1] Respondent relies on § 51.318 for her authority to require a cash payment before filing the transcript in the Court of Appeals. Section 51.318 allows the district clerk to collect fees at the time she is requested to *copy* a "record, judgment, order, pleading, or paper on file or of record in the district clerk's office." However, § 51.318 provides for the fees to be paid in cash, *or* the district clerk "may accept a bond as security for the fee imposed under this section." TEX.GOV'T CODE ANN. § 51.318(d) (Vernon 1988). Apparently, Respondent believes she can still demand a cash payment, after a bond has been filed as security. We hold that once the bond, or cash deposit in lieu thereof, is filed, the clerk cannot require more.

[2, 3] Under the Texas Rules of Appellate Procedure, an appeal is perfected when the appeal bond or cash deposit is filed, TEX.R.APP.P. 40(a), and filing a cost bond is a necessary and jurisdictional step in perfecting an appeal. *Fleming v. State*, 704 S.W.2d 530, 531 (Tex.App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). Thus, in an appeal, the district clerk must accept an appeal bond for perfection of an appeal, since she has no power to do otherwise. Once she does so, she has also accepted that bond as security for the fee imposed under § 51.318, and thereafter has a duty to deliver the transcript. *Pat Walker & Co. v. Johnson*, 623 S.W.2d 306, 309 (Tex.1981). This duty is clearly stated in TEX.R.APP.P. 51(c): "*Upon perfection of the appeal*, the clerk of the trial court *shall* prepare under his [her] hand and seal of the court and immediately transmit the transcript to the appellate court designated by the appellant" (emphasis added).

[4] Under the well established rule of statutory construction known as *in pari materia*, § 51.318 should be construed in harmony with the Texas Rules of Appellate Procedure, since the Rules and statute pertain to the same subject, have the same general purpose, and relate to the same conduct. *Cullen v. State*, 832 S.W.2d 788, 791

SPg0472

(Tex.App.—Austin 1992, pet. ref'd); *Lenhard v. Butler*, 745 S.W.2d 101, 105 (Tex.App.—Fort Worth 1988, no writ). The Texas Rules of Appellate Procedure *require* the district clerk to copy and transmit, among other things, "any filed paper any party may designate as material." TEX.R.APP.P. 51(a).

[5] It is clear from a review of the history of the rules governing the perfection of appeals, that the purpose of an appeal bond, or cash deposit in lieu of a bond, is to provide security to the district clerk and insure that she will recover the costs of preparing the transcript. Prior to the adoption of the Texas Rules of Appellate Procedure in 1986, perfection of an appeal in a civil case was governed by TEX.R.CIV.P. 354 (Vernon 1985) (repealed 1986). Until 1962, Rule 354 provided that the bond filed by the appellant covered the costs "of the court below." In 1962 the rule was amended to provide that the bond would specifically cover "the cost of the statement of facts and transcript." The wording of Rule 354, as it appeared in 1984, was incorporated almost verbatim into TEX.R.APP.P. 46 (Vernon Supp.1993), which now reads in pertinent part: "The bond on appeal shall have sufficient surety and shall be conditioned that appellant . . . shall pay . . . the cost of the statement of facts and transcript." Rule 46(a). Therefore, the purpose of an appeal bond is to insure that the district clerk's costs of preparing the transcript are paid. *Tapiador v. North Am. Lloyds of Texas*, 772 S.W.2d 954, 955 (Tex.App.—Houston [1st Dist.] 1989, writ denied).

Respondent apparently believes that she should be able to "collect on delivery" in the same manner as the court reporter upon completion of the statement of facts. However, the Texas Rules of Appellate Procedure specifically provide for "payment on delivery" to court reporters. Rule 46(e), entitled "Payment of Court Reporters," provides:

> Even if a bond is filed or deposit in lieu of bond is made, appellant shall either pay or make arrangements to pay the court reporter upon completion and delivery of the statement of facts. . . .

TEX.R.APP.P. 46(e). If the Supreme Court had intended for the District Clerk to also collect cash after a cost bond is filed, it would have made a special provision in the Rules for clerks, as it did for court reporters. The Rules of Appellate Procedure clearly do not provide for immediate payment to the District Clerk. They do provide that the appeal bond satisfies any payment requirement of the District Clerk; that the District Clerk cannot demand a bond *and* cash; that once a bond, or cash in lieu thereof, is filed the District Clerk *shall* prepare and deliver the transcript; and, that the District Clerk cannot interfere with the jurisdiction of the Court of Appeals. The District Clerk has *no authority* to refuse to accept the bond, or to require cash payment in addition to the bond. Once an appellate court accepts a cost bond on appeal, the District Clerk *must* comply with the Rules of Appellate Procedure.

[6] In response to the application for Writ of Mandamus, Respondent argued that Relators' petition for a writ of mandamus was moot, since she filed the transcript in Relators' case *after* the petition was filed. Respondent does not argue mootness in her Motion for Rehearing. However, because of the motion, it is clear that we cannot consider the matter moot. We received several Amicus Curiae briefs advising the court that this is a recurring problem. Further, Respondent also filed two response briefs, following her initial reply brief, and they all reflect Respondent's continuing belief that she is acting with clear legal authority. We find we must speak to the problem rather than treat it as moot.

[7,8] The Texas Supreme Court has recognized two exceptions to the mootness doctrine: (1) the capable of repetition yet evading review exception; and (2) the collateral consequences exception. *General Land Office of the State of Texas v. Oxy U.S.A., Inc.*, 789 S.W.2d 569, 571 (Tex.1990). The "capable of repetition yet evading review" exception applies where the act challenged is of such short duration that the appellant cannot obtain review before the issue becomes moot. *Id.* (quoting *Spring Branch I.S.D. v. Reynolds*, 764 S.W.2d 16, 18 (Tex.App.—Houston [1st Dist.] 1988, no writ). In addition, there must be a reasonable expectation that the same complaining party would be subjected to the same action again. *Ex parte Nelson*,

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ing.

815 S.W.2d 737, 739 (Tex.Crim.App.1991) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 348, 46 L.Ed.2d 350 (1975)). As Relators and amici have argued, Respondent is able to short-circuit any appellant's attempt to prohibit Respondent from requiring advance payment for transcripts by simply filing the transcript after a petition for a writ of mandamus is filed. This creates a situation where the complained of act is of such short duration that it evades review whenever Respondent's actions are challenged. Also, Respondent's replies to Relators' petition and her Motion for Rehearing show that Respondent will not willingly alter her course of conduct. Thus, Respondent's action clearly falls under the "capable of repetition" exception to the mootness doctrine, and the court has jurisdiction to address this continuing problem.

[9] We hold that Relators have a clear right to relief under their petition for a writ of mandamus. When an appeal bond, or cash deposit in lieu of an appeal bond, has been filed, Respondent has no authority to require advance cash payment of the costs of the appellate transcript. If the amount of the appeal bond or cash deposit is not sufficient to cover the costs of the transcript, Respondent may move for an increase in the amount of the bond, so as to provide her with sufficient security to cover the costs of the transcript. TEX.R.APP.P. 49(a). However, requiring advance payment for the transcript, after the bond has been filed, is not an option available to the District Clerk under the Texas Rules of Appellate Procedure. Further, these Rules are controlling and are mandatory.

In conclusion, we grant Relators' writ of mandamus and order the District Clerk of Harris County to accept appeal bonds, or cash deposits in lieu of an appeal bond, as surety for costs in preparing the appellate transcript, and to cease and desist from requiring advance payment in addition to the bond. We overrule the Motion for Rehearing.

Delayne Nell GARCIA, Appellant,

v.

Glynn ANDREWS d/b/a Mo–Vac Ser Company, Nick Tiller, and Mo–Va Service Company, Inc., Appellees.

No. 13–92–224–CV.

Court of Appeals of Texas, Corpus Christi.

Dec. 9, 1993.

Former employee brought action against former employer and corporate manager to recover for intentional infliction of emotional distress. The County Court at Law No. 1, Hidalgo County, Rodolfo Delgado. J., entered summary judgment in favor of defendants. Former employee appealed. The Court of Appeals, Seerden, C.J., held that: (1) statement in summary judgment motion that it was based on the attached evidence and pleadings on file was "statement of intent to use the specified discovery as summary judgment proofs" within meaning of requirement to file and serve statement of intent to use the discovery products not on file with clerk; (2) "reasonable woman" was not standard for determining what constituted extreme and outrageous conduct; and (3) manager did not engage in extreme and outrageous conduct.

Affirmed.

1. Pretrial Procedure ⇐202

Excerpts from depositions are competent summary judgment evidence when party offering them attaches copy of court reporter's certificate and his own affidavit certifying that copy is true and correct. Vernon's Ann.Texas Rules Civ.Proc., Rule 166a.

2. Pretrial Procedure ⇐201.1

Statement in summary judgment motion that it was based on the attached evidence and pleadings on file was "statement of intent to use the specified discovery as summary judgment proofs" within meaning of

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to judgment, we affirm. *See id.* § 14.41(b).

Lynda LAIRD and Derrick Laird, Relators,

v.

The Honorable Jack R. KING, Respondent,

and

E–Z Mart Stores, Inc., Real Party in Interest.

No. 09–93–200 CV.

Court of Appeals of Texas, Beaumont.

Dec. 2, 1993.

Prevailing plaintiff in underlying personal injury action sought writ of mandamus after defendant moved for reduction of supersedeas bond pending appeal. The Court of Appeals, Brookshire, J., held that: (1) trial court rendering judgment that awards recovery of money is authorized to set security in amount less than amount of judgment, interest, and costs, but not in judgment rendered in bond forfeiture procedure, personal injury case, wrongful death action, claim covered by liability insurance, or worker's compensation claim, and (2) trial judge was required to base any stay order respecting judgment pending appeal upon $7,150,000 supersedeas bond.

Writ conditionally granted.

1. Appeal and Error ⇐465(1)

Courts ⇐85(1)

Trial court rendering judgment that awards recovery of money is authorized to set security in amount less than amount of judgment, interest, and costs, but not in bond forfeiture procedure, personal injury case, wrongful death action, claim covered by liability insurance, or worker's compensation claim; statute governing bond or deposit for money judgment controlled over apparently conflicting appellate procedural rule. Rules App.Proc., Rule 47(b)(1); V.T.C.A., Civil Practice & Remedies Code §§ 52.002, 52.005.

2. Appeal and Error ⇐465(1)

Trial judge in personal injury action was required to base any stay order respecting judgment pending appeal upon $7,150,000 supersedeas bond, where jury damage award of $16.5 million had been reduced by remittitur to $5 million. Rules App.Proc., Rule 47(b)(1); V.T.C.A., Civil Practice & Remedies Code §§ 52.002, 52.005.

Richard Clarkson, Reaud, Morgan & Quinn, Beaumont, for relator.

Russell Heald, Benckenstein, Norvell & Nathan, Beaumont, John Mercy, Atchley, Russell, Waldrop & Hlavinka, Texarkana, for real party in interest.

Before WALKER, C.J., and BROOKSHIRE and BURGESS, JJ.

OPINION

BROOKSHIRE, Justice.

Writ of mandamus proceeding.

A hearing was conducted on the Motion of E–Z Mart Stores, Inc., (E–Z) for the reduction of the supersedeas bond relative to the judgment entered below in this litigation. The real party in interest took the position that the motion to reduce was brought basically under Rule 47(b), section 1, of the Texas Rules of Appellate Procedure.

The record reflects that counsel for the real party in interest stated:

> What we're asking the Court to do is to reduce the supersedeas bond or at the Court's discretion to eliminate the supersedeas bond requirements in this case because we think that we can put on evidence this morning through Ms. Hubbard that shows that the two criteria that are required by the rule can be met in this case

that do away with the necessity of supersedeas bonds in this case.

And basically what the rule requires that—it says that the Court can reduce the amount of the bond or do away with it if we can show that posting of the bond will cause irreparable harm to E–Z Mart in this case and that not posting the bond will do no substantial harm to Ms. Laird.

Counsel for E–Z stated that evidence would be forthcoming that had to do with the amount of equity that the real party in interest has in its Texas stores that is free of liens and upon which Ms. Laird's abstract of judgment liens have now attached. Counsel said the abstract of judgment liens has become matured and that Ms. Laird's judgment liens can be satisfied fully from an excess of value which is over and above the amount of Laird's judgment, including interest and costs.

Counsel then stated at the hearing below that E–Z in this case would have to post a bond in the approximate amount of $7.15 million to supersede the judgment if it was required to supersede the full amount. Counsel stated he intended to offer proof to show that E–Z cannot purchase that size bond and cannot collateralize any loan or any type of credit or line of credit which would allow E–Z to obtain a bond to supersede a $7.15 million judgment. Counsel then stated that basically his motion was the exact situation that the amendments to Rule 47 were meant to apply to after the famous case of *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768 (Tex.App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.), *cert. denied*, 485 U.S. 994, 108 S.Ct. 1305, 99 L.Ed.2d 686 (1988).

The chief financial officer of E–Z was put on the stand. She is a graduate in Business Administration and is a Certified Public Accountant. She stated that it was her understanding that the original judgment was somewhere in the neighborhood of $16 million but that by way of remittitur that the amount of bond that would be necessary to supersede the judgment would be a bond in the amount of $7,150,000.

She stated that on the Texas properties only that after all the prior indebtedness and prior liens had been paid there would be an equity remaining of $7 million to $11 million and that these figures were conservative. She considered only the real estate and no other assets of E–Z and she did not consider the equity values in the stores located in other states. Her figures of $7 million to $11 million allowed for a reduction because of depreciation. But it was her opinion that the fair market value of the stores upon sale would increase the equity therein to about $24 million because the depreciation factor would not play any significant part in the purchase price or the fair market value.

This witness stated unequivocally that the abstract of judgment liens of Ms. Laird had been filed against the Texas stores and that these liens had been filed in mid-to-late April 1993. She then testified that even after certain first liens had been paid off, there would still be a remaining equity between $7 million to $22 million available to satisfy Ms. Laird's judgment. The record reflects, according to her testimony, that she had had recent experience with obtaining and applying for large bonds. The supersedeas bonding process was explained and she stated that E–Z would have to go to a bank and get approval for a letter of credit. The letter of credit had to be supported by a certificate of deposit and that a certificate of deposit necessary to collateralize the bond would have to be in the amount of $7,150,000.

The thrust of her unequivocal testimony was that E–Z would have to actually put up the cash in the amount of the bond in order to get the bond. She stated that E–Z could simply not meet this requirement and that E–Z did not have $7.1 million in cash nor did E–Z have $7.1 million to obtain an adequate line of credit. She stated the properties could not be pledged as collateral because of the fact that the abstract of judgment liens had been filed by Ms. Laird against all of these Texas properties. She described these as "the Laird liens". The thrust of her testimony was that the bankers would not lend money unless E–Z came up with the cash which it simply didn't have in the amount of $7.15 million. Ms. Laird's abstract of judgment liens had been recorded in every county in Texas where E–Z had stores.

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This financial officer was Ms. Hubbard and at the end of her testimony on direct, counsel for Laird had no questions and the counsel for E–Z stated that that was all the evidence he wished to proffer. The hearing to reduce the supersedeas bond was not lengthy and Ms. Hubbard's evidence was not challenged or impeached.

The Jury's Finding and Verdict on the Trial on the Merits

In response to questions the jury found that the officers, agents, and/or the employees of E–Z Mart Stores, Inc., were negligent and that the negligence was a proximate cause of two certain occurrences that happened on or about August 10, 1990, and on or about August 21, 1990. The jury also found that the officers, agents, and/or employees of E–Z Mart Stores, Inc., were grossly negligent as to the occurrences of August 10 and August 21. For her injuries sustained on August 10, 1990, the jury awarded to Lynda Laird the sum of $1,000,000; but as to the August 21st occurrence, the jury awarded Lynda Laird $2,500,000.

In a separate question the jury awarded and assessed against E–Z Mart Stores, Inc., the sum of $13,000,000 which was awarded in favor of Lynda Laird as exemplary damages. The jury also found that the officers, agents, and/or employees of E–Z Mart Stores, Inc., acted with malice and that malice was a proximate cause of the injuries to Lynda Laird on August 10th and also on August 21st of 1990. These occurrences on the two dates were found by the jury to have been intentional, sexual assaults made on Laird.

An amended judgment awarded to Lynda Laird damages from and against E–Z Mart Stores, Inc., and Dennis Walker, jointly and severally, in the sum of $3,500,000 and it was further adjudged by the trial court that Lynda Laird do have and recover from E–Z Mart Stores, Inc., exemplary damages in the sum of $13,000,000—totaling $16,500,000 combining the compensatory and the exemplary damages. Later the able trial court rendered what was characterized as "the largest remittitur in Texas history for a single personal injury plaintiff". The remittitur reduced Lynda Laird's judgment to $5,000,000.

Thereafter, E–Z moved for a reduction of the supersedeas bond to no supersedeas bond at all or supersedeas bond limited to the amount of $1,000,000 although the judgment after remittitur still amounted to $5,000,000.

E–Z Mart's Contentions

The briefest explanation of the paramount issue before us is that the real party in interest maintains that Texas Rule of Appellate Procedure 47(b)(1) governs and is exclusively and paramountly relevant and germane to the question of reducing the supersedeas bond. The real party in interest places major reliance on *Texaco, Inc. v. Pennzoil Co., supra.*

TEX.R.APP.P. 47(b)(1)(2) provides:

(b) Money Judgment. When the judgment awards recovery of a sum of money, *the amount of the bond or deposit shall be at least the amount of the judgment, interest, and costs.* The trial court may make an order to provide for security in an amount or type deviating from this general rule if after notice to all parties and a hearing the trial court finds:

(1) as to civil judgments rendered in a bond forfeiture proceeding, a personal injury or wrongful death action, a claim covered by liability insurance or a workers' compensation claim that posting the amount of the bond or deposit will cause irreparable harm to the judgment debtor, *and not posting such bond or deposit will cause no substantial harm to the judgment creditor.* In such a case, the trial court may stay enforcement of the judgment based upon an order which adequately protects the judgment creditor against any loss or damage occasioned by the appeal;

(2) as to civil judgments rendered other than in a bond forfeiture proceeding, a personal injury or wrongful death action, a claim covered by liability insurance or a workers' compensation claim, that posting the security at an amount of the judgment, interest, and costs would cause irreparable harm to the judgment debtor, and ordering

the security at a lesser amount would not substantially decrease the degree to which a judgment creditor's recovery under the judgment would be secured after the exhaustion of all appellate remedies. (emphasis added)

The Relators' Contentions

Relators argue that the governing authority is the statute in the Texas Civil Practice and Remedies Code §§ 52.002, 52.005 (Vernon Supp.1993), and that the statutory enactment in the Civil Practice and Remedies Code supersedes Texas Rule of Appellate Procedure 47(b). As an alternative position, the Relators maintain that the reduction of the amount of the supersedeas bond was in violation of TEX.R.APP.P. 47(b)(1). Relators maintain that the real party in interest did not prove the necessary elements of reduction because the real party in interest failed to show that the reduction "will cause no substantial harm to the judgment creditor". *See* TEX.R.APP.P. 47(b)(1).

TEX.CIV.PRAC. & REM.CODE ANN. § 52.002 reads:

§ 52.002. Bond or Deposit for Money Judgment

A trial court rendering a judgment that awards recovery of a sum of money, *other than* a judgment rendered in a bond forfeiture proceeding, *a personal injury* or wrongful death action, a claim covered by liability insurance, or a workers' compensation claim, may set the security in an amount less than the amount of the judgment, interest, and costs if the trial court, after notice to all parties and a hearing, finds that:

(1) setting the security at an amount equal to the amount of the judgment, interest, and costs would cause irreparable harm to the judgment debtor; and

(2) *setting the security at the lesser amount would not substantially decrease the degree to which a judgment creditor's recovery under the judgment would be secured after the exhaustion of all appellate remedies.* (emphasis added)

Added by Acts 1989, 71st Leg., ch. 1178, § 1, eff. Sept. 1, 1989.

Also effective on September 1, 1989, was TEX.CIV.PRAC. & REM.CODE ANN. § 52.005:

§ 52.005 Conflict With Texas Rules of Appellate Procedure

(a) To the extent that this chapter conflicts with the Texas Rules of Appellate Procedure, *this chapter controls.*

(b) Notwithstanding Section 22.004, Government Code, *the supreme court may not adopt rules in conflict with this chapter.*

(c) The Texas Rules of Appellate Procedure apply to any proceeding, cause of action, or claim to which Section 52.002 does not apply. (emphasis added)

Acts 1989, 71st Leg., ch. 1178, § 1, eff. Sept. 1, 1989. Personal injury money judgments are exempted out of § 52.002; hence, the Texas Rules of Appellate Procedure do not apply because the appellate rules yield to the statutory enactments. The last amendment to Rule 47 by the Supreme Court was effective September 1, 1990.

We hold that sections 52.002 and 52.005 control. The Legislature clearly mandated that Chapter 52 controls over any conflict with the Texas Rules of Appellate Procedure, and further, that notwithstanding section 22.004 of the Government Code, the Supreme Court may not adopt rules in conflict with Chapter 52.

[1] We hold that the plain and compelling language of 52.002 authorizes a trial court rendering a judgment that awards a recovery of money to set the security in an amount less than the amount of the judgment, interest and costs—but not in a judgment rendered in a bond forfeiture procedure, a personal injury case, or a wrongful death action, or a claim covered by liability insurance, or a worker's compensation claim. Query: What would be the logic or reason for authorizing a trial court to set security at less than the amount in a bond forfeiture case or a personal injury case or a claim that was actually covered by liability insurance? Or for that matter, a worker's compensation claim? Hence, we think the short answer to our problem is that the trial court cannot after rendering a judgment (that awards a recovery of money) set the security in an amount

less than the amount of the judgment, interest, and costs in a personal injury case, as here. The legislative diktat simply disallowed such empowerment to a trial court. And clearly, 52.005(a) dogmatically mandates that this Chapter 52 controls over the Texas Rules of Appellate Procedure and it also forbade the Supreme Court to adopt rules that are in conflict with Chapter 52. The *Texaco, Inc. v. Pennzoil Co., supra*, case did not involve personal injuries and was a gigantic lawsuit between large corporations over commercial and contractual matters.

The Legislative History and Intent

TEX.CIV.PRAC. & REM.CODE ANN. §§ 52.002 and 52.005 were originally identical bills filed in the Texas House of Representatives and in the Texas Senate. An analysis of the bill demonstrates and clearly indicates that it was the committee's opinion that Senate Bill 134 by Senator Carl Parker of Port Arthur did not grant any additional rule-making authority to any State officer, institution or agency. And importantly, the bill analysis states that Section 52.005 provides that this chapter (Chapter 52) controls if any conflicts occur with the Texas Rules of Appellate Procedure and affirmatively and mandatorily prohibits the Supreme Court from adopting any rules in conflict with Chapter 52.

We also conclude that from the debate on the Senate Bill 134 it became clear that when Senator Carl Parker laid out his legislation he explained that Section 52.002 was specifically designed to protect and favor judgments in bond forfeiture cases, personal injury cases, wrongful death actions, claims covered by liability insurance, and worker's compensation claims. Thus the judgments in these classes of cases were not subject to a lowered supersedeas bond. Thus the supersedeas bond in amount must equal the judgment which is sought to be superseded plus interest and costs. The Senator explained in substance that the main thing that this legislation was getting at was the large, business-type, commercial disputes and business torts. He reasoned that Senate Bill 134 was not intended to have people who were injured, widows or what-have-you waiting forever with no security for their judgments.

The Rationale of this Opinion

But we base our opinion on the clear language and wording of 52.002 and 52.005. Additionally, we point out that Justice Michol O'Connor of the First Court of Appeals in Houston has written on this very subject and she has stated clearly:

> A trial court has the discretion to permit a party to file a bond for less than the full amount of a money judgment (plus costs and one year's interest) if the judgment is not one that was rendered in a bond forfeiture proceeding, a personal injury or wrongful death suit, a claim covered by liability insurance, or a workers' compensation suit.

Justice O'Connor emphatically wrote that although TEX.R.APP.P. 47(b)(1) seems to attempt to permit a lower supersedeas bond in the enumerated kinds of suits, section 52.005 clearly states and mandates that to the extent Chapter 52 of the Remedies Code conflicts with the Rules of Appellate Procedure, then Chapter 52 controls, and even the Supreme Court may not adopt rules in conflict with Chapter 52. *See O'Connor's Texas Rules*Civil Appeals*, Ch. 13, § 8 "Challenging the Bond" (1993).

We hold that the Legislative enactments prevail over TEX.R.APP.P. 47(b)(1) even if the Rule applies. But we hold Rule 47(b)(1) does not apply. In fact, Rule 47 limits its own application by its own language. Rule 47 has no efficacy when other laws apply. *See* TEX. R.APP.P. 47(a). We sanguinely hold that the legislative intent, both at the committee level and at the legislative level has been clearly and unmistakably expressed and set forth in Chapter 52 and that the legislature has mandatorily forbade the Supreme Court of Texas from in any manner modifying Chapter 52 and that the Texas Legislature was acting well within its powers and prerogatives.

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[2] We determine and hold that the learned and conscientious trial judge fell into error. Misapplication of legal principles and rules took place in that the real party in interest here failed to carry its burden of proof in the hearing of July 8, 1993, by failing to show that the bond reduction would and

will cause no substantial harm to the judgment creditor. *See* TEX.R.APP.P. 47(b)(1). We make this alternative determination while nevertheless reemphasizing that in our opinion, TEX.R.APP.P. 47, simply has no application in this original mandamus proceeding. In briefest summary, we hold that the clear and manifest legislative intent in the passing and promulgating of TEX.CIV.PRAC. & REM. CODE ANN. §§ 52.002 and 52.005 was to make certain that judgments rendered in personal injury cases required a full supersedeas bond equal to the amount of the judgment, plus interest, plus costs.

We are confident that Judge King will comply with this opinion and for that reason, we grant and issue the writ of mandamus conditionally.

Moreover, concerning the stay order entered by the able trial court, we determine that any stay order must be based upon a sufficient supersedeas bond in the amount of $7,150,000. This amount of $7,150,000 is realistic and necessary to protect the judgment creditor, Lynda Laird, against any loss or damage or detriment occasioned by the appeal or occurring during the appeal. The present stay order entered below utterly fails in this regard. And, of course, the present supersedeas bond is dramatically inadequate to protect Lynda Laird in relationship to the amount of the underlying, reduced and drastically "remittitured" judgment. Although E-Z pleaded that it simply did not have sufficient cash to either post a correct bond or to obtain a line of credit from banks or financial institutions to post a larger bond; nevertheless, we note that E-Z did not pledge any of its out-of-Texas properties or reserves; nor did it set aside any other assets that would adequately secure any damages occasioned by the appeal. And, of course, it seems glaringly clear that the filed, pending appeal from the trial on the merits will challenge, inter alia, the reduction of the original judgment amount. We have not yet heard oral argument.

Thus, we conditionally grant the writ of mandamus, confident that the learned trial judge will seasonably, but with all dispatch, require a supersedeas bond in the amount of at least $7.15 million. If no such appropriate, timely action is forthcoming, we will be constrained to issue the writ of mandamus consistent with this opinion.

WRIT CONDITIONALLY GRANTED.

Shon Dwayne DIXON, Appellant,

v.

The STATE of Texas, Appellee.

No. 10-93-246-CR.

Court of Appeals of Texas,
Waco.

Dec. 8, 1993.

Defendant indicted for aggravated robbery sought writ of habeas corpus on ground that state had failed to announce its readiness for trial within 90 days of his arrest. The 54th District Court, McLennan County, George H. Allen, J., denied application, and defendant appealed. The Court of Appeals, Cummings, J., held that defendant failed to rebut state's prima facie showing of readiness for trial.

Affirmed.

1. Criminal Law ⇐577.16(9)

For purposes of statute requiring that defendant be released if state is not ready for trial within 90 days of defendant's arrest, state made sufficient showing of readiness for trial where evidence indicated that state was ready for trial as of date of indictment and within 90 days of defendant's arrest, even though hearing was held on 91st day after arrest. Vernon's Ann.Texas C.C.P. art. 17.151.

2. Criminal Law ⇐577.16(9)

Defendant who claimed violation of statute requiring state to release defendant if state is not ready to proceed to trial within

conditional award of attorney's fees is improper. *Id.*

[10] The error is harmless so far because Sipco's appeal has not succeeded here. However, to the extent this point of error applies to the unconditional award of attorney's fees on appeal to the Texas Supreme Court, it is sustained.

The ninth point of error states that awarding appellate attorney's fees before the appeal occurs denies due process and equal protection rights under the United States and Texas Constitutions. This contention was rejected in *Pullman v. Brill, Brooks, Powell & Yount*, 766 S.W.2d 527, 530 (Tex.App.—Houston [14th Dist.] 1988, no writ), and we reject it for the same reasons.

The ninth point of error is overruled.

We reform the judgment to provide Wyatt will receive attorney's fees on appeal to the Texas Supreme Court only if Sipco does not prevail in that court. As reformed, the judgment is affirmed.

COHEN, J., concurs.

JONES, J., not participating in the opinion on rehearing.

COHEN, Justice, concurring.

I agree with Justice Bass' opinion. This opinion is written to expose what I consider to be weaknesses in current Texas law regarding what must be done to preserve for appellate review a claimed error in overruling a motion for directed verdict.

Texas law has traditionally imposed two requirements on parties appealing the overruling of a motion for directed verdict. The first is that the ruling must appear in the judgment or be recited in a separate order. The second is that a defendant who introduces evidence after the motion for directed verdict is overruled must reurge the motion at the close of the case, or else he waives it. I think those rules should be abandoned.

REQUIREMENT FOR A SEPARATE ORDER OR JUDGMENT RECITAL

Many Texas cases have held that an order overruling a motion for directed verdict must appear in the judgment or be recited in a separate written order; it is not sufficient that the ruling is recorded fully in the statement of facts. *Wal-Mart Stores, Inc. v. Berry*, 833 S.W.2d 587, 590 (Tex.App.—Texarkana 1992, writ requested, Aug. 18, 1992); *Soto v. Southern Life & Health Ins., Co.*, 776 S.W.2d 752, 754 (Tex.App.—Corpus Christi 1989, no writ); *Pierce v. Gillespie*, 761 S.W.2d 390, 396 (Tex.App.—Corpus Christi 1988, no writ); *Superior Trucks, Inc. v. Allen*, 664 S.W.2d 136, 145 (Tex.App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Steed v. Bost*, 602 S.W.2d 385, 387 (Tex.Civ.App.—Austin 1980, no writ); *Southwestern Materials Co. v. George Consol. Inc.*, 476 S.W.2d 454, 455 (Tex.Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.).

This requirement seems to have been created and enforced solely by the intermediate appellate courts. I have found no supreme court authority for the rule. If there is today a reason for the rule, I cannot discern it. The rule has been criticized by commentators as being unfair, unnecessary, and contrary to statutory authority. MICHAEL A. HATCHELL AND LORI M. GALLAGHER, TEN WORST TRAPS—AND A FEW RUNNERS UP! (State Bar of Texas, Advanced Civil Appellate Practice Course A-6 (September, 1992). The rule seems to have first appeared in its present form in *Southwestern Materials*. That opinion cited two cases as authority for the rule, but neither case supports it. In *Ellis Drilling Corp. v. McGuire*, 321 S.W.2d 911, 912 (Tex.Civ. App.—Eastland 1959, writ ref'd n.r.e.), the court merely held that the motion was waived because it was never presented and overruled. The same is true of *Lewis v. Smith*, 198 S.W.2d 598, 600 (Tex.Civ. App.—Fort Worth 1946, writ dism'd). Nevertheless, the rule created in *Southwestern Materials* has been repeatedly applied without being explained or justified.

'REMENT FOR A SEPARATE)RD' OR JUDGMENT .ECITAL

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The same is true of *Lewis v.* 98 S.W.2d 598, 600 (Tex.Civ. t Worth 1946, writ dism'd). Ne-, the rule created in *Southwest-ials* has been repeatedly applied eing explained or justified.

I know of no reason why an oral ruling that is fully recorded in the statement of facts will not preserve error in overruling a motion for directed verdict. Two different parts of TEX.R.APP.P. 52 indicate that is sufficient.

Rule 52(a) provides:

> In order to preserve a complaint for appellate review, a party must have *presented to the trial court a timely request, objection or a motion*, stating the specific grounds for the ruling he desires the court to make ... It is also necessary for the complaining party *to obtain a ruling upon the parties request, objection or motion ... It is not necessary to formally except to rulings or orders of the trial court.*

(emphasis added.)

SIPCO complied with this rule. It made a motion and obtained a ruling; it should not have to formally except to the oral ruling by getting a written order to memorialize it.

Moreover, the requirement for a separate written order is inconsistent with TEX. R.APP.P. 52(c)(10), which provides:

> Anything occurring in open court or chambers that is reported and so certified by the court reporter may be included in the statement of facts rather than a formal bill of exception ...

Thus, a party should not have to obtain a written order, which is like a formal bill of exception, in order to show what is already shown by the statement of facts.

WAIVER BY PRESENTING EVIDENCE

The second rule limiting appellate review is that a party who introduces evidence after the motion is overruled must reurge the motion at the close of all evidence, or else waive review. *Bryan v. Dockery*, 788 S.W.2d 447, 449 (Tex.App.—Houston [1st Dist.] 1990, no writ); *Texas Steel Co. v. Douglas*, 533 S.W.2d 111, 114 (Tex.Civ. App.—Fort Worth 1976, writ ref'd n.r.e.). SIPCO introduced evidence after its motion was overruled and did not reurge the motion at the close of all evidence.

Like the previous rule, this requirement also seems to have been created and enforced solely by the intermediate appellate courts. Courts have applied the rule in both jury and nonjury trials. *Wenk v. City Nat'l Bank*, 613 S.W.2d 345, 348 (Tex.Civ. App.—Tyler 1981, no writ); *Horizon Properties Corp. v. Martinez*, 513 S.W.2d 264, 265 (Tex.Civ.App.—El Paso 1974, writ ref'd n.r.e.); *Thornhill v. Elskes*, 412 S.W.2d 73, 74 (Tex.Civ.App.—Waco 1967, no writ).

On original submission, we applied the rule in *Bryan v. Dockery* and held that SIPCO waived appellate review because it introduced evidence after the judge overruled its motion for directed verdict and did not reurge its motion for directed verdict at the close of all evidence. I now believe that following this rule in a nonjury case, as we originally did, would conflict with TEX.R.APP.P. 52(d).

A motion for directed verdict is a complaint that the plaintiff's evidence was legally insufficient. Since its amendment effective September 1, 1990, rule 52(d) has provided in pertinent part as follows:

> A party desiring to complain on appeal in a nonjury case that the evidence was legally or factually insufficient to support a finding of fact, that a finding of fact was established as a matter of law or was against the overwhelming weight of the evidence shall not be required to comply with paragraph (a) of this rule.

Rule 52(a) requires a party to complain in the trial court in order to preserve issues for appellate review. Rule 52(d) excuses parties in nonjury cases from that requirement when they complain of legally or factually insufficient evidence. Thus, rule 52(d), as I understand it, says that no predicate is required for SIPCO to raise its complaint. If no predicate is required, SIPCO's failure to renew its motion at the close of all evidence should not constitute a waiver.[1] Thus, I would hold that the cases

1. The same is true of a movant's failure to attain a written order overruling its motion for directed verdict. If, in a nonjury trial, a party does not have to move for directed verdict to complain of insufficient evidence, it certainly should not have to obtain a written order overruling the unnecessary motion.

applying the rule in *Bryan v. Dockery* to nonjury cases are no longer good law because they require the defendant to do more than rule 52(d) requires. Consequently, I would decline to follow them, and instead hold that the insufficient evidence complaint was preserved for review, even though SIPCO presented evidence and did not renew its motion at the close of all evidence.

This holding, however, would raise questions about the standard of review. In deciding legal sufficiency, should the appellate court consider all the evidence, including evidence introduced after the judge denied the motion, or only the evidence as it stood when the judge denied the motion for directed verdict?

In *San Antonio Traction Co. v. Kelleher*, 48 Tex.Civ.App. 421, 107 S.W. 64 (1908, writ dism'd), the court held that all the evidence should be considered, no matter when the motion for directed verdict was made. The court wrote:

> In the absence of such proof at the time plaintiff closed his testimony, we think that the court should have granted defendant's motion to instruct a verdict in its favor. But it does not follow from this that the judgment should be reversed on this assignment of error. To have effected such results the defendant should have rested its case upon the refusal of the court to grant the motion to instruct a verdict in its favor upon the close of plaintiff's testimony. Instead of doing so the defendant introduced its evidence. The effect of this was to waive its right to have the judgment reversed on account of the error of the court in refusing its peremptory instruction, if the plaintiff's evidence, together with that introduced by the defendant, was sufficient to carry the case to the jury on any one or more of the alleged grounds of negligence. *Grooms v. Neff Harness Co.*, 79 Ark. 401, 96 S.W. 135. The question as to whether the evidence, after the introduction of all the testimony, was sufficient to require a submission of the case to the jury, will be determined in considering subsequent assignments.

107 S.W. at 66. The *Kelleher* court cited with approval the rule in *Grooms v. Neff Harness Co.*, 79 Ark. 401, 96 S.W. 135 (1906) (op. on reh'g). There, the Arkansas Supreme Court relied on three decisions by the United States Supreme Court, and held:

> [I]n testing the sufficiency of the evidence, the court must consider all the evidence, whether introduced by the plaintiff or by the defendant. So, in testing the correctness of the trial court in denying a request for peremptory instruction, regardless of the time when the request is made, this court must look to all the testimony introduced, and will not reverse the case on account of the trial court's refusal to give the request, even though the evidence was insufficient at the time the request was made, if upon the whole case there is sufficient [evidence] to sustain the verdict.

96 S.W. at 137.

This is still the rule in federal courts. *Farley Transp. Co. v. Santa Fe Transp. Co.*, 786 F.2d 1342, 1345 n. 1 (9th Cir.1985); *see also* 5A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 50.05F(1) (1992); 9 C. WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2534 (1971). The federal cases rely on *Bogk v. Gassert*, 149 U.S. 17, 13 S.Ct. 738, 37 L.Ed. 631 (1892), which held:

> Without going into the question whether the motion was properly made in this case, it is sufficient to say that the defendant waived it by putting in his testimony. A defendant has an undoubted right to stand upon his motion for a non suit, and have his writ of error if it be refused; but he has no right to insist upon his exception, after having subsequently put in his testimony and made his case upon the merits, since the court and jury have the right to consider the whole case as made by the testimony. It not infrequently happens that the defendant himself, by his own evidence, supplies the missing link, and, if not, he may move to take the case from the jury upon conclusion of the entire testimony.

149 U.S. at 23, 13 S.Ct. at 739.

Texas criminal courts follow the same rule. *Degarmo v. State*, 691 S.W.2d 657,

SIP[illegible] Cite

661 (Tex.Crim.App.1985) U.S. 973, 106 S.Ct. [illegible] (1985); *Kuykendall* 791, 794 (Tex.Crim.App several judges on this c ed, have stated that rule violates the co against double jeopar the State two chan *Herbert v. State*, 82 12 (Tex.App.—Houston pet.); *Winter v. State* 731–34 (Tex.App.— 1986, no pet.) (Cohe

I question the rule in 23, 13 S.Ct. at 739. based on the premi jury have the right to case as made by the premise is flawed to any right of the jury consider the whole cas we would not giv judges the right u evidence to set aside a direct verdicts in the

As for the court have the right to consi when there would be cept for the judge's motion for directed tiff presents insufficie defendant points th directed verdict, the dant's evidence. The even be there. The tri ed, and the defend discharged. As I h nal law context,

> By considering la to decide sufficie State to benefit bo to present sufficient the trial judge's defendant's const quittal. This case is harm from such neous ruling forc tify and now the testimony to cure th own evidence.

t 66. The *Kelleher* court cited val th rule in *Grooms v. Neff* o., rk. 401, 96 S.W. 135 on re g). There, the Arkansas urt re ied on three decisions by States Supreme Court, and held: ng the sufficiency of the evie cour must consider all the whether introduced by the r by the defendant. So, in testrrectness of the trial court in requ st for peremptory inregar less of the time when t is ma de, this court must look testim ny introduced, and will e the ase on account of the 's refu al to give the request, gh the evidence was insuffie time the request was made, whole case there is sufficient to sustain the verdict.

37.

l the rule in federal courts. p. Co. v. Santa Fe Transp. 1342, 1345 n. 1 (9th Cir.1985); JAMES W. MOORE ET AL., ERAL PRACTICE, § 50.05F(1) RIGHT AND A. MILLER, FEDERND CEDURE, § 2534 (1971). ses on *Bogk v. Gassert*, 13 S.Ct. 738, 37 L.Ed. 631 held:

ng into the question whether was properly made in this fficient to say that the defendit by putting in his testimodant has an undoubted right n his motion for a non suit, writ of error if it be re- has no right to insist upon after having subsequently stimony and made his case its, since the court and jury t to consider the whole case he testimony. It not infreens that the defendant himown evidence, supplies the and, if not, he may move to from the jury upon conclunire testimony.

13 S.Ct. at 739.

al courts follow the same *v. State*, 691 S.W.2d 657, 661 (Tex.Crim.App.1985), *cert. denied*, 474 U.S. 973, 106 S.Ct. 337, 88 L.Ed.2d 322 (1985); *Kuykendall v. State*, 609 S.W.2d 791, 794 (Tex.Crim.App.1981). However, several judges on this court, myself included, have stated that in criminal cases, the rule violates the constitutional protection against double jeopardy because it gives the State two chances to prove its case. *Herbert v. State*, 827 S.W.2d 507, 508, 509–12 (Tex.App.—Houston [1st Dist.] 1992, no pet.); *Winter v. State*, 725 S.W.2d 728, 731–34 (Tex.App.—Houston [1st Dist.] 1986, no pet.) (Cohen, J., concurring).

I question the rule in *Bogk*. 149 U.S. at 23, 13 S.Ct. at 739. The rule in *Bogk* is based on the premise that "the court and jury have the right to consider the whole case as made by the testimony." *Id.* The premise is flawed to the extent it relies on any right of the jury. If the jury's right to consider the whole case were paramount, we would not give trial and appellate judges the right under any state of the evidence to set aside a jury's verdict or to direct verdicts in the first place.

As for the court, why should a judge have the right to consider the whole case when there would be no "whole case" except for the judge's erroneous denial of the motion for directed verdict? If the plaintiff presents insufficient evidence and the defendant points that out by moving for directed verdict, there should be no defendant's evidence. The defendant should not even be there. The trial should have ended, and the defendant should have been discharged. As I have stated in the criminal law context,

> By considering later presented evidence to decide sufficiency, the courts allow the State to benefit both from its own failure to present sufficient evidence and from the trial judge's erroneous denial of the defendant's constitutional right to an acquittal. This case is a typical example of harm from such error: the judge's erroneous ruling forced the defendant to testify and now the State seeks to use that testimony to cure the insufficiency of its own evidence.

Herbert, 827 S.W.2d at 511 (Cohen, J., concurring). If the word "plaintiff" is substituted for "State" and the reliance on the double jeopardy provision is removed, the same considerations apply in a civil case.

Reviewing the evidence after the erroneous denial of a motion for directed verdict puts the defendant to an unfair choice: surrender the right to be heard or risk waiving the insufficiency of the evidence by presenting its own evidence. Unfortunately, under present law, giving up the right to be heard is "the price which must be paid" by the defendant to appeal the judge's refusal to direct a verdict at the conclusion of the plaintiff's case. DAVID B. HARRISON, ANNOTATION, PROPRIETY OF DIRECTION OF VERDICT IN FAVOR OF FEWER THAN ALL DEFENDANTS AT CLOSE OF PLAINTIFF'S CASE, 82 ALR3d 974, 981 (1978). Why should a defendant suffer that choice when the plaintiff's evidence was insufficient and the trial judge failed to recognize it? No one would argue that a defendant should suffer a judgment when the evidence is insufficient, and no one would argue that a defendant should not be allowed to present evidence. Why, then, would anyone say that a defendant can enjoy one of these rights, but not both? *Cf. Simmons v. United States*, 390 U.S. 377, 389–94, 88 S.Ct. 967, 973–76, 19 L.Ed.2d 1247 (1968) (criminal defendant's incriminating testimony at pretrial motion to suppress hearing could not be used against the nontestifying defendant at trial because that would force him to give up his fifth amendment right against self-incrimination in order to assert his fourth amendment right against illegal search and seizure). This situation is comparable to one where the judge erroneously overrules an objection to evidence and the objecting party then presents more evidence about the same fact to rebut, minimize, or explain the erroneously admitted evidence. In that case, the objecting party does not waive the judge's error in admitting the evidence. This sound rule is recognized in civil and in criminal cases. *See Harrison v. United States*, 392 U.S. 219, 222–26, 88 S.Ct. 2008, 2010–12, 20 L.Ed.2d 1047 (1968); *Valcarcel v. State*, 765 S.W.2d 412, 417–18 (Tex.Crim.App.1989); *Roosth &*

Genecov Production Co. v. White, 152 Tex. 619, 262 S.W.2d 99, 104 (1953); *Miller v. State*, 786 S.W.2d 494, 496–97 (Tex. App.—San Antonio 1990, no pet.); *D.L.N. v. State*, 590 S.W.2d 820, 823 (Tex.Civ. App.—Dallas 1979, no writ). The cases recognize reality: the erroneous ruling forced the objector to present the evidence or risk even greater harm from having it go unanswered. The same is true of a party forced to present its entire case after a motion for directed verdict is wrongfully denied.

To determine legal sufficiency, I would review only the evidence as it stood when the motion for directed verdict was denied. If the defendant did not move for directed verdict at the close of the plaintiff's case, then I would review all of the evidence presented. In my opinion, these considerations apply to both nonjury and jury cases. Thus, I would apply the same rule in jury cases, even though they are not covered by the last sentence of rule 52(d).

I concur in the judgment here because under either standard, whether judging the evidence as a whole or as it stood when the motion for directed verdict was overruled, it was sufficient.

Arthur JOHNSON, Relator,

v.

The Honorable Bradley SMITH, Judge of the 164th District Court of Harris County, Texas, and the Honorable David West, Judge of the 269th District Court of Harris County, Texas, Respondents.

No. 01-92-00137-CV.

Court of Appeals of Texas, Houston (1st Dist.).

April 8, 1993.

Rehearing Denied June 9, 1993.

Motion was filed for leave to petition for writ of mandamus challenging denial of motion for recusal, order to post bond to secure costs, and imposition of sanctions. The Court of Appeals, Dunn, J., held that: (1) judge is not obligated to rule on untimely filed motion for recusal or to forward it for hearing by another judge, and (2) presiding judge could not impose sanctions for failure to accept certified mail, filing of lawsuits pro se, or refusal to obey orders of another court entered in cause of action in the other court.

Motion granted, and writ conditionally granted in part.

O'Connor, J., concurred and filed opinion.

1. Judges ⇐51(2)

Motion for recusal was untimely filed only five days before hearing on motion for costs. Vernon's Ann.Texas Rules Civ. Proc., Rule 18a(a).

2. Judges ⇐51(4)

Judge is not obligated to rule on untimely filed motion for recusal or to forward it for hearing by another judge and is not bound by prohibition against judge taking further action in cause for which motion to recuse has been filed. Vernon's Ann.Texas Rules Civ.Proc., Rule 18a(a, d).

3. Costs ⇐118

Court could not require plaintiff to post bond in finite amount as security for anticipated costs. Vernon's Ann.Texas Rules Civ.Proc., Rule 143.

4. Costs ⇐2

Presiding judge could not impose sanctions for failure to accept certified mail, filing of lawsuits pro se, or refusal to obey orders of another court entered in cause of action in the other court. Vernon's Ann.Texas Rules Civ.Proc., Rules 13, 21b.

5. Costs ⇐2

Presiding judge may not attempt to enforce, by imposition of sanctions, order of another trial court while sitting as pre-

ously testified that he was put on leave of absence due to criminal conviction arising out of incident giving rise to wrongful death action, but defense counsel told jury that witness was on leave of absence because of allegations in wrongful death case, and in response to judge's questioning, witness answered that he was not suspended because of lawsuit.

16. Appeal and Error ⇐1135

Appellants failed to produce sufficient record to demonstrate error that jury finding of no damages was against great weight and preponderance of evidence where trial was electronically recorded and appellants failed to provide complete written transcription of statement of facts but, rather, provided only selected pages from written transcription.

17. Damages ⇐221(7)

Where there is no liability finding, question of damages is immaterial.

Robert V. Holland, Jr., Kelly D. Shephens, Houston, for appellants.

Debora Beck McWilliams, Houston, for appellee.

Before ROBERTSON and CANNON, JJ., and MORSE, J., Sitting by Designation.

OPINION

ROBERT E. MORSE, Jr., Justice.

The survivors of William B. Born, Jr. appeal from a take nothing judgment rendered in favor of appellee, Virginia City Dance Hall and Saloon. Appellants bring six points of error. We affirm.

Appellants filed a wrongful death suit against appellee, and against three parties who are not part of this appeal, including Jerry B. Nicar, Movimex, Inc., and Carlos Tamborrel. Appellants contended that appellee violated the Texas Dram Shop Act by serving the decedent and Jerry Nicar alcohol after they had become intoxicated. Appellants further claimed that Nicar, who was allegedly intoxicated, was negligent in failing to warn the decedent and in operating the vehicle that was involved in a collision which resulted in the death of William Born, Jr.

Upon motion, the trial court granted summary judgment in favor of Movimex, Inc. and Carlos Tamborrel. The case proceeded to trial, where the proceedings were electronically recorded. After all parties had rested and while the jury was deliberating, appellants and Nicar reached a settlement and filed this agreement with the court. The jury returned a verdict finding no negligence on the part of appellee, Nicar, or the decedent. Thus, the trial court entered judgment awarding appellants $25,000.00 based on their settlement agreement with Nicar and ordering that appellants take nothing against appellee.

[1] In their first point of error, appellants contend the judgment should be reversed because there is an insufficient record on appeal. Because the trial was electronically recorded and the written transcription contains many omissions and errors, appellants argue that Rule 50(e) is applicable and that they are entitled to a new trial. Rule 50(e) pertains to lost or destroyed records and provides:

> When the record or any portion thereof is lost or destroyed, it may be substituted in the trial court and when so substituted the record may be prepared and transmitted to the appellate court as in other cases. If the appellant has made a timely request for a statement of facts, but the court reporter's notes and records have been lost or destroyed without appellant's fault, the appellant is entitled to a new trial unless the parties agree on a statement of facts.

TEX.R.APP.P. 50(e). In interpreting this rule, Texas courts have held that there are three requirements for a new trial under Rule 50(e):

1. That the appellant has made a timely request for a statement of facts;
2. That the court reporter's notes and records have been lost or destroyed without the appellant's fault;
3. That the parties cannot agree on a statement of facts.

TRAP 53

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November 4, 1993

Professor William Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Dear Bill:

I would appreciate very much if you would include in the appellate rules agenda for your subcommittee, and make a report and recommendation, that the rules regarding filing of electronic tape recorded Statements of Facts be made to conform to the time requirements of the Texas Rules of Appellate Procedure. Alternatively, if the time for filing an electronically recorded Statement of Facts is to be different, that should be incorporated into the Texas Rules of Appellate Procedure. See National Union Fire Insurance Co., the Ninth Court of Appeals, 37 Tex. Sup. Ct. J. 84 (October 30, 1993).

Very truly yours,

LUTHER H. SOULES III

LHSIII/hhd
cc: Honorable Nathan L. Hecht

P.S. What if the Statement of Facts is partly electronic and partly stenographic as often occurs in Bexar County.

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TRAP 53

NHD
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December 2, 1993

Luther H. Soules, III
Soules & Wallace
Attorneys at Law
Tenth Floor, Republic of Texas Plaza
175 East Houston Street
San Antonio, Texas 78205-2230

Re: Electronic Statement of Facts

Dear Mr. Soules:

I am writing to you at the suggestion of Professor Hadley Edgar, to inquire whether a new rule of Appellate Procedure has been drafted, proposed, or is in the drafting stage, to provide a uniform procedure for the use of the electronic statement of facts.

From the case of *National Union Fire Insurance Company v. The Ninth Court of Appeals*, No. D-3492, 1993 WL 433381 (Tex. Oct. 27, 1993), I understand that twelve counties now have rules set forth in nine separate Supreme Court *ad hoc* orders which permit and govern the use of electronic statements of facts, and which provide that the deadline for filing runs from the date of perfecting the appeal rather than from the date the judgment is signed. Surely we will eventually have a new, uniform rule in the Texas Rules of Appellate Procedure to cover this matter, and if a proposed rule has been drafted, I would like to see it if that's appropriate at this stage of things.

Thanks very much for any information you can give me on this, and I do appreciate your consideration of my inquiry.

Sincerely yours,

Daniel H. Benson
Professor of Law

SPg0488

TRAP 54(c) A

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January 11, 1994

Professor William Dorsaneo III
Southern Methodist University
Dallas, Texas 75275

Honorable Clarence A. Guittard
Guittard, Hyden & Guittard
4849 Greenville Ave.
Suite 680
Dallas, Texas 75206

Re: Texas Rules of Appellate Procedure

Dear Professor Dorsaneo and Judge Guittard:

Enclosed is a copy of National Union Fire Insurance Company of Pittsburg v. The Ninth Court of Appeals, 864 S.W.2d 58 (Tex. 1993). Please prepare 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.

Sincerely,

LUTHER H. SOULES III

LHSIII/hhd
Enclosure
cc: Honorable Nathan L. Hecht

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* BOARD CERTIFIED COMMERCIAL AND RESIDENTIAL REAL ESTATE LAW
* BOARD CERTIFIED FAMILY LAW

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, Relator,

v.

The NINTH COURT OF APPEALS, Respondent.

No. D-3492.

Supreme Court of Texas.

Oct. 27, 1993.

Action was brought to recover workers' compensation benefits. The 253d District Court, Liberty County, Chap B. Cain, III, J., held for worker, and insurer appealed. The Court of Appeals, 852 S.W.2d 1, withdrew prior order granting carrier extension of time to file statement of facts, and carrier sought mandamus relief. The Supreme Court, Cornyn, J., held that appellant's confusion regarding proper procedures to be followed in counties authorized to make records of court proceedings by electronic recording constituted reasonable explanation required for obtaining extension of time for filing transcript or statement of facts in Court of Appeals.

Relief granted.

Phillips, C.J., dissented and filed opinion in which Gonzalez and Enoch, JJ., joined.

1. Appeal and Error ⇐624

While Court of Appeals may not grant motion for late filing of transcript or statement of facts which lacks reasonable explanation of need for extension, mere presence of reasonable explanation does not require that Court of Appeals grant motion; granting of properly supported motion is discretionary. Rules App.Proc., Rule 54(c).

2. Appeal and Error ⇐624

Any conduct short of deliberate or intentional noncompliance qualifies as requisite "reasonable explanation" for seeking extension for filing record in Court of Appeals, even if that conduct could also be characterized as professional negligence. Rules App.Proc., Rule 54(c).

3. Appeal and Error ⇐624

Appellant's confusion regarding proper procedures to be followed in counties authorized to make records of court proceedings by electronic recording constituted a reasonable explanation, as required for obtaining extension of time for filing transcript or statement of facts in Court of Appeals. Rules App.Proc., Rule 54(c).

4. Appeal and Error ⇐624

Absence of affidavit of court reporter or certificate of trial judge, explaining when statement of facts would be available for filing, did not preclude granting of extension for filing late statement of facts; where reason for seeking extension was appellant's own mistake as to its obligations under special electronic recording rules, lack of supporting affidavit or certificate was not relevant. Rules App.Proc., Rules 54(c), 73(i).

5. Mandamus ⇐4(4)

Appellant challenging Court of Appeals' withdrawal of its order extending appellant's deadline for filing statement of facts had no adequate remedy at law, and thus was entitled to mandamus relief.

George W. Vie, III, Galveston, for relator.

E. Casey Magan, Houston, for respondent.

OPINION

CORNYN, Justice.

In this original mandamus proceeding, National Union Fire Insurance Company seeks relief from a January 28, 1993, order of the Ninth Court of Appeals in which it withdrew an October 15, 1992, order that had granted National an extension of time to file an electronic statement of facts. National's appeal arises from an adverse judgment in a workers' compensation action filed in Liberty County by Floyd Smith, the real party in interest. 852 S.W.2d 1. The effect of the court's January 28, 1993, order is that National has no statement of facts timely filed with the court of appeals. National argues that the court of appeals abused its discretion in withdrawing its earlier order, which allowed National ... the statement of ... adequate remedy ... conditionally gran...

The record of ... court, which Nati... court of appeals, ... tape recording. T... mitted by our ord... ing a record of e... tronic recording ... Misc. Docket No. ... *for Liberty Count... Court Proceedings* ... These rules requir... recorder "shall fil... with the court of a... of the perfection ... error." *Id.* at p. ... fected its appeal o... statement of facts ... 1992.[1] On Octobe... teen days' grace pe... tions by TEX.R.APP ... motion to extend ti... facts, and the cour... motion on October ... deadline until Nov... vember 10th, howe... of appeals to with... National's deadline ... claiming that Nat... did not reasonabl... delay. After a re... reply by Smith, o... court of appeals wi... ber 15, 1992, disre... facts already filed ... As a result, Natic... statement of facts ...

1. By contrast, TEX.R... dinary timetable for ... The transcript an... shall be filed in th... days after the ju... timely motion for ... judgment has been ... party has timely fi... fact and conclusi... without a jury, ... days after the jud...

2. Rule 4 of the speci... provides that "[n]o ...

allowed National an extension of time to file the statement of facts, and that it has no adequate remedy at law. We agree, and conditionally grant the writ.

The record of proceedings in the trial court, which National seeks to file with the court of appeals, consists of an electronic tape recording. This type of record is permitted by our order adopting rules for making a record of court proceedings by electronic recording in Liberty County. *See* Misc. Docket No. 91–0058, *Adoption of Rules for Liberty County for Making a Record of Court Proceedings by Electronic Recording.* These rules require, however, that the court recorder "shall file the statement of facts with the court of appeals within fifteen days of the perfection of an appeal or writ of error." *Id.* at p. 4. Because National perfected its appeal on September 15, 1992, its statement of facts was due by September 30, 1992.[1] On October 14, 1992, within the fifteen days' grace period allowed for such motions by TEX.R.APP.P. 54(c), National filed its motion to extend time to file the statement of facts, and the court of appeals granted that motion on October 15, postponing National's deadline until November 17, 1992. On November 10th, however, Smith urged the court of appeals to withdraw the order extending National's deadline and to dismiss the appeal, claiming that National's October 14 motion did not reasonably explain the reason for delay. After a response by National and a reply by Smith, on January 28, 1993, the court of appeals withdrew its order of October 15, 1992, disregarding the statement of facts already filed on November 17, 1992. As a result, National has no timely filed statement of facts upon which to base its appeal. The court of appeals did not, however, dismiss the appeal.

Abuse of Discretion

[1] TEX.R.APP.P. 54(c)[2] provides:

> 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 with the court of appeals not later than fifteen days after the last date for filing the record. Such motion shall also reasonably explain any delay in the request required by Rule 53(a).

(emphasis added). One thing is immediately clear from the rule: the court of appeals "may" grant such a motion, but it is not required to do so. And, although we hold that the court of appeals abused its discretion, it did so not by refusing National an extension of time, but by basing its decision on an erroneous legal standard for judging the reasonableness of the movant's explanation. It would not necessarily have been an abuse of discretion to deny the extension of time; Rule 54(c) specifically makes such a decision discretionary.[3] Even "if a motion reasonably explaining the need therefor is filed," the court is not compelled to grant the motion. While a court of appeals may not grant a motion that lacks a reasonable explanation, the mere presence of a reasonable explanation does not require that the court of appeals grant the motion. Nothing in the remainder of Rule 54(c) divests the court of appeals of the discretion granted it by the word "may" in the first line.

[2] In its opinion withdrawing its original order, the court of appeals held that National's motion was deficient because it "failed to

1. By contrast, TEX.R.APP.P. 54(a) provides the ordinary timetable for civil cases:

> The transcript and statement of facts, if any, shall be filed in the appellate court within sixty days after the judgment is signed, or, if a timely motion for new trial or to modify the judgment has been filed by any party, or if any party has timely filed a request for findings of fact and conclusions of law in a case tried without a jury, within one hundred twenty days after the judgment is signed.

2. Rule 4 of the special electronic recording rules provides that "[n]o other filing deadlines as set out in the Texas Rules of Appellate Procedure are changed." Thus, Rule 54(c) and other deadlines in the Rules of Appellate Procedure not inconsistent with deadlines in the special electronic recording rules, continue in force.

3. Because the reason the court of appeals gives for its denial is a misapplication of authority from this court as to the meaning of the phrase "reasonably explains" in Rule 54(c), this mistake amounts to an abuse of discretion. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex.1992).

reasonably explain the need for an extension of time for the late filing of the statement of facts in this case." 852 S.W.2d at 2. By holding that National's explanation failed to meet the standard for reasonableness in Rule 54(c), the court of appeals misapplied legal principles, and at that level committed an abuse of discretion.[4] In *Garcia v. Kastner Farms, Inc.*, 774 S.W.2d 668 (Tex.1989), we defined "reasonably explaining" in the context of TEX.R.APP.P. 41(a) as follows:

> In *Meshwert* [*Meshwert v. Meshwert*, 549 S.W.2d 383 (1977)], we defined the phrase "reasonably explaining," to mean "any plausible statement of circumstances indicating that failure to file within the [required] period was not deliberate or intentional, but was the result of inadvertence, mistake or mischance."

Id. at 669. In fact, "[a]ny conduct short of deliberate or intentional noncompliance qualifies ... even if that conduct can also be characterized as professional negligence." *Id.* at 670. Under this generous standard, it is clear that National's explanation of its need for an extension of time qualifies as a reasonable explanation.

National's original Motion to Extend Time filed on October 14, 1992, contained ample evidence of a reasonable explanation for its need for an extension of time. National was confused about almost every element of the proper procedures that must be followed in counties authorized to make records of court proceedings by electronic recording. First, National recited the date that the judgment was signed, and from that calculated that October 19, 1992, being 120 days from that date, was the last timely date to file the statement of facts. Second, its motion related that the clerk had advised it of the fifteen-days-from-perfection deadline, but National believed the clerk to be mistaken. Third, while professing knowledge of certain rules for Harris and Dallas County, National explained that to its knowledge this court had yet to adopt rules relating to the making of a record by electronic recording for Liberty County. Fourth, National's motion explained that it needed time "so that the court reporter may transfer to this Court the certified cassette copy of the original recording of the trial proceeding." Fifth, National's motion requested an order from the court of appeals "setting out the requirements of the parties relating to any appendix and written transcription of all portions of the recorded statement of facts relevant to the error asserted." Any one of these five aspects of its motion provides a reasonable explanation under the requirements of Rule 54(c)—National was mistaken as to its obligations under this court's *Adoption of Rules for Liberty County for Making a Record of Court Proceedings by Electronic Recording.*[5]

[3] Through nine orders of this court, courts in twelve counties operate under essentially identical rules for electronic recording.[6] There are eleven rules, the last of which specifically provides that the overall effect on the remainder of the rules of procedure should be minimal:

> dissent by Justice Brookshire that first raised confusion about the law as a reason. 852 S.W.2d at 2. While Smith is literally correct, we are unwilling to hold that a party confused about the law is prohibited from having such confusion serve as a reasonable explanation unless through a fleeting lucid moment or jurisprudential epiphany, the party suddenly realizes its mistake or confusion. Such a requirement would nearly eliminate "mistake" from those excuses which this court has repeatedly held suffice as reasonable explanation.

4. In fact, the court of appeals would have been entitled to rest its decision on discretionary grounds, but chose not to. *See Pat Walker & Co. v. Johnson*, 623 S.W.2d 306, 309 (Tex.1981) (interpreting predecessor Rule 21(c) with identical relevant language and noting that "[b]ecause the Court of Civil Appeals has this discretion, the denial of the motion was not a ministerial act for which original mandamus will lie"). Instead, by basing its denial of an extension of time on the "if-a-motion-reasonably-explaining" clause of Rule 54(c), the court of appeals' decision must be reviewed as any other application of legal principles.

5. Smith asserts that National's motion never contained any reasonable explanation and that National had never raised its confusion about the law as a reason. Smith argues that it was the

6. These counties include: the 39th Judicial District Court in Haskell, Throckmorton, Stonewall and Kent Counties; Bexar; Brazos; Dallas; Harris; Kleberg; Liberty; Montgomery; and Stonewall.

> 11. **Other Provisions.** Except to the extent inconsistent with these rules, all other statutes and rules governing the procedures in civil actions shall continue to apply to those proceedings of which a record is made by electronic tape recording.

There are, however, important differences in those counties in which electronic recording is permitted, such as the elimination of the need for a stenographic record and provision for a different deadline for filing the statement of facts, calculated from perfection of the appeal and not the signing of the judgment.[7] While we do not approve of counsel's inattention and lack of awareness of these special rules, there is no evidence that National's mistake was deliberate or intentional. Consequently, we hold that National's mistake constitutes a reasonable explanation, and the court of appeals abused its discretion by holding otherwise.

[4] Smith argues that National's motion was further deficient in that it was not supported by either an affidavit of the court reporter or the certificate of the trial judge explaining when the statement of facts would be available for filing as required by TEX. R.APP.P. 73(i). Rule 73(i) provides:

> when an extension of time is requested for filing the statement of facts, the *facts relied upon* to reasonably explain the need for an extension must be supported by the affidavit of the court reporter, or the certificate of the trial judge, which shall include the court reporter's estimate of the earliest date when the statement of facts will be available for filing.

(emphasis added). In this case, neither the court reporter nor trial judge had personal knowledge of any of the facts upon which National's explanation turned. As we have already concluded that National's own mistake as to its obligations under the special electronic recording rules suffices as a reasonable explanation, the lack of a supporting affidavit or certificate is not relevant under these facts.

No Adequate Remedy at Law

[5] Absent mandamus, National's relief consists of proceeding through an appeal that, without a statement of facts, amounts to a useless exercise. It is difficult for a court of appeals to engage in a meaningful appellate review without the benefit of a properly filed statement of facts. In this context, it must be said that National has no adequate remedy at law.[8] *Cf. Walker*, 827 S.W.2d at 843.

Conclusion

The Ninth Court of Appeals abused its discretion by misapplying the legal principles for interpreting the phrase "reasonably explains" in TEX.R.APP.P. 54(c). National's mistake as to its obligations under the special rules for electronic recordings in Liberty

7. Rule 2, in outlining the various duties of the "court recorder," an individual designated by the court to administer the system (i.e., assuring a functioning recording system, making a log of the proceedings while recording, filing same and other exhibits, storing of the original recording, etc.), provides that: "No stenographic record shall be required of any civil proceedings electronically tape recorded." Rule 3 delineates what should constitute the statement of facts: (a) a standard certified cassette recording, (b) a certified copy of the typewritten logs, and (c) all exhibits with a brief identifying description. Rule 4, discussed above, requires filing of the statement of facts within fifteen days of the perfection of an appeal. Rule 5 requires that a written transcript of all portions of the recorded statement of facts and a copy of all exhibits relevant to the error asserted be filed as an appendix with a party's brief.

8. CHIEF JUSTICE PHILLIPS argues in dissent that National's remedy by appeal is adequate. He states that "[e]ven if the court of appeals' failure to permit the filing of the statement of facts doomed National Union's chances of intermediate appellate success, however, I would not grant the writ of mandamus." *Supra* at 62. Ironically, Chief Justice Phillips, on behalf of the court, has previously argued in the discovery context that "an appeal will not be an adequate remedy where the party's ability to present a viable claim or defense at trial is vitiated or severely compromised by the trial court's discovery order." *Walker*, 827 S.W.2d at 843. He basically concludes that a waste of judicial resources at the court of appeals level is acceptable, yet such a waste is intolerable at the trial court level. While his is perhaps a brighter-line test, we cannot agree. We cannot let the limit swallow the goal. In this case, National's appeal, without a statement of facts, is a clear, and useless waste of judicial resources, and National has no adequate remedy by appeal.

Country is a sufficient explanation under Rule 54(c). Further, as National has no adequate remedy at law, a writ of mandamus is appropriate if the Ninth Court of Appeals does not consider National's statement of facts as timely filed.

We are confident that the Ninth Court of Appeals will reconsider its decision and permit the filing of the electronic statement of facts in accordance with the views we have expressed. The clerk is instructed to issue the writ only if it does not.

Dissenting opinion by PHILLIPS, C.J., joined by GONZALEZ and ENOCH, JJ.

PHILLIPS, Chief Justice, dissenting.

I respectfully dissent. Regardless of whether the court of appeals erred, or whether that error constituted an abuse of discretion, I believe that National Union's rights could be adequately protected through the normal appellate process.

Since mandamus is supposed to be an extraordinary remedy, we have historically used care to ensure that litigants do not make frivolous or misguided attempts to secure the writ. In our recent writings, we have emphasized that mandamus is not available where the relator has an adequate remedy by appeal, *see Walker v. Packer*, 827 S.W.2d 833, 840–44 (Tex.1992) (and cases cited therein), and we have explained that seeking mandamus relief is *never* a prerequisite for obtaining full appellate review. *Id.* at 842 n. 9; *Pope v. Stephenson*, 787 S.W.2d 953, 954 (Tex.1990).

Today's decision departs from this tenor of restraint by granting mandamus relief despite National Union's clearly adequate remedy by appeal. Assuming it does not ultimately prevail in the court of appeals, National Union could challenge that court's refusal to extend the time for filing the statement of facts by application for writ of error. How, then, could the court of appeals' ruling inflict irreparable harm justifying expedited review by mandamus?

We addressed this precise question in *Pat Walker & Co. v. Johnson*, 623 S.W.2d 306, 309 (Tex.1981), holding that the court of appeals' refusal to extend the time for filing a statement of facts was not reviewable by mandamus because the ruling "may be addressed by this Court when properly presented in an Application for Writ of Error." I can discern no good reason for the Court's *sub silentio* overruling of that holding today.

The Court purportedly rests its decision on the principles of *Walker v. Packer*, 827 S.W.2d 833 (Tex.1992). There we held that a party does not have an adequate appellate remedy from a trial court's discovery error if that error vitiates the party's ability to present a viable claim or defense to such an extent that "the trial would be a waste of judicial resources." 827 S.W.2d at 843. While imprecise, I am convinced this is as good a standard as we can articulate. But it has no application here, for at least two reasons.

First, National Union has not demonstrated that its ability to prosecute the appeal has been so severely compromised that the proceeding would truly waste judicial resources. Since National Union has not provided us with its appellate points of error, we cannot determine to what extent its appeal has been vitiated by the absence of a statement of facts. At argument, however, National Union conceded that it intends to assert at least one point of error—concerning the trial court's charge—which may be considered without a statement of facts. If National Union were to prevail on that issue, its complaint regarding the statement of facts would be moot.

Even if the court of appeals' failure to permit the filing of the statement of facts doomed National Union's chances of intermediate appellate success, however, I would not grant the writ of mandamus. However erroneous the appellate court's ruling, the delay in obtaining review in our Court by ordinary writ of error would virtually never be sufficient to justify mandamus relief. When a trial court abuses its discretion in the discovery phase of the pre-trial process, a litigant might have to wait literally years for relief. The enormous expense and delay of a full trial, requisite post-trial procedures, preparation of a full appellate record, full appellate briefing on all points, and oral argument

before obtaining vindication can be of such significance as to mandate immediate attention. Our writing in *Walker v. Packer* was directed to that type of hardship.

The same circumstances are almost always lacking when the courts of appeals abuse their discretion. Errors of those courts can be reviewed through the normal writ of error process with little if any more delay, and little if any additional expense to the parties, than the mandamus action will entail. Thus, most of the writs of mandamus we have previously granted or conditionally granted against appellate courts have involved those courts' review of interlocutory trial court orders by mandamus,[1] not errors of first impression or of review in the ordinary appellate process. *See, e.g., Scott v. Twelfth Court of Appeals*, 843 S.W.2d 439 (Tex.1992); *Spears v. Fourth Court of Appeals*, 797 S.W.2d 654 (Tex.1990); *Flores v. Fourth Court of Appeals*, 777 S.W.2d 38 (Tex.1989); *Packer v. Fifth Court of Appeals*, 764 S.W.2d 775 (Tex.1989); *Champion Int'l Corp. v. Twelfth Court of Appeals*, 762 S.W.2d 898 (Tex.1988); *Hoffman v. Fifth Court of Appeals*, 756 S.W.2d 723 (Tex.1988); *Stringer v. Eleventh Court of Appeals*, 720 S.W.2d 801 (Tex.1986); *Street v. Second Court of Appeals*, 715 S.W.2d 638 (Tex.1986); *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916 (Tex.1985); *Jordan v. Fourth Court of Appeals*, 701 S.W.2d 644 (Tex.1985); *Peeples v. Fourth Court of Appeals*, 701 S.W.2d 635 (Tex.1985); *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105 (Tex.1985). The cases I have found where we granted mandamus relief based on a court of appeals' error of first impression have either not addressed the critical issue of whether relator had an adequate remedy by ordinary appeal, *see Head v. Twelfth Court of Appeals*, 811 S.W.2d 570 (Tex.1991); *Chojnacki v. First Court of Appeals*, 699 S.W.2d 193 (Tex.1985); *Crites v. Second Court of Appeals*, 516 S.W.2d 123 (Tex.1974), or have involved circumstances where relator clearly did not have an adequate appellate remedy. *See O'Connor v. First Court of Appeals*, 837 S.W.2d 94 (Tex.1992) (court of appeals' refusal to allow non-panel member justice to publish dissenting opinion on motion for en banc reconsideration); *Mapco, Inc. v. Forrest*, 795 S.W.2d 700 (Tex.1990) (refusal of court of appeals to forward application for writ of error to Supreme Court); *Doctors Hosp. Facilities v. Fifth Court of Appeals*, 750 S.W.2d 177 (Tex.1988) (refusal of court of appeals to rule on motion for rehearing, thereby impeding Supreme Court's jurisdiction over application for writ of error); *Cowan v. Fourth Court of Appeals*, 722 S.W.2d 140 (Tex.1987) (same). Notably, the cases on which the Court relies in finding an abuse of discretion both reached this Court through the normal appellate process, not by mandamus. *See Garcia v. Kastner Farms, Inc.*, 774 S.W.2d 668 (Tex.1989); *Meshwert v. Meshwert*, 549 S.W.2d 383 (Tex.1977).

The salient principle of *Walker v. Packer* was that mandamus relief should be restricted to compelling situations. Today's decision, far from being an extension of *Walker*, stands that principle on its head.

The total number of mandamus actions we passed upon in the last five years is nearly twice as great as the number during the preceding five year period.[2] If the standards for mandamus review are not carefully confined to truly extraordinary circumstances, we risk even greater escalation of such filings. An increased diversion of appellate resources to mandamus review would, in my opinion, serve neither the bar, the litigants, nor the public.

Perhaps there are cases, where constitutional questions are implicated or rights could be irrevocably lost, that call for issuance of a conditional writ of mandamus against a court of appeals for an error committed in the ordinary appellate process. This is not such a case. I am hard pressed to think of any preliminary ruling by any

1. When mandamus relief is sought against a court of appeals for its ruling in a mandamus action, we make an independent inquiry as to whether the trial court abused its discretion. *See Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex.1985).

2. From September 1, 1988, to August 31, 1993, the Court decided 1322 mandamus actions, or 17.7% of all cases decided during that period. From September 1, 1983, to August 31, 1988, the Court decided only 708 mandamus actions, or 10.9% of all decided cases.

lower court in Texas which, if clearly erroneous, would fail to qualify for mandamus review under today's standard. Even if this ruling is not taken as an invitation to a mandamus firesale, I see no reason to inject such uncertainty into an already cumbersome and confusing appellate structure. Therefore, I dissent.

GONZALEZ and ENOCH, JJ., join in this dissent.

Jesus Sanchez ALVAREZ, Appellant,

v.

The STATE of Texas, Appellee.

No. 501-91.

Court of Criminal Appeals of Texas, En Banc.

Oct. 27, 1993.

Defendant sought habeas relief to bar retrial on double jeopardy grounds. The 34th District Court, El Paso County, Jose Baca, J., denied relief, and defendant appealed. The El Paso Court of Appeals, 804 S.W.2d 617, affirmed. On further appeal, the Court of Criminal Appeals, Baird, J., held that during voir dire district court violated not only principles governing voir dire examination, but also prohibition of judicial comment on evidence, which exposed jury to court's opinion of case and, therefore, manifest necessity for mistrial existed and retrial was not jeopardy barred.

Affirmed.

McCormick, P.J., concurred in result.

1. States ⇐4.1(2)

Fifth Amendment to United States Constitution prohibits state from twice putting defendant in jeopardy for same offense. U.S.C.A. Const.Amend. 5.

2. Double Jeopardy ⇐59

Jeopardy attaches in jury trial when jury is impaneled and sworn. U.S.C.A. Const.Amend. 5.

3. Double Jeopardy ⇐95.1

Prohibition against double jeopardy will generally prevent retrial if defendant is placed in jeopardy and jury is discharged without defendant's consent. U.S.C.A. Const.Amend. 5.

4. Double Jeopardy ⇐95.1

Double jeopardy provision of Fifth Amendment does not mean that every time defendant is put to trial he is entitled to go free if trial ends in mistrial. U.S.C.A. Const. Amend. 5.

5. Double Jeopardy ⇐99

Retrial is not jeopardy barred if mistrial was based on manifest necessity. U.S.C.A. Const.Amend. 5.

6. Double Jeopardy ⇐99

Manifest necessity for mistrial existed and, therefore, retrial was not jeopardy barred, where district court's comments during voir dire violated not only principles governing voir dire examination, but also prohibition of judicial comment on evidence, which exposed jury to court's opinion of case. U.S.C.A. Const.Amend. 5.

Marcos A. Lizarraga, El Paso, for appellant.

Steve W. Simmons, Former Dist. Atty. & George Havlovic & Davis Hilton, Asst. Dist. Attys., El Paso, Robert Huttash, State's Atty., Austin, for the State.

Before the Court en banc.

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

BAIRD, Judge.

Appellant's trial ended when the trial judge declared a mistrial over appellant's objection. Appellant then filed an application for writ of habeas corpus claiming a

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February 22, 1994

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Judge Clarence A. Guittard
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Re: Texas Rules of Appellate Procedure; Electronic Statements of Facts

Dear Gentlemen:

In connection with the review of the Texas Rules of Appellate Procedure by the Supreme Court Advisory Committee and the Committee of the State Appellate Rules, Appellate Practice and Advocacy Section of the State Bar, enclosed are a State Bar Appellate Seminar paper entitled "What You Don't Know Can Hurt You--A 'Baker's Dozen' of Landmines in Texas Practice," which Mike Hatchell and I co-authored, and a memorandum. The paper and memorandum address some of the pitfalls encountered by experienced appellate practitioners around the State in appeals involving electronic statements of facts.

Mike and I thought perhaps these materials would be of interest. If you would like to discuss these issues with Mike or me, please feel free to contact us.

Very truly yours,

Lori M. Gallagher

Lori M. Gallagher

2262:jgw

cc: Mike Hatchell

MEMORANDUM

ANDREWS & KURTH
L.L.P.

TO: Mike Hatchell

FROM: Lori Gallagher

DATE: February 22, 1994

SUBJECT: Electronic Statements of Facts

At your request, the following is a list of anomalies with electronic statements of facts:

1. **Deadlines and requirements are not found in the Texas Rules of Appellate Procedure and they are not widely publicized:**

The deadlines and requirements for obtaining and filing electronic statements of facts are not found in the Texas Rules of Appellate Procedure. Instead, to discover the existence of an order of the Supreme Court of Texas or the Court of Criminal Appeals that authorizes use of electronic statements of facts for a particular court or courts within a county, one must read about it either in a seminar publication, such as our "TRAPS" paper, or in The Appellate Advocate (Vol. V, No. 11, Spring 1992), or contact:

(i) The clerk/court reporter/court recorder of the trial court;

(ii) The clerk of the Supreme Court; or

(iii) The clerk of the Court of Criminal Appeals.

For appellate practitioners who handle appeals of cases for which they are not trial counsel, this anomaly can be devastating. They may not realize until after the filing deadline that the statement of facts is electronic rather than conventional.

2. **Time of filing:**

Unlike a conventional record, which is filed within 60 or 120 days of the judgment being signed, depending upon whether a motion for new trial is filed or findings of fact and conclusions of law are requested (Tex. R. App. P. 54(a)), an electronic statement of facts must be filed within 15 days of perfection of appeal. This requirement has caught many experienced practitioners off guard, particularly in those cases in which an appeal is perfected prematurely. See Bell v. Hair, 832 S.W.2d 55, 56 n.1 (Tex. App.--Houston [14th Dist.] 1992, writ denied) (on the merits; court of appeals refused to consider electronic statement of facts); Bell v. Hair, 832 S.W.2d 53, 54-55 & n.1 (Tex. App.--Houston [14th Dist.] 1992) (per curiam)(court of appeals denied appellants' motion to refile statement of facts, noting that the Order was not a local rule, but an Order of the Supreme Court that the court of appeals was powerless to "strike down").

Each of the Supreme Court Orders states that it does not affect any of the other appellate deadlines. Therefore, if an appellant chooses to prematurely perfect his appeal, he could find that he has lost his right to file a statement of facts even before the deadline in Tex. R. App. P. 54(a) for requesting one! In many cases, the filing deadlines for electronic statements of facts may be discovered after the 15-day extension period in Tex. R. App. P. 54(c). At that point, a party is placed in the awkward position of either proceeding with an appeal on a transcript only, which usually is a "useless exercise," or seeking mandamus relief, which often is difficult to obtain.

3. **What comprises an electronic statement of facts is different from what comprises a conventional statement of facts:**

Unlike a conventional record, an electronic statement of facts is comprised of three parts:

(i) The tapes;

(ii) The exhibits; and

(iii) The recorder's log of the proceedings.

The actual transcription of the statement of facts is not included in the definition of an electronic statement of facts. The transcription of the part of the statement of facts that is relevant to the issues on appeal is attached as an appendix to a party's brief.

Cases discussing confusion over this point include the following:

(i) Ex parte Occhipenti, 796 S.W.2d 805, 806-807 (Tex. App.--Houston [1st Dist.] 1990, no writ);

(ii) National Union Fire Ins. Co. v. Smith, 852 S.W.2d 1, 2-3 (Tex. App.--Beaumont) (per curiam), mandamus granted sub nom. National Union Fire Ins. Co. v. Ninth Court of Appeals, 864 S.W.2d 58 (Tex. 1993); and

(iii) Marino v. Hartsfield, 849 S.W.2d 835 (Tex. App.--Beaumont 1993), rev'd per curiam, No. D-3678, 1994 WL 1931 (Tex. Jan. 5, 1994) (Tex. R. App. P. 170) (alternative request for mandamus relief not reached).

4. Electronic statements of fact are inaudible:

Many practitioners, judges and appellate staff have complained that electronic statements of facts lack necessary quality; the tapes are inaudible and valuable parts of the trial are lost.

5. For most appeals, tapes of the entire proceeding must be filed and transcribed to avoid waiver of error.

To avoid waiver of points of legal or factual sufficiency, improper jury argument and even some pretrial rulings, the entire record of the proceedings must be filed (tapes and transcription).

A number of cases address this problem:

(i) Marino v. Hartsfield, 849 S.W.2d 835 (Tex. App.--Beaumont 1993), rev'd per curiam, No. D-3678, 1994 WL 1931 (Tex. Jan. 5, 1994);

(ii) Mason v. Dallas County Child Welfare Unit, 794 S.W.2d 454, 456 (Tex. App.--Dallas 1990, no writ);

(iii) Born v. Virginia City Dance Hall & Saloon, 857 S.W.2d 951, 954 (Tex. App.--Houston [14th Dist.] 1993, writ denied);

(iv) Rowlett v. Colortek, Inc., 741 S.W.2d 206, 207-208 (Tex. App.--Dallas 1987, writ denied); and

(v) Darley v. Texas Uvatan, Inc., 741 S.W.2d 200, 201-206 (Tex. App.--Dallas 1987, no writ) (on motions).

Therefore, the pilot program has not achieved its goal of facilitating faster, more cost efficient appeals because few appeals are made less time consuming or costly through the use of electronic statements of facts.

5. Conclusion:

On a case-by-case basis, the Supreme Court of Texas and some intermediate appellate courts have corrected many of the foregoing problems as they have arisen. See Marino and National Union, supra; Fazio v. Hames, 866 S.W.2d 267, 269-271 (Tex. App.--Dallas 1993, no writ). Yet, as a general rule, the anomalies that result from application of these orders remain as traps for the unwary.

6. Westlaw Search:

Attached for your information is a recent Westlaw search of cases addressing electronic statements of facts.

L.M.G.

TX-CS Electronic I/O Statement I/S Fact

2/22/94

CITATIONS LIST
Database: TX-CS

Search Result Documents: 16

1. National Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. Ninth Court of Appeals, 864 S.W.2d 58 (Tex., Oct 27, 1993) (NO. D-3492)

2. Fazio v. Hames, 866 S.W.2d 267 (Tex.App.-Dallas, Sep 27, 1993) (NO. 05-93-01035-CV)

3. Mutz v. State, 862 S.W.2d 24 (Tex.App.-Beaumont, Jul 21, 1993) (NO. 09-92-070 CR)

4. Garza v. Tan, 849 S.W.2d 430 (Tex.App.-Corpus Christi, Feb 25, 1993) (NO. 13-92-139-CV)

5. National Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. Smith, 852 S.W.2d 1 (Tex.App.-Beaumont, Jan 28, 1993) (NO. 09-92-234 CV)

6. Bell v. Hair, 832 S.W.2d 53 (Tex.App.-Hous. (14 Dist.), Jan 09, 1992) (NO. A14-91-00835-CV)

7. Nichols v. State, 815 S.W.2d 306 (Tex.App.-Hous. (1 Dist.), Aug 08, 1991) (NO. 01-90-00564-CR)

8. Hollins v. State, 805 S.W.2d 475 (Tex.Cr.App., Mar 20, 1991) (NO. 939-87)

9. Ex parte Occhipenti, 796 S.W.2d 805 (Tex.App.-Hous. (1 Dist.), Sep 06, 1990) (NO. 01-90-00489-CV)

10. Mason v. Dallas County Child Welfare Unit of Texas Dept. of Human Services, 794 S.W.2d 454 (Tex.App.-Dallas, Jun 11, 1990) (NO. 05-89-00708-CV)

11. 4M Linen & Uniform Supply Co., Inc. v. W.P. Ballard & Co., Inc., 793 S.W.2d 320 (Tex.App.-Hous. (1 Dist.), May 10, 1990) (NO. 01-88-00855-CV)

12. Galvin v. Gulf Oil Corp., 759 S.W.2d 167 (Tex.App.-Dallas, Aug 30, 1988) (NO. 05-87-01176-CV)

13. Lauterbach v. Lieber Enterprises, Inc., 754 S.W.2d 370 (Tex.App.-Dallas, Jun 28, 1988) (NO. 05-87-01277-CV)

14. Darley v. Texas Uvatan, Inc., 741 S.W.2d 200 (Tex.App.-Dallas, Nov 06, 1987) (NO. 05-87-00281-CV)

15. Rowlett v. Colortek, Inc., 741 S.W.2d 206 (Tex.App.-Dallas, Nov 06, 1987) (NO. 05-87-00312-CV)

16. Port v. State, 736 S.W.2d 865 (Tex.App.-Austin, Aug 12, 1987) (NO. 3-85-191-CR)

END OF CITATIONS LIST

WHAT YOU DON'T KNOW CAN HURT YOU--A "BAKER'S DOZEN" OF LANDMINES IN TEXAS PRACTICE

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- Houston Young Lawyers Association

PUBLICATIONS:

Attorney-Client Conflicts Of Interest And Disqualification Of Counsel In Texas Litigation, 24 Texas Tech Law Review 1039 (1993) (co-author with Andy Hanen)

Libel Law - New Mexico Adopts An Ordinary Negligence Standard For Defamation Of A Private Figure: Marchiondo v. Brown, New Mexico Law Review (1983)

"Preservation of Error Prior to the Charge Stage," The University of Texas' Third Annual Conference On Techniques For Handling Civil Appeals In State And Federal Court (June 10 & 11, 1993) (co-author and co-speaker with Mike Hatchell)

"Preservation of Error: Post-Charge to Court of Appeals," Southern Methodist University School of Law Seminar: Appellate Advocacy: Handling the Referred Appeal (March 11 and 12, 1993) (speaker and author)

"The Ten Worst Traps," State Bar of Texas' Sixth Annual Advanced Civil Appellate Practice Course (September 10-11, 1992) (speaker and co-author with Mike Hatchell)

"Preservation of Error: Post-Charge To Court Of Appeals," State Bar of Texas' Fifteenth Annual Advanced Civil Trial Course (September 2-4 and 16-18, 1992) (speaker and author)

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WHAT YOU DON'T KNOW CAN HURT YOU--A "BAKER'S DOZEN" OF LANDMINES IN TEXAS PRACTICE

Mike Hatchell
Lori M. Gallagher

Throughout the years, we have endeavored to alert practitioners to "traps" in procedural rules and common law regarding preservation of error for appeal and pursuit of appeal. Some of these traps, such as those inherent in trial court delegation of judicial duties to masters, now are the subject of separate presentations. (See Kathy Butler's presentation) This year, we have chosen to focus on what we consider to be the most devastating traps--those which continue to confound and amaze even the most seasoned practitioners and which can result in total or partial loss of appellate rights. Thus, we have dubbed these traps "landmines."

A. THE LANDMINES LURKING IN OUR MIDST:

Grand Prize Winner: "Of course I filed the statement of facts on time. Just read the Rules!"--the trap in appeals with electronically recorded statements of facts:

The trap inherent in electronically recorded statements of facts is awarded the grand prize. What began as a pilot program in Dallas has been expanded to wider spread use in several counties, among them Harris, Dallas, Liberty, Montgomery, Brazos, Bexar, Haskell, Throckmorton, Stonewall and Kent Counties. In those counties, and perhaps others, some criminal and civil trial courts have implemented programs for the use of electronically recorded, audio-taped, statements of facts. In those courts, practitioners are well-advised to note the different requirements imposed upon the parties with respect to the timely filing of a statement of facts and what constitutes the statement of facts.

a. TIMING

One of the most noteworthy differences is the shortened deadline for filing the taped statement of facts, accompanying recorder's log and exhibits: within 15 days of the perfection of an appeal or writ of error. This deadline is much shorter than the deadlines for filing the record found in Appellate Rule 54, which are: (i) 60 days after the judgment is signed if no motion for new trial or motion to modify the judgment is filed or no findings of fact and conclusions of law are requested, or (ii) 120 days after the judgment is signed if a motion for new trial or motion to modify the judgment is filed or findings of fact and conclusions of law are requested. Tex. R. App. P. 54; Garza v. Tan, 849 S.W.2d 430, 434 (Tex. App.--Corpus Christi 1993, no writ) (holding that statement of facts filed within four days of perfection of appeal was timely under Supreme Court rule for Harris County).

This unpublished requirement is one of the worst landmines because of the interaction between the deadline for filing the electronic statement of facts and the premature perfection of an appeal. Many litigants accustomed to having 60 or 120 days from the date the judgment is signed to file the statement of facts in conventional cases are caught unawares by the requirement that the electronic statement of facts be filed within 15 days of perfection of appeal.

Ironically, one party lost the right to have any statement of facts filed as a result of a premature perfection of an appeal, when it would not have lost those rights if the appeal had not been perfected early. See Bell v. Hair, 832 S.W.2d 55, 56 n.1 (Tex. App.--Houston [14th Dist.] 1992, writ denied) (decision on merits of appeal) (in which the court of appeals refused to consider a statement of facts that was not tendered for filing, as required by the Supreme Court's Order, within 15 days of the appeal being perfected under a prematurely filed cost bond, Tex. R. App. P. 41(c)). See also Bell v. Hair, 832 S.W.2d 53, 54-55 & n.1 (Tex. App.--Houston [14th Dist.] 1992) (per curiam) (on motions) (denying appellee's motion to dismiss appeal and denying appellant's motion to refile statement of facts, noting that the Order was not a local rule, but an order of the Supreme Court of Texas which the court of appeals was powerless to "strike down").

Although the trial courts operating under these Orders provide copies of these Orders to all attorneys appearing before them and notice of the existence of the Order for Harris County has been published in The Appellate Advocate, Vol. V, No. 11 (Spring 1992), which is the State Bar Appellate Practice & Advocacy Section Report, the Orders apparently have not been published in the Texas Bar Journal or similar publications. They are available through John T. Adams, Clerk of the Supreme Court of Texas, and

Thomas F. Lowe, Clerk of the Court of Criminal Appeals. See Appendices.

b. CONTENTS

Not only has the timing of filing of the statement of facts in electronically recorded cases been one of the most significant departures from conventional practice, but so is what constitutes a "statement of facts." Under the Orders, the "statement of facts" is the court recorder's certified tapes and logs, plus the exhibits. Ex parte Occhipenti, 796 S.W.2d 805, 807 (Tex. App.--Houston [1st Dist.] 1990, no writ). The written transcription of the tapes is not the "statement of facts." Instead, the transcription of the portion of the statement of facts that is relevant to the errors asserted on appeal is filed as an appendix to the briefs. Note that if the errors on appeal are no evidence or legal or factual insufficiency points, the entire statement of facts, including voir dire, opening and closing, should be attached to the appellant's brief. This rule is expanding to other areas. See Section A(10) infra.

Confusion over the contents of the statement of facts is now appearing in reported decisions.

In National Union Fire Insurance Co. v. Smith, 852 S.W.2d 1, 2-3 (Tex. App.--Beaumont 1993) (per curiam) (on motions), the appellant filed a motion for extension of time to file the statement of facts. The court of appeals granted the motion, but subsequently withdrew the grant based upon the appellee's motion contending that the appellant had failed to reasonably explain the need for the extension. The appellant had requested the extension to file "a written transcription of all portions of the recorded statement of facts relevant to the error asserted." Id. at 1-2. Yet, the court determined such written transcription was not required to be filed as part of the statement of facts. The court held:

> The statement of facts in proceedings which are electronically recorded consists of (1) standard cassette recordings certified by the court reporter to be clear and accurate copies of the original recording of the entire proceeding, (2) a copy of the typewritten and original logs filed in the case and certified by the court reporter, and (3) all exhibits filed in the case.

Id. at 1 (citing Supreme Court of Texas Order, Misc. Docket No. 91-0058). The court further held that the transcription of the statement of facts is filed by each party only as an appendix to its brief. Id. at 1-2.

Justice Brookshire dissented, noting the confusion between traditional rules for filing the statement of facts and new rules relating to electronically recorded statements of facts, especially among attorneys and parties unfamiliar with the Liberty County rules concerning electronic recordings. Id. at 2-3. Justice Brookshire would have allowed the statement of facts to remain filed. Id. Justice Brookshire noted that the basic purpose of the electronic recording system and the Orders--to reduce the time and cost of appellate procedures--was not hindered or diminished by the court's prior grant of the motion for extension of time to file the statement of facts and its subsequent filing. Id. at 2. In closing, Justice Brookshire asked: "Query: why does the appellee object to the Ninth Court of Appeals hearing oral arguments and reviewing the merits of the case?" Id. at 3. Presumably, the appellant could have handled this problem by filing a motion for extension of time to file its appellant's brief and the appendix containing the written transcription of the recorded statement of facts. [Note: This case is still pending before the Beaumont Court of Appeals, but the appellant has filed a petition for writ of mandamus in the Supreme Court of Texas regarding the statement of facts.]

Similarly, the Beaumont Court of Appeals withdrew a previously granted motion to extend time to file the record in Marino v. Hartsfield, 849 S.W.2d 835 (Tex. App.--Beaumont 1993, writ requested). In that case the court noted that it could not dismiss the appeal because the transcript was timely filed. Id. at 838. However, the court did limit the error the party could assert absent a statement of facts to "complaints concerning errors of law, erroneous pleadings, an erroneous charge, irreconcilable conflicts in the jury findings and fundamental error." Id.

A number of other cases deal with the written transcription of the statement of facts to effectuate loss of appellate rights. See Rowlett v. Colortek, Inc., 741 S.W.2d 206, 207-208 (Tex. App.--Dallas 1987, writ denied) (complete set of electronic tapes of the statement of facts was timely filed, but appellant failed to provide the appellate court with a written transcription of the entire statement of facts as an appendix to his brief, as required by paragraph 5 of the Supreme Court Order, given the points of error asserted and consistent with the case law governing conventional statements of facts; the court of appeals held that the written partial statement of facts was insufficient to preserve no evidence and factual insufficiency points of error; the court held that the presumption in paragraph 6 of the Supreme Court's Order that nothing omitted from the transcriptions in the appendices is relevant to any point raised or to the disposition of the appeal means only that a partial

transcription of the statement of facts does not automatically defeat an appellant's showing of error, but it does not mean that anything the appellant omits can be presumed to sustain the appellant's assigned error); Mason v. Dallas County Child Welfare, 794 S.W.2d 454, 456 (Tex. App.--Dallas 1990, no writ) (citing Rowlett and holding that appellant could not succeed on her no evidence or insufficient evidence points without bringing a complete written transcription of the recorded statement of facts, as provided in the Supreme Court's Order); Born v. Virginia City Dance Hall & Saloon, No. C14-92-00918-CV, 1993 WL 232204, at *2 (Tex. App.--Houston [14th Dist.] July 1, 1993, n.w.h.) (citing Rowlett and noting that Texas courts have extended the Supreme Court's analysis that no error can be shown on an appellant's no evidence points without a complete or agreed statement of facts to cases where an appellant complains of insufficient evidence in an electronically recorded trial). But see Darley v. Texas Uvatan, Inc., 741 S.W.2d 200, 201-206 (Tex. App.--Dallas 1987, no writ) (complete set of electronic tapes of the statement of facts was timely filed; the court of appeals denied a motion to dismiss the appeal based upon the written transcription of the statement of facts not being filed within 15 days of perfection of the appeal and granted a motion to extend the appellant's time for filing its brief and appendix, holding that when the record was electronically recorded under the Order set forth in the appendix to the opinion, Appellate Rule 53(a) governed the timeliness of the request to the court reporter for preparation of the statement of facts as that term is defined in the Order and that the appellant met the jurisdictional requirements for invoking the appellate court's authority to consider the statement of facts).

c. ERRORS OR OMISSIONS

Recently an appellant contended that the judgment should be reversed because there was an insufficient record on appeal due to errors and omissions in the electronic record. Born, 1993 WL 232204, at *1 (motion for reh'g overruled Aug. 5, 1993). The court overruled that point of error, stating that the ability to obtain a new trial under Tex. R. App. P. 50(e) is limited to cases in which (i) an appellant has made a timely request for the statement of facts; (ii) the court reporter's notes and records have been lost or destroyed without appellant's fault; and (iii) the parties cannot agree on a statement of facts. Id. at *1. The court agreed with the appellee that errors and omissions in the electronic statement of facts is not equivalent to a lost or destroyed record. Id. at *2. The court further noted that appellants had not endeavored to correct the statement of facts under Tex. R. App. P. 55 and had not shown that the parties could not agree on the unidentified speakers and inaudible responses. Id. at *1-2. Note that the court did not hold that the appellant had waived its appellate rights entirely for failing to present a complete statement of facts. Instead, the court held only that appellants had not demonstrated that the errors and omissions in the statement of facts had rendered the record wholly insufficient for the prosecution of appeal and for appellate review, as contended in their first point of error, because appellants had presented only the pages of the written transcription that contained the errors and omissions and not the entire record. Id. Thus, in order to complain about errors and omissions in electronic statements of facts, parties should use Tex. R. App. P. 55 to correct the error if possible, and bring the entire statement of facts to the appellate court to prove reversible error. Tex. R. App. P. 50(d).

d. COPIES

The Dallas Court of Appeals has interpreted the Supreme Court's Order to require only one copy, rather than six copies, of the written transcription of the statement of facts as part of the appendix to appellant's brief. Lauterbach v. Lieber Enters., Inc., 754 S.W.2d 370, 371 (Tex. App.--Dallas 1988, writ denied) (per curiam).

Note: According to their terms, the Orders of the Supreme Court and Court of Criminal Appeals do not affect any other appellate deadline.

SOLUTION: Prior to trial or other proceedings in participating courts in the affected counties, counsel is well-advised to check with the trial court, the clerk and the court reporter to ascertain whether the proceedings will be recorded electronically or stenographically. If the proceedings are scheduled to be recorded electronically, counsel should obtain a copy of the applicable Order and confirm the respective responsibilities of the court reporter, the person monitoring the electronic taping and the parties as well as the deadlines with respect to filing the electronic tapes as the official statement of facts. Additionally, each party should take steps to ensure that the court recorder is recording all proceedings and that the equipment is functioning properly. When accepting an appeal of a case that you did not try, follow the same procedure and verify the information obtained from the trial court personnel with the appellate court clerk. See Orders attached in Appendices.

1. "It's all there in black and white, judge, you just can't see it"--the unfiled summary judgment evidence and statement of intent trap:

This term, the Corpus Christi Court of Appeals addressed a procedural issue of first impression: how a party can invoke the statement of intent provision of Tex. R. Civ. P. 166a(d), which enables a party to use "discovery products not on file with the clerk" as summary judgment evidence if (i) copies of the material, (ii) appendices containing the evidence, or (iii) a notice containing specific references to the discovery or other instruments are filed and served on all parties with a "statement of intent" to use the specified discovery. E.B. Smith Co. v. United States Fidelity & Guar. Co., 850 S.W.2d 621, 623 (Tex. App.--Corpus Christi 1993, writ denied). In that case, the court held that a "statement of intent" that merely declared that the party intended to use specific pages of unfiled depositions and contained broad statements regarding that evidence were not sufficient to constitute a "notice containing specific references as required by [Rule] 166a(d)." Id. at 624. The court held that the term "specific references" means that the party relying on unfiled discovery "by its notice and statement of intent, must show the court language from an unfiled deposition or other unfiled discovery document before the court rules on the summary judgment motion." Id. (emphasis added). The court reasoned that it was not the intent in amending Rule 166a to place the burden on the trial court to request the unfiled discovery prior to ruling on a summary judgment motion. Id. Because the trial court had not had the depositions before it at the time of the summary judgment hearing and because the statement of intent in the summary judgment response was inadequate, the court held that it could not consider the unfiled depositions despite the fact that the depositions appeared in the transcript. Id. at 623-624. Nevertheless, the court reversed the summary judgment for other reasons.

SOLUTION: Follow Tex. R. Civ. P. 166a(d) and quote the unfiled discovery language in the notice and statement of intent. In support of a motion for summary judgment or response, one also can attach the discovery to an authenticating affidavit accompanied by a court reporter's certificate, if appropriate, in compliance with Kotzur v. Kelly, 791 S.W.2d 254, 255-256 (Tex. App.--Corpus Christi 1990, no writ), and Deerfield Land Joint Venture v. Southern Union Realty Co., 758 S.W.2d 608, 610 (Tex. App.--Dallas 1988, no writ).

2. "Yes it was, but no it wasn't"--the motion for instructed verdict trap:

Despite the enjoinder of Appellate Rule 52(c)(10) that anything occurring in open court and so reported by the court reporter constitutes an adequate bill of exceptions, some courts of appeals hold that a ruling denying an oral motion for instructed verdict appearing in the statement of facts is not sufficient to preserve error. Tex. R. App. P. 52(c)(10). Instead, the ruling must appear, so these courts hold, in the judgment or by separate order. Wal-Mart Stores, Inc. v. Berry, 833 S.W.2d 587, 590 (Tex. App.--Texarkana 1992, writ requested); Soto v. Southern Life & Health Ins. Co., 776 S.W.2d 752, 754 (Tex. App.--Corpus Christi 1989, no writ); Pierce v. Gillespie, 761 S.W.2d 390, 396 (Tex. App.--Corpus Christi 1988, no writ); Superior Trucks, Inc. v. Allen, 664 S.W.2d 136, 145 (Tex. App.--Houston [1st Dist.] 1983, writ ref'd n.r.e.); Steed v. Bost, 602 S.W.2d 385, 387 (Tex. Civ. App.--Austin 1980, no writ); Southwestern Materials Co. v. George Consol., Inc., 476 S.W.2d 454, 455 (Tex. Civ. App.--Houston [14th Dist.] 1972, writ ref'd n.r.e.). In Sipco Services Marine, Inc. v. Wyatt Field Service Co., No. 1-91-00916-CV, 1993 WL 82707, at *6-7 (Tex. App.--Houston [1st Dist.] March 25, 1993, no writ) (op. on reh'g), in a concurring opinion, Justice Cohen cogently observed that this rule had been applied only by intermediate appellate courts. He questioned the continued validity of and necessity for the rule, and argued that, under Tex. R. App. P. 52(a) and (c), an oral ruling fully recorded in the statement of facts should be sufficient to preserve error. Id.

SOLUTION: Have an order prepared and signed by the court and file it immediately after the ruling. It is best not to wait until the judgment because the opposing party may be in control of preparation of the judgment and may convince the court that the oral ruling is sufficient. (In the latter instance, the request for inclusion of the ruling in the judgment should be made plain in the record; then the opposing party should be estopped to claim waiver.) If the ruling is not documented immediately by written order or in the judgment, use Rule 306a and request the court to document the ruling by written order. Tex. R. Civ. P. 306a; Ballard v. King, 652 S.W.2d 767, 769 n.3 (Tex. 1983) (citing Rule 306a). Present these motions to the court at the conclusion of the hearing on post-verdict motions or set another hearing date for presenting these motions to the trial court.

3. "This is easy--it's either my issue or their issue, and when I figure that out I'll know exactly what to do"--the object and request dilemma:

We have been taught for years that whether one must only object to the charge or also must request inclusions in the charge depends upon (i) whether a question is theirs or yours, and (ii) whether there is a defective submission of an instruction or a complete omission. Broad form submission, generally, has put these standard rules in limbo, but those belt-and-suspenders lawyers who have always said the safest thing to do is object and request have been ridiculed. No longer! The Corpus Christi Court of Appeals has held (four times now) that, in the situations presented, error would not be preserved if the appealing party did not object to the charge and specify the legal basis for the objection as well as tender requested inclusions. Texas Commerce Bank Reagan v. Lebco Constrs., Inc., No. 13-91-423-CV, 1993 WL 230212, at *4 (Tex. App.--Corpus Christi June 30, 1993, n.w.h.) (holding that when the trial court erroneously has failed to include instructions on the proper measure of damages, it is the complaining party's burden to both object to the charge and tender such instructions in substantially correct form); Wright Way Constr. Co. v. Harlingen Mall Co., 799 S.W.2d 415, 420-422 (Tex. App.--Corpus Christi 1990, writ denied) (holding that Wright Way preserved error regarding the omission of estoppel instruction by tendering an instruction and objecting to the trial court's refusal to submit the instruction because estoppel was raised by the evidence); National Fire Ins. Co. v. Valero Energy Corp., 777 S.W.2d 501, 508 (Tex. App.--Corpus Christi 1989, writ denied) (appellant waived error by failing to submit instructions on the proper measure of damages that could accompany a broad-form damage question; tender of its own questions containing accompanying instructions on the measure of damages was insufficient; holding that it was "complaining party's burden to both object to the charge and tender instructions in substantially correct form"); Texas Cookie Co. v. Hendricks & Peralta, Inc., 747 S.W.2d 873, 878 (Tex. App.--Corpus Christi 1988, writ denied) (holding that where the court has failed to include a limiting instruction on the proper measure of damages, it is the complaining party's responsibility to both object to the charge and tender written instructions containing the proper measure; by failing to tender, the party waives error).

Intermediate appellate court opinions in the last couple of years demonstrate that this "exception" may be becoming the rule. In holding that the defendant-appellant had waived error by merely objecting to the plaintiffs' defective damages question, the court stated that in most cases the appellant would have been correct that "a party who finds fault with a proposed jury question need only object to the inclusion of the question in the charge." Jim Howe Homes, Inc. v. Rogers, 818 S.W.2d 901, 902 (Tex. App.--Austin 1991, no writ) (citing Vela v. Alice Specialty Co., 607 S.W.2d 289, 291 (Tex. Civ. App.--Tyler 1980, no writ)). Contrary to the general rule, however, the court held that when the question that is defective is a damages question, a court's charge should limit the jury's consideration to the proper elements of damages by an instruction. Id. at 903. The court stated that it recognized that earlier Texas cases have held that the defendant need only object to a damages question that is defective as submitted. Id. (citing Chrysler Corp. v. McMorries, 657 S.W.2d 858, 864 (Tex. App.--Amarillo 1983, no writ), and Stewart v. Moody, 597 S.W.2d 556, 558 (Tex. Civ. App.--Beaumont 1980, writ ref'd n.r.e.)). Nevertheless, the court stated: "We believe, however, that the party who stands to benefit from the limiting instruction has now the burden of requesting such an instruction." Id. (emphasis added) (citing Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535, 538 n.4 (Tex. 1981); Atex Pipe & Supply, Inc. v. Sesco Prod. Co., 736 S.W.2d 914, 918 (Tex. App.--Tyler 1987, writ denied); Texas Power & Light Co. v. Barnhill, 639 S.W.2d 331, 335 (Tex. App.--Texarkana 1982, writ ref'd n.r.e.); National Fire Ins., 777 S.W.2d at 508; Texas Cookie Co., 747 S.W.2d at 878). The court declined to determine whether the submitted question was proper because it held that the appellant waived any error. Id. at n.2. See also Texas Commerce Bank Reagan, 1993 WL 230212, at *4.

This strict approach would seem to be contrary to W.O. Bankston Nissan, Inc. v. Walters, 754 S.W.2d 127, 128 (Tex. 1988), in which the Supreme Court sustained a simple objection by the defendant that the damage question did not submit a proper measure of damages.

Additionally, in sharp contrast to the hard line taken by some intermediate appellate courts, other recent Supreme Court of Texas opinions illustrate a trend toward relaxation of preservation requirements in the charge area. In State Department of Highways v. Payne, 838 S.W.2d 235, 240 (Tex. 1992) (op. on reh'g), the Court specifically noted that current broad-form submission charge practice makes it "impossible to determine which party has responsibility for each part of a charge." "Rather than attempt to decide under the pressure of the courtroom and in peril of losing appellate rights, whether an objection or a request is called for, cautious counsel might choose to do both in all cases--request and object." Id. Noting that "[t]he

procedure for preparing and objecting to the jury charge had lost its philosophical moorings," the Court held: "There should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling. The more specific requirements of the rules should be applied, while they remain, to serve rather than defeat this principle." Id. at 241. In Payne, the Court concluded that the complaining party had preserved error with respect to the trial court's refusal to submit a premise defect theory to the jury. Id. at 239-241. Following the Payne principles, recently the Supreme Court held in Spencer v. Eagle Star Insurance Co., 36 Tex. Sup. Ct. J. 1090 (June 30, 1993), that error in a defective instruction regarding liability under Tex. Ins. Code art. 21.21 was preserved by objection and that an instruction was not required to be tendered. Id. at 1091-1092 (citing Moulton v. Alamo Ambulance Serv., Inc., 414 S.W.2d 444, 449-450 (Tex. 1967)).

Similarly, the Supreme Court has emphasized that the trial court commits reversible error in failing to submit a viable theory of recovery or defense. Exxon Corp. v. Perez, 842 S.W.2d 629, 630 (Tex. 1992) (per curiam) (op. on reh'g); Payne, 838 S.W.2d at 239-240. At least one intermediate appellate court has followed this trend. Collins v. Beste, 840 S.W.2d 788, 790-791 (Tex. App.--Fort Worth 1992, writ denied).

SOLUTION: In light of Payne, Perez, Spencer, and Collins, do your level best to present to the trial court by objection and/or request the complaint to the charge, pointing out the defect or omission so the trial court can correct the error. As Jim Howe, Texas Commerce Bank and other cases demonstrate, with broad form submission, some intermediate appellate courts now appear to be declining to find a question defective and more often find the "defect" to be the "omission" of a substantially correct instruction. One of the problems with these types of holdings is that they require the careful practitioner to preserve error at the most risk-free level. Thus, the only sure bet is to object and request everything (questions and instructions), despite the fact that this has never been the intent of the Rules, and the Rules and some opinions are to the contrary. At a minimum, always object and tender with respect to instructions and definitions, particularly those necessary to correct any "defect" in broad-form questions or to limit the jury's consideration to proper elements. With respect to questions, if it is absolutely clear that the question truly is not yours--i.e., it is one relied upon by the other party--then merely object; otherwise, object and tender questions. Tex. R. Civ. P. 278. Remember, you will not know if your client is the "party complaining of the judgment," in the words of Rule 278, until after the charge objection stage has passed, the verdict has been returned and the judgment is signed!

4. "Let's do it right; first file a motion for new trial and a motion to modify, correct or reform the judgment under Rules 324 and 329 within 30 days of the judgment being signed, and then we'll file a motion for judgment notwithstanding the verdict under Rule 301 a few weeks later attacking the legal errors"--the motion for judgment notwithstanding the verdict that is treated by an appellate court as a motion to modify, correct or reform trap:

Despite the fact that there is no time limit in Rule 301 or the case law for filing motions for judgment notwithstanding the verdict, an appellate court recently imposed a deadline for such a motion of 30 days after the judgment was signed and unilaterally cut off an appellant's right to have at least one issue decided on the merits. Commonwealth Lloyd's Ins. Co. v. Thomas, 825 S.W.2d 135, 141 (Tex. App.--Dallas 1992), writ granted and court of appeals' judgment vacated by agr., 843 S.W.2d 486 (Tex. 1993). In Commonwealth, the court of appeals determined that the motion for judgment notwithstanding the verdict would result in "a substantive change in the judgment" and held such motions should be treated like motions for new trial or motions to modify, correct or reform the judgment, and filed within the 30-day time limit prescribed in Rule 329 for such motions. Id.; Tex. R. Civ. P. 329.

Commonwealth is contrary to numerous appellate decisions holding that there is no time limit for filing motions for judgment notwithstanding the verdict and that such motions can be filed before or after judgment. See, e.g., Spiller v. Lyons, 737 S.W.2d 29 (Tex. App.--Houston [14th Dist.] 1987, no writ) (motions for judgment notwithstanding the verdict may be filed at any time after the court has announced judgment); Eddings v. Black, 602 S.W.2d 353, 357 (Tex. Civ. App.--El Paso 1980), writ ref'd n.r.e. per curiam, 615 S.W.2d 168 (Tex. 1981) (motion to disregard findings may be filed after judgment and acted upon before the judgment becomes final); Cleaver v. Dresser Indus., 570 S.W.2d 479, 483 (Tex. Civ. App.--Tyler 1978, writ ref'd n.r.e.) ("The Texas Rules of Civil Procedure do not provide for a time limit for filing a motion for judgment notwithstanding the verdict. A motion for judgment notwithstanding the verdict may be filed and acted upon even after judgment is entered and a motion for new trial filed, but before the judgment becomes

final."); Needville ISD v. S.P.J.S.T. Rest Home, 566 S.W.2d 40, 42 (Tex. Civ. App.--Beaumont 1978, no writ) (motion for judgment notwithstanding the verdict may be filed after a judgment has been entered but before it becomes final); Walker v. S & T Truck Lines, Inc., 409 S.W.2d 942, 943 (Tex. Civ. App.--Corpus Christi 1966, writ ref'd) (discussing distinctions between motions for judgment notwithstanding the verdict and motions for new trial and citing with approval numerous cases in which courts recognized that motions for judgment notwithstanding the verdict can be filed before or after judgment with no time limit on the filing other than prior to the finality of the judgment); Hann v. Life & Casualty Ins. Co., 312 S.W.2d 261, 263 (Tex. Civ. App.--San Antonio 1958, no writ) (the rules do not provide for a time limit on the filing and passing upon a motion for judgment notwithstanding the verdict).

SOLUTION: Unfortunately, before the Supreme Court of Texas could reverse the erroneous holding in Commonwealth, the parties settled. As a result, the court of appeals' judgment was vacated, but the opinion was not. The precedential effect of the Commonwealth opinion is equivalent to a "writ dismissed" case, according to the Supreme Court of Texas in Houston Cable TV, Inc. v. Inwood West Civic Ass'n, 36 Tex. Sup. Ct. J. 927, 928 n.1 (May 19, 1993) (per curiam). The next time the Supreme Court of Texas is faced with this issue, it should overrule the court of appeals' holding because the court should not have written a time limit into Rule 301 when the Supreme Court of Texas has chosen not to impose such a time limit, either in Rule 301 or in the case law. Further, the Supreme Court should reject the standard of whether a "substantive change in the judgment" is sought in order to determine the deadline for filing a motion for judgment notwithstanding the verdict because that standard is unworkable. The Supreme Court specifically eliminated that standard in the area of multiple judgments, see Check v. Mitchell, 758 S.W.2d 755, 756 (Tex. 1988) (per curiam), and the Supreme Court should not allow that standard to be resurrected. If the Supreme Court chooses to create a deadline for filing Rule 301 motions, the Court should plainly state the deadline in the Texas Rules of Civil Procedure and apply the rule prospectively only, so that application of the rule will not cut off the right to have issues heard on the merits. It would be appropriate to embody the foregoing case law in an amended Rule 301 or Rule 329 and to provide for the filing of a motion for judgment notwithstanding the verdict or a motion to disregard a jury finding at any time after the court has accepted the jury verdict and before the trial court loses plenary power. At the same time, it would be appropriate to clarify that a trial court has full authority to rule upon such motions up until the trial court loses plenary power.

5. An added complication to an old problem--from Ben Taylor of Houston: "I'll file a motion for new trial and appeal if the motion is not granted as soon as I figure out which of these two judgments is effective"--the multiple judgments trap:

The cases dealing with multiple judgments, premature motions for new trial, premature appeal bonds and other prematurely filed documents are legion. Unfortunately, not all of the cases come out the same way.

a. MULTIPLE JUDGMENTS

On the issue of multiple judgments, compare Check v. Mitchell, 758 S.W.2d 755, 756 (Tex. 1988) (per curiam) (if a trial court modifies, corrects or reforms the judgment "in any respect" within its plenary power, the appellate timetable commences on the date the modified judgment is signed), with Gainesville Oil & Gas Co. v. Farm Credit Bank, 795 S.W.2d 826, 827-828 (Tex. App.--Texarkana 1990, no writ) (court of appeals dismissed appeal, holding that judgment was not final where first summary judgment granted a take-nothing judgment in favor of only one defendant and second summary judgment granted a take-nothing judgment in favor of all defendants; the court of appeals held that because the second judgment did not expressly vacate the first judgment, the first judgment was effective and prevailed over the second, making the second judgment a nullity; yet, the court dismissed the appeal, holding that the first summary judgment was not final because all of the defendants had not moved for summary judgment).

Since Gainesville, other courts have written that Check v. Mitchell is not dispositive of all multiple judgment questions. Recently, the Dallas Court of Appeals held that a second judgment was a nullity. Azbill v. Dallas County Child Protective Servs., No. 5-93-00301-CV, 1993 WL 218640 (Tex. App.--Dallas June 22, 1993, n.w.h.). That case commenced by the state suing the parents of four children to terminate their parental rights. The wife then filed a divorce action against the husband in the same cause number. Without ordering a separate trial, the court first tried the termination claim to a jury. Thereafter, the divorce action was tried to the bench. The trial court signed two judgments: one labeled "Judgment on the Verdict of the Jury" signed November 10, 1992, and the second labeled "Decree of Divorce" signed November 30, 1992. The Dallas

Court of Appeals held that the first judgment was a final judgment under the presumption in North East Independent School District v. Aldridge, 400 S.W.2d 893, 897-898 (Tex. 1966), because it was signed after a jury trial and there was no order of separate trial. Id. at *1-2. The court held that the divorce decree was a nullity. The court based its holdings upon Mullins v. Thomas, 136 Tex. 215, 217-218, 150 S.W.2d 83, 84 (1941), and its progeny. The court stated that the Mullins line of cases holds that "entry of a second judgment in the same case is not a vacation of the first, and if there is nothing to show that the trial court vacated the first, the second is a nullity." Id. at *5. The court noted that Check v. Mitchell, 758 S.W.2d 755 (Tex. 1988) (per curiam), and City of West Lake Hills v. State, 466 S.W.2d 722, 726-727 (Tex. 1971), and their progeny hold that a second judgment replaces the first judgment, and, therefore, the second judgment controls, Id. at *4-7, but distinguished those cases. The court distinguished the City of West Lake Hills line of cases on the ground that the rule announced in those cases focused on statements in the record demonstrating the trial court's intent to replace the first judgment with the second. Id. at *5. The court distinguished Check on the basis that it relied strictly upon Tex. R. Civ. P. 329b, did not cite a single case and did not overrule Mullins. Id. at *6. The net effect of Azbill, however, was not to prevent a party from pursuing an appeal, but instead to place the parties in limbo regarding the portion of the divorce decree held to have been a nullity. Id. at *10 ("The Court expresses no opinion on how or whether Tina and Terry may correct the error regarding the divorce decree"). Presumably, the parties will pursue their appeal of the termination of their parental rights by filing the record and then refile and retry the divorce action (because the trial court has lost plenary power over the divorce action). This case presents a new wrinkle in the "multiple judgments" area.

b. PREMATURELY FILED MOTIONS FOR NEW TRIAL

Once the appellant determines which judgment is effective, the appellant must determine whether to file a new motion for new trial or to rely upon a previously filed motion (one directed to the first judgment). The appellate courts have reached harsh results despite the language in Rule 306c, which provides that a prematurely filed motion for new trial shall be deemed filed on the date of, but subsequent to, the date of signing of the judgment assailed by the motion. Tex. R. Civ. P. 306c.

This term, the Supreme Court of Texas addressed the issues of multiple judgments and motions for new trial and reaffirmed Check v. Mitchell. In Old Republic Insurance Co. v. Scott, 846 S.W.2d 832 (Tex. 1993) (per curiam), the Supreme Court of Texas reversed a court of appeals' dismissal of an appeal for want of jurisdiction based upon a trial court's striking of a motion for new trial. In that case, the trial court granted a default judgment on February 1, 1990, and Old Republic filed a timely motion to set aside and motion for new trial on March 1, 1990. On April 16, 1990, the trial court modified the judgment by granting the motion for new trial in part, setting aside the damages and holding a hearing on damages. On May 4, 1990, the trial court signed a second order, denying the motion for new trial without providing for a new trial on damages and without stating whether it reinstated the original judgment. On May 14, 1990, the trial court signed a third order that rescinded and withdrew the trial court's prior ruling that had ordered a hearing on damages and instead overruled the alternative motion to set aside and motion for new trial in their entirety. On June 8, 1990, Old Republic filed a second motion for new trial, which the trial court purported to strike on July 17, 1990. On August 9, 1990, Old Republic perfected its appeal. The Supreme Court reversed the trial court's dismissal of the appeal for want of jurisdiction and held that under Check v. Mitchell, the May 14, 1990 order, which essentially reinstated the original default judgment, operated as an order modifying, correcting or reforming the original default judgment, and restarted the appellate timetable. The Court further held that the trial court erred in attempting to strike the second motion for new trial. The Court stated: "The filing of a motion for new trial in order to extend the appellate timetable is a matter of right, whether or not there is any sound or reasonable basis for the conclusion that a further motion is necessary." Id. at 833. The Court concluded that there was no "second motion for new trial problem" because there was no final judgment until the trial court signed the May 14, 1990 judgment and, therefore, the appeal bond was filed timely. Id. at 833-834.

Intermediate appellate courts have reached conflicting results on these issues. The Waco Court of Appeals imposes the harshest rule, holding that a movant must file a second motion for new trial after the second judgment, even if the first motion for new trial has not been overruled. Kitchens v. Kitchens, 737 S.W.2d 101, 102 (Tex. App.--Waco 1987, no writ) (judgment 1 signed; motion for new trial filed and heard; judgment 2 signed reforming amount of judgment before motion for new trial overruled; held: the motion for new trial did not extend time to file appeal bond after judgment 2, and therefore appeal

bond filed too late).

Similarly, the El Paso Court of Appeals has applied a harsh rule--depending upon whether the first motion for new trial "assails" the second judgment. American Home Assurance Co. v. Faglie, 747 S.W.2d 5, 6 (Tex. App.--El Paso 1988, writ denied) (judgment 1 signed December 24, 1986; motion for new trial filed January 22, 1987; on March 9, 1987, motion for new trial overruled, first judgment vacated and second judgment signed as of January 9, 1987; cash deposit in lieu of bond filed on March 23, 1987 held too late--motion for new trial assailed only first judgment and cost bond was not filed within 30 days of January 9, 1987 judgment). But see Gill v. Rosas, 821 S.W.2d 689, 690 (Tex. App.--El Paso 1991, no writ) (holding that when a prematurely filed motion for new trial is "harmonized" with both the first and second judgments, the motion for new trial filed before the second judgment was treated as a premature document under Tex. R. App. P. 58(a) and (c), and extended the time for filing the appeal under Rule 41(a)(1) from the date the second judgment was signed).

The Dallas and Houston (First) Courts of Appeals have held that a movant must file another motion for new trial after the second judgment IF the first motion for new trial is no longer a "live" pleading because it was overruled. Miller v. Hernandez, 708 S.W.2d 25, 26-27 (Tex. App.--Dallas 1986, no writ) (judgment 1 signed; motion for new trial filed; judgment 2 signed (vacating judgment 1 but still providing that Miller take nothing) before motion for new trial overruled; held: motion for new trial was a "live" pleading at time of entry of judgment 2 and extended time to file appeal bond after judgment 2); A.G. Solar & Co. v. Nordyke, 744 S.W.2d 646, 647-648 (Tex. App.--Dallas 1988, no writ) (judgment 1 signed; motion for new trial and motion to modify filed and overruled by operation of law; then, judgment 2 was signed; held: motion for new trial was not a "live" pleading at time of judgment 2, appeal bond filed too late); Syn-Labs, Inc. v. Franz, 778 S.W.2d 202, 203-205 (Tex. App.--Houston [1st Dist.] 1989, no writ) (per curiam) (judgment 1 signed; motion for new trial filed; judgment 2 signed before motion for new trial overruled; held: motion for new trial was a viable pleading at time of judgment 2 and extended time to file appeal bond after judgment 2). See also Texas Employers Ins. Ass'n v. Rivera, 673 S.W.2d 690, 692 (Tex. App.--Austin 1984, no writ) (per curiam) (applying Rule 306c to motions to modify, correct or reform the judgment), and Tex. R. App. P. 58(c) (stating that in "civil cases, if the trial court has signed an order modifying, correcting, or reforming the order appealed from, or has vacated that order and signed another, any proceedings relating to an appeal of the first order may be considered applicable to the second").

More recently, the First Court questioned the "live pleading" approach to this issue, and instead considered whether the motion obviously "assailed" the subsequently signed judgment. Harris County Hosp. Dist. v. Estrada, 831 S.W.2d 876, 878-880 (Tex. App.--Houston [1st Dist.] 1992, no writ) (op. on reh'g). In that case, the trial court announced judgment from the bench, but did not, at first, sign a judgment. Then the appellant filed a motion for new trial. The trial court granted the motion for new trial by written order, but subsequently set that order aside and denied the new trial. Thereafter, the trial court signed the first and only judgment. From that judgment the appellant perfected its appeal, albeit within more than thirty days from the judgment being signed. The appellees filed a motion to dismiss the appeal for lack of jurisdiction, contending that the premature motion for new trial did not extend the appellate timetable. The court of appeals overruled the motion, noting that Tex. R. Civ. P. 306 and Tex. R. App. P. 58(a) specifically were designed to avoid dismissals under such circumstances. Id. at 878. Therefore, the court held that the two rules should be construed to accomplish their manifest purpose to eliminate jurisdictional pitfalls that result in dismissals on technical grounds. Id. The court held that under Rule 306c, the premature motion is deemed to be filed on the date the judgment was signed. The court further held that there was no question that the premature motion "assailed" the trial court's judgment. Id. at 878-880. The court distinguished Miller, Solar and other cases. Id.

The Eastland Court of Appeals recently interpreted Miller to hold that a court could consider a motion for new trial relating to an earlier judgment as applicable to a corrected judgment "when the substance of the motion is such as could properly be used with respect to the corrected judgment." Dunn v. City of Tyler, 848 S.W.2d 305, 306 (Tex. App.--Eastland 1993, no writ). Using that test, the court held that a premature motion for new trial extended the appellate timetable from a second judgment granting a summary judgment motion. Id.

c. "UNGRANTING" MOTIONS FOR NEW TRIAL

Other variations on this theme include when the trial court grants a motion for new trial and attempts to "ungrant" it later. Whether the trial court can "ungrant" a motion for new trial may depend upon whether the "ungranting" takes place up to and including the 75th day after the judgment is

signed, or whether it takes place between the 76th and 105th day after the judgment is signed.

The Supreme Court of Texas recently has clarified the law when a trial court has "ungranted" a motion for new trial within the 75-day period after the judgment is signed. The Supreme Court held that if a timely motion for new trial is filed, the trial court does have the authority up to and including the 75th day after the judgment is signed to set aside an order granting a motion for new trial and overrule the motion. Fruehauf Corp. v. Carrillo, 848 S.W.2d 83, 84 (Tex. 1993) (per curiam). In Fruehauf, the Supreme Court reversed the court of appeals' judgment that had held that once a motion for new trial is filed and granted, the trial court has no authority to set aside its order granting the new trial. The Supreme Court held that the court of appeals erred in holding that the trial court does not have the authority to vacate an order granting a new trial during the 75-day period. Id. (citing Rule 329b(c) and (d) and Fulton v. Finch, 162 Tex. 351, 355-356, 346 S.W.2d 823, 827 (1961) (orig. proceeding)). Additionally, the Supreme Court held that the trial court has plenary power over its judgment until the judgment is final. Id. (citing Mathes v. Kelton, 569 S.W.2d 876, 878 (Tex. 1978), and TransAmerican Leasing Co. v. Three Bears, Inc., 567 S.W.2d 799, 800 (Tex. 1978) (per curiam)). The Supreme Court also held that the trial court retains continuing control over interlocutory orders, such as an order granting a new trial, and has the power to set aside those orders any time before final judgment. Id. (citing Texas Crushed Stone Co. v. Weeks, 390 S.W.2d 846, 849 (Tex. Civ. App.--Austin 1965, writ ref'd n.r.e.), and B.F. Walker, Inc. v. Chaney, 446 S.W.2d 896, 897 (Tex. Civ. App.--Amarillo 1969, writ ref'd n.r.e.)). The Supreme Court concluded that "[d]enying the trial court the authority to reconsider its own order for new trial during the 75-day period needlessly restricts the trial court, creates unnecessary litigation, and is inconsistent with the notion of inherent plenary power vested in the trial courts." Id.

See also Homart Dev. Co. v. Blanton, 755 S.W.2d 158, 159 (Tex. App.--Houston [1st Dist.] 1988, orig. proceeding) (any reconsideration of the order granting the new trial must be accomplished within the 75-day period); Essex Int'l Ltd. v. Wood, 646 S.W.2d 322, 324-325 (Tex. App.--Dallas 1983, no writ) ("[w]ithin the time allowed for ruling on the motion for new trial [75 days] the court may vacate its order granting a new trial and consider the motion as if it has never been ruled on").

After the 75th day, however, the courts have reached divergent conclusions on whether the trial court can "ungrant" a motion for a new trial. In Fulton v. Finch, 162 Tex. 351, 355, 346 S.W.2d 823, 826-827 (1961) (orig. proceeding), the Supreme Court, applying earlier procedural rules with different timetables than our current rules, held that the trial court was required to determine all original and amended motions for new trial within the time period for determining those motions--the equivalent of the 75-day rule under Rule 329b--and set aside an order that was signed after that time period that "ungranted" a motion for new trial and reinstated the original judgment. See also Garza v. Gonzalez, 737 S.W.2d 588 (Tex. App.--San Antonio 1987, orig. proceeding) (movant filed a timely motion for new trial, which the trial court granted; nonmovant filed a motion for rehearing; 100 days after the final judgment was signed, the trial court rescinded his new trial order and reinstated the original judgment; the court of appeals held that mandamus will issue to set aside the new order and reinstated judgment because, after granting a motion for new trial, the trial court cannot set aside "the motion" after the expiration of the 75-day period (citing Rule 329b(c) and Fulton v. Finch, 162 Tex. 351, 355, 346 S.W.2d 823, 826 (1961) (orig. proceeding))).

But at least one court has held that within the 105 day period, a trial court can change its mind after it grants a new trial. Gates v. Dow Chem. Co., 777 S.W.2d 120, 123-124 (Tex. App.--Houston [14th Dist.]), vacated, 783 S.W.2d 589 (Tex. 1989) (court of appeals held that the trial court may "ungrant" a motion for new trial even after the expiration of the 75 day period cited in Rule 329b(c), but before the additional 30 days cited in Rule 329b(e) elapse; Supreme Court of Texas vacated in accordance with the settlement agreement of the parties).

An exception to the rule of ungranting exists, of course, if the trial court had no authority or power to grant a new trial in the first instance and the order granting the new trial and subsequent judgment are void, such as where the trial court recused itself and later granted a new trial after judgment by a visiting judge.

SOLUTION: With respect to multiple judgments, despite the correct holding in Check v. Mitchell, which indicates that the second judgment should govern the appellate timetable, if the trial court chooses to sign multiple judgments, the best course is to have the trial court expressly vacate the original judgment and state the new judgment in full with a new date of signature.

With respect to prematurely filed post-verdict motions or appeal bonds, the safest course is to file new post-verdict motions assailing the verdict and the new judgment and restart the appellate timetable. The same is true of cost bonds and other documents

relating to perfecting the appeal and obtaining the record, as well as requests for findings of fact and conclusions of law in a bench trial.

6. "Yes, I get the extended appellate timetable based upon a request for findings of fact and conclusions of law--or so I thought"--the trap in partial jury trial, partial bench trial cases:

In one of the first interpretations of the 1990 amendment to Rule 54(a) regarding an extended appellate timetable in a nonjury case if a timely request for findings of fact and conclusions of law is filed, the court of appeals dismissed an appeal in a partial jury trial, partial bench trial case. Smith v. Smith, 835 S.W.2d 187, 190 (Tex. App.--Tyler 1992, no writ). In that divorce case, the trial court submitted questions to the jury with respect to grounds for divorce, attorneys' fees, disposition of certain property, and a reimbursement claim. Thereafter, the wife (appellee) filed a motion for judgment notwithstanding the verdict. The exact ruling on the motion is unclear from the opinion. Nevertheless, the trial court signed the divorce decree, partially on the jury's verdict (no-fault divorce) and partially on its own determination of attorneys' fees, the proper division of the property and the reimbursement claim. Id. at 188. After the decree was signed, the husband (appellant) timely filed a request for findings of fact and conclusions of law, but neither party filed a motion for new trial or motion to modify. Id. In reliance upon the extended timetable of Tex. R. App. P. 54(a), the husband filed a motion for extension of time to file the statement of facts and a separate motion for extension of time to file the transcript. The transcript was received, but not filed, and the court of appeals dismissed the appeal on the basis that it had no authority to grant the "late-filed" motion for extension. Id. at 189. Subsequently, the court reinstated the appeal, only to dismiss it again! The court rejected the appellant's argument that the case had been converted from a jury case into a nonjury case for purposes of Tex. R. App. P. 54(a) because the trial court acted on the appellee's motion for j.n.o.v., made certain fact findings and "ignored" the jury's verdict. Id. at 190. Thus, the court dismissed the appeal!

SOLUTION: In mixed jury trial, bench trial cases, to obtain an extended appellate timetable, cover all bases by filing a timely motion for new trial or motion to modify the judgment and a timely request for findings of fact and conclusions of law.

7. "All of these post-verdict motions are the same--what difference does it make what I call them and what I ask for, the court knows what I mean"--traps in post-verdict motion practice:

The distinctions among post-verdict motions are not always clear to practitioners, but these distinctions are important. Each motion has a separate function. A Rule 301 motion to disregard jury answers or the verdict is an attack on adverse jury findings and/or the entire verdict. By contrast, a motion for new trial requests just that: a new trial. A motion to modify, correct or reform the judgment is a third type of motion, designed to attack problems in the judgment that are not otherwise covered by a Rule 301 motion or a motion for new trial, such as issues regarding attorneys' fees or prejudgment interest or other discrete legal issues. Thus, it does make a difference, substantively, which motion is filed and what relief is requested. The distinctions among post-verdict motions also are significant because they affect the appellate timetable. Motions for new trial and motions to modify, correct or reform the judgment extend the appellate timetable whereas Rule 301 motions to disregard the jury's findings or the entire verdict do not.

a. "WOW, I JUST FIGURED OUT SOMETHING NEAT ABOUT RULE 329b--A NEW WAY TO EXTEND THE APPELLATE TIMETABLE"-OR SO YOU THINK--THE MOTION TO CORRECT, MODIFY OR REFORM TRAP VIS-A-VIS THE EXTENDED APPELLATE TIMETABLE:

Although a motion to correct, modify or reform the judgment is not the subject of a separate rule of procedure, it is mentioned in Rule 329b, which specifically states that the extended 120-day timetable is invoked when such a motion is filed. Tex. R. Civ. P. 329b(g).

A dilemma arises when a motion to correct, modify or reform looks like a motion for judgment notwithstanding the verdict insofar as the effect of the motion is concerned. In First Freeport National Bank v. Brazoswood National Bank, 712 S.W.2d 168, 169-170 (Tex. App.--Houston [14th Dist.] 1986, no writ), the court held that a motion entitled "Motion to Modify and Enter Judgment" was not a motion to correct, modify or reform the judgment because the "nucleus of Freeport Bank's motion is that because the jury's answers are contrary to the evidence, judgment should be rendered in favor of it rather than Brazoswood Bank." Accordingly, the court held that the extended appellate timetable was not invoked and that the appeal bond, filed more than 30 days after the judgment was signed, was untimely.

SOLUTION: Take care that a motion to correct, modify or reform the judgment intended to be made under Rule 329b names the rule and contains objections to an actual judgment, rather than merely requests the setting aside of a verdict or seeks entry of a completely different judgment. Additionally, always file a motion for new trial under Rule 324 and Rule 329b (assuming a new trial is desired) to ensure that the longer timetable is invoked, or, if a new trial is not desired, perfect the appeal within 30 days of the judgment being signed. Tex. R. App. P. 41.

b. "OOPS, THAT'S NOT EXACTLY WHAT I HAD IN MIND WHEN I FILED THAT THING"--THE PREMATURE MOTION FOR NEW TRIAL TRAP IF A DOCUMENT LOOKS LIKE A MOTION FOR NEW TRIAL:

Assume your opponent files a proposed judgment and you make objections to that judgment on the ground that the jury's answer to the damages question is not supported by factually sufficient evidence. Or assume that you file a motion to disregard that complains that a jury answer should be set aside because of factually insufficient evidence. These objections and complaints look strangely like a motion for new trial. The procedural rules recognize prematurely filed motions for new trial. Tex. R. Civ. P. 306c. If the trial court enters judgment contrary to your client's objections and overrules those objections, there is a risk that the motion will be deemed a premature motion for new trial that is overruled and, thus, there may be no right to file a true post-judgment motion for new trial.

SOLUTION: Be careful not to file pre-judgment documents that look like motions for new trial--particularly documents that contain those assignments required by Rule 324 to be stated in a motion for new trial. Tex. R. Civ. P. 324. Additionally, state in any such filing that that document is not a motion for new trial or a motion to correct, modify or reform, and reserve the right to file such motions.

8. "Well I'll just get something on file and then amend it later"--the facially insufficient motion for new trial trap:

Some attorneys still follow the rules from the pre-1970's era, when there were separate and distinct periods for filing a motion for new trial and an amended motion for new trial, by filing a motion for new trial that reads something like this: "The verdict is not supported by the law and the facts." This type of motion was filed under former procedure to secure the additional period of time in which to file the amended motion.

That useless formality no longer is required because current Rule 329b(a) permits any number of motions and amended motions for new trial to be filed within a 30-day period after judgment. Tex. R. Civ. P. 329b(a). But Rule 329b(b) provides a cut-off of that right when a preceding motion for new trial is overruled. So, if a party files a facially insufficient motion for new trial--particularly one that fails to make the assignment required by Rule 324--the right to make those required assignments is forever lost if a cagey and wise opponent hustles to the courthouse and has the deficient motion for new trial overruled. Tex. R. Civ. P. 324.

SOLUTION: Use the entire 30-day period before filing one full and complete motion for new trial or have a hearing on the motion set well after the 30-day period for filing motions for new trial.

9. "I know my client will appreciate it if I save him a little money here"--the harm dilemma when the voir dire and argument are not made a part of the statement of facts:

Building on statements by Justice Pope in Standard Fire Insurance Co. v. Reese, 584 S.W.2d 835, 840 (Tex. 1979), to the effect that harm from improper argument cannot be demonstrated without an examination of the entire record, "which begins with the voir dire and ends with the closing argument," several court of appeals' opinions hold that harm cannot be demonstrated if the record does not contain the voir dire examination of the jury, the opening statements of counsel, and the entire jury argument. See, e.g., Central Nat'l Gulfbank v. Comdata Network, Inc., 773 S.W.2d 626, 628 (Tex. App.--Corpus Christi 1989, no writ). The first two components of the trial frequently are omitted from the record. The rule is, perhaps, more understandable where jury argument is concerned, but it has been applied in a non-argument context. See, e.g., City of Wichita Falls v. Alvarado, 802 S.W.2d 424, 426-427 (Tex. App.--Fort Worth 1991, writ denied) (holding that the entire record must be examined, including closing arguments, before an appellate court can determine whether the trial court's error in submitting a jury question on the res ipsa loquitur doctrine was harmful).

An analogous line of cases holds that a party cannot prevail on appeal on complaints about insufficiency of the evidence to support the trial court's judgment if the appellant fails to bring the entire record to the court of appeals. See, e.g., Englander Co. v. Kennedy, 428 S.W.2d 806, 807 (Tex. 1968) (per curiam) (appeal of bench trial in which

Supreme Court held that an appellant cannot discharge the burden of showing that a judgment is erroneous when the appellate complaint is of the factual or legal sufficiency of the evidence to support or refute a vital fact finding and the appellant fails to bring a complete statement of facts to the appellate court); Kwic Wash Laundries, Inc. v. McIntyre, 840 S.W.2d 739, 741-742 (Tex. App.--Austin 1992, no writ) (appeal from judgment n.o.v. in which court of appeals held that attempted reliance upon partial statement of facts under Tex. R. App. P. 53(d) did not provide a sufficient record for review of legal and factual sufficiency points; also holding that without the entire record, the court was unable to determine whether "any alleged error was harmful") (citing Christiansen v. Prezelski, 782 S.W.2d 842, 843 (Tex. 1990)); Schafer v. Conner, 805 S.W.2d 554, 556-557 (Tex. App.--Beaumont), writ denied per curiam, 813 S.W.2d 154 (Tex. 1991) (also holding that appellant could not rely upon presumption that nothing omitted from the record is relevant to the appeal); Candelier v. Ringstaff, 786 S.W.2d 41, 44 (Tex. App.--Beaumont 1990, writ denied) (in limited appeal from a bench trial of a will contest, the court held that a partial statement of facts was insufficient to show error attacking the sufficiency of the evidence and that appellant was required to bring forth the entire record to sustain such an attack); Champion Drilling Corp. v. Ranton, 664 S.W.2d 785, 786-787 (Tex. App.--Waco 1984, no writ) (addressing partial statements of fact without a statement of points upon which appellant relies, incomplete statements of fact and insufficiency complaints, and presumptions on appeal).

Recently, this rule has been applied to require all exhibits along with all of the testimonial evidence to be included in the statement of facts. Jakober v. Missouri Pacific R.R., No. 9-92-071-CV, at 2-3 (Tex. App.--Beaumont May 27, 1993, no writ) (unpublished). This rule also has been extended to claims with respect to sanctions. In one case, the appellant claimed that the trial court abused its discretion in imposing sanctions against a putative father for failure to submit to DNA paternity testing. Sutton v. Eddy, 828 S.W.2d 56, 58-60 (Tex. App.--San Antonio 1991, no writ) (citing Englander). Similarly, a court affirmed a "death penalty" sanction of dismissing a counterclaim as a result of discovery abuse where the case was appealed only on the transcript and there was no statement of facts from the hearing on the third motion for sanctions. Johnson v. Whitney Sand & Gravel, Inc., 828 S.W.2d 801, 803-804 (Tex. App.--Waco 1992, no writ). The court of appeals even went further and ordered payment of ten times costs ($5,150) for filing a frivolous appeal, in part because the appellant presented an insufficient record. Id. at 806. In that case, the court noted that if no evidence is presented at such hearings, the appellant has the burden of filing an affidavit so stating. Id. at 803 n.2 (citing Walker v. Packer, 827 S.W.2d 833, 837 n.3 (Tex. 1992) (orig. proceeding [leave denied]).

In a similar vein, a court of appeals affirmed a trial court's denial of injunctive and declaratory relief under the City of Austin's hazardous materials storage and registration ordinance because the appellants failed to bring forward a record containing the applicable municipal ordinance. Metro Fuels, Inc. v. City of Austin, 827 S.W.2d 531, 532 (Tex. App.--Austin 1992, no writ) (per curiam) (citing Tex. R. App. P. 50(d)). In that case, although the agreed statement of facts recited that the trial court had taken judicial notice of the municipal ordinance, the court of appeals declined to do so, noting the difficulty of researching and verifying municipal and county ordinances. Id.

Even in a summary judgment case alleging that the trial court abused its discretion in refusing to set aside deemed admissions, the court held that a statement of facts from the hearing on the motion to withdraw the deemed admissions was necessary to prove error. Wheelis v. First City, Texas-Northeast, 853 S.W.2d 81, 82 (Tex. App.--Houston [14th Dist.] 1993, writ requested) (citing Tex. R. App. P. 50(d); National Union Fire Ins. Co. v. Wyar, 821 S.W.2d 291, 296 (Tex. App.--Houston [1st Dist.] 1991, no writ)).

SOLUTION: Order the voir dire, opening statement, closing argument and all of the evidence, including testimony and exhibits, to be included in the statement of facts in all cases. Even at pre-trial hearings, request and obtain a statement of facts recording all proceedings before the trial court.

10. "There's an old Chinese Proverb: If you create a ridiculous sanction, some day, somebody will use it"--the failure to serve the appeal bond trap:

Rule 46(d) requires that "prompt" notice of the filing of an appeal bond be given to "all parties in the trial court together with notice of the date on which the appeal bond or certificate was filed." Tex. R. App. P. 46(d). That's easy enough, but, then, the Rule provides: "Failure to serve all other parties shall be ground for dismissal of the appellant's appeal or other appropriate sanction if an appellee is prejudiced by such failure."

Talk about the death penalty for speeding! Sure enough, this sanction has been invoked. In Hare v. Hare, 786 S.W.2d 747, 748-749 (Tex. App.--Houston [1st Dist.] 1990, no writ) (per

curiam), notice of filing the appeal bond was given 17 days after perfection of the appeal. Mr. Hare's appeal was dismissed because (presumably) Mrs. Hare suffered prejudice from the delay because she was unable to secure temporary orders from the trial court pending appeal, although she had notice of the appeal within the 30 days during which such orders could have been rendered. Perhaps the appealing party was slow in providing notice, but bear in mind that the Rule does not define "promptly," and it would seem that the Draconian remedy of dismissal ought to rest upon a more specific duty. Mrs. Hare's "prejudice," moreover seems more the product of the system than it does from the late notice of the bond filing.

Similarly, in Hexcel Corp. v. Conap, Inc., 738 S.W.2d 359, 361-362 (Tex. App.--Fort Worth 1987, writ denied), Hexcel filed an appeal bond on the last day for filing, but did not serve notice of the filing of the bond until 38 days later. Its appeal was dismissed on the ground that such failure to provide notice deprived B.F. Goodrich (who had been sued by Hexcel and had obtained summary judgment against Hexcel) of the ability to perfect an appeal against Synair (whom B.F. Goodrich had sued and who had obtained summary judgment against Goodrich).

This case illustrates the incongruity of the dismissal sanction. Because a party can file an appeal bond on the last day for any party to file a bond (and notice can be given after that date under the "promptly" standard), it cannot be said that the failure of notice deprives the opposing party of the right to timely perfect a precautionary appeal against another party. (Goodrich was put to the task of having to ask for an extension of time, which is risky at best, particularly in this instance because it is the duty of all parties to monitor the status of a case.)

There are two problems with the court's reasoning about prejudice: First, under the Supreme Court's interpretation of the limitation of appeal rule, Appellate Rule 40(a)(4), an argument can be made that Goodrich had the right to proceed against Synair by cross appeal if Hexcel had not limited its appeal. Tex. R. App. P. 40(a)(4). Second, however, the nature of Goodrich's claim against Synair would seem an ideal one for application of the rule in Turner, Collie & Braden, Inc. v. Brookhollow, Inc., 642 S.W.2d 160, 166 (Tex. 1982), where rights of a non-appealing party are inextricably intertwined with the rights of another and may turn upon disposition of the appeal as to the rights of the other.

This trap demonstrates the need for a rule allowing an additional time period for a party to perfect an appeal after the other party perfects an appeal.

Rather than dismissal, a more appropriate remedy would have been to calculate the monetary value, if any, of the inability to secure temporary orders and award the amount lost as a sanction. See, e.g., Teague v. Espinosa, 824 S.W.2d 340, 341-342 (Tex. App.--San Antonio 1992, no writ) (where the court held that, even though appellees were not prejudiced by appellant's failure to give them notice of the filing of the appeal bond, appellant's consistent failure to send appellees copies of documents filed with both the district and appellate clerks was severe enough to require a sanction under Rule 46(d) that appellant pay appellees ten times the total taxable costs of court).

SOLUTION: Always serve notice of the filing of the appeal bond or other type of perfection of the appeal by certified mail. Note also that there is a requirement (of what utility is unclear) that notice must be given of the date of filing of the bond, meaning that notice must be given after the bond is filed. If confronted with a motion to dismiss for failure to provide notice, analyze the prejudice component carefully, and also argue that the crime does not fit the punishment--a la TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991) (orig. proceeding). (See infra at Section B(9)).

11. "Gosh! I thought everybody got at least one free extension on their motion for rehearing. But, they overruled the thing. Help! What do I do now?"--the hidden appeal from orders overruling motions for extension of time to file for rehearing trap:

When Tex. R. App. P. 100 was amended to allow a court of appeals, on motion based on reasonable explanation, to extend the time for filing a motion for rehearing, many members of the bar soon came to believe that such extensions were automatic, even when based on the ground that the attorney was just too busy to file the motion. Such extensions are not automatic! At least one court of appeals regularly denies such motions.

What to do when the court of appeals denies a motion to extend time for filing a motion for rehearing and the deadline passes is a potential trap, because the rules of appellate procedure do not define the proper course of action; rather, the remedy lurks in a little known case that created, just for such situations, a so-called "interlocutory appeal" that is not recognized anywhere except in that case.

Obviously, relief cannot be obtained by application for writ of error, because Tex. R. App. P. 131(e) requires that any point in an application for

writ of error "be assigned as error in the motion for rehearing in the court of appeals." In Banales v. Jackson, 610 S.W.2d 732 (Tex. 1980) (per curiam), the Supreme Court held it could review denials (only) of a motion to extend time for rehearing "by an interlocutory review." Id.

In addition to creating this limited appeal, Banales also creates its own rules of procedure, as follows:

(1) The moving document in the Supreme Court is called a "petition for review"; it must state "all of the facts relating to the circumstances leading up to the denial. . . ." Id.

(2) The record in support of the petition must include (i) the Rule 100(g) motion filed in the court of appeals, (ii) any supporting affidavits, (iii) a certified copy of the order of denial and any other relevant orders, and (iv) a brief of the argument.

(3) The record and petition must be accompanied by a motion for leave to file.

(4) The motion for leave to file, the petition, the brief, and the record must be filed "within thirty days from the date of the denial of the motion." Id.

(5) The standard of review is abuse of discretion.

See City of Denton v. Van Page, 701 S.W.2d 831, 833 n.2 (Tex. 1986).

Seemingly, the only relief that can be obtained by the interlocutory appeal is a declaration that the court of appeals abused its discretion in denial of the motion for extension and an order requiring the court of appeals to consider a late-filed motion or, possibly, to allow such a motion to be filed. (Regarding the latter relief, it is not clear what happens if the moving party never files a motion for rehearing in the court of appeals within the time period requested by the motion, because the motion is denied before that time. The careful practitioner, therefore, will file the motion for rehearing anyway.)

Unanswered questions regarding this appeal are:

(1) Does the amendment to Rule 100(g) in 1990, adding the phrase "any order of the court of appeals denying a motion for extension of time to file a motion for rehearing in a civil case shall be reviewable by the Supreme Court" mean that appeal of such a ruling is by application for writ of error?

(2) Can the time limit for filing the interlocutory appeal be extended and, if so, by what standard?

The cautious practitioner will answer those questions "No". It can be argued, however, that an extension of the 30-day period is permissible because the Supreme Court said in Banales that the interlocutory appeal must be filed "within the time required for an appeal to this court from the court of civil appeals. . . ." 610 S.W.2d at 733. Because the Supreme Court can extend a conventional appeal by application for writ of error under Rule 130(d), arguably the same right exists in an interlocutory appeal, since the Court states that the latter is governed by the same time limits as a conventional appeal.

12. "Sure. I'll agree to your motion for extension of your application for writ of error. What difference does it make to me?"--the successive or conditional application for writ of error trap:

Experienced appellate practitioners who may have suffered minor adversity from a court of appeals' judgment, but are otherwise satisfied with it, and thus intend to appeal only if the opposing party files application for writ of error, have always (and rightly) assumed that they have an additional ten days to file a successive or conditional application for writ of error after the opposing party files an application for writ of error. If the application for writ of error by the opposing party was filed on the last day, then the conditional application must be filed 40 days from the overruling of the motion for rehearing.

The 1990 amendment to Rule 130(c) not only ostensibly preserved the 10-day period, but ensured that it would always be a 10-day period when it provided: "If any party files an application within the time specified or as extended by the Supreme Court any other party who was entitled to file an application may do so within forty days after the overruling of the last timely motion for rehearing filed by any party." Tex. R. App. P. 130(c).

Noting that the extended period now dates from the day of the order overruling the last timely-filed motion for rehearing and is not a floating date that commences when the opponent's application is filed, what is the result if the Supreme Court grants the first-filing party an extension of time for filing an application for writ of error beyond the 40th day from the overruling of the last timely-filed motion for rehearing? Seemingly, the time period for filing the successive application has vaporized, even though the wording of the rule seems to contemplate that it exists when the time for filing the first application is "extended by the Supreme Court . . . ."

SOLUTION: If your opponent files a motion for extension, file a companion motion for extension to preserve your right to file a successive or conditional application within 10 days of the filing of the opponent's application.

B. TRAPS THAT THE SUPREME COURT OF TEXAS HAS SPRUNG:

With the rules amendments in 1973, the Supreme Court of Texas began a commendable effort to relax the restrictive application of the rules of procedure and to implement rules that would allow cases to be presented to appellate courts on the merits. With only an occasional step backwards, e.g., Davis v. City of San Antonio, 752 S.W.2d 518, 520-521 (Tex. 1988), the Court has been true to that goal. (See infra) More recently, the Supreme Court reaffirmed "the policy that 'the decisions of the courts of appeals [should] turn on substance rather than procedural technicality.' " City of San Antonio v. Rodriguez, 828 S.W.2d 417, 418 (Tex. 1992) (per curiam) (citing Crown Life Ins. Co. v. Estate of Gonzalez, 820 S.W.2d 121-122 (Tex. 1991) (per curiam)). Since our report last year, the authors are pleased to announce that the Supreme Court has removed several procedural traps, including the following:

1. "How long is the arm of the law for discovery abuse?" -- the "death penalty" sanctions trap:

Following its lead in TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 919 (Tex. 1991) (orig. proceeding) (see infra at Section B(9)), this year the Supreme Court of Texas again held that the trial court abused its discretion in granting death penalty discovery sanctions. Remington Arms Co. v. Caldwell, 850 S.W.2d 167, 168 (Tex. 1993). In Remington, discovery disputes led to the trial court's imposition of a $25,000 pre-trial sanction against Remington and a warning that future discovery abuse would result in "death penalty" sanctions. Id. at 168-169 & n.3. Following a trial that exceeded three weeks, and a verdict in favor of Remington, as a penalty for pre-trial discovery abuse, the trial court declared a mistrial, struck Remington's pleadings and rendered a default judgment against Remington on the liability issues. The Supreme Court granted the petition for writ of mandamus and ordered the sanctions vacated. Id. at 168. The Court held that failure to obtain a pretrial ruling on discovery disputes that exist before commencement of trial constitutes a waiver of any claim for sanctions based on that conduct. Id. at 170. The waiver ruling does not extend to discovery abuse that is not revealed until after trial has begun or is completed. Id. The opinion reiterates the standards set forth in TransAmerican and other recent "death penalty" sanction cases. Id. at 170-172.

2. "I would have filed the motion for new trial in the severed cause, but that cause had not been created yet" -- the severance trap:

In another case that focuses on the effect of severance orders on the timely and proper perfection of appeals, the Supreme Court held that a party had extended the appellate timetable, thereby defeating a claim that McRobert's first counsel was negligent as a matter of law. McRoberts v. Ryals, 36 Tex. Sup. Ct. J. 1093, 1097-1098 (Tex. 1993). In an appeal of a summary judgment in a bill of review, the court found that a motion for new trial filed in the original cause number extended the appellate timetable. Id. The court found that despite the fact that the judgment ordered a severance, it would have been impossible for the appellant to have filed the motion for new trial in the severed cause, because, at the time of filing, the trial court clerk had not yet created a severed cause or opened a new file for the severed cause. Id. The delay in creating the severed cause was just the first in a series of unfortunate events: (i) the district clerk never notified counsel of the subsequent creation of the severed cause, and therefore the appeal bond was filed in the original cause, rather than the severed cause; (ii) the court of appeals' clerk notified counsel that the severance order was interlocutory because there was nothing in the record to reflect that an order had been signed in the severed cause; (iii) appellate counsel decided that if the judgment was interlocutory, it should ask the court (a new presiding judge) to reconsider, which the new trial court did, and, in fact, ordered the prior judgment vacated; (iv) the next day, the appellant voluntarily dismissed the appeal; (v) the appellees sought mandamus relief, contending that the trial court had lost plenary power to vacate the judgment and severance, which was granted; and (vi) with its appeal voluntarily dismissed, the appellant had no choice but to file the bill of review that was the subject of the Supreme Court's opinion. After this tortured history, the Supreme Court saved counsel from the severance trap and reversed and remanded to the trial court!

3. "I'm appealing and don't have to pay the judgment, unless, of course, the sheriff's at the door" -- the satisfaction of judgment trap:

It is well-established that a party cannot appeal a judgment that has been voluntarily satisfied. However, a party can appeal a judgment that is involuntarily paid under threat of execution. Riner v. Briargrove Park Property Owners, Inc., 36 Tex. Sup. Ct. J. 1220 (June 30, 1993) (per curiam). In Riner, the appellant perfected his appeal and thereafter the appellee sought to execute on the judgment. The appellant paid the judgment to avoid execution. The

Court held that the appeal was not moot because the judgment was not paid voluntarily. The Court further held that the appellee was not misled because the payment was made after the perfection of the appeal. Id. With this holding, the Supreme Court reaffirmed an 1877 opinion. This holding is particularly critical to appellants who are unsuccessful in obtaining a stay of the mandate under Tex. R. App. P. 86(c), but still desire to seek certiorari review from the Supreme Court of the United States.

For those who are not aware of the advances made by the Supreme Court toward the removal of similar traps during the 1991 and 1992 terms, and some 1993 refinements of those advances, consider the following:

4. Remember the "I'm perfect--but my computer software has a glitch"--the proper cause number trap:

As incredible as it seems, a cause was dismissed and a litigant almost lost the right to appeal due to an appellate court holding that a timely filed notice of appeal was not properly filed because of an error in the cause number. (The court of appeals denied the right to amend the notice of appeal.) The glitch is now fixed! See City of San Antonio v. Rodriguez, 828 S.W.2d 417, 418 (Tex. 1992) (per curiam). The Supreme Court reversed the court of appeals' dismissal and held that the incorrect cause number on a notice of appeal does not defeat the jurisdiction of the court of appeals. The Supreme Court distinguished the case upon which the court of appeals had relied, Philbrook v. Berry, 683 S.W.2d 378, 379 (Tex. 1985) (orig. proceeding) (per curiam). In Philbrook, the Supreme Court had held that a motion for new trial filed in the original cause, rather than a severed cause, did not extend the time for perfecting an appeal. Id. In City of San Antonio, the Supreme Court distinguished Philbrook stating that in Philbrook the party names associated with the original and severed causes were identical, making the different cause numbers crucial to proper management of the two cases, whereas in City of San Antonio there was no suggestion of confusion regarding the judgment from which the City sought to appeal. City of San Antonio, 828 S.W.2d at 418. The Court supported its holding in City of San Antonio with the well-established principle that the pivotal requirement in perfecting an appeal is that an appellant file an instrument that is a "bona fide" attempt to invoke appellate jurisdiction. Id. (citing Grand Prairie ISD v. Southern Parts Imports, Inc., 813 S.W.2d 499, 500 (Tex. 1991) (per curiam)). There being no doubt that the City's notice of appeal satisfied that requirement, the Supreme Court held that the incorrect cause number could not defeat appellate jurisdiction. 828 S.W.2d at 418.

To avoid these problems in the future, at the outset, prepare an appellate timetable and note on the timetable for the benefit of anyone working on the case the exact cause numbers (trial and appellate) in which all documents must be filed. Carefully proofread the cause number before each filing. The same procedure should be used to ensure that all documents are filed using the correct names of the parties. If a typographical error still occurs, use City of San Antonio.

5. "I meant to file an appeal bond, but the form used was based upon the old rules so I accidentally called it a notice of appeal"--the notice of appeal when an appeal bond is required trap:

Apparently not all lawyers have realized that a notice of appeal does not perfect an appeal in the same way and for the same parties as it did under prior practice. Those lawyers often refer to the appeal bond or cost bond as a "notice of appeal." Now there is relief! See Grand Prairie ISD v. Southern Parts Imports, Inc., 813 S.W.2d 499, 500 (Tex. 1991) (per curiam) (holding that an appellant should be given an opportunity to amend a defective appeal bond, cash deposit in lieu of bond or affidavit of inability to post an appeal bond before a court of appeals dismisses an appeal; a court of appeals has jurisdiction over any appeal when the appellant files an instrument in a bona fide effort to invoke appellate jurisdiction; if an appellant files a notice of appeal, but should have filed an appeal bond in order to perfect the appeal, the appellate court still has jurisdiction). But the intermediate appellate courts are not listening! See Hosey v. County of Victoria, 852 S.W.2d 963 (Tex. App.--Corpus Christi 1993, no writ) (per curiam) (holding that "the simple filing of a notice of appeal, as was done in this case, absent additional actions, does not establish, by itself, a bona fide attempt to invoke our jurisdiction and perfect an appeal"). Apparently, the court based its holding on the fact that the appellant had not complied with Tex. R. App. P. 41(a)(2) regarding extensions of time for perfecting appeal.

6. "Whew--I barely made it to the courthouse on time on the last day for filing the appeal bond--oh no--the courthouse is closed"--the unexpected court holiday or closure trap:

Recently, the Supreme Court of Texas alleviated the closed courthouse problem in Miller Brewing Co. v. Villarreal, 829 S.W.2d 770 (Tex. 1992) (per curiam). The Court stated: "Under our current rules, a party who finds the courthouse closed on the

last day that a document must be filed is not without recourse. He may mail the document that day, and if it is received by the clerk not more than ten days later it is timely filed. Tex. R. Civ. P. 5; Tex. R. App. P. 4(b). He may also locate the clerk or judge of the court and file the document with them. Tex. R. Civ. P. 74; Tex. R. App. P. 4(b). In some circumstances, a party may also move for an enlargement of time. Tex. R. Civ. P. 5; Tex. R. App. P. 41(a)(2), 54(c), 100(g), 130(d), 190(e)." Id. at 771-772. The Court has further alleviated the problem by holding that a "legal holiday" includes not only those dates listed in the statute as legal holidays (Tex. Rev. Civ. Stat. Ann. art. 4591 (Vernon Supp. 1992)), but also any day that the commissioners' court in the county in which the case is pending determines is a holiday or on which the clerk's office for that court is closed. Id. See also In re V.C., 829 S.W.2d 772, 773 (Tex. 1992) (per curiam) (Martin Luther King Day is a legal holiday); Dorchester Master Ltd. Partnership v. Hunt, 790 S.W.2d 552, 553 (Tex. 1990) (per curiam) (cost bond filed on the 91st day after the judgment was signed, which was a Tuesday after Christmas, was not untimely and appeal should not have been dismissed).

7. "To present or not to present"--the presentment of the motion for new trial trap:

In Cecil v. Smith, 804 S.W.2d 509 (Tex. 1991), the Supreme Court corrected an overly technical appellate court holding that the appellant's complaints had been waived by failure to "present" a motion for new trial to the trial court and instead held that no presentment is required for complaints upon which no evidence must be heard--in that case, no evidence and factual insufficiency points. Id. at 511 n.3.

8. "The court of appeals issued another opinion in conjunction with overruling my motion for rehearing, but did not change the judgment. What do I do about a second motion for rehearing?"--the successive motion for rehearing trap:

In Oil Field Haulers Association, Inc. v. Railroad Commission, 381 S.W.2d 183, 188 (Tex. 1964), Justice Calvert held that a second motion for rehearing is absolutely required when a prior motion for rehearing is granted and a new judgment is entered. He reasoned: "A motion for rehearing which seeks a change in a judgment which is subsequently vacated, cannot lay a jurisdictional predicate for an application for writ of error." Id.

In 1986, Rule 100 was amended in an attempt to make clear when a second motion for rehearing may be filed and when one is not required. Tex. R. App. P. 100. Rule 100 now provides:

> If on rehearing the court of appeals or any panel thereof modifies its judgment, or vacates its judgment and renders a new judgment, or hands down an opinion in connection with the overruling of a motion for rehearing, a further motion for rehearing may, if a party desires to complain of the action taken, be filed within fifteen days after such action occurs. However, in civil cases, a further motion for rehearing shall not be required or necessary as a predicate for a point in the application for writ of error if the asserted point of error was overruled by the court of appeals in a prior motion for rehearing.

Tex. R. App. P. 100(d) (emphasis added). Therefore, under Rule 100, it is permissible to file a second motion for rehearing in one of several instances: (i) when a court of appeals modifies its judgment, (ii) when a court of appeals vacates its judgment and renders a new judgment, and (iii) when a court of appeals hands down an opinion in connection with overruling a motion for rehearing. Tex. R. App. P. 100. A second motion for rehearing is not required if the asserted point was previously overruled; however, under Rule 100, it is permissible.

Last term, the Supreme Court took steps to clarify the application of Rule 100 in Havner v. E-Z Mart Stores, Inc., 825 S.W.2d 456, 458 (Tex. 1992). In that case, the court of appeals overruled the petitioner's first motion for rehearing, leaving its judgment unchanged but changing its opinion. Id. The petitioners filed a second motion for rehearing, which was denied. Petitioners then obtained an extension and filed their application for writ of error within 40 days of the overruling of the second motion for rehearing. Id. at 457 n.1. The respondents contended that the application was untimely filed on the basis that the second motion for rehearing was unnecessary and improper. In overruling that challenge to the Court's jurisdiction, the Court stated:

> [T]his court, writing on the permissibility of further motions for rehearing in an effort to put the matter at rest, held that
>
> > when a court of civil appeals hands down an opinion in connection with an order overruling a motion for rehearing, Rule 458 authorizes a losing party to file a further motion for rehearing as a matter of right if he deems one necessary, whether or not there is any sound or reasonable basis for his conclusion.

Id. at 458 (emphasis in original) (citing Honeycutt v. Doss, 410 S.W.2d 772, 773 (Tex. 1966) (per curiam)). The Court added that "[t]his refusal to second-guess the need for a further motion for rehearing was reaffirmed in Stoner v. Massey, 586 S.W.2d 843, 845 (Tex. 1979) (orig. proceeding)." Id. The Court stated that despite these cases and the amendment of the rules, cautious practitioners still file motions for extension of time with the Supreme Court, seeking guidance on the permissibility of a further motion for rehearing. The Court concluded by stating:

> Any risk of delay from parties filing further motions for rehearing is outweighed by the uncertainty injected into the appellate process by this court's review on a case-by-case basis of the permissibility of a further filing. To put the matter at rest once again, we hold that a party may file a further motion for rehearing as a matter of right if the court of appeals alters in any way its opinion or judgment in conjunction with the overruling of a prior motion for rehearing.

Id. Thus, the safest, and now perfectly acceptable route, is to file a second motion for rehearing.

9. "I never thought the trial court would get that mad at my client for failing to show up for a deposition"--the "death penalty" sanctions dilemma:

In response to rash actions taken by many trial courts, the Supreme Court of Texas provided trial courts with much needed guiding principles in ordering sanctions and discouraged trial courts from issuing "death penalty" orders for discovery abuse. See TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917-920 (Tex. 1991) (orig. proceeding) (granting mandamus relief and vacating a "death penalty" discovery sanction order that struck pleadings and had the effect of precluding a decision on the merits of a party's claim); Braden v. Downey, 811 S.W.2d 922, 929 (Tex. 1991) (orig. proceeding) (granting mandamus relief and striking the imposition of monetary sanctions that threatened a party's ability to continue the litigation such that an appeal would have been an inadequate remedy).

C. LANDMINES AND DILEMMAS RAISED BY OTHER PRACTITIONERS:

1. From David Gunn of Houston: "The notice of appeal that provided notice of the appeal, but did not successfully perfect the appeal"--the harsh realities of Tex. R. App. P. 40(b) for appeals in criminal cases!

Recently, in a rare en banc opinion, the First Court of Appeals affirmed a criminal case on the basis that a defective notice of appeal failed to preserve error. Moreno v. State, No. 01-92-00820-CR, 1993 WL 290392, at *1 (Tex. App.--Houston [1st Dist.] Aug. 5, 1993, n.w.h.). In that case, the notice of appeal stated all of the information required by Tex. R. App. P. 40(b) (in order to prosecute an appeal for a nonjurisdictional defect or error that occurred prior to entry of the plea), except it failed to state that the trial court had granted the defendant permission to appeal or to specify that the motion to suppress evidence was raised by written motion and ruled upon before trial. Id. at *2. The State did not raise this defect until it filed its appellee's brief. Following two other cases, the court held that the language of Tex. R. App. P. 40(b) is "unequivocally mandatory," and the notice of appeal was insufficient to preserve for appellate review the denial of the motion to suppress evidence. Id. at *2 (citing Jones v. State, 796 S.W.2d 183, 186-187 (Tex. Crim. App. 1990, no pet.) (en banc); Moshay v. State, 828 S.W.2d 178-179 (Tex. App.--Houston [14th Dist.] 1992, no pet.)). Four justices joined in the majority opinion, but noted their reluctance to approve such a harsh result. Id. at *2-3 (Oliver-Parrott, Mirabal, Wilson, Hedges and Duggan, Jr., JJ.). Another justice dissented, noting the harshness of the denial of appellate review, especially when, as in this case, there was no dispute from the record that the defendant and his attorney sought to appeal an adverse ruling on a pretrial motion to suppress evidence. Id. at *3-4 (Cohen, J.). The dissent urged that the better rule is that a defendant can comply with Rule 40(b)(1), provided the record reflects that the appellant desires to appeal the trial court's judgment. Id. at *4 (citing Miles v. State, 842 S.W.2d 278, 279 (Tex. Crim. App. 1989, no pet.) (en banc) (per curiam)). The dissent and four of the concurring justices urged the Court of Criminal Appeals to abolish the Rule 40(b)(1) requirement that a notice of appeal state that the trial court granted permission to appeal or specify "that those matters were raised by written motion and ruled on before the trial." Id. at *2, 5. At a minimum, the dissent urged that the appellant should be granted leave under Tex. R. App. P. 83 to amend the notice. Id. at *4. But see

Jones, 796 S.W.2d at 187 (holding that Rule 83 cannot be used to cure this defect). (Justices O'Connor and Andell did not participate in the en banc consideration.)

2. "It is one appeal but there are multiple appellants. Help!" - - the dilemma over how to perfect an appeal for multiple appellants:

During the Fifth Annual Advanced Appellate Practice Course, the authors were asked during a break how to perfect an appeal for multiple appellants. The authors recommended one appeal bond for $1,000 that listed each appellant by name and was signed by each appellant or its counsel.

SOLUTION: Last year, the Dallas Court of Appeals held that multiple appellants may perfect an appeal by filing one bond for $1,000 on behalf of all appellants. Ramirez v. Pecan Deluxe Candy Co., 839 S.W.2d 101, 104 (Tex. App. - - Dallas 1992, writ denied). The court also held that an appeal may not be dismissed for procedural defects of form or substance without allowing an opportunity to correct the defect. Id. The court stated: "An appellant who shows that he was accidentally omitted from the jurisdiction-invoking cost bond has the right to amend the bond by adding his name to it." Id. This rule applies "even when the person executing the cost bond [is] not a proper party on appeal." Id.

Incidentally, the same court of appeals has held that the omission of an appellee's name from the clerk's certificate of cash deposit in lieu of cost bond is not a defect that requires the appellant to obtain and file an amended or corrected certificate. Vail v. First Gibraltar Bank FSB, No. 05-93-00055-CV, 1993 WL 195857, at *1 (Tex. App. - - Dallas June 9, 1993, n.w.h.) (not yet released for publication). The court stated that an appeal is perfected by the cash deposit, not by filing the clerk's certificate acknowledging receipt of the deposit. It reasoned that because (1) the cash deposit is available to pay the costs on appeal as directed by the appellate court, (2) the party making the deposit does not designate to whom the money is to be paid, and (3) the purpose of the clerk's certificate is merely to identify the style of the case and show that the deposit has been made, not to designate the parties to whom the money may be paid, the omission of an appellee's name from the certificate has no effect on the availability of the cash deposit to pay costs. Id.

3. "It's a bankruptcy order but I am appealing to federal district court. Which rules do I use?" - - the bankruptcy rules v. the federal rules dilemma:

Last year, a practitioner wrote the authors and suggested the inclusion in this paper of the dilemma regarding which rules govern the time for filing motions and perfection of appeals from bankruptcy orders - - the bankruptcy rules or the federal rules.

SOLUTION: It depends upon the stage of the case, but a basic rule of thumb is to (i) start with the bankruptcy rules, which specifically address such procedures, (ii) check the other rules, and (iii) if possible, always satisfy the lesser time period. See In re Eichelberger, 943 F.2d 536 (5th Cir. 1991) (involving dismissal of appeal following untimely motion for rehearing of district court's judgment on appeal from bankruptcy court judgment). The problem arises, of course, because the timetable is calculated differently under the Bankruptcy Rules and the Federal Rules of Civil Procedure. Bankruptcy Rule 9006(a) provides that "[w]hen the period of time prescribed or allowed is less than 8 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." Bankr. R. 9006(a) (emphasis added). Yet, Federal Rule of Civil Procedure 6(a) states: "When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." Fed. R. Civ. P. 6(a) (emphasis added). Further, the Federal Rules of Appellate Procedure state: "When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." Fed. R. App. P. 26(a) (emphasis added).

In Eichelberger, the court stated some key principles regarding appeals of bankruptcy orders following the denial of a motion for rehearing by the district court: (i) Bankruptcy Rule 9006(a) establishes the manner of computation of any period of time allowed by the Bankruptcy Rules; (ii) Rule 6 of the Federal Rules of Civil Procedure contains no language allowing use of that rule in bankruptcy cases; (iii) Rule 81(a) of the Federal Rules of Civil Procedure specifically prohibits the use of the Federal Rules of Civil Procedure in bankruptcy proceedings; (iv) under the current version of the rules, the Supreme Court has not applied Rule 6 of the Federal Rules of Civil Procedure to bankruptcy cases; and (v) Bankruptcy Rule 8015 provides the sole mechanism for filing a motion for rehearing of a district court's judgment from an appeal of a bankruptcy court judgment. 943 F.2d at 538-539. If the district court overrules the motion for rehearing,

turn to Rule 6 of the Federal Rules of Appellate Procedure, which applies the Federal Rules of Appellate Procedure to such appeals, with some exceptions. Fed. R. App. P. 6(b)(2)(i). Warning: The entire bankruptcy appeal area is fraught with traps. Take time to read all of the rules and ascertain the correct timetable given the circumstances at issue.

APPENDICES

SUPREME COURT OF TEXAS' ORDER FOR 39TH JUDICIAL DISTRICT COURT IN HASKELL, THROCKMORTON, STONEWALL AND KENT COUNTIES

APPENDIX A

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 93- 0154

ADOPTION OF RULES FOR THE 39TH JUDICIAL DISTRICT COURT IN HASKELL, THROCKMORTON, STONEWALL & KENT COUNTIES FOR MAKING A RECORD OF COURT PROCEEDINGS BY ELECTRONIC RECORDING

ORDERED:

The attached rules are adopted for making a record of court proceedings by electronic recording in the 39th District Court of Haskell, Throckmorton, Stonewall and Kent Counties.

This Order shall be effective immediately. The 39th District Court shall record the Order in its minutes and comply with Texas Rule of Civil Procedure 3a(5).

SPg0534

SIGNED AND ENTERED this 1st day of September, 1993.

Thomas R. Phillips, Chief Justice

Raul A. Gonzalez, Justice

Jack Hightower, Justice

Nathan L. Hecht, Justice

Lloyd Doggett, Justice

John Cornyn, Justice

Bob Gammage, Justice

Craig Enoch, Justice

Rose Spector, Justice

RULES GOVERNING THE PROCEDURE FOR MAKING A RECORD OF COURT PROCEEDINGS FOR THE 39TH JUDICIAL DISTRICT COURT IN HASKELL, THROCKMORTON, STONEWALL & KENT COUNTIES BY ELECTRONIC RECORDING

1. **Application.** The following rules govern the procedures in the 39th District Court of Haskell, Throckmorton, Stonewall and Kent Counties in proceedings in civil matters in which a record is made by electronic tape recording, and appeals from such proceedings.

2. **Duties of Court Recorders.** No stenographic record shall be required of any civil proceedings electronically tape recorded. The court shall designate one or more persons as court recorders, whose duties shall be:

a. Assuring that the recording system is functioning and that a complete, distinct, clear and transcribable recording is made;

b. Making a detailed, legible log of all proceedings while recording, indexed by time of day, showing the number and style of the proceeding before the court, the correct name of each person speaking, the nature of the proceeding (e.g., voir dire, opening, examination of witnesses, cross-examination, argument, bench conferences, whether in the presence of the jury, etc.), and the offer, admission or exclusion of all exhibits;

c. Filing with the clerk the original log and a typewritten log prepared from the original;

d. Filing all exhibits with the clerk;

e. Storing or providing for storing of the original recording to assure its preservation as required by law;

f. Prohibiting or providing for prohibition of access by any person to the original recording without written order of the presiding judge of the court;

g. Preparing or obtaining a certified cassette copy of the original recording of any proceeding, upon full payment of any charge imposed therefor, at the request of any person entitled to such recording, or at the direction of the presiding judge of the court, or at the direction of any appellate judge who is presiding over any matter involving the same proceeding, subject to the laws of this state, rules of procedure, and the instructions of the presiding judge of the court;

h. Performing such other duties as may be directed by the judge presiding.

3. **Statement of Facts.** The statement of facts on appeal from any proceeding of which an electronic tape recording has been made shall be:

a. A standard cassette recording, labeled to reflect clearly the contents of the cassette, and numbered if more than one cassette is required, certified by the court recorder to be a clear and accurate copy of the original recording of the entire proceeding;

b. A copy of the typewritten and original logs filed in the case certified by the court recorder; and

c. All exhibits, arranged in numerical order and firmly bound together so far as practicable, with a list in numerical order and a brief identifying description of each.

4. **Time for Filing.** The court recorder shall file the statement of facts with the court of appeals within fifteen days of the perfection of an appeal or writ of error. No other filing deadlines as set out in the Texas Rules of Appellate Procedure are changed.

5. **Appendix.** Each party shall file with his brief an appendix containing a written transcription of all portions of the recorded statement of facts and a copy of all exhibits relevant to the error asserted. Transcriptions shall be presumed to be accurate unless objection is made. The form of the appendix and transcription shall conform to any specifications of the Supreme Court.

6. **Presumption.** The appellate court shall presume that nothing omitted from the transcriptions in the appendices is relevant to any point raised or to the disposition of the appeal. The appellate court shall have no duty to review any part of an electronic recording.

7. **Supplemental Appendix.** The appellate court may direct a party to file a supplemental appendix containing a written transcription of additional portions of the recorded statement of facts.

8. **Paupers.** Texas Rule of Appellate Procedure 53(j)(1) shall be interpreted to require the court recorder to transcribe or have transcribed the recorded statement of facts and file it as appellant's appendix.

9. **Accuracy.** Any inaccuracies in transcriptions of the recorded statement of facts may be corrected by agreement of the parties. Should any dispute arise after the statement of facts or appendices are filed as to whether an electronic tape recording or any transcription of it accurately discloses what occurred in the trial court, the appellate court may resolve the dispute by reviewing the recording, or submit the matter to the trial court.

which shall, after notice to the parties and hearing, settle the dispute and make the statement of facts or transcription conform to what occurred in the trial court.

10. **Costs.** The expense of appendices shall be taxed as costs at the rate prescribed by law. The appellate court may disallow the cost of portions of appendices that it considers surplusage or that do not conform to any specifications prescribed by the Supreme Court.

11. **Other Provisions.** Except to the extent inconsistent with these rules, all other statutes and rules governing the procedures in civil actions shall continue to apply to those proceedings of which a record is made by electronic tape recording.

SUPREME COURT OF TEXAS' ORDER FOR LIBERTY COUNTY

APPENDIX B

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 91-0058

ADOPTION OF RULES FOR LIBERTY COUNTY FOR MAKING A RECORD OF COURT PROCEEDINGS BY ELECTRONIC RECORDING

ORDERED:

The attached rules are adopted for making a record of court proceedings by electronic recording in Liberty County.

Any court in Liberty County using these rules shall comply with Texas Rule of Civil Procedure 3a(5).

SIGNED AND ENTERED this 25th day of July, 1991.

Thomas R. Phillips, Chief Justice

Raul A. Gonzalez, Justice

Oscar H. Mauzy, Justice

Eugene A. Cook, Justice

Jack Hightower, Justice

Nathan L. Hecht, Justice

Lloyd Doggett, Justice

John Cornyn, Justice

Bob Gammage, Justice

RULES GOVERNING THE PROCEDURE FOR MAKING A RECORD OF COURT PROCEEDINGS IN LIBERTY COUNTY BY ELECTRONIC RECORDING

1. **Application.** The following rules govern the procedures in the courts of Liberty County in proceedings in civil matters in which a record is made by electronic tape recording, and appeals from such proceedings.

2. **Duties of Court Recorders.** No stenographic record shall be required of any civil proceedings electronically tape recorded. The court shall designate one or more persons as court recorders, whose duties shall be:

a. Assuring that the recording system is functioning and that a complete, distinct, clear and transcribable recording is made;

b. Making a detailed, legible log of all proceedings while recording, indexed by time of day, showing the number and style of the proceeding before the court, the correct name of each person speaking, the nature of the proceeding (e.g., voir dire, opening, examination of witnesses, cross-examination, argument, bench conferences, whether in the presence of the jury, etc.), and the offer, admission or exclusion of all exhibits;

c. Filing with the clerk the original log and a typewritten log prepared from the original;

d. Filing all exhibits with the clerk;

e. Storing or providing for storing of the original recording to assure its preservation as required by law;

f. Prohibiting or providing for prohibition of access by any person to the original recording without written order of the presiding judge of the court;

g. Preparing or obtaining a certified cassette copy of the original recording of any proceeding, upon full payment of any charge imposed therefor, at the request of any person entitled to such recording, or at the direction of the presiding judge of the court, or at the direction of any appellate judge who is presiding over any matter involving the same proceeding, subject to the laws of this state, rules of procedure, and the instructions of the presiding judge of the court;

h. Performing such other duties as may be directed by the judge presiding.

3. **Statement of Facts.** The statement of facts on appeal from any proceeding of which an electronic tape recording has been made shall be:

a. A standard cassette recording, labeled to reflect clearly the contents of the cassette, and numbered if more than one cassette is required, certified by the court recorder to be a clear and accurate copy of the original recording of the entire proceeding;

b. A copy of the typewritten and original logs filed in the case certified by the court recorder; and

c. All exhibits, arranged in numerical order and firmly bound together so far as practicable, with a list in numerical order and a brief identifying description of each.

4. **Time for Filing.** The court recorder shall file the statement of facts with the court of appeals within fifteen days of the perfection of an appeal or writ of error. No other filing deadlines as set out in the Texas Rules of Appellate Procedure are changed.

5. **Appendix.** Each party shall file with his brief an appendix containing a written transcription of all portions of the recorded statement of facts and a copy of all exhibits relevant to the error asserted. Transcriptions shall be presumed to be accurate unless objection is made. The form of the appendix and transcription shall conform to any specifications of the Supreme Court.

6. **Presumption.** The appellate court shall presume that nothing omitted from the transcriptions in the appendices is relevant to any point raised or to the disposition of the appeal. The appellate court shall have no duty to review any part of an electronic recording.

7. **Supplemental Appendix.** The appellate court may direct a party to file a supplemental appendix containing a written transcription of additional portions of the recorded statement of facts.

8. **Paupers.** Texas Rule of Appellate Procedure 40(j)(1) shall be interpreted to require the court recorder to transcribe or have transcribed the recorded statement of facts and file it as appellant's appendix.

9. **Accuracy.** Any inaccuracies in transcriptions of the recorded statement of facts may be corrected by agreement of the parties. Should any dispute arise after the statement of facts or appendices are filed as to whether an electronic tape recording or any transcription of it accurately discloses what occurred in the trial court, the appellate court may resolve the dispute by reviewing the recording, or submit the matter to the trial court, which shall, after notice to the parties and hearing, settle the dispute and make the statement of facts or transcription conform to what occurred in the trial court.

10. **Costs.** The expense of appendices shall be taxed as costs at the rate prescribed by law. The appellate court may disallow the cost of portions of appendices that it considers surplusage or that do not conform to any specifications prescribed by the Supreme Court.

11. **Other Provisions.** Except to the extent inconsistent with these rules, all other statutes and rules governing the procedures in civil actions shall continue to apply to those proceedings of which a record is made by electronic tape recording.

SUPREME COURT OF TEXAS' ORDER FOR HARRIS COUNTY

APPENDIX C

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 91-0017

ADOPTION OF RULES FOR HARRIS COUNTY FOR MAKING A RECORD OF COURT PROCEEDINGS BY ELECTRONIC RECORDING

ORDERED:

The attached rules are adopted for making a record of court proceedings by electronic recording in Harris County.

Any court in Harris County using these rules shall comply with Texas Rule of Civil Procedure 3a(5).

SIGNED AND ENTERED this 27th day of February, 1991

Thomas R. Phillips, Chief Justice

Raul A. Gonzalez, Justice

Oscar H. Mauzy, Justice

Eugene A. Cook, Justice

Jack Hightower, Justice

Nathan L. Hecht, Justice

Lloyd Doggett, Justice

John Cornyn, Justice

Bob Gammage, Justice

RULES GOVERNING THE PROCEDURE FOR MAKING A RECORD OF COURT PROCEEDINGS IN HARRIS COUNTY BY ELECTRONIC RECORDING

1. **Application.** The following rules govern the procedures in the courts of Harris County in proceedings in civil matters in which a record is made by electronic tape recording, and appeals from such proceedings.

2. **Duties of Court Recorders.** No stenographic record shall be required of any civil proceedings electronically tape recorded. The court shall designate one or more persons as court recorders, whose duties shall be:

a. Assuring that the recording system is functioning and that a complete, distinct, clear and transcribable recording is made;

b. Making a detailed, legible log of all proceedings while recording, indexed by time of day, showing the number and style of the proceeding before the court, the correct name of each person speaking, the nature of the proceeding (e.g., voir dire, opening, examination of witnesses, cross-examination, argument, bench conferences, whether in the presence of the jury, etc.), and the offer, admission or exclusion of all exhibits;

c. Filing with the clerk the original log and a typewritten log prepared from the original;

d. Filing all exhibits with the clerk;

e. Storing or providing for storing of the original recording to assure its preservation as required by law;

f. Prohibiting or providing for prohibition of access by any person to the original recording without written order of the presiding judge of the court;

g. Preparing or obtaining a certified cassette copy of the original recording of any proceeding, upon full payment of any charge imposed therefor, at the request of any person entitled to such recording, or at the direction of the presiding judge of the court, or at the direction of any appellate judge who is presiding over any matter involving the same proceeding, subject to the laws of this state, rules of procedure, and the instructions of the presiding judge of the court;

h. Performing such other duties as may be directed by the judge presiding.

3. **Statement of Facts.** The statement of facts on appeal from any proceeding of which an electronic tape recording has been made shall be:

a. A standard cassette recording, labeled to reflect clearly the contents of the cassette, and numbered if more than one cassette is required, certified by the court recorder to be a clear and accurate copy of the original recording of the entire proceeding;

b. A copy of the typewritten and original logs filed in the case certified by the court recorder; and

c. All exhibits, arranged in numerical order and firmly bound together so far as practicable, with a list in numerical order and a brief identifying description of each.

4. **Time for Filing.** The court recorder shall file the statement of facts with the court of appeals within fifteen days of the perfection of an appeal or writ of error. No other filing deadlines as set out in the Texas Rules of Appellate Procedure are changed.

5. **Appendix.** Each party shall file with his brief an appendix containing a written transcription of all portions of the recorded statement of facts and a copy of all exhibits relevant to the error asserted. Transcriptions shall be presumed to be accurate unless objection is made. The form of the appendix and transcription shall conform to any specifications of the Supreme Court.

6. **Presumption.** The appellate court shall presume that nothing omitted from the transcriptions in the appendices is relevant to any point raised or to the disposition of the appeal. The appellate court shall have no duty to review any part of an electronic recording.

7. **Supplemental Appendix.** The appellate court may direct a party to file a supplemental appendix containing a written transcription of additional portions of the recorded statement of facts.

8. **Paupers.** Texas Rule of Appellate Procedure 40(j)(1) shall be interpreted to require the court recorder to transcribe or have transcribed the recorded statement of facts and file it as appellant's appendix.

9. **Accuracy.** Any inaccuracies in transcriptions of the recorded statement of facts may be corrected by agreement of the parties. Should any dispute arise after the statement of facts or appendices are filed as to whether an electronic tape recording or any transcription of it accurately discloses what occurred in the trial court, the appellate court may resolve the dispute by reviewing the recording, or submit the matter to the trial court, which shall, after notice to the parties and hearing, settle the dispute and make the statement of facts or transcription conform to what occurred in the trial court.

10. **Costs.** The expense of appendices shall be taxed as costs at the rate prescribed by law. The appellate court may disallow the cost of portions of appendices that it considers surplusage or that do not conform to any specifications prescribed by the Supreme Court.

11. **Other Provisions.** Except to the extent inconsistent with these rules, all other statutes and rules governing the procedures in civil actions shall continue to apply to those proceedings of which a record is made by electronic tape recording.

SUPREME COURT OF TEXAS' ORDER FOR DALLAS COUNTY

APPENDIX D

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 91-0059

ADOPTION OF RULES FOR DALLAS COUNTY FOR MAKING A RECORD OF COURT PROCEEDINGS BY ELECTRONIC RECORDING

ORDERED:

The attached rules are adopted for making a record of court proceedings by electronic recording in Dallas County. These rules having been in effect prior to January 1, 1991, and their use having been continued since that time, this order is retroactive to January 1, 1991.

Any court in Dallas County using these rules shall comply with Texas Rule of Civil Procedure 3a(5).

SIGNED AND ENTERED this 7th day of August, 1991.

Thomas R. Phillips, Chief Justice

Raul A. Gonzalez, Justice

Oscar H. Mauzy, Justice

Eugene A. Cook, Justice

Jack Hightower, Justice

Nathan L. Hecht, Justice

Lloyd Doggett, Justice

John Cornyn, Justice

Bob Gammage, Justice

RULES GOVERNING THE PROCEDURE FOR MAKING A RECORD OF COURT PROCEEDINGS IN DALLAS COUNTY BY ELECTRONIC RECORDING

1. **Application.** The following rules govern the procedures in the courts of Dallas County in proceedings in civil matters in which a record is made by electronic tape recording, and appeals from such proceedings.

2. **Duties of Court Recorders.** No stenographic record shall be required of any civil proceedings electronically tape recorded. The court shall designate one or more persons as court recorders, whose duties shall be:

a. Assuring that the recording system is functioning and that a complete, distinct, clear and transcribable recording is made;

b. Making a detailed, legible log of all proceedings while recording, indexed by time of day, showing the number and style of the proceeding before the court, the correct name of each person speaking, the nature of the proceeding (e.g., voir dire, opening, examination of witnesses, cross-examination, argument, bench conferences, whether in the presence of the jury, etc.), and the offer, admission or exclusion of all exhibits;

c. Filing with the clerk the original log and a typewritten log prepared from the original;

d. Filing all exhibits with the clerk;

e. Storing or providing for storing of the original recording to assure its preservation as required by law;

f. Prohibiting or providing for prohibition of access by any person to the original recording without written order of the presiding judge of the court;

g. Preparing or obtaining a certified cassette copy of the original recording of any proceeding, upon full payment of any charge imposed therefor, at the request of any person entitled to such recording, or at the direction of the presiding judge of the court, or at the direction of any appellate judge who is presiding over any matter involving the same proceeding, subject to the laws of this state, rules of procedure, and the instructions of the presiding judge of the court;

h. Performing such other duties as may be directed by the judge presiding.

3. **Statement of Facts.** The statement of facts on appeal from any proceeding of which an electronic tape recording has been made shall be:

a. A standard cassette recording, labeled to reflect clearly the contents of the cassette, and numbered if more than one cassette is required, certified by the court recorder to be a clear and accurate copy of the original recording of the entire proceeding;

b. A copy of the typewritten and original logs filed in the case certified by the court recorder; and

c. All exhibits, arranged in numerical order and firmly bound together so far as practicable, with a list in numerical order and a brief identifying description of each.

4. **Time for Filing.** The court recorder shall file the statement of facts with the court of appeals within fifteen days of the perfection of an appeal or writ of error. No other filing deadlines as set out in the Texas Rules of Appellate Procedure are changed.

5. **Appendix.** Each party shall file with his brief an appendix containing a written transcription of all portions of the recorded statement of facts and a copy of all exhibits relevant to the error asserted. Transcriptions shall be presumed to be accurate unless objection is made. The form of the appendix and transcription shall conform to any specifications of the Supreme Court.

6. **Presumption.** The appellate court shall presume that nothing omitted from the transcriptions in the appendices is relevant to any point raised or to the disposition of the appeal. The appellate court shall have no duty to review any part of an electronic recording.

7. **Supplemental Appendix.** The appellate court may direct a party to file a supplemental appendix containing a written transcription of additional portions of the recorded statement of facts.

8. **Paupers.** Texas Rule of Appellate Procedure 40(j)(1) shall be interpreted to require the court recorder to transcribe or have transcribed the recorded statement of facts and file it as appellant's appendix.

9. **Accuracy.** Any inaccuracies in transcriptions of the recorded statement of facts may be corrected by agreement of the parties. Should any dispute arise after the statement of facts or appendices are filed as to whether an electronic tape recording or any transcription of it accurately discloses what occurred in the trial court, the appellate court may resolve the dispute by reviewing the recording, or submit the matter to the trial court, which shall, after notice to the parties and hearing, settle the dispute and make the statement of facts or transcription conform to what occurred in the trial court.

10. **Costs.** The expense of appendices shall be taxed as costs at the rate prescribed by law. The appellate court may disallow the cost of portions of appendices that it considers surplusage or that do not conform to any specifications prescribed by the Supreme Court.

11. **Other Provisions.** Except to the extent inconsistent with these rules, all other statutes and rules governing the procedures in civil actions shall continue to apply to those proceedings of which a record is made by electronic tape recording.

SUPREME COURT OF TEXAS' ORDER FOR BEXAR COUNTY

APPENDIX E

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 90-0017

ADOPTION OF RULES FOR BEXAR COUNTY FOR MAKING A RECORD OF COURT PROCEEDINGS BY ELECTRONIC RECORDING

ORDERED:

The attached rules are adopted for making a record of court proceedings by electronic recording in Bexar County.

Any court in Bexar County using these rules shall comply with Texas Rule of Civil Procedure 3a(5).

SIGNED AND ENTERED this 9th day of November, 1990.

Thomas R. Phillips, Chief Justice

Franklin S. Spears, Justice

C. L. Ray, Justice

Raul A. Gonzalez, Justice

Oscar H. Mauzy, Justice

Eugene A. Cook, Justice

Jack Hightower, Justice

Nathan L. Hecht, Justice

Lloyd Doggett, Justice

RULES GOVERNING THE PROCEDURE FOR MAKING A RECORD OF COURT PROCEEDINGS IN BEXAR COUNTY BY ELECTRONIC RECORDING

1. **Application.** The following rules govern the procedures in the courts of Bexar County in proceedings in civil matters in which a record is made by electronic tape recording, and appeals from such proceedings.

2. **Duties of Court Recorders.** No stenographic record shall be required of any civil proceedings electronically tape recorded. The court shall designate one or more persons as court recorders, whose duties shall be:

a. Assuring that the recording system is functioning and that a complete, distinct, clear and transcribable recording is made;

b. Making a detailed, legible log of all proceedings while recording, indexed by time of day, showing the number and style of the proceeding before the court, the correct name of each person speaking, the nature of the proceeding (e.g., voir dire, opening, examination of witnesses, cross-examination, argument, bench conferences, whether in the presence of the jury, etc.), and the offer, admission or exclusion of all exhibits;

c. Filing with the clerk the original log and a typewritten log prepared from the original;

d. Filing all exhibits with the clerk;

e. Storing or providing for storing of the original recording to assure its preservation as required by law;

f. Prohibiting or providing for prohibition of access by any person to the original recording without written order of the presiding judge of the court;

g. Preparing or obtaining a certified cassette copy of the original recording of any proceeding, upon full payment of any charge imposed therefor, at the request of any person entitled to such recording, or at the direction of the presiding judge of the court, or at the direction of any appellate judge who is presiding over any matter involving the same proceeding, subject to the laws of this state, rules of procedure, and the instructions of the presiding judge of the court;

h. Performing such other duties as may be directed by the judge presiding.

3. **Statement of Facts.** The statement of facts on appeal from any proceeding of which an electronic tape recording has been made shall be:

a. A standard cassette recording, labeled to reflect clearly the contents of the cassette, and numbered if more than one cassette is required, certified by the court recorder to be a clear and accurate copy of the original recording of the entire proceeding;

b. A copy of the typewritten and original logs filed in the case certified by the court recorder; and

c. All exhibits, arranged in numerical order and firmly bound together so far as practicable, with a list in numerical order and a brief identifying description of each.

4. **Time for Filing.** The court recorder shall file the statement of facts with the court of appeals within fifteen days of the perfection of an appeal or writ of error. No other filing deadlines as set out in the Texas Rules of Appellate Procedure are changed.

5. **Appendix.** Each party shall file with his brief an appendix containing a written transcription of all portions of the recorded statement of facts and a copy of all exhibits relevant to the error asserted. Transcriptions shall be presumed to be accurate unless objection is made. The form of the appendix and transcription shall conform to any specifications of the Supreme Court.

6. **Presumption.** The appellate court shall presume that nothing omitted from the transcriptions in the appendices is relevant to any point raised or to the disposition of the appeal. The appellate court shall have no duty to review any part of an electronic recording.

7. **Supplemental Appendix.** The appellate court may direct a party to file a supplemental appendix containing a written transcription of additional portions of the recorded statement of facts.

8. **Paupers.** Texas Rule of Appellate Procedure 40(j)(1) shall be interpreted to require the court recorder to transcribe or have transcribed the recorded statement of facts and file it as appellant's appendix.

9. **Accuracy.** Any inaccuracies in transcriptions of the recorded statement of facts may be corrected by agreement of the parties. Should any dispute arise after the statement of facts or appendices are filed as to whether an electronic tape recording or any transcription of it accurately discloses what occurred in the trial court, the appellate court may resolve the dispute by reviewing the recording, or submit the matter to the trial court, which shall, after notice to the parties and hearing, settle the dispute and make the statement of facts or transcription conform to what occurred in the trial court.

10. **Costs.** The expense of appendices shall be taxed as costs at the rate prescribed by law. The appellate court may disallow the cost of portions of appendices that it considers surplusage or that do not conform to any specifications prescribed by the Supreme Court.

11. **Other Provisions.** Except to the extent inconsistent with these rules, all other statutes and rules governing the procedures in civil actions shall continue to apply to those proceedings of which a record is made by electronic tape recording.

SUPREME COURT OF TEXAS' ORDER FOR BRAZOS COUNTY

APPENDIX F

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 90-0016

ADOPTION OF RULES FOR BRAZOS COUNTY FOR MAKING A RECORD OF COURT PROCEEDINGS BY ELECTRONIC RECORDING

ORDERED:

The attached rules are adopted for making a record of court proceedings by electronic recording in Brazos County.

Any court in Brazos County using these rules shall comply with Texas Rule of Civil Procedure 3a(5).

RULES GOVERNING THE PROCEDURE FOR MAKING A RECORD OF COURT PROCEEDINGS IN BRAZOS COUNTY BY ELECTRONIC RECORDING

1. **Application.** The following rules govern the procedures in the courts of Brazos County in proceedings in civil matters in which a record is made by electronic tape recording, and appeals from such proceedings.

2. **Duties of Court Recorders.** No stenographic record shall be required of any civil proceedings electronically tape recorded. The court shall designate one or more persons as court recorders, whose duties shall be:

a. Assuring that the recording system is functioning and that a complete, distinct, clear and transcribable recording is made;

b. Making a detailed, legible log of all proceedings while recording, indexed by time of day, showing the number and style of the proceeding before the court, the correct name of each person speaking, the nature of the proceeding (e.g., voir dire, opening, examination of witnesses, cross-examination, argument, bench conferences, whether in the presence of the jury, etc.), and the offer, admission or exclusion of all exhibits;

c. Filing with the clerk the original log and a typewritten log prepared from the original;

d. Filing all exhibits with the clerk;

e. Storing or providing for storing of the original recording to assure its preservation as required by law;

f. Prohibiting or providing for prohibition of access by any person to the original recording without written order of the presiding judge of the court;

g. Preparing or obtaining a certified cassette copy of the original recording of any proceeding, upon full payment of any charge imposed therefor, at the request of any person entitled to such recording, or at the direction of the presiding judge of the court, or at the direction of any appellate judge who is presiding over any matter involving the same proceeding, subject to the laws of this state, rules of procedure, and the instructions of the presiding judge of the court;

h. Performing such other duties as may be directed by the judge presiding.

SIGNED AND ENTERED this 9th day of November, 1990.

Thomas R. Phillips, Chief Justice

Franklin S. Spears, Justice

C. L. Ray, Justice

Raul A. Gonzalez, Justice

Oscar H. Mauzy, Justice

Eugene A. Cook, Justice

Jack Hightower, Justice

Nathan L. Hecht, Justice

Lloyd Doggett, Justice

10. **Costs.** The expense of appendices shall be taxed as costs at the rate prescribed by law. The appellate court may disallow the cost of portions of appendices that it considers surplusage or that do not conform to any specifications prescribed by the Supreme Court.

11. **Other Provisions.** Except to the extent inconsistent with these rules, all other statutes and rules governing the procedures in civil actions shall continue to apply to those proceedings of which a record is made by electronic tape recording.

3. **Statement of Facts.** The statement of facts on appeal from any proceeding of which an electronic tape recording has been made shall be:

a. A standard cassette recording, labeled to reflect clearly the contents of the cassette, and numbered if more than one cassette is required, certified by the court recorder to be a clear and accurate copy of the original recording of the entire proceeding;

b. A copy of the typewritten and original logs filed in the case certified by the court recorder; and

c. All exhibits, arranged in numerical order and firmly bound together so far as practicable, with a list in numerical order and a brief identifying description of each.

4. **Time for Filing.** The court recorder shall file the statement of facts with the court of appeals within fifteen days of the perfection of an appeal or writ of error. No other filing deadlines as set out in the Texas Rules of Appellate Procedure are changed.

5. **Appendix.** Each party shall file with his brief an appendix containing a written transcription of all portions of the recorded statement of facts and a copy of all exhibits relevant to the error asserted. Transcriptions shall be presumed to be accurate unless objection is made. The form of the appendix and transcription shall conform to any specifications of the Supreme Court.

6. **Presumption.** The appellate court shall presume that nothing omitted from the transcriptions in the appendices is relevant to any point raised or to the disposition of the appeal. The appellate court shall have no duty to review any part of an electronic recording.

7. **Supplemental Appendix.** The appellate court may direct a party to file a supplemental appendix containing a written transcription of additional portions of the recorded statement of facts.

8. **Paupers.** Texas Rule of Appellate Procedure 40(j)(1) shall be interpreted to require the court recorder to transcribe or have transcribed the recorded statement of facts and file it as appellant's appendix.

9. **Accuracy.** Any inaccuracies in transcriptions of the recorded statement of facts may be corrected by agreement of the parties. Should any dispute arise after the statement of facts or appendices are filed as to whether an electronic tape recording or any transcription of it accurately discloses what occurred in the trial court, the appellate court may resolve the dispute by reviewing the recording, or submit the matter to the trial court, which shall, after notice to the parties and hearing, settle the dispute and make the statement of facts or transcription conform to what occurred in the trial court.

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 90-0015

ADOPTION OF RULES FOR MONTGOMERY COUNTY FOR MAKING A RECORD OF COURT PROCEEDINGS BY ELECTRONIC RECORDING

ORDERED:

The attached rules are adopted for making a record of court proceedings by electronic recording in Montgomery County.

Any court in Montgomery County using these rules shall comply with Texas Rule of Civil Procedure 3a(5).

SUPREME COURT OF TEXAS' ORDER FOR MONTGOMERY COUNTY

APPENDIX G

RULES GOVERNING THE PROCEDURE FOR MAKING A RECORD OF COURT PROCEEDINGS IN MONTGOMERY COUNTY BY ELECTRONIC RECORDING

1. **Application.** The following rules govern the procedures in the courts of Montgomery County in proceedings in civil matters in which a record is made by electronic tape recording, and appeals from such proceedings.

2. **Duties of Court Recorders.** No stenographic record shall be required of any civil proceedings electronically tape recorded. The court shall designate one or more persons as court recorders, whose duties shall be:

a. Assuring that the recording system is functioning and that a complete, distinct, clear and transcribable recording is made;

b. Making a detailed, legible log of all proceedings while recording, indexed by time of day, showing the number and style of the proceeding before the court, the correct name of each person speaking, the nature of the proceeding (e.g., voir dire, opening, examination of witnesses, cross-examination, argument, bench conferences, whether in the presence of the jury, etc.), and the offer, admission or exclusion of all exhibits;

c. Filing with the clerk the original log and a typewritten log prepared from the original;

d. Filing all exhibits with the clerk;

e. Storing or providing for storing of the original recording to assure its preservation as required by law;

f. Prohibiting or providing for prohibition of access by any person to the original recording without written order of the presiding judge of the court;

g. Preparing or obtaining a certified cassette copy of the original recording of any proceeding, upon full payment of any charge imposed therefor, at the request of any person entitled to such recording, or at the direction of the presiding judge of the court, or at the direction of any appellate judge who is presiding over any matter involving the same proceeding, subject to the laws of this state, rules of procedure, and the instructions of the presiding judge of the court;

h. Performing such other duties as may be directed by the judge presiding.

SIGNED AND ENTERED this 9th day of November, 1990.

Thomas R. Phillips, Chief Justice

Franklin S. Spears, Justice

C. L. Ray, Justice

Raul A. Gonzalez, Justice

Oscar H. Mauzy, Justice

Eugene A. Cook, Justice

Jack Hightower, Justice

Nathan L. Hecht, Justice

Lloyd Doggett, Justice

10. **Costs.** The expense of appendices shall be taxed as costs at the rate prescribed by law. The appellate court may disallow the cost of portions of appendices that it considers surplusage or that do not conform to any specifications prescribed by the Supreme Court.

11. **Other Provisions.** Except to the extent inconsistent with these rules, all other statutes and rules governing the procedures in civil actions shall continue to apply to those proceedings of which a record is made by electronic tape recording.

3. **Statement of Facts.** The statement of facts on appeal from any proceeding of which an electronic tape recording has been made shall be:

a. A standard cassette recording, labeled to reflect clearly the contents of the cassette, and numbered if more than one cassette is required, certified by the court recorder to be a clear and accurate copy of the original recording of the entire proceeding;

b. A copy of the typewritten and original logs filed in the case certified by the court recorder; and

c. All exhibits, arranged in numerical order and firmly bound together so far as practicable, with a list in numerical order and a brief identifying description of each.

4. **Time for Filing.** The court recorder shall file the statement of facts with the court of appeals within fifteen days of the perfection of an appeal or writ of error. No other filing deadlines as set out in the Texas Rules of Appellate Procedure are changed.

5. **Appendix.** Each party shall file with his brief an appendix containing a written transcription of all portions of the recorded statement of facts and a copy of all exhibits relevant to the error asserted. Transcriptions shall be presumed to be accurate unless objection is made. The form of the appendix and transcription shall conform to any specifications of the Supreme Court.

6. **Presumption.** The appellate court shall presume that nothing omitted from the transcriptions in the appendices is relevant to any point raised or to the disposition of the appeal. The appellate court shall have no duty to review any part of an electronic recording.

7. **Supplemental Appendix.** The appellate court may direct a party to file a supplemental appendix containing a written transcription of additional portions of the recorded statement of facts.

8. **Paupers.** Texas Rule of Appellate Procedure 40(j)(1) shall be interpreted to require the court recorder to transcribe or have transcribed the recorded statement of facts and file it as appellant's appendix.

9. **Accuracy.** Any inaccuracies in transcriptions of the recorded statement of facts may be corrected by agreement of the parties. Should any dispute arise after the statement of facts or appendices are filed as to whether an electronic tape recording or any transcription of it accurately discloses what occurred in the trial court, the appellate court may resolve the dispute by reviewing the recording, or submit the matter to the trial court, which shall, after notice to the parties and hearing, settle the dispute and make the statement of facts or transcription conform to what occurred in the trial court.

COURT OF CRIMINAL APPEALS OF TEXAS' ORDER FOR BRAZOS COUNTY

APPENDIX H

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

ORDER

October 9, 1989

In order to determine if significant reductions can be made in the time required for appellate procedures and in the cost thereof:

IT IS HEREBY ORDERED that district courts of Brazos County hearing criminal law matters may enter into a pilot project to study the use of an electronic recording system, to commence as soon as practicable after October 1, 1989, and to continue until further orders of this Court.

1. Application. This order shall govern the procedures in the district courts of Brazos County in proceedings in criminal law matters in which by written stipulation of the parties a record is made by electronic tape recording, and appeals from such proceedings.

2. Duties of Court Reporters. No stenographic record shall be required of any proceedings in a criminal law matter conducted pursuant to the pilot project. In addition to duties imposed by law on official court reporters their duties shall include the following:

a. Assuring that the recording system is functioning and that a complete, distinct and clear recording is made;

b. Making a detailed, legible log of all proceedings while recording, indexed by time of day, showing the number and style of the proceeding before the court, the correct name of each person speaking, the nature of the proceeding (e.g., voir dire, opening, examination of witnesses, cross-examination, argument, bench conferences, whether in the presence of the jury, etc.), and the offer, admission or exclusion of all exhibits;

c. Filing with the clerk the original log and a typewritten log prepared from the original;

d. Filing all exhibits with the clerk;

e. Storing or providing for storing of the original recording to assure its preservation as required by law;

f. Prohibiting or providing for prohibition of access by any person to the original recording without written order of the presiding judge of the court;

g. Preparing or obtaining a certified cassette copy of the original recording of any proceeding, upon full payment of any charge imposed therefor, at the request of any person entitled to such recording, or at the direction of the presiding judge of the court, or at the direction of any appellate judge who is presiding over any matter involving the same proceeding, subject to the laws of this state, rules of procedure, and the instructions of the presiding judge of the court.

3. Statement of Facts. The statement of facts on appeal from any proceeding of which an electronic tape recording has been made shall be:

a. A standard cassette recording, labeled to reflect clearly the contents of the cassette, and numbered if more than one cassette is required, certified by the court reporter to be a clear and accurate copy of the original recording of the entire proceeding;

b. A copy of the typewritten and original logs filed in the case certified by the court reporter; and

c. All exhibits, arranged in numerical order and firmly bound together so far as practicable, with a list in numerical order and a brief identifying description of each.

4. Time for Filing. The court reporter shall file the statement of facts with the court of appeals within fifteen days of the perfection of an appeal. No other filing deadlines as set out in the Code of Criminal Procedure and Texas Criminal Appellate Rules are changed.

5. Appendix. Each party shall file with his brief an appendix containing a written transcription of all portions of the recorded statement of facts and a copy of all exhibits relevant to the error asserted. Transcriptions shall be presumed to be accurate unless objection is made. The form of the appendix and transcription shall conform to the specifications of the Court of Criminal Appeals.

6. Presumption. The appellate court shall presume that nothing omitted from the transcriptions in the appendices is relevant to any point raised or to the disposition of the appeal. The appellate court shall have no duty to review any part of an electronic recording.

7. Supplemental Appendix. The appellate court may direct a party or the court reporter to file a supplemental appendix containing a written transcription of additional portions of the recorded statement of facts.

8. Paupers. For purposes of the pilot program Rule 53(j)(2), Tex.R.App.Pro., shall be interpreted to require the court reporter to transcribe or have transcribed portions of the recorded statement of facts designated by appellant and file it as appellant's appendix.

9. Accuracy. Any inaccuracies in transcriptions of the recorded statement of facts may be corrected by agreement of the parties. Should any dispute arise after the statement of facts or appendices are filed as to whether an electronic tape recording or any transcription of it accurately discloses what occurred in the trial court, the appellate court may resolve the dispute by reviewing the recording, or submit the matter to the trial court, which shall, after notice to the parties and hearing, settle the dispute and make the statement of facts or transcription conform to what occurred in the trial court.

10. Costs. The expense of appendices shall be taxed as costs at the rate prescribed by law. The appellate court may disallow the cost of portions of appendices that it considers surplusage or that do not conform to the specifications prescribed by the Court of Criminal Appeals.

11. Other Provisions. Except to the extent inconsistent with this Order, all other statutes and rules governing the procedures in criminal law matters shall continue to apply to those proceedings of which a record is made by electronic tape recording under the pilot project approved for use in Brazos County.

SIGNED AND ENTERED IN DUPLICATE ORIGINALS this the 9 day of October, 1989.

Michael J. McCormick,
Presiding Judge

W. C. Davis, Judge

Sam Houston Clinton, Judge

Marvin O. Teague, Judge

Chuck Miller, Judge

Charles F. (Chuck) Campbell,
Judge

Bill White, Judge

M. P. Duncan, III, Judge

David Berchelmann, Jr., Judge

COURT OF CRIMINAL APPEALS OF TEXAS' ORDER FOR DALLAS COUNTY

APPENDIX I

IN THE COURT OF CRIMINAL APPEALS

O R D E R

JANUARY 21, 1986

An Order to determine if significant reductions can be made in the time required for appellate procedures and in the cost thereof:

IT IS HEREBY ORDERED that district courts of Dallas County hearing criminal law matters may enter into a pilot project to study the use of an electronic recording system, to commence as soon as practicable after January 2, 1986, and to continue until further orders of this Court.

1. Application. This Order shall govern the procedures in the district courts of Dallas County in proceedings in criminal law matters in which by written stipulation of the parties a record is made by electronic tape recording, and appeals from such proceedings.

2. Duties of Court Reporters. No stenographic record shall be required of any proceedings in a criminal law matter conducted pursuant to the pilot project. In addition to duties imposed by law on official court reporters their duties shall include the following:

a. Assuring that the recording system is functioning and that a complete, distinct and clear recording is made;

b. Making a detailed, legible log of all proceedings while recording, indexed by time of day, showing the number and style of the proceeding before the court, the correct name of each person speaking, the nature of the proceeding (e.g., voir dire, opening, examination of witnesses, cross-examination, argument, bench conferences, whether in the presence of the jury, etc.), and the offer, admission or exclusion of all exhibits;

c. Filing with the clerk the original log and a typewritten log prepared from the original;

d. Filing all exhibits with the clerk;

e. Storing or providing for storing of the original recording to assure its preservation as required by law;

f. Prohibiting or providing for prohibition of access by any person to the original recording without written order of the presiding judge of the court;

g. Preparing or obtaining a certified cassette copy of the original recording of any proceeding, upon full payment of any charge imposed therefor, at the request of any person entitled to such recording, or at the direction of the presiding judge of the court, or at the direction of any appellate judge who is presiding over any matter involving the same proceeding, subject to the laws of this state, rules of procedure, and the instructions of the presiding judge of the court.

3. Statement of Facts. The statement of facts on appeal from any proceeding of which an electronic tape recording has been made shall be:

a. A standard cassette recording, labeled to reflect clearly the contents of the cassette, and numbered if more than one cassette is required, certified by the court reporter to be a clear and accurate copy of the original recording of the entire proceeding;

b. A copy of the typewritten and original logs filed in the case certified by the court reporter; and

c. All exhibits, arranged in numerical order and firmly bound together so far as practicable, with a list in numerical order and a brief identifying description of each.

4. Time for Filing. The court reporter shall file the statement of facts with the clerk of the trial court within fifteen days of the perfection of an appeal. No other filing deadlines as set out in the Code of Criminal Procedure and Texas Criminal Appellate Rules are changed.

5. Appendix. Each party shall file with his brief an appendix containing a written transcription of all portions of the recorded statement of facts and a copy of all exhibits relevant to the error asserted. Transcriptions shall be presumed to be accurate unless objection is made. The form of the appendix and transcription shall conform to the specifications of the Court of Criminal Appeals.

6. Presumption. The appellate court shall presume that nothing omitted from the transcriptions in the appendices is relevant to any point raised or to the disposition of the appeal. The appellate court shall have no duty to review any part of an electronic recording.

7. Supplemental Appendix. The appellate court may direct a party or the court reporter to file a supplemental appendix containing a written transcription of additional portions of the recorded statement of facts.

8. Paupers. For purposes of the pilot program Article 40.09, §5, Code of Criminal Procedure shall be interpreted to require the court reporter to transcribe or have transcribed portions of the recorded statement of facts designated by appellant pursuant to §5 and file it as appellant's appendix.

9. Accuracy. Any inaccuracies in transcriptions of the recorded statement of facts may be corrected by agreement of the parties. Should any dispute arise after the statement of facts or appendices are filed as to whether an electronic tape recording or any transcription of it accurately discloses what occurred in the trial court, the appellate court may resolve the dispute by reviewing the recording, or submit the matter to the trial court, which shall, after notice to the parties and hearing, settle the dispute and make the statement of facts or transcription conform to what occurred in the trial court.

10. Costs. The expense of appendices shall be taxed as costs at the rate prescribed by law. The appellate court may disallow the cost of portions of appendices that it considers surplusage or that do not conform to the specifications prescribed by the Court of Criminal Appeals.

11. Other Provisions. Except to the extent inconsistent with this Order, all other statutes and rules governing the procedures in criminal law matters shall continue to apply to those proceedings of which a record is made by electronic tape recording under the pilot project approved for use in Dallas County.

SIGNED AND ENTERED IN DUPLICATE ORIGINALS this the 21st day of January, 1986.

John F. Onion, Jr.
Presiding Judge

Tom G. Davis
Judge

W. C. Davis
Judge

Sam Houston Clinton
Judge

Michael J. McCormick
Judge

Marvin O. Teague
Judge

Chuck Miller
Judge

Charles F. (Chuck) Campbell
Judge

Bill White
Judge

COURT OF CRIMINAL APPEALS OF TEXAS' ORDER FOR MONTGOMERY COUNTY

APPENDIX J

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

O R D E R

December 10, 1990

In order to determine if significant reductions can be made in the time required for appellate procedures and in the cost thereof:

IT IS HEREBY ORDERED that district courts of Montgomery County hearing criminal law matters may enter into a pilot project to study the use of an electronic recording system, to commence as soon as practicable after January 1, 1991, and to continue until further orders of this Court.

1. Application. This order shall govern the procedures in the district courts of Montgomery County in proceedings in criminal law matters in which by written stipulation of the parties a record is made by electronic tape recording, and appeals from such proceedings.

2. Duties of Court Reporters. No stenographic record shall be required of any proceedings in a criminal law matter conducted pursuant to the pilot project. In addition to duties imposed by law on official court reporters, their duties shall include the following:

a. Assuring that the recording system is functioning and that a complete, distinct and clear recording is made;

b. Making a detailed, legible log of all proceedings while recording, indexed by time of day, showing the number and style of the proceeding before the court, the correct name of each person speaking, the nature of the proceeding (e.g., voir dire, opening, examination of witnesses, cross-examination, argument, bench conferences, whether in the presence of the jury, etc.), and the offer, admission or exclusion of all exhibits;

c. Filing with the clerk the original log and a typewritten log prepared from the original.

d. Filing all exhibits with the clerk;

e. Storing or providing for storing of the original recording to assure its preservation as required by law;

f. Prohibiting or providing for prohibition of access by any person to the original recording without written order of the presiding judge of the court;

g. Preparing or obtaining a certified cassette copy of the original recording of any proceeding, upon full payment of any charge imposed therefor, at the request of any person entitled to such recording, or at the direction of the presiding judge of the court, or at the direction of any appellate judge who is presiding over any matter involving the same proceeding, subject to the laws of this state, rules of procedure, and the instructions of the presiding judge of the court.

3. Statement of Facts. The statement of facts on appeal from any proceeding of which an electronic tape recording has been made shall be:

a. A standard cassette recording, labeled to reflect clearly the contents of the cassette, and numbered if more than one cassette is required, certified by the court reporter to be a clear and accurate copy of the original recording of the entire proceeding;

b. A copy of the typewritten and original logs filed in the case certified by the court reporter; and

c. All exhibits, arranged in numerical order and firmly bound together so far as practicable, with a list in numerical order and a brief identifying description of each.

4. Time for Filing. The court reporter shall file the statement of facts with the court of appeals within fifteen days of

4543.001

4-14-94

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL. (512) 463-1312
FAX (512) 463-1365

April 13, 1994

HAD Scott TRAP Soole Agenda Scott Soules staff

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

TRAP 74(a)

Dear Luke:

Enclosed is a copy of a letter from Charles Spain regarding the Texas Rules of Appellate Procedure.

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht

Nathan L. Hecht
Justice

NLH:sm

Encl.

CHARLES A. SPAIN, JR.
Court of Appeals for the Third District of Texas
Post Office Box 12547
Capitol Station
Austin, Texas 78711-2547

Staff Attorney
Telephone: (512) 463-1733

April 7, 1994

The Honorable Nathan Hecht
Justice
The Supreme Court of Texas
Supreme Court Building Room 104
201 West 14th Street
Austin, Texas 78701

Re: Texas Rules of Appellate Procedure

Dear Justice Hecht:

Here are three more suggestions regarding the rules:

First, Texas Rule of Appellate Procedure 74(a) requires the clerk to notify "the parties to the trial court's final judgment or their counsel, if any, of the judgment and *all orders* of the court of appeals." (Emphasis added). Does the supreme court really intend for notice to be sent to all parties to the trial court's final judgment on matters such as granting a motion for extension of time to file the record? I doubt any of the courts of appeals currently send postcard notices on orders on routine motions to all parties to the trial court's final judgment. If this is the rule, we need to comply, but it seems like a great deal of effort, paper, and postage for not much. In addition, as my final point discusses, how does the clerk send notice to everyone concerning orders that are rendered before the briefs are filed?

Second, perhaps Texas Rule of Appellate Procedure 5(e) could be amended to allow an alternative to notice by first-class mail. The Third Court uses interagency mail to notify the attorney general, saving the state quite a bit of money in postage.

Finally, I believe the Texas Rules of Appellate Procedure should be amended to require the parties to file a docketing statement. I understand that the State Bar Appellate Practice Section has recommended such an amendment, but I have not seen a copy of the specific proposal.

Beginning in spring 1993, the staff attorneys at the Third Court have screened cases for

the perfection of an appeal. No other filing deadlines as set out in the Code of Criminal Procedure and Texas Criminal Appellate Rules are changed.

5. Appendix. Each party shall file with his brief an appendix containing a written transcription of all portions of the recorded statement of facts and a copy of all exhibits relevant to the error asserted. Transcriptions shall be presumed to be accurate unless objection is made. The form of the appendix and transcription shall conform to the specifications of the Court of Criminal Appeals.

6. Presumption. The appellate court shall presume that nothing omitted from the transcriptions in the appendices is relevant to any point raised or to the disposition of the appeal. The appellate court shall have no duty to review any part of an electronic recording.

7. Supplemental Appendix. The appellate court may direct a party or the court reporter to file a supplemental appendix containing a written transcription of additional portions of the recorded statement of facts.

8. Paupers. For purposes of the pilot program Rule 53(j)(2), Tex.R.App.Pro., shall be interpreted to require the court reporter to transcribe or have transcribed portions of the recorded statement of facts designated by appellant and file it as appellant's appendix.

9. Accuracy. Any inaccuracies in transcriptions of the recorded statement of facts may be corrected by agreement of the parties. Should any dispute arise after the statement of facts or appendices are filed as to whether an electronic tape recording or any transcription of it accurately discloses what occurred in the trial court, the appellate court may resolve the dispute by reviewing the recording, or submit the matter to the trial court, which shall, after notice to the parties and hearing, settle the

dispute and make the statement of facts or transcription conform to what occurred in the trial court.

10. Costs. The expense of appendices shall be taxed as costs at the rate prescribed by law. The appellate court may disallow the cost of portions of appendices that it considers surplusage or that do not conform to the specifications prescribed by the Court of Criminal Appeals.

11. Other Provisions. Except to the extent inconsistent with this Order, all other statutes and rules governing the procedures in criminal law matters shall continue to apply to those proceedings of which a record is made by electronic tape recording under the pilot project approved for use in Montgomery County.

SIGNED AND ENTERED IN DUPLICATE ORIGINALS this the 10th day of December, 1990.

Michael J. McCormick,
Presiding Judge

W. C. Davis, Judge

Sam Houston Clinton, Judge

Marvin O. Teague, Judge

Chuck Miller, Judge

Charles F. (Chuck) Campbell,
Judge

Bill White, Judge

Louis Sturns, Judge

Charles F. Baird, Judge

jurisdiction when the transcript is tendered for filing. The single biggest task in this process has turned out to be determining who are the appellants and appellees, who are the "other parties to the trial court's final judgment," and who are all of the aforementioned parties' attorneys. It is a ***big*** pain, and we get no help from the attorneys. Texas Rule of Appellate Procedure 74(a) requires the parties to furnish this information when their briefs are filed, but it is fairly worthless to us at that point in time since we have already ferreted out the information on our own about two months earlier.

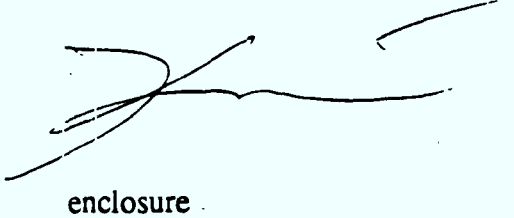
A surprisingly large number of appeals are disposed of on jurisdictional grounds before the briefs are tendered. We are not really giving procedural due process if we wait until the briefs are tendered to assemble an accurate mailing list for notices. In my opinion, Rule 74(a) just does not work. Providing a list of parties and attorneys as a part of the principal pleading works, of course, in both the trial court and supreme court because the petition and answer and the application for writ of error and response are usually the first documents tendered; this is not the case in the court of appeals.

I have attached a suggestion for a docketing statement that would provide the clerk of the court of appeals with all the essential information for docketing a cause on the case management system. Such a docketing statement would have to arrive before or concurrent with the transcript (or any motion for extension of time to file the perfecting instrument or transcript) to be of actual use. I feel certain that the parties will not provide the clerk with this information voluntarily; the supreme court will have to require it.

Forcing counsel to file such a statement would not only make docketing the appeal accurately much easier for the clerk, but also and more importantly force counsel to think about what they are doing and, thus, avoid many of the time consuming "you forgot to include *x* in the transcript" letters that the clerk's office sends.

Thank you for your continued receptiveness to suggestions.

Respectfully,



enclosure

CIVIL DOCKETING STATEMENT

3-9___-_____-C V

☐ Original proceeding: _____ (type)
☐ Petition for writ of error
☐ Accelerated appeal

Appellant 1:_____
Designated attorney in charge for appellant:_____
State Bar of Texas number:_____
Firm (if any):_____
Address:_____
Office telephone:_____
Telecopier:_____

Appellant 2:
Designated attorney in charge for appellant:_____
State Bar of Texas number:_____
Firm (if any):_____
Address:_____
Office telephone:_____
Telecopier:_____

(attach additional sheets as necessary if more than two appellants)

Appellee 1:_____
☐ Designated attorney in charge for appellee:_____
or
☐ Trial attorney for appellee:_____

State Bar of Texas number:_____
Firm (if any):_____
Address:_____
Office telephone:_____
Telecopier:_____

Appellee 2:_____
☐ Designated attorney in charge for appellee:_____
or
☐ Trial attorney for appellee:_____

State Bar of Texas number:_____
Firm (if any):_____
Address:_____
Office telephone:_____
Telecopier:_____

(attach additional sheets as necessary if more than two appellees)

Other, nonappealing parties to trial court's final judgment:_____
☐ Designated attorney in charge for other party:_____
State Bar of Texas number:_____
Firm (if any):_____
Address:_____
Office telephone:_____
Telecopier:_____

(attach additional sheets as necessary if more than one other party)

Trial court (in which cause was filed): ☐ _____ (list number) District Ct. ☐ County Ct.
☐ County Ct. at Law No. _____ ☐ Probate Ct. No. _____
County:_____
Trial court cause no.:_____
Trial court judge (who signed final judgment):_____
Trial court reporter:_____
Trial to: ☐ Court ☐ Jury
Type of case (consult list available from Clerk's office):_____

Perfecting instrument: ☐ Appeal bond ☐ Certificate of cash deposit ☐ Notice of appeal

Dates	Transcript (if known)
Trial court's final judgment signed:_____	p._____
Motion for new trial filed:_____	p._____
Overruled:_____	p._____
Request for findings of fact and conclusions of law filed:_____	p._____
Perfecting instrument filed in trial court:_____	p._____
Motion for extension of time filed:_____	p._____
Supersedeas bond filed:_____	p._____
Affidavit of inability to pay cost of appeal or give security filed:_____	p._____
Notice sent:_____	p._____
Contest filed:_____	p._____
Motion for extension of time for hearing on contest filed:_____	p._____
Motion for extension of time for hearing on contest signed:_____	p._____
Order ruling on contest signed:_____	p._____
Notice of limitation of appeal filed:_____	p._____
Order from trial court re original papers and exhibits:_____	p._____

Submitted by:_____
State Bar of Texas number:_____
Counsel for:_____
Date:_____

Signature:_____

Notice: Complete this statement and, *before the transcript or any motions are tendered for filing*, tender the statement in person or mail it to Clerk, Court of Appeals for the Third District of Texas, Post Office Box 12547, Austin, Texas 78711-2547. The Clerk will not docket a civil appeal based solely on receipt of this statement, but providing this information will help the Clerk to docket the appeal accurately and promptly. Submission of this statement by counsel will constitute an appearance. Thank you for your assistance.

CODES FOR CIVIL CAUSES
CASE MANAGEMENT SYSTEM

Code	Description
ADMIN	Administrative law
ASSAULT	Assault & battery
AUTO	Automobile
BILL-REV	Bill of review
BILLS	Bills & notes
CERT	Certiorari
CHILD	Child custody/adoption/termination
CON-LAW	Constitutional law
CONDEMN	Condemnation
CONSUMER	Consumer protection/DTPA
CONTRACT	Contract
CORP	Corporations & partnerships
CRED-RTS	Creditors rights
DEC-J	Declaratory judgment
DIVORCE	Divorce
DWOP	Dismissal for want of prosecution
ELECTION	Election contest
EXECUTE	Execution
F-ENTRY	Forcible entry & detainer
FORFEIT	Forfeiture
GUARDIAN	Guardianship
HABEAS	Habeas corpus
INJ	Injunction
INS	Insurance
INTENT	Intentional tort, other
JUV-ADJ	Juvenile adjudication
LANDLORD	Landlord & tenant
LIBEL	Libel & slander
LIEN	Lien
MALPRAC	Malpractice
MANDAMUS	Mandamus/prohibition
MENTAL	Mental illness
NEGL	Negligence tort, other
NUISANCE	Nuisance
OIL-GAS	Oil & gas
PROBATE	Probate
PROD-LIA	Products liability
QUO	Quo warranto
REAL	Real estate
RECEIVER	Receivers
SANCTION	Sanctions
SCHOOL	Schools
SEC-TRAN	Secured transactions
SUM-J	Summary judgment
TAX	Tax
TRESPASS	Trespass
TRUST	Trusts
USURY	Usury
WILLS	Wills
WKR-COMP	Worker's compensation
WRIT	Writ of error
WRONG-D	Wrongful death & survival
ZONING	Zoning

TRAP 74

MEMORANDUM

TO: Lee Parslee

FROM: Charles Spain

RE: Odds and ends re appellate rules

DATE: January 28, 1994

First, thank you for assisting Jessie Amos and me by researching the supreme court orders on electronic filing of documents in the courts of appeals. I'm sure it was boring work.

Second, I have enclosed a copy of our CLE paper. The appendices of local rules and practice guidelines of the courts of appeals may be the more useful material. The Third Court's practice guidelines are appendix 2.

Finally, please permit me to insert my two cents worth on the issue of amending the Texas Rules of Appellate Procedure to require parties to file a docketing statement. I understand that the State Bar Appellate Practice Section has recommended such an amendment, but I have not seen a copy of the specific proposal.

Beginning in spring 1993, the staff attorneys at the Third Court have screened cases for jurisdiction when the transcript is tendered for filing. The single biggest task in this process has turned out to be determining who are the appellants and appellees, who are the "other parties to the trial court's final judgment," and who are all of the aforementioned parties' attorneys. It is a ***big*** pain, and we get no help from the attorneys. Texas Rule of Appellate Procedure 74(a) requires the parties to furnish this information when their briefs are filed, but it's fairly worthless to us at that point in time since we have already ferreted put the information on our own about two months earlier.

A surprisingly large number of appeals are disposed of on jurisdictional grounds before the briefs are tendered. We aren't really giving procedural due process if we wait until the briefs are tendered to assemble an accurate mailing list for notices. Without harping too much, Rule 74(a) just doesn't work. (Providing a list of parties and attorneys as a part of the principal pleading works, of course, in both the trial court and supreme court because the petition and answer and the application for writ of error and response are usually the first documents tendered; this isn't the case in the court of appeals.) Given the amount of time it takes to check transcripts for jurisdiction and accurately docket the appeal and the fact that we get no help from the attorneys, it is quite tempting to adopt a "it's good enough for government work" attitude about this process.

4543.001

12-10-93

Court of Appeals

Eleventh District of Texas

100 WEST MAIN STREET
P.O. BOX 271
EASTLAND, TEXAS 76448

AREA CODE 817
629-2638

December 8, 1993

NHD, Sup. Ct. Agenda
J. Hecht
COAs Staff

Luther H. Soules, III
Soules & Wallace
100 W. Houston Street
Suite 1500
San Antonio, TX 78205-1457

Re: TEX.R.APP.P. 75(f)
Amendment to allow advancement of criminal cases

Dear Luke:

The Council of Chief Justices of the Courts of Appeals voted to request that TEX.R.APP.P. 75(f) be amended to provide that:

> The court of appeals may, in its discretion, advance civil [or criminal] cases for submission without oral argument where oral argument would not materially aid the court in the determination of the issues of law and fact presented in the appeal.

By inserting the words "or criminal," the courts of appeals would now have the same authority as the Supreme Court and the Court of Criminal Appeals to submit certain cases without the delay of having to wait for oral argument.

This change is a necessary one, particularly in light of the transfer procedure which we have in Texas. Pursuant to TEX. GOV'T CODE ANN. § 73.003 (Vernon 1988), oral argument is usually heard at the court from which the case was transferred. As Rule 75(f) is now written, inordinate delays in the preparation of the statement of facts or the briefs result in the delay in the submission not only of that case but also of other transfer cases.

Further, under the holding in Robinson v. State, 790 S.W.2d 334 (Tex.Cr.App.1990), it is possible for an attorney to request argument in the court of appeals when the case is remanded from the Court of Criminal Appeals. In a transfer situation, this could mean that a panel of three judges might have to travel several hundred miles to hear an argument which might well be repetitious.

A third fact situation makes this change necessary. It is not uncommon for pro se appellants who are confined in penal institutions to request oral argument. As the rules read now, there is not a specific provision to advance these cases.

I believe that this change in TEX.R.APP.P. 75(f) is needed.

Very truly yours,

Austin McCloud

ml

encls.

cc: Hon. Sam Houston Clinton
Professor William V. Dorsaneo, III
Hon. Clarence A. Guittard
Hon. Nathan L. Hecht
Chief Justices, Courts of Appeal

TEX.R.APP.P. 75(f):

A party to the appeal desiring oral argument shall file a request therefor at the time he files his brief in the case. Failure of a party to file a request shall be deemed a waiver of his right to oral argument in the case. Although a party waives his right to oral argument under this rule, the court of appeals may nevertheless direct such party to appear and submit oral argument on the submission date of the case.

The court of appeals may, in its discretion, advance civil [or criminal] cases for submission without oral argument where oral argument would not materially aid the court in the determination of the issues of law and fact presented in the appeal. Notice of the submission date of cases without oral argument shall be given by the clerk in writing to all attorneys of record, and to any party to the appeal not presented by counsel, at least twenty-one days prior to the submission date. The date of the notice shall be deemed to be the date such notice is delivered into the custody of the United States Postal Services in a properly addressed post-paid wrapper (envelope).

4543.001 WHS WHD

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AMY H. MURDOCK
THOMAS E. GANUCHEAU
LONNY J. HOFFMAN
JENNIFER PARKER

11-6-93 SB TRCE

HHD SCAC Agenda J. Hecht. 11-9-93

November 4, 1993

Re: Self-Critical Analysis Privilege

Gilbert I. Low, Esq.
Orgain, Bell & Tucker
470 Orleans Street, Suite 400
Beaumont, Texas 77701

Dear Buddy:

I propose for consideration by your committee a new rule creating a privilege for self-critical analysis. The new privilege would fall within Article V of the Texas Rules of Civil Evidence.

The privilege for self-critical analysis protects an organization's internal investigations and analytical reports from discovery under certain circumstances. The privilege has been discussed and advocated by numerous commentators.[1] The privilege is intended to promote the societal goal of encouraging the candid appraisal of problems as an aid to implementing beneficial change. Without such a privilege, and the resulting assurance of confidentiality, an organization is unlikely to conduct a candid appraisal of its problems because of the following facts:

---

[1] Peloso, *The Privilege for Self-Critical Analysis: Protecting the Public by Protecting the Confidentiality of Internal Investigations in the Securities Industry*, 18 Securities Reg. Law J. 227 (Fall 1990); David P. Leonard, *Codifying a Privilege for Self-Critical Analysis*, 25 Harv. J. on Legis. 113 (1988); Note, *The Privilege of Self-Critical Analysis*, 96 Harv. L. Rv. 1083 (1983); Crisman & Mathews, *Limited Waiver of Attorney-Client Privilege and Work-Product Doctrine in Internal Corporate Investigations: An Emerging Corporate Self-Evaluative Privilege*, 21 Am. Crim. L. Rev. 123 (1983); Murphy, *The Self-Evaluative Privilege*, 7 J. Corp. L. 489 (1982).

1. organizations faced with potentially crippling litigation expenses do not want to create damaging "paper trails;" and

2. individuals within an organization, knowing that damaging revelations could lead to reprisals if liability results, are reluctant to come forward and to speak candidly.

Of course, the benefits of the privilege must be weighed against:

1. a general policy favoring the free flow of information; and

2. the discovering party's need for the privileged information.

Acknowledging these competing concerns, the articles and cases which have discussed the privilege have developed four circumstances in which the information contained in "self-critical analyses" may be obtained:

1. where the plaintiff demonstrates "exceptional need;"

2. where there was no expectation that the information remain confidential;

3. where factual data can be removed from evaluative portions of a report; and

4. for voluntary peer review reports and evaluations in employment discrimination cases.[2]

I would submit that the privilege of self-critical analysis, when consistently applied within these limitations, will encourage beneficial, uninhibited internal debate within organizations while at the same time allowing litigants reasonable access to relevant information.

---

[2] Note, *The Privilege of Self-Critical Analysis*, 96 Harv. L. Rev. 1083, 1098-9 (1983); *Hardy v. New York News, Inc.*, 114 F.R.D. 633 (S.D.N.Y. 1987); *Roberts v. National Detroit Corp.*, 87 F.R.d. 30 (E.D. Mich. 1980); *LeMasters v. Christ Hospital*, 791 F. Supp. 188, 190 (S.D. Ohio 1991); *Dowling v. American Hawaii Cruises, Inc.*, 133 F.R.D. 150 (D. Haw. 1990).

4543.001
✓10-29-93

JAMES W. HAMBRIGHT
GILBERT I. LOW
BENNY H. HUGHES, JR.
J. HOKE PEACOCK II
LAWRENCE L. GERMER
JOHN CREIGHTON III
JAMES H. CHESNUTT II
J. B. WHITTENBURG
PAUL W. GERTZ
GARY NEALE REGER
JOHN W. NEWTON III
D. ALLAN JONES
HOLLIS HORTON
LOIS ANN STANTON
ROBERT J. HAMBRIGHT
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JOHN G. TUCKER
B. D. ORGAIN
STANLEY PLETTMAN

CLEVE BACHMAN (RETIRED)

WILL E. ORGAIN (1882-1965)
MAJOR T. BELL (1897-1969)

October 27, 1993

HHD -
to all Members.

Mr. Luther H. Soules III
Soules & Wallace
Frost Bank Tower, 15th Floor
100 W. Houston, Suite 1500
San Antonio, TX 78205-1457

Dear Luther:

As Chairman of the sub-committee on Texas Rules of Civil Evidence, I have been called upon to make recommendations on November 19-20, 1993, concerning certain Civil Evidence Rules and one Rule of Criminal Evidence. These rules are as follows, along with the comments that I have. I invite other comments in writing or by telephone (from other members of the sub-committee) so that I may make note of them and report.

1. Rule 606(b) of the Rules of Criminal Evidence - Rule 606(b) of the Rules of Civil Evidence and Rule 606(b) of the Rules of Criminal Evidence are worded differently. The Rules of Criminal Evidence provide that a juror may testify as "to any matter relevant to the validity of the verdict or indictment." This seems to make a distinction between whether or not the verdict or indictment is "valid" - meaning perhaps "void" or whether some error occurred. The Rules of Civil Evidence provide, "That a juror may testify whether any outside influence was improperly brought to bear upon any juror." Rule 606(b) of the Federal Rules provide, "That a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." It appears that all of the rules discourage jurors from giving testimony or affidavits attempting to impeach the jury verdict. Yet if for some reason the verdict or indictment is void, then certainly testimony could be presented. Also, if there is an outside influence, testimony could be presented. The Federal Rule addresses, just as the Texas Civil Rule, outside influence, but the Federal Rule also addresses extraneous prejudicial information improperly brought to the jury's attention. In my opinion we should either adopt the

Texas Civil Rule or the Federal Civil Rule. If we adopt the Federal Civil Rule, then I think we should adopt it as our Texas Civil Rule, as well as our Texas Criminal Rule. The validity of an indictment is considered in the Civil Rule and certainly has no place in the Civil Rule. I can also see the need that a juror may be called to testify as to his qualifications as a juror. For instance, if a juror was not a citizen, he may be called to testify that he was not a citizen or a qualified juror just as a grand juror may be called to testify as to his qualifications concerning an indictment. None of the rules contemplate calling a juror to testify as to his qualifications as a juror. The juror's qualifications may come into issue if the juror is not a resident of the country. The juror would then be called to testify. In summary, my recommendation is:

(a) Adopt the Federal Rule for both 606(b) of the Texas Rules of Criminal Procedure and Texas Rules of Civil Procedure, adding to it a third element, and that being "on the question of whether or not the juror is statutorily qualified to service to serve."

2. Texas Rule of Civil Evidence 204 - The question raised is whether we need to make reference to taking judicial notice of the contents of the Texas Register and the Texas Administrative Code in light of statutes covering both of them. Tex.R.Civ.Stat. Article 6252-13a §4c provides that the contents of the Texas Register are to be judicially noticed. Tex.R.Civ.Stat. 6252-13b §4 provides that the codified rules of the agencies published in the Texas Administrative Code are to be judicially noticed. Therefore, I recommend that we delete reference to the Texas Register and the Texas Administrative Code and put a footnote showing that judicial notice is provided for in Article 6252-13a §4c and Article 6252-13b §4.

3. Texas Rules of Civil Evidence 407a - It has been recommended by the sub-committee that the last sentence be deleted so that the rule no longer states, "nothing in this rule shall preclude admissibility in product's liability cases based on strict liability." I go along with that because the policy behind subsequent changes should be basically the same for both. The Federal Rule does not have that provision. The committee recommending this change also recommended a comment making it clear that deletion of the last sentence was not intended to have any inference drawn with reference to applicability of 407a to product's liability cases and was not intended to change existing case law.

4. Texas Rules of Civil Evidence proposed new rule 413 - I agree with this proposal except I have some quarrel with the use of the word "findings". The word findings may have more of

a meaning than is intended here. I think it is the intent of 413 that the judge shall have heard sufficient evidence that a prima facie case is made. Therefore, we may want to substitute "prima facie case". I also have trouble about the use of the term "trier of fact". If it is a jury case, than the jury is the trier of fact and I don't think the jury should have to make some determination before evidence is presented of this. That would require trying the case in stages. As the rule now stands, the judge has the right to sever issues and try liability before trying other issues if he so desires. (Rule 174) I think we should leave that alone. If we do adopt the new rule, then we may want to put some comment to the effect that we do not address the issue of the authority of the trial judge to bifurcate the trial (pursuant to Rule 174) but merely provide a method of presenting evidence if there is no bifurcation. Yet, I am not so sure it is good to mention the word bifurcation and we may want to just merely state that this does not distract from other options that the trial court may have (pursuant to the Rules of Civil Procedure).

5. Texas Rules of Civil Evidence 510(d)(6) - I don't recommend any change here. Basically the courts are pretty liberal concerning the admissibility of evidence, as long as it is relevant, in a case affecting parent-child relationship. The rule, pertaining to confidentiality of mental health information, has exception 6 which is "when the disclosure is relevant in any suit affecting the parent-child relationship." I think this should be left alone and the court can handle it on an individual basis pertaining to each case.

6. Texas Rule of Civil Evidence 703 - I think the recommendation of Steven A. Mendel is a good one and I would even recommend amending Rule 168 of the Texas Rules of Civil Procedure to conform thereto. I don't think we have to go that far if we choose not to do so, because the witness can state that he relied upon such interrogatory answers and can state the gist of the answer to interrogatories without actually offering and introducing the interrogatories. I can certainly see some argument against amending Rule 168 because a party defendant may make some agreement to get out of the case and before doing so give some damaging opinions as against a co-defendant and then get out of the case and the interrogatory would be admissible. I can also see an argument that an expert should not be able to rely upon interrogatory answers given by a party when at the time the expert testifies the party giving answers to interrogatories is no longer a party. I don't see this as affecting the opinion of the expert too much one way or another except in some situations a party, who is no longer a party to the lawsuit, may have given factual answers to interrogatories and is no longer around to depose or maybe his deposition wasn't taken. In that case the proposed change

would certainly be warranted. In brief, I see arguments both for and against but if a party gives answers to interrogatories and another party proves up these answers after the person giving answers is no longer a party, this can probably be solved by the usual impeachment rules. At any rate, getting back to the real issue - amending Rule 703 - I think we can do that without amending Rule 168 if we decide to do so. I certainly agree that many hearsay matters come in through the expert by saying that he relied on the matter.

7. Texas Rule of Civil Evidence 902(10) - It has been recommended that we change this Rule of Civil Evidence because it is in conflict with Section 18.001 of the Texas Civil Practices and Remedies Code. I do not feel that a change is necessary. Section 18.001 originally provided for fourteen days. It was amended in 1987 to provide that an affidavit must be filed with the clerk at least thirty days before the day on which the evidence is first presented. I don't see a conflict. First of all, Section 18.001 pertains to affidavits concerning costs and necessity of services. This is where the affidavit itself is offered as substantive evidence concerning costs and services. Texas Rule of Civil Evidence 902(10) pertains only to business records accompanied by an affidavit. This is not where the affidavit itself is being offered as substantive evidence but it is only where an affidavit is given stating that the person is custodian of a particular business record. In my opinion they deal with two different things.

Please let me have your comments so that we may report at our meeting in November.

Thanks.

Sincerely,

Gilbert I. Low

GIL/cc

4543.001

[redacted]

hhd

V4-6-94

sm

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
TEL (512) 463-1312
FAX (512) 463-1365

April 5, 1994

HHD
SCAC Subc
✓ Agenda
SBOT Court Rules Staff.

Mr. Luther H. Soules III
Soules and Wallace
100 West Houston Street #1500
San Antonio TX 78205

Dear Luke:

Enclosed is a copy of a letter from Mark Sales regarding TRCE 503(a)(2).

I would appreciate your bringing this to the attention of the Rules Committee at the appropriate time.

Sincerely,

Nathan L. Hecht
Justice

NLH:sm

Encl.

HUGHES & LUCE, L.L.P.
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FAX (512) 482-6859

March 30, 1994

Direct Dial Number
(214) 939-5626

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

RE: Proposed Rule Change to Rule 503(a)(2) of the Texas Rules of Civil Evidence by the State Bar of Texas Committee on the Administration of the Rules of Evidence

Dear Justice Hecht:

On behalf of the State Bar of Texas Committee on the Administration of the Rules of Evidence, I am enclosing for the Supreme Court Advisory Committee's review and consideration a proposed rule change to Rule 503(a)(2) of the Texas Rules of Civil Evidence.

Mr. Dee Kelley of Fort Worth previously requested that the Committee consider possible changes to Rule 503 in light of the Supreme Court's decision in National Tank Co. v. Brotherton. A subcommittee was appointed to study Mr. Kelly's request. After an extensive review of this issue, the subcommittee prepared its written report and recommendation, a copy of which also is enclosed. Our Committee took up this matter at its meeting on March 11, 1994, and following the subcommittee's report and discussion among the entire committee, approved the attached recommendation regarding Rule 503.

The Committee requests that the Supreme Court Advisory Committee consider this proposed change during the course of its up coming review of the Rules of Evidence. If the Advisory Committee would like any additional information or

help from this Committee, please let me know. By copy of this letter, I am forwarding a copy of the Committee's proposed rule change to the State Bar Board of Directors and to Mr. Kelley. Thank you for your consideration of this matter.

Very truly yours,

Mark K. Sales

MKS:spt
Enclosure
cc: Lonny D. Morrison
James L. Branton
Estil A. Vance, Jr.
Orrin L. Harrison III
Dee Kelley
E. Lee Parsley
All Committee Members

M E M O R A N D U M

TO: All Committee Members

FROM: Lee Courington

DATE: March 4, 1994

RE: State Bar Administration of Rules of Evidence Committee

Chairman Mark Sales received a letter from Dee Kelly of Fort Worth requesting that the committee address the Supreme Court's adoption of the "control group" test in National Tank Co. v. Brotherton, 851 S.W.2d 193 (Tex. 1993), to determine who qualifies as a representative of a corporation for purposes of the attorney/client privilege. In response to a memorandum sent by Mr. Sales to all committee members, John F. Sutton, Jr., Karl Bayer, Rene Mouledoux, Mike Prince, and Brenda Wade volunteered to study this issue, and Mr. Sales appointed all of the volunteers to a subcommittee to be chaired by myself to study this issue. This memorandum will report on the work of our subcommittee.

It should be pointed out at that the outset that various members of the committee represented the diverse experiences, interests, and concerns of different sections of the Bar. Our membership consisted of two in-house corporate counsel, a law school professor, a commercial litigator and two personal injury trial lawyers, one a plaintiff's attorney and one a defense attorney.

It was the initial sense of the committee that the Texas Supreme Court felt that its adoption of the "control group" test in the National Tank Co. case (as distinguished from the so-called "Upjohn test" or any other test) for determination of which corporate employees come within the attorney/client privilege was mandated by the language of Rule 503(a)(2) of the Texas Rules of Civil Evidence. The subcommittee then determined to study the issue of whether the control group test is the appropriate test to be used in Texas and, if not, whether, and if so, how, Rule 503 should be changed.

It is not surprising that a good deal of discussion ensued about the competing interests of encouraging candor between the attorney and the representatives of the client, on the one hand, and the need, on the other, to ensure that the valid purposes of the attorney/client privilege do not become, as one member noted, "a blanket privilege which might encourage the belief that everything otherwise unprivileged becomes so merely by being placed in the hands of, or communicated to, an attorney." A fundamental point made by a number of members of the subcommittee is that the control group test does not recognize the fact that employees

outside the control group often are the very persons who have the information needed by the attorney in order to properly advise the corporation. In addition, I have attached to this memorandum, with his permission, a copy of the excellent outline Rene Mouledoux prepared concerning the difficulties that the control group test presents for corporations which operate in states where different tests are used and which also have litigation in the federal system.

Mr. Bayer and Mr. Sutton both pointed out that the National Tank Co. case also had impact on the "in anticipation of litigation" and witness statement rules, and while most, if not all, the committee believed that any consideration of the provisions of Rule 166b of the Texas Rules of Civil Procedure is outside the scope of the work of this Committee, Mr. Bayer in particular emphasized the view that the scope of the attorney/client privilege could not be studied in a vacuum without considering National Tank Co.'s modification of the "in anticipation of litigation" test.

In addition, John Sutton has allowed us to circulate to you his letter to the committee expressing his view that neither the control group test; the holding of Upjohn Co. v. United States, 449 U.S. 383, 101 S.Ct. 677 (1981); nor the view taken in the Restatement of the Law Governing Lawyers (3rd), Tentative Draft #2 (1989) is totally satisfactory and proposing the utilization of a test based on Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978) (en banc). (I should point out that Mr. Sutton has asked that I circulate his letter with the caveat that it was written quickly in the midst of our committee deliberations and that he reserves the right to amend or supplement any of the views expressed therein.) All of us in the subcommittee are very much in Mr. Sutton's debt for the extensive research and thoughtful analysis provided by this letter.

After discussion of the concerns expressed by various members of the subcommittee and a review of the Meredith and Upjohn opinions, it was the view of the group that the Meredith test came the closest to providing for inclusion of the appropriate employees within the scope of the privilege as well as the predictability and greater uniformity of privileges sought on the one hand while protecting, on the other, against the abuses possible in a blanket application of the privilege.

We then determined to propose to the committee as a whole a redrafting of Rule 503(a)(2) that would provide that when the client is a legal entity other than a natural person, those persons who shall be considered to be "representatives of the client" pursuant to Rule 503(a)(2) will be those persons who satisfy all of the elements of the Meredith test. Karl Bayer, in particular, was quite insistent that only the incorporation of all of the Meredith test elements, which include the requirement that the subject of the communication be a matter within the scope of the employee's corporate duties, would be satisfactory to prevent the feared

abuses of the privilege. In addition, it should be noted that it was the sense of the entire group that the attorney/client privilege is not intended to cover documents or things prepared in the ordinary course of business or routine reports that are merely forwarded to counsel, as the mere forwarding of material to counsel does not make privileged anything that would not have been privileged had it not been forwarded to counsel.

The subcommittee's proposed revision of Rule 503(a)(2) is as follows:

> (2) A representative of a client other than a legal entity is one having authority either to obtain professional legal services or to act on advice rendered pursuant thereto, on behalf of the client. If the client is a legal entity other than a natural person, a representative of such client is (A) a partner, officer, director, or employee having authority either to obtain professional legal services or to act on advice rendered pursuant thereto on behalf of the entity, or (B) an agent or employee of the entity who has been requested by such partner, officer, director, or such superior employee to communicate with a lawyer on a subject matter within the scope of the employee's duties in connection with ~~the~~ securing ~~of~~ legal advice by the entity. The term agent as used in this rule does not include an independent contractor.

It is the subcommittee's recommendation that the full committee, in turn, recommend to the Supreme Court that Rule 503(a)(2) be amended in this fashion.

We would also note that since the Diversified Industries, Inc. v. Meredith and Upjohn opinions, as well as the National Tank Co. case, were the subject of a good deal of discussion among members of the subcommittee, members of the full committee may find it interesting and/or helpful to review these cases prior to the meeting. In addition, should any of the members of the full committee have any questions or wish to discuss these issues prior to the full committee on March 11, all of the members of the subcommittee would urge you to feel free to call any of us.

END OF MEMORANDUM

TEXAS RULE OF CIVIL EVIDENCE 503 SUBCOMMITTEE

Current issues regarding corporate attorney-client privileges after National Tank:

1. Need For Uniformity.

   - Modern corporations conduct business in many states.
   - A corporation may be sued in Texas for conduct arising in another state.
   - A corporation's attorney may conduct an investigation in a state which uses the Upjohn test.
   - An Upjohn privilege recognized in the state in which the investigation occurred will not be recognized in Texas.

2. Opponent's Control of a Corporation's Privilege.

   - Federal Courts recognize the Upjohn privilege at least with respect to federal causes of action.
   - Within Texas, the existence of an Upjohn privilege will depend upon an opponent's pleading of a federal cause of action in federal court.
   - Thus, the "artful pleading" of a third party can cause a corporation to lose an otherwise lawful privilege.

3. Difficult Application of Current "Control Group" Rule.

   - No clear definition of which corporate employees fall within "the control group."
   - No clear definition of what constitutes "authority to act." Ambiguity exists even in tests such as "in a position to control" or "substantial part in decision making."
   - Within a large corporation, the scope of persons with authority to act on legal advice will vary greatly depending upon the subject matter of the legal advice.
   - An attorney may inadvertently waive a privilege (and presumably commit malpractice) by expanding his investigation by "one witness too many" when he includes a witness who is later determined to fall outside the control group.

4. Need for Confidential Communications with All Employees.

- A corporation is liable for conduct of any employee acting within scope and course of his employment.

- Under Rule of Evidence 801(d)(2)(D), a corporation may be bound by an admission made by its employee in a statement concerning a matter within the scope of his employment.

- Those employees with the greatest knowledge of relevant facts are usually not part of a corporation's control group.

- If a corporation is to be bound by the actions and statements of its employees, an attorney must communicate with these employees in order to render sound and informed advice to his corporate client.

- Unless an attorney-client privilege attaches, a frank and meaningful disclosure of underlying facts will not be communicated to the attorney. Thus, the attorney's advice will be either incomplete (at best) or wrong (at worst).

- The corporation itself needs a full disclosure of the underlying facts in order to critically analyse the situation and identify what action is needed to correct the current problem and prevent a recurrence.

- Unless the self-critical analysis is protected from discovery in a subsequent lawsuit, the corporation is forced to decide between two unreasonable choices: 1) the creation of the analysis which will be extremely damaging to the corporation's defense when produced in discovery, or 2) the decision not to conduct the analysis in order to avoid creation of the potentially damaging document but at the cost of not fully identifying and correcting the underlying problem and avoiding a recurrence.

RJN
2/2/94

SCHOOL OF LAW

THE UNIVERSITY OF TEXAS AT AUSTIN

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Feb. 6, 1994

Chairperson Lea F. Courington
1201 Elm St., Suite 4100
Dallas, Texas 75270

Re: Dee Kelly's requested review of National Tank Co. v. Brotherton, 851 S.W. 2d 193 (Tex. 1993)

Dear Ms. Courington:

Unfortunately, by missing the telephone conference on Feb. 1st, I do not have the benefit of that conversation. Also, I must add that I CANNOT be available on Friday, Feb. 18, at 10:30 a.m., so there is no need to change the next proposed telephone conference to that time. I have a prior commitment in Houston that Friday morning. Therefore, I write to express my thoughts. I think better on the computer, anyway.

I begin with axiomatic principles of evidence law. The attorney-client privilege "is, as a matter of law, construed narrowly so as not to exceed the means necessary to support the policy which it promotes."[1] The underlying policy supporting the privilege "is to encourage full and frank communications between attorneys and their clients."[2] The privilege is construed narrowly because it "creates an exception to the general rule that a court is entitled to every witness's testimony."[3] It has been pointed out that:

> "extending the privilege to corporations risks creating an intolerably large zone of sanctuary since many corporations continuously consult attorneys. Any standard developed, therefore, must strike a balance between encouraging corporations to seek legal advice and preventing corporate attorneys from being used as shields to thwart discovery. Note, Where Do We Go After Upjohn, 81 Mich.L.R. 665, 6677-68 (1983)."[4]

My conclusion is that neither the control group test, the precise holding on its facts in Upjohn,[5] nor the view taken in the Restatement of the Law Governing Lawyers (3rd), Tentative Draft #2 (1989), is totally satisfactory. A better test can be devised following

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[1] In re Grand Jury Matter No. 91-01386, 969 F.2d 995 (11th Cir. 1992).
[2] See, e.g., In re Grand Jury Matter, 147 F.R.D. 82, 84 (E.D. Pa. 1992).
[3] Fausek v. White, 965 F.2d 126 (6th Cir. 1992), reh. den. en banc.
[4] First Chicago International v. United Exchange Co., Ltd., 125 F.R.D. 55, 57 (S.D. N.Y. 1989).
[5] Upjohn's holding, in its particular fact situation, seems to be that the privilege applies to "communications by any corporate employee regardless of position when the communications concern matters within the scope of the employee's corporate duties and the employee is aware that the information is being furnished to enable the attorney to provide legal advice to the corporation;" but nevertheless the Court said that this is not "an all-encompassing test" and the Upjohn holding is that "each case must be evaluated to determine whether the application of the privilege would further its underlying purpose." See Admiral Insurance Co. v. U.S. Dist. Ct of Ariz, 881 F.2d 1486, 1492 (1989).

the standard stated in the Meredith case[6] and approved in J.Weinstein's Evidence, which is close to the subject matter test. Indeed, Upjohn recognized that the choice need not be between the control group test and the subject matter test. The control group test - - if it, as usually assumed, is limited to the upper echelon of corporate management -- is unsatisfactory because it is unrealistic when applied to large corporations[7] and because it creates conflict-of-laws problems since the federal courts do not follow it in federal issues. The test as applied in Upjohn (which is different from the subject matter test as defined in National Tank) is unsatisfactory because it goes much further than is needed in order to support the underlying policy supporting the privilege and because it is virtually an unnecessary, unreasonable blanket protection of witness statements given by any employee to a lawyer directed by the corporate officers to make an investigation. In my view, an important limitation on the corporate attorney-client privilege should be that either the higher echelon, or an officer who is authorized to consult with or act upon advice from lawyers, directs, orders or authorizes the particular employee to talk to the lawyer. Directing the lawyer to investigate should not be enough; the direction should be to the employee to talk, on behalf of the corporation, to the lawyer. This would be a middle ground between the Upjohn decision and the control group test.

We can improve on Rule 503 as interpreted in National Tank.[8] The problem is sensitive, however, in that the Rule of Civil Evidence 503 and the Rule of Criminal Evidence 503 are virtually identical and, indeed the two 503(a)(2) provisions are identical. Thus, we are talking about changing the criminal rules as well as the civil rules; the Court of Criminal Appeals as well as the Supreme Court will be interested in this problem.

In National Tank, the company (Natco) asserted "attorney-client, work-product, witness-statement, and party-communication privileges" in response to a discovery request for accident reports and witness statements prepared in connection with the investigations by Natco and its insurer.[9] I assume the focus of our committee is on only Rule 503, Texas Rules of Civil Procedure.[10]

After an explosion, Natco's in-house general counsel, Pease, sent Townsend, a non-lawyer employed in the legal department, to investigate. (This is factually similar to

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[6] Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978).

[7] We all know of banks and other large corporations where lower department heads and their assistants, whether in the main office or a branch office (and clearly not in the control group) have actual authority (express and implied) to consult lawyers and to act on the lawyer's advice, and those communications should be protected by the privilege.

[8] I have no idea what will be the effect on all of this by the recent amendment to Rule 26(a)(1), Fed.R.Civ.P., requiring parties to make disclosure of many things without waiting for a discovery request.

[9] A recent discussion of National Tank is Addison, Representative of the Client, Tex.B.J., Feb. 1994, at 192.

[10] Although the various opinions in National Tank dealt at length with the provisions of Rule 166b, Tex.R.Civ.Proc., regarding its work-product privilege and its witness statements privilege, it seems to be outside the scope of the work of this committee to suggest amendments to Rule 166b. Most of the opinions in National Tank were concerned with Rule 166b and with Flores and Stringer. The work-product provisions of Rule 166b would be affected, of course, by any modification of the exceptions in Rule 503(d).

Upjohn.) Pease was also Natco's Secretary. Townsend's investigation involved conversations with Natco plant personnel at the Wichita Falls plant. He took witness statements from the employees and gave the statements to Pease. Attorney-client privilege objections were made at Townsend's deposition in regard to those statements. Treating the statements the same as if the employees had made the statements directly to Pease, the plurality opinion held that these witness statements were not protected by the attorney-client privilege because the employees were not Natco's representatives within the meaning of Rule 503(a)(2).[11]

In so holding, the plurality opinion said that 503(a)(2)[12] "clearly adopts the 'control group' test . . ." that was rejected in Upjohn.[13] The opinion also said, "Courts applying this test generally protect only statements made by the upper echelon of corporate management."[14] The employees at Wichita Falls, "although they may have been speaking with management's blessing, had not been authorized to seek legal counsel on behalf of the corporation."[15] The plurality opinion distinguished the "subject matter" test, where the employee's statement is deemed to be that of the corporation if

> "the employee made the statement at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment."[16]

The plurality opinion also recognized correctly that in Upjohn the United States Supreme Court refused to expressly adopt the subject matter test although holding that statements given by lower-level employees to the corporation's attorney who was investigating at the behest of the corporate management were protected, on the facts in the case.

A recent survey article on the Corporate Attorney-Client Privilege[17] is summarized (I believe accurately unless too briefly):

> The corporation, holder of the privilege, can communicate with its lawyers only through its officers, agents and employees. The dominant tests for

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[11] The plurality opinion made a similar, but somewhat guarded, holding regarding statements between Pease and the insurer's investigator, Precht.

[12] 503(a)(2) reads: "A representative of the client is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client."

[13] Upjohn Co. v. United States, 449 U.S. 383, 101 S.Ct. 677 1981).

[14] 851 S.W.2d at 197.

[15] 851 S.W.2d at 199. At p. 199, the plurality opinion seems to misread, or mischaracterize, 503(a)(2) when it is stated: "However, under Rule 503(a)(2) the qualifying employees must be those actually having authority to *hire* counsel *and* to act on counsel's advice on behalf of the insured." (Emphasis added.)

[16] Am I correct in thinking that the National Tank situation did NOT involve an order or direction from the upper echelon officers to each employee who was interviewed, requiring them to talk to Townsend or a representative of the legal department? If that is correct, it appears that the statements also would be inadmissible under the subject matter test, even though admissible, perhaps, under some language in the Upjohn opinion.

[17] Survey Project, Confidentiality: Corporate Attorney-Client Privilege, 3 Geo. J. Legal Ethics 131 (1989).

determining which communications to its lawyers are protected have been the control group and subject matter tests. The control group test, which was favored by most federal courts, protects communications only from those having managerial responsibility for taking action in response to the lawyer's advice. The subject matter test (accurately restated in National Tank) arose because the control group test is inadequate in that lower rank employees often are the ones having the information needed by the lawyer. Nevertheless, the Supreme Court in Upjohn did not explicitly embrace the subject matter test, using a case-by-case approach.

"In rejecting the control group test, the Supreme Court held that the attorney-client privilege extends to all communications to counsel by corporate employees upon a superior's direction and for the known corporate purpose of obtaining legal advice.[18] Additionally, the information communicated must be related to matters within the scope of the employee's duties and must be intended to be kept confidential." Many state courts have used the Upjohn analysis as a guide in deciding privilege issues under state law.

"In the minority of states where the control group principle governs, state claims in both state and federal courts will be governed by the control group principle while federal claims in federal courts will be governed by the Upjohn principles. Therefore, the same federal court may have to apply two different standards of privilege to the same corporation which came before it on two different claims, one state and one federal. This oddity will cause confusion among corporate clients who will not know if certain communications they make to their counsel will be broadly covered by the Upjohn doctrine or scantily clad by the control group test. Such a result frustrates the 'full and frank communication' purpose of confidentiality since the doctrine assumes that a client will shape his candor to his lawyer based upon the rules of confidentiality."[19]

Judge Jack Weinstein's Manual, in ¶ 18.03(05) makes the salient point that the Supreme Court in Upjohn cited Diversified Industries, Inc. v. Meredith[20] many times. Meredith states what appears to be a practical position that is close to the subject matter test; its test is that the attorney-client privilege applies in the corporate setting when five requirements are satisfied:

(1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not

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[18] 3 Geo.J.Legal Ethics at 134, citing Upjohn, 449 U.S. at 394. But query: in Upjohn, didn't the "superior's direction" go to the lawyer to investigate, rather than to the employee to communicate with the lawyer?

[19] 3 Geo. J.Legal Ethics at 136-37. Although the note speaks on the "Upjohn doctrine," I believe the only Upjohn doctrine is that the control group test is outlawed and the decision should be made on an ad hoc basis.

[20] 572 F.2d 596 (8th Cir. 1978) (en banc).

disseminated beyond those persons who, because of the corporate structure, need to know its contents.[21]

The Restatement of the Law Governing Lawyers (Tentative Draft #2, Apr. 7, 1989) in a rather formalistic rule (reminiscent of IRS regulations), § 123, adopts a test it says is closer to the "subject matter" test than to the "control group" test. Its Comment d states that the limitation of the control group is "unnecessary to prevent abuse of the privilege and significantly frustrates the purpose of the privilege." Comment d further summarizes the effect of § 123: "Section 123(2) accordingly provides that the privilege protects a communication that involves any agent of the organization, without regard to the agent's position or degree of decision-making responsibility in the organization, so long as that person imparts information to the lawyer in behalf of the client or receives or reviews advice or other legal assistance in behalf of the organization from the lawyer." (That seems to leave out the "direction of his corporate superior" requirement, and overly protects mere witness-statements.)

The heart of § 123 seems to be subdivision (2): "The communication is between a person communicating pursuant to an agency relationship with the organization and a privileged person within the meaning of § 120" concerning a legal matter of interest to the organization. (By cross reference to §§ 118-122, it is required, of course, that the communication be made in confidence for the purpose of obtaining or providing legal assistance for the client.)

In my view, neither the control group test, Upjohn, nor the Restatement is precisely right. The main difficulty with tests escaping the control group test is that they fail to include the Meredith requirement that the superior requested (or, authorized) the employee to make the communication. Restatement § 123 is better than the control group test and is close to the subject matter test, Upjohn's holding gives some guidance but is too lenient, and the Meredith test seems the best of the lot.

I am not sure how to reword a revision of Rule 503. The Restatement format is far too stilted to follow. My rough and first attempt would be to reword sub-division (2) of Rule 503(a) something like this (in legislative form with inserted language underlined):

> (2) A representative of a client, other than a corporate client, is one having authority either[22] to obtain professional legal services or to act on advice rendered pursuant thereto, on behalf of the client. A representative of a corporate client is a corporate officer in the upper echelon of corporate management, a corporate officer or employee having express or implied authority either to obtain

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[21] See also Cuno, Inc. v. Pall Corp., 121 F.R.D. 198 (E.D. N.Y. 1988), using the Meredith test as its standard and citing as authority 2 J. Weinstein & M. Berger, *Weinstein's Evidence*, ¶ 503(b)(4) at 503-54.

[22] I would insert "either" to clear up the ambiguity that led the plurality opinion to state, "However, under Rule 503(a)(2) the qualifying employees must be those actually having authority to *hire* counsel *and* to act on counsel's advice on behalf of the insured." (Emphasis added.) Furthermore, "to obtain" professional legal services does not necessarily mean to "hire," for the outside firm probably is already "hired" and is being consulted.

professional legal services or to act on advice rendered pursuant thereto on behalf of the corporation, or an agent or employee of the corporation who has been requested or directed by such corporate officer or such superior employee to communicate with a lawyer in connection with the securing of legal advice by the corporation.

With best regards to all,

Sincerely yours,

John F. Sutton, Jr.

cc: Rene J. Mouledoux
800 Bell St., Ste. 1895
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Austin, Texas 78701

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PROPOSED AMENDMENT TO TEX. R. CIV. EVID. 503(a)(2)

The Committee's proposed revision of Rule 502(a)(2) is as follows:

> (2) A representative of a client other than a legal entity is one having authority either to obtain professional legal services or to act on advice rendered pursuant thereto on behalf of the client. If the client is a legal entity other than a natrual person, a representative of such client is (A) a partner, officer, director, or employee having authority either to obtain professional legal services or to act on advice rendered pursuant thereto on behalf of the entity, or (B) an agent or employee of the entity who has been requested by such partner, officer, director, or such superior employee to communicate with a lawyer on a subject matter within the scope of the employee's or agent's duties in connection with securing legal advice by the entity. The term agent as used in this Rule does not include an independent contractor.

(3) any member or employee of the board or any person who assists the board in carrying out its duti[illegible] by law.

(u) The [illegible] state action on the rep[illegible] ganization.
See 21 U[illegible]

Fax Transmittal Memo

# of Pages 3	
To: LEE PARSLEY	From: CARL DITZLER
Co.: STATE BAR	Co.: PER SUSAN COMBS
Dept.: 3-6645	Phone # 463-0650
Fax # ~~475-2774~~ 3-1365	Fax # 499-0813

RCFX14

Sec. 5.07 [illegible] the trier of fact of gui[illegible] racticing in this state [illegible] lving moral turpitude. [illegible] an offense involving [illegible] or not the conviction [illegible] laws of this state, the [illegible] finding was entered [illegible] information required under [illegible] ized criminal history system.

(b) Not later than the 30th day after the date a court adjudges or finds that a physician is mentally ill or mentally incompetent, the clerk of the court of record in which the adjudication or finding was entered shall prepare and forward to the board a certified true and correct abstract of record, regardless of whether the adjudication or finding is later withheld or appealed.

TRUE [illegible]

Physician-patient communication

Sec. 5.08 (a) Communications between one licensed to practice medicine, relative to or in connection with any professional services as a physician to a patient, is confidential and privileged and may not be disclosed except as provided in this section.

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

(d) The prohibitions of this section continue to apply to confidential communications or records concerning any patient irrespective of when the patient received the services of a physician, except for medical records 100 years old or older requested for historical research purposes.

(e) The privilege of confidentiality may be claimed by the patient or physician acting on the patient's behalf.

(f) The physician may claim the privilege of confidentiality, but only on behalf of the patient. The authority to do so is presumed in the absence of evidence to the contrary.

(g) Exceptions to confidentiality or privilege in court or administrative proceedings exist:

(1) when the proceedings are brought by the patient against a physician, including but not limited to malpractice proceedings, and any criminal or license revocation proceeding in which the patient is a complaining witness and in which disclosure is relevant to the claims or defense of a physician;

(2) when the patient or someone authorized to act on his behalf submits a written consent to the release of any confidential information, as provided in Subsection (j) of this section;

(3) when the purpose of the proceedings is to substantiate and collect on a claim for medical services rendered to the patient;

(4) in any civil litigation or administrative proceeding, if relevant, brought by the patient or someone on his behalf if the patient is attempting to recover monetary damages for any physical or mental condition including death of the patient. Any information is discoverable in any court or administrative proceeding in this state if the court or administrative body has jurisdiction over the subject matter, pursuant to rules of procedure specified for the matters;

(5) in any disciplinary investigation or proceeding of a physician conducted under or pursuant to this Act, provided that the board shall protect the identity of any patient whose medical records are examined, except for those patients covered under Subdivision (1) of Subsection (g) of this section or those patients who have submitted written consent to the release of their medical records as provided by Subsection (j) of this section;

(6) in any criminal investigation of a physician in which the board is participating or assisting in the investigation or proceeding by providing certain medical records obtained from the physician, provided that the board shall protect the identity of any patient whose medical records are provided in the investigation or proceeding, except for those patients covered under Subdivision (1) of Subsection (g) of this section or those patients who have submitted written consent to the release of their medical records as provided by Subsection (j) of this section. This subsection does not authorize the release of any confidential information for the purpose of instigating or substantiating criminal charges against a patient;

(7) in an involuntary civil commitment proceeding, proceeding for court-ordered treatment, or probable cause hearing under:

(A) the Texas Mental Health Code (Article 5547-1 et seq., Vernon's Texas Civil Statutes);

(B) the Mentally Retarded Persons Act of 1977 (Article 5547-300, Vernon's Texas Civil Statutes);[1]

(C) Section 9, Chapter 411, Acts of the 53rd Legislature, Regular Session, 1953 (Article 5561c, Vernon's Texas Civil Statutes);

(D) Section 2, Chapter 543, Acts of the 61st Legislature, Regular Session, 1969 (Article 5561c-1, Vernon's Texas Civil Statutes); or

(8) in any criminal prosecution where the patient is a victim, witness, or defendant. Records are not discoverable until the court in which the prosecution is pending makes an in camera determination as to the relevancy of the records or communications or any portion thereof. Such determination shall not constitute a determination as to the admissibility of such records or communications or any portion thereof.

(h) Exceptions to the privilege of confidentiality, in other than court or administrative proceedings, allowing disclosure of confidential information by a physician, exist only to the following:

(1) governmental agencies if the disclosures are required or authorized by law;

(2) medical or law enforcement personnel if the physician determines that there is a probability of imminent physical injury to the patient, to himself, or to others, or if there is a probability of immediate mental or emotional injury to the patient;

(3) qualified personnel for the purpose of management audits, financial audits, program evaluations, or research, but the personnel may not identify, directly or indirectly, a patient in any report of the research, audit, or evaluation or otherwise disclose identity in any manner;

(4) those parts of the medical records reflecting charges and specific services rendered when necessary in the collection of fees for medical services provided by a physician or physicians or professional associations or other entities qualified to render or arrange for medical services;

(5) any person who bears a written consent of the patient or other person authorized to act on the patient's behalf for the release of confidential information, as provided by Subsection (j) of this section;

(6) individuals, corporations, or governmental agencies involved in the payment or collection of fees for medical services rendered by a physician;

(7) other physicians and personnel under the direction of the physician who are participating in the diagnosis, evaluation, or treatment of the patient; or

(8) in any official legislative inquiry regarding state hospitals or state schools, provided that no information or records which identify a patient or client shall be released for any purpose unless proper consent to the release is given by the patient, and only records created by the state hospital or school or its employees shall be included under this subsection.

(i) Exceptions to the confidentiality privilege in this Act are not affected by any statute enacted before the effective date of this Act.

(j)(1) Consent for the release of confidential information must be in writing and signed by the patient, or a parent or legal guardian if the patient is a minor, or a legal guardian if the

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[1] "Mentally Retarded Perso
in Acts 1977, 75th Leg., ch.
[2] V.A.T.S. Probate Code §

Sec. 5.09. (a) A ph
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patient has been adjudicated incompetent to manage his personal affairs, or an attorney ad litem appointed for the patient, as authorized by the Texas Mental Health Code (Article 5547-1 et seq., Vernon's Texas Civil Statutes); the Mentally Retarded Persons Act of 1977 (Article 5547-300, Vernon's Texas Civil Statutes); Section 9, Chapter 411, Acts of the 58rd Legislature, Regular Session, 1963 (Article 5561c, Vernon's Texas Civil Statutes); Section 2, Chapter 648, Acts of the 61st Legislature, Regular Session, 1969 (Article 5561c-1, Vernon's Texas Civil Statutes); Chapter 5, Texas Probate Code;[2] and Chapter 11, Family Code; or a personal representative if the patient is deceased, provided that the written consent specifies the following:

(A) the information or medical records to be covered by the release;

(B) the reasons or purposes for the release; and

(C) the person to whom the information is to be released.

(2) The patient, or other person authorized to consent, has the right to withdraw his consent to the release of any information. Withdrawal of consent does not affect any information disclosed prior to the written notice of the withdrawal.

(3) Any person who receives information made confidential by this Act may disclose the information to others only to the extent consistent with the authorized purposes for which consent to release the information was obtained.

(k) A physician shall furnish copies of medical records requested, or a summary or narrative of the records, pursuant to a written consent for release of the information as provided by Subsection (j) of this section, except if the physician determines that access to the information would be harmful to the physical, mental, or emotional health of the patient, and the physician may delete confidential information about another person who has not consented to the release. The information shall be furnished by the physician within 30 days after the date of receipt of the request and reasonable fees for furnishing the information shall be paid by the patient or someone on his behalf. If the physician denies the request, in whole or in part, the physician shall furnish the patient a written statement, signed and dated, stating the reason for the denial. A copy of the statement denying the request shall be placed in the patient's medical records. In this subsection, "medical records" means any records pertaining to the history, diagnosis, treatment, or prognosis of the patient.

(l) A person aggrieved by a violation of this section relating to the unauthorized release of confidential and privileged communications may petition the district court of the county in which the person resides, or in the case of a nonresident of the state, the District Court of Travis County, for appropriate injunctive relief, and the petition takes precedence over all civil matters on the docketed court except those matters to which equal precedence on the docket is granted by law. A person aggrieved by a violation of this section relating to the unauthorized release of confidential and privileged communications may prove a cause of action for civil damages.

(m) "Patient" for the purposes of this section means any person who consults or is seen by a person licensed to practice medicine to receive medical care.

(n) A person who may provide a copy of a record, or a summary or narrative of the record, to another under this section may provide the copy, summary, or narrative:

(1) on paper; or

(2) on microfilm, microfiche, computer hard disk, magnetic tape, or optical disk or by means of another appropriate medium, including a machine-readable medium, if the person who is to provide and the person who is to receive the copy, summary, or narrative agree to a form authorized by this subdivision.

[1] "Mentally Retarded Persons Act of 1977" reference means the "Persons With Mental Retardation Act", as provided in Acts 1991, 72nd Leg., ch. 76, § 2, eff. Sept. 1, 1991.
[2] V.A.T.S. Probate Code, § 72 et seq.

Authority to Supply Drugs

Sec. 5.09. (a) A physician licensed to practice medicine under this Act may supply patients with any drugs, remedies, or clinical supplies as are necessary to meet the patients' immediate needs. This subsection does not permit the physician to operate a retail pharmacy without first complying with the Texas Pharmacy Act (Article 4542a-1, Vernon's Texas Civil Statutes).