Revised 1/15/02

PROPOSED RULE 166b

1. Definitions.

(a.) "Claim" means a claim to recover monetary damages or for other relief, and includes a counterclaim, cross-claim, or third-party claim.

(b.) "Claimant" means a person making a claim.

(c.) "Defendant" means a person from whom a claimant seeks recovery of damages or other relief on a claim, including a counterdefendant, cross-defendant, or third-party defendant.

(d.) "Litigation costs" means costs actually incurred that are directly related to preparing an action for trial and actual trial expenses which are incurred after the date of the rejected offer to settle which is used to measure an award under Section 9 of this rule, including:

(1) attorneys' fees, including fees earned pursuant to a valid contingency fee contract;

(2) costs of court;

(3) reasonable deposition costs; and

(4) reasonable fees for necessary testifying expert witnesses.

(e.) "Offer to settle" means an offer to settle or compromise a claim made in compliance with Section 5.

2. Applicability and Effect.

(a.) This rule does not apply to:

(1) a class action;

(2) an action brought under the Deceptive Trade Practices-Consumer Protection Act (Sections 17.41 et seq., Business & Commerce Code);

(3) an action brought under the Family Code; or

(4) an action to collect workers' compensation benefits under Subtitle A, Title 5, Labor Code.

(b.) This rule does not limit or affect the ability of any person to make an offer to settle or compromise a claim that does not comply with this rule. A party's offer to settle or compromise that does not comply with subsection 5 of this rule does not entitle the party to recover litigation costs under this rule.

3. Election By Governmental Units; Waiver.

(a.) This rule does not apply to an action by or against the state, any unit of state government, or any political subdivision of the state unless the governmental unit expressly elects both to seek recovery of litigation costs under this rule and to waive immunity from liability for litigation costs awarded under this rule.

(b.) To be effective as an election and waiver, the governmental unit must make the election and waiver specifically and affirmatively by a writing filed with the court within 45 days of the filing of the governmental unit's original petition or original answer.

(c.) An election and waiver is effective only in the action in which it is filed, even if the action is subsequently joined or consolidated with another action.

4. **Service.** When this rule requires a writing to be served on another party, service is adequate if it is performed in a manner described in Rules 4, 5 and 21a, Texas Rules of Civil Procedure.

5. **Offer To Settle.**

(a.) A party may serve on an opposing party an offer to settle all the claims in the action between that party and the opposing party.

(b.) The offer to settle:

(1) must be in writing;

(2) must state that it is an offer to settle all claims pursuant to this section;

(3) must specify the terms by which the claims may be settled;

(4) must specify a deadline by which the offer must be accepted;

(5) may not include a demand for litigation costs except for costs of court;

(6) must offer to allow a judgment to be entered consistent with the terms of the offer; and

(7) must be served on the party to whom the offer is made.

(c.) A party may not make an offer to settle under this section after the tenth day before the date set for trial, except that a party may make an offer to settle that is a counteroffer on or before the seventh day before the date set for trial.

(d.) The parties are not required to file with the court an offer to settle.

(e.) A party may only make an offer to settle under this rule during the course of the litigation but may make successive offers to settle.

6. **Acceptance of Offer.**

(a.) A party may accept an offer to settle on or before 5:00 p.m. on the 14th day after the date the party received the offer to settle or before the deadline specified in the offer, whichever is later.

(b.) Acceptance of an offer must be:

(1) in writing; and

(2) served on the party who made the offer.

(c.) Upon acceptance of an offer to settle, either party may file the offer and notice of acceptance together with proof of service thereof, and thereupon the court shall enter judgment in accordance with the offer and acceptance except that the Court may not seal any judgment without first complying with Rule 76a, T.R.C.P..

7. **Withdrawing an Offer**

(a.) A party may withdraw an offer to settle by a writing served on the party to whom the offer was made before the party accepts the offer. A party may not accept an offer to settle after it is withdrawn. A party may not withdraw an offer to settle after it has been accepted.

(b.) If a party withdraws an offer to settle, that offer does not entitle the party to recover litigation costs.

8. **Rejection of Offer.** For purposes of this rule, an offer to settle a claim is rejected if:

(a.) the party to whom the offer was made rejects the offer by a writing served on the party making the offer; or

(b.) the offer is not withdrawn and is not accepted before the deadline for accepting the offer.

9. Award of Litigation Costs.

(a.) A party who made an offer to settle the claims between that party and the party to whom the offer was made may recover litigation costs provided:

(1) the offer to settle was rejected;

(2) the court entered a judgment on the claims and;

(3) if a party sought monetary damages.

(A) the amount of monetary damages awarded on the claims in the judgment is more favorable to the party who made the offer than the offer to settle the claims; and

(B) the difference between the amount of monetary damages awarded on the claims in the judgment and the amount of the offer to settle the claims is equal to or greater than twenty-five percent of the amount of the offer to settle the claims; or

(4) if a party sought nonmonetary relief, the judgment is more favorable to the party who made the offer to settle the claims.

(b.) Each element of litigation costs awarded under this rule must be both reasonable and necessary to the prosecution or defense of the action.

(c.) The court will determine the amount of "Litigation Costs" under this rule and may reduce, but not enlarge, the amount as justice requires.

(d.) The amount of litigation costs awarded against the claimant may not exceed the amount of the damages recovered by the claimant in the action.

10. Attorney's Fees.

(a.) A party may not recover attorneys' fees as litigation costs under this rule unless the party was represented by an attorney.

(b.) If Litigation Costs are contested, the court may award additional Litigations Costs for the reasonable and necessary amount expended to pursue or dispute the claimed Litigation Costs.

11. Evidence Not Admissible.

(a.) Evidence relating to offers to settle is not admissible except in an action to enforce the settlement or in a proceeding to obtain litigation costs under this rule.

(b.) Except in an action or proceeding described in Subsection 11(a), the provisions of this rule may not be made known to the jury through any means, including voir dire, introduction into evidence, instruction, or argument.

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TO: SCAC MEMBERS

FROM: Professor Elaine A. Carlson

RE: Offer of Judgment Proposal: Rule 166b

March 1, 2002

Chairman Babcock has requested the SCAC Offer of Judgment Subcommittee review the proposed Offer of Judgment Rule 166b generated by the Supreme Court Task Force Committee chaired by Joe Jamail. (Attachment A) We have reviewed the proposed rule and the literature surrounding the subject and set forth the following analysis and observations for your consideration.

I. Overview of Offer of Judgment Rule

An offer of judgment rule provides for the shifting of costs upon an offeree who fails to accept an offer of judgment from their adversary when the ultimate judgment in the case is less favorable than that offered. Federal Rule of Civil Procedure 68, as well as many parallel state rules or statutes, provide that if a defendant offers to have judgment entered against him, the plaintiff does not accept, and the plaintiff's judgment is not more favorable than the offer, then the plaintiff must pay the defendant's post-offer costs.[1] "The effect

[1] It has been reported that twenty-eight states (including a majority of the federal replica jurisdictions), plus the District of Columbia, have provisions identical or substantially similar to Federal Rule 68. Another thirteen states have provisions which depart from the Federal Rule in significant ways, while nine states apparently have no provision at all. See Solimine & Pacheco,

is to reverse the usual rule that a losing party must pay the winner's costs."[2] State rules vary as to whether the offer of judgment mechanism extends to both plaintiffs and defendants and as to what is recoverable beyond costs, with some providing recovery for attorney's fees as well as expert fees under a myriad of offer of judgment schemes.

Proposed Rule 166b is an offer of judgment rule that applies to both plaintiffs and defendants. It provides for the shifting of litigation costs including costs of court, attorneys fees, as well as reasonable expert fees when an offer of judgment is rejected and the offeree suffers a less favorable judgment. A less favorable money judgment is defined by the rule as a judgment more favorable to the offeror when the amount of monetary damages awarded is equal to or great than twenty-five percent of the offer to settle. A more favorable nonmonetary judgment results when the "judgment is more favorable to the party who made the offer to settle the claims".[3]

A majority of our subcommittee is opposed to an offer of judgment rule. However, a majority of the subcommittee endorses a modification to rule 131 to clarify that the trial court has the discretion to tax costs against a prevailing plaintiff who receives less than the amount offered by a Defendant before trial. The following discussion reflecting our concerns is offered for the full committee's consideration.

II. Historical Overview of Fee and Cost Shifting

The United States has long rejected the "English Rule", followed in Great Britain and most European nations, that the loser must pay the successful party's attorney's fees.[4] The historical justification for the "American Rule"- that parties bear the costs of their own attorney's fees in litigation whether

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State Court Regulation of Offers of Judgment and Its Lessons For Federal Practice,13 Ohio St. J. Dispute Resolution 51, 64 (1997).

[2] Rowe & Vidmar, Empirical Research on Offers of Settlement: A Preliminary Report, 51 Law & Contemporary Problems 13, 13-14, Autumn 1988.

[3] See Appendix A. Proposed Rule 166b.

[4] Sherman, "From Loser Pays to Modified Offer of Judgment Rules: Reconciling Incentives To Settle With Access to Justice", 76 Tex. L. Rev. 1863, 1863 (1998).

they win or lose- is premised upon the American belief in liberal access to the courts to redress wrongs.[5] A deterrent, including the threat of paying the other sides attorney's fees if suit is unsuccessful, raises the concern that wrongs may go unremedied in our society, and that any such rule would disproportionately impact the plaintiff's access to the courts. It has been suggested that the differences in our two systems justifies these practices:

> England virtually abolished juries in civil cases (except for libel and malicious prosecution) more than 50 years ago. Cases are tried before judges whose decisions are narrowly bound by precedent, not only on liability but on damages as well. Outcomes, therefore, tend to be more predictable in England than in the United States..... Moreover, lack of predictability in American law is not limited to juries. Substantive and procedural law has undergone constant and sometimes dramatic change during the past 40 years. Law in America is more volatile and less precedent-bound than in England. Propositions that might at one time have been thought frivolous, or at least highly speculative, have become accepted. It is a rare case of which one can say with assurance that it cannot prevail.[6]

There are a number of exceptions to the American rule that permit recovery of attorney's fees by a claimant. For example, a party determined to have brought an action in bad faith may be responsible for the attorneys fees of an opponent. Further, a myriad of statutory provisions allow the recovery of attorney's fees by a prevailing party despite the American rule. Further, some states have adopted offer of judgment rules that allow for the shifting of attorney's fees when an offeree refuses his opponent's offer to settle and does no better at trial. (The state adoptions are both by rule and by statute).

Offer of judgment rules are intended to encourage settlements and avoid protracted litigation. Perhaps more precisely, the object of such rules are "to encourage more serious evaluation of a proposed settlement at an earlier stage than otherwise might occur, which should lead to more dispositions of cases

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[5] Sherman, "From Loser Pays to Modified Offer of Judgment Rules: Reconciling Incentives To Settle With Access to Justice", 76 Tex. L. Rev. 1863, 1863 (1998).

[6] William W Schwarzer, Fee-Shifting Offers of Judgment--An Approach to Reducing the Cost of Litigation, Judicature, Oct.-Nov. 1992, at 147, 149-150.

before the heaviest expenses have been incurred".[7]

Federal Rule 68 provides for an offer of judgment mechanism. It "resembles the English practice, except that by its terms it is limited to court costs, generally only a fraction of attorney fees. As noted above, the rule permits a defendant at any time more than 10 days before trial to serve an offer of judgment for money or other relief and costs then accrued. If the plaintiff accepts the offer within 10 days, judgment is entered. If the plaintiff does not accept and the final judgment "is not more favorable (to the plaintiff) than the offer," it must pay the costs incurred after the making of the offer. If an offer is not accepted, a subsequent offer may be made."[8]

Federal Rule 68 was adopted in 1938, and since that time over thirty states have adopted by rule or statute an offer of judgment mechanism.[9] The Federal Advisory Committee on the Civil Rules, noted in its proposed 1983 amendment to Rule 68, that the rule "has rarely been invoked and has been considered largely ineffective in achieving its goals."[10] [11] In particular, the federal rule has been criticized as: (1) it only provides for a defending party to make an offer of judgment, (2) it only provides for the recovery of court costs, and not attorney's fees so there is insufficient incentive to utilize it, and, (3) the time to make and accept an offer is too limited to allow parties to assess whether the proposed offer should be accepted. Proposed

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[7] See Committee on Federal Rules of Civil Procedure, to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Submitting Proposals for Amendment of the Federal Rules of Civil Procedure (Aug. 1984), reprinted in 102 F.R.D. 423, 423-24 (1984).)

[8] William W Schwarzer, Fee-Shifting Offers of Judgment--An Approach to Reducing the Cost of Litigation, Judicature, Oct.-Nov. 1992, at 147.

[9] See Solimine & Pacheco, State Court Regulation of Offers of Judgment and Its Lessons For Federal Practice,13 Ohio St. J. Dispute Resolution 51, 64 (1997).

[10] Wright, Miller & Marcus, Federal Practice & Procedure 2d, § 3001 (West Publishing, 2001).

[11] Fisher, Federal Rule 68, A Defendant's Sublte Weapon: Its Use and Pitfalls, 14 DePaul Bus. L. J. 89, 90 (Fall 2001): "Commentators claim that Rule 68 is not often utilized. More likely, its use is underreported. A Rule 68 offer that is not accepted will not be filed with the court. Thus, no reliable mechanism exists for counting the frequency of Rule 68 offers. In addition, a defendant may prefer to settle privately even though it has made a Rule 68 offer. The plaintiff usually loses nothing by settling privately and may gain additional concessions from the defendant, such as additional money for a confidentiality provision. In such situations, the parties will settle privately, outside the scope of Rule 68. While this will not be reported as a "successful" Rule 68 offer, the application of the rule was nonetheless an important force driving the settlement."

amendments to the federal rules to correct these deficiencies were not adopted. As observed by Professor Sherman:

> Although proposals for changes in Rule 68 have primarily focused on expanding it to apply to offers by plaintiffs and recovery of attorneys' fees, a number of proposals have also tinkered with the basic terms of what triggers cost shifting. One of the more interesting proposals came from the local rule experimentation fostered by the Civil Justice Reform Act of 1990 (CJRA). For example, the CJRA-generated plan adopted in 1993 by the United States District Court for the Eastern District of Texas [See Appendix B] provides that "a party may make a written offer of judgment" and "if the offer of judgment is not accepted and the final judgment in the case is of more benefit to the party who made the offer by 10%, then the party who rejected the offer must pay the litigation costs incurred after the offer was rejected." "Litigation costs" is defined to include "those costs which are directly related to preparing the case for trial and actual trial expenses, including but not limited to reasonable attorneys' fees, deposition costs and fees for expert witnesses." If the plaintiff recovers either more than the offer or nothing at trial, or if the defendant's offer is not realistic or in good faith, the cost shifting sanctions do not apply. Chief Judge Robert M. Parker reported that in the rule's first two years, hundreds of parties made offers of judgment, generally resulting in settlement at a subsequently negotiated figure. No sanctions had to be granted under the rule for failure of the offeree to have obtained a judgment less than 10% better than the offer. There is a question, however, as to whether such a local federal rule is inconsistent with Rule 68, and similar modification of Rule 68 has not been followed in other local rules. (citations omitted).

Indeed, the fifth circuit held the local rule to be invalid[12]:

> In Ashland Chemical Inc. v. Barco Inc., the Fifth Circuit held that an award of attorney's fees as litigation costs under a United States District Court for the Eastern District of Texas local rule was a substantive, rather than procedural, rule and thus required

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[12] Ashland Chemical Inc. v. Barco Inc., 123 F.3d 261, 268 (5th Cir. Sept. 1997).

> congressional approval..... The Fifth Circuit held that Congress must authorize substantive departures from the American rule, which requires each party to pay its own attorney's fees. After reviewing congressional history, as well as the Civil Justice Reform Act of 1990, the Fifth Circuit found that there was no congressional approval for the fee-shifting provision of the Eastern District's local rule. (citations omitted).[13]

The ABA proposed amendments to Federal Rule 68 are reproduced in Appendix C.

III. Propriety of Court Rule Making Power to Effectuate Fee Shifting

Is an offer of judgment rule that includes fee shifting within the rule making power of the courts? As noted above, federal rule 68 does not provide for shifting attorney's fees, only costs, so the issue has not been directly addressed in federal jurisprudence. However, the United States Supreme Court has expressed general disapproval of the judicial creation of fee-shifting provisions. Perhaps to compensate for the omission in the federal offer of judgment rule to allow for the recovery of attorney's fees, the private attorney general doctrine developed whereby federal courts could exercise their inherent equity powers to award fees "when the interests of justice so required." By 1970, intermediate court decisions permitted the recovery of fees in the absence of a fee-shifting statute by prevailing plaintiffs who "vindicated a right that (1) benefits a large number of people, (2) requires private enforcement, and (3) is of societal importance."

In Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), however, the Supreme Court eliminated the private attorney general doctrine, holding that the federal judiciary had exceeded its authority in crafting the broad private attorney general exception to the American Rule. Justice White, writing for the majority opined that fee shifting was generally a matter within the legislative province and that federal courts could not play a role in creating substantive exceptions to the American Rule of attorneys' fees, "no matter how noble the purpose" Justice White wrote:

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[13] James M. McCown, Civil Procedure Survey, 30 Tex. Tech L. Rev. 475, 504 (1999).

> [The] rule followed in our courts with respect to attorneys' fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents and followed by the Court of Appeals."

Subsequently, Congress enacted a myriad of statutes allowing for the recovery of attorneys fees, some expressly providing for the recovery of attorney's fees as part of the plaintiff's costs.

One academician opines that *Aleyska* has been misinterpreted and concludes "that properly read, the rulings suggest that fee-shifting laws related to conduct triggering a cause of action are usually substantive, while fee-shifting laws related to conduct during litigation are typically procedural. Fee-shifting laws related to conduct surrounding the commencement of a lawsuit may be either substantive or procedural depending on their purpose."[14]

Attorney fee shifting has been allowed on a limited basis in federal practice. The United States Supreme Court in Marek v. Chesny, 473 U.S. 1 (1985), held that when a statute provides for an award of attorneys' fees to a prevailing party and the statute defines the fees as costs, a prevailing plaintiff who does not obtain a judgment more favorable than the defendant's offer of judgment loses the right to recover his or her attorneys' fees. In *Marek*, the successful Plaintiff lost its statutory right to recover attorney's fees as provided in the Civil Rights Attorney's Fees Award Act of 1976, due to its failure to accept an offer of judgment when the resulting judgment was less favorable and the fees were awarded as a part of costs. Thus, where the underlying statute defines "costs" to include attorney's fees, such fees, according to the majority, are to be included as costs for purposes of applying Federal Rule 68.

Justice Brennan's dissent suggests that the majority's interpretation of Rule 68 to include attorney's fees as a part of costs in these types of cases

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[14] See Parness, "Choices About Attorney-Fee Shifting Laws: Further Substance/Procedure Problems Under Erie and Elsewhere" 40 U. Pitt. L. Rev. 393 (1988).

violates the separation of powers doctrine and is beyond the judiciary's rulemaking authority. Procedural rules or interpretation of rules that abridge, enlarge or modify a substantive right of a litigant are prohibited by the Federal Rules Enabling Act. (Citing: The Conflict Between Rule 68 and the Civil Rights Attorneys' Fee Statute: Reinterpreting the Rules Enabling Act, 98 Harv.L.Rev. 828, 844 (1985)). [Texas Rules Enabling Act has substantially the same limitation.] Justice Brennan opined that "The right to attorney's fees is substantive under any reasonable definition of that term" and that while the courts have "inherent authority to asses fees against parties who act in bad faith, vexatiously, wantonly or for oppressive reasons" it may not impose a mechanical per se rue awarding attorneys fees that supplants the congressionally prescribed reasonableness standard for imposing fees in civil rights cases. Justice Brennan noted that the September 1984 revised version of Rule 68, provided for the recovery of attorney's fee but only if a court determined that "an offer was rejected unreasonably," and the proposal sets forth detailed factors for assessing the reasonableness of the rejection. It would seem that a majority of the Court would view an Offer of Judgment rule that provides for the recovery of attorney's fees due to the unreasonable rejection of an offer of judgment as proper and within the rule making authority of the court. Our subcommittee considered inclusion of this restriction, but rejected it due to concerns that any reasonableness standard would provoke satellite litigation and needlessly consume judicial resources.

In 1991 the United States Supreme Court handed down its decision in Chambers v. NASCO, Inc.,[15] limiting the scope of Aleyeska's determination that fee shifting is substantive in nature and thus must be the subject of congressional approval. The district court, in reliance of its inherent powers, sanctioned the defendant for its bad faith conduct ordering the payment to plaintiff of approximately one million dollars in attorneys' fees and expenses. The Supreme Court upheld the award recognizing the trial court's inherent powers to "assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." The Court further held that when a federal court sits in a diversity case, its inherent power to use fee shifting as a sanction for bad-faith conduct is not limited by the forum state's law regarding sanctions.[16]

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[15] 501 U.S. 32 (1991).

[16] Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

Two other United States Supreme Court decisions interpreting fee shifting under Rule 68 are noteworthy. In Evans v. Jeff, 475 U.S. 717 (1986), the Court expanded fee shifting under the rule holding that an offer of settlement in a class action could properly be conditioned upon the Plaintiff's attorney waiving his or her right to statutory attorney's fees. The Ninth Circuit viewed these types of offers of judgment as inherently unfair, noting the potential conflict that would exist between the plaintiff's attorney and the client. The Supreme Court, however, upheld the settlement offer as a proper offer of judgment, dismissed the conflict issue, and acknowledged "the possibility of a tradeoff between merits relief and attorney's fees." The Court in Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981), held that Rule 68 fee shifting is not implicated when the judgment is for the defendant, presenting the anomaly that a plaintiff may be better off under the fee shifting provision by a take nothing judgment that a plaintiff's verdict that was less favorable than the rejected offer. Academicians suggest that "The virtue of this literal interpretation of the rule...is to prevent defendants from making token, rater than serious, offer for small amounts (say $1) in order to invoke fee shifting in every case in which there is a defendant's verdict." [17]

A necessary corollary to the debate over rule making authority that is dependent upon whether fee shifting provisions are substantive or procedural in nature, is the question as to the law that should apply when the law of another state is controlling or Erie principles are implicated in federal court. One academician has concluded that "properly read, the rulings suggest that fee-shifting laws related to conduct triggering a cause of action are usually substantive, while fee-shifting laws related to conduct during litigation are typically procedural. Fee-shifting laws related to conduct surrounding the commencement of a lawsuit may be either substantive or procedural depending on their purpose."[18]

Assuming that rule making power supports an offer of judgment rule allowing for the shifting of attorney's fees, consideration should be given to

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[17] Sherman, "From Loser Pays to Modified Offer of Judgment Rules: Reconciling Incentives To Settle With Access to Justice", 76 Tex. L. Rev. 1863, 1880-1881 (1998).

[18] See Parness, "Choices About Attorney-Fee Shifting Laws: Further Substance/Procedure Problems Under Erie and Elsewhere" 40 U. Pitt. L. Rev. 393 (1988).

the extensive legislative entrenchment in the recoverability of attorney's fees and the advisability of the court entering this arena.

IV. Pros vs Cons-Offer of Judgment Rule

Pros

Promotion of earlier settlement and serious consideration of offers to settle.

An offer of judgment rule serves to elicit realistic settlement offers early by giving parties a potential gain together with incentives for an adversary to take the offer seriously.

Settlement at an earlier stage than otherwise might occur, should lead to more dispositions of cases before the heaviest expenses have been incurred.

An offer of judgment that is not accepted, nonetheless may promote settlement on other terms.

An offer of judgment device affecting liability for post-offer fees should give parties with strong claims or defenses, who otherwise might have to yield more in negotiations than the merits seem to warrant (because of the threat of unrecoverable fees), an effective way of countering groundless opposition.

Offer of judgment rules may help fulfill a goal of remedial law, full compensation of injured plaintiffs. Rather than being limited to damages minus a large attorney's fee, a party with a strong claim who makes a reasonable, early offer seems likely to get an early settlement with relatively little fee expense or a judgment including a fee award. Similarly, a defendant could be compensated for expenses suffered because of a plaintiff's unjustified persistence.

Application of a properly constructed offer of judgment is within the rule making authority of the court and is equitable. Is it fair for a party that makes a reasonable offer to settle that is rejected to bear the post-offer costs and fees for preparing and trying the case successfully to judgment?

Criticisms of Offer of Judgment Rule

There is no preexisting procedural duty to settle. Parties who file suit do not have a duty to settle. Thus, the premise underlying an offer of judgment rule is faulty. An offer of judgment rule undermines access to the courts.

Gain from increased settlement is marginal and is offset by the complexity in applying an offer of judgment rule

Parties do not have an obligation to accurately predict the outcome of the suit.

An offer of judgment rule that shifts attorney's fees is arguably beyond the rule making authority of the court and is a matter for legislative determination. (See discussion above)

Prevailing parties should not be punished for losing a gamble or insisting on litigating a nonfrivolous claim. Offer of judgment rules are "Vegas rules" that "force a party to accept an offer of judgment, even if they reasonably believe that they are entitled to a larger judgment and even if they reasonably believe that they are entitled to adjudicate their legal claim in court--or they may gamble that they will receive more at trial than the offer, thereby risking their status as prevailing party for purposes of costs and, in some cases, attorneys' fees."[19]

Given the difficulty of predicting jury verdicts in many cases, is it illogical and incongruous to have a rule of civil procedure that punishes parties who reasonably believe that they will fare better at trial beyond that offered pre-trial?[20]

Rules of civil procedure should not punish litigants for nonfrivolous, nonvexatious, good faith pursuit of claims or defenses.

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[19] Merenstein, "More Proposals To Amend Rule 68: Time To Sink the Ship Once and For All", 184 F.R.D. 145 (1999).

[20] William W Schwarzer, Fee-Shifting Offers of Judgment--An Approach to Reducing the Cost of Litigation, Judicature, Oct.-Nov. 1992, at 147, 148-49.

Auto Policy Litigation. Will an auto policy cover the additional costs and fees under an offer of judgment rule, or must the parties pick up those fees? If the latter, is this fair when the insurer directs the defense? Further, many offers to settle are already routine under the Stowers doctrine.

What is the harm we are trying to address? Ninety-five percent of cases settle. The federal offer of judgment rule was formulated before alternate dispute resolution. Today, a large percentage of cases settle after mediation. Further, sanctions rules allow for the imposition of attorney's fees in appropriate circumstances. Why allow attorney's fees under an offer of judgment rule in cases where the parties have bona fide differences as to the value of the case: example: cases where experts advance competing damage models.

An offer of judgment rule does more than promote or encourage settlements; it coerces settlement. Proposed Rule 166b provides a hammer to the defense, will likely result in lower settlements, and harms plaintiffs of limited means disproportionately. On the other hand, plaintiffs with no assets may actually value the claim higher with the potential increased recovery under an offer of judgment rule. Instead of encouraging settlements, litigants who believe they have a strong potential for offer of judgment recovery may "dig in" and not seriously entertain future bona fide offers. [21]

The savings from settlement are not evenly distributed between the parties and the rule favors wealthier litigants.

A defendant willing to offer a particular amount to settle without a cost- (or fee-) shifting rule will offer something less under an offer of judgment. Even with a bilateral rule, the detrimental effects on plaintiffs would remain in the many cases in which the plaintiff is more risk-averse than the defendant or when a prevailing plaintiff would already be entitled to costs (or fees) in the absence of an offer of judgment rule.[22]

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[21] Merenstein, "More Proposals To Amend Rule 68: Time To Sink the Ship Once and For All", 184 F.R.D. 145,165 (1999).

[22] Merenstein, "More Proposals To Amend Rule 68: Time To Sink the Ship Once and For All", 184 F.R.D. 145,165 (1999).

VI. Issues To be Decided In Crafting an Offer of Judgment Rule

1) Time for Making Offer

a) The timing is important. Should a party be able to make an offer of judgment immediately after service of process when there has not been adequate time for discovery and to fairly evaluate clams and defenses? On the other hand, the offer should be made before trial and at such time as parties may seriously entertain settlement negotiations.
Reasonable time after discovery, after suit is filed? But no later than _____ days before trial?

Under federal rule, an offer may be made after the complaint is filed. This arguably leads to gamesmanship and does not allow for an honest evaluation of the value of the case before an offer must be responded to. It is arguably not desirable to allow an offer to be made too early in the litigation, as evidenced by the following strategies:

> Plaintiffs. "First, plaintiffs should conduct as much investigation and research as possible before filing suit. Second, plaintiffs should conduct all formal discovery as early in the case as possible. Third, when an unsatisfactory rule 68 offer is received, plaintiffs should immediately launch into intensive discovery before rejecting the offer. Fourth, when unable to evaluate an offer within ten days, plaintiffs should seek an extension of time to respond. Fifth, plaintiffs' attorneys should modify their fee arrangements in fee-shifting cases to account for the new situation created by Marek. Sixth, if a plaintiff ultimately obtains a judgment less favorable than a rejected settlement offer, the plaintiff should be prepared to argue vigorously that rule 68 does not apply."
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> Defendants. "Rule 68 allows a defendant to make an offer of judgment as soon as the complaint is filed. Defendants should take advantage of this right by making rule 68 offers as soon as possible, meaning as soon as the case can be roughly evaluated. If a defendant anticipates suit, then she should evaluate the anticipated suit and prepare a rule 68 offer to be served on the plaintiff immediately after the complaint is filed.
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> Early offers have several advantages. First, if an offer is successful (i.e., if the offer equals or exceeds the judgment finally obtained by the

plaintiff), it stops costs from accruing at the earliest possible point. Especially in fee-shifting suits, cutting off costs at the earliest possible moment will make a substantial economic difference.

Second, an early offer may catch the plaintiff by surprise before the plaintiff has had an opportunity to evaluate the case. The plaintiff may then either accept an offer that is too low or reject one that is too high, saving the defendant money in either instance. More specifically, since the plaintiff is not ordinarily entitled to responses to interrogatories or document requests until forty-five days after the complaint is served, and since the plaintiff has only ten days to respond to the offer, an early offer may force the plaintiff to accept or reject the offer before taking any discovery.

Third, if the plaintiff rejects it, the rule 68 offer will hang over the litigation like a guillotine, influencing the plaintiff's behavior in several ways." (Citations Omitted) [23]

2) The Offer

a) Apply to Plaintiffs and Defendants.
Federal rule only applies to defendants. ABA proposal applies to both plaintiffs and defendants. Proposed Rule 166b allows plaintiffs as well as defendants to make offers of judgment.

b) As to all claims.
To qualify, an offer must extend to all claims. Otherwise, piecemeal settlement would be encouraged and the purpose of the offer of judgment rule would not be fulfilled.

c) Buffer. Should the rule include a buffer or a cap?
As proposed, the rule provides offerees a 25% margin of error before they can be subjected to cost shifting. This tracks the ABA proposal. "The 75%-125% percentages that trigger cost shifting were chosen in the belief that case evaluations by parties and their attorneys often lack exact precision and that a margin of error should be accorded to offerees before imposing cost shifting." See Sherman article. The offeree who rejects a more

[23] Simon, The New Meaning of Rule 68: Marek v. Chesney and Beyond, 14 N.Y.U. Rev. L. & Soc. Change 475 (1986).

favorable offer than she receives at trial must pay the offeror's costs, including all reasonable attorney's fees and expenses incurred after the date of the offer. However, this penalty provision does not operate to shift costs to the offeree unless the final judgment is greater than 125% of the amount of the offer. Similarly, an offeror cannot recover costs unless the final judgment obtained is less than 75% of the amount of the offer.

d) Cap.
The proposal specifically limits the maximum fee award to the amount of the judgment,

e) Joint Offers. Should multiple parties be entitled to make a joint offer of judgment, and if so, may they be conditioned upon acceptance by al the parties?

- Nevada's rule provides extensive provisions regarding multi-parties.
    a) Multi-parties may make a joint offer of judgment.
    b) A party may make two or more parties an apportioned offer of judgment that is conditioned upon acceptance by all the parties.
    c) The sanctions for refusing an offer apply to each party who rejected the apportioned offer, but not to a party who accepted the offer.
    d) An offer to multiple <u>defendants</u> only applies if:
        1) the same person is authorized to decide whether to settle the claims against all defendants; AND
        2) there is a single common theory of liability against all the defendants; OR
        3) the liability of one or more of the defendants to whom the offer is made is entirely derivative of the liability of the remaining defendants to whom the offer is made; OR
        4) the liability of all the defendants to whom the offer is made is entirely derivative of the liability of the remaining defendants to whom the offer is made

e) A similar provision applies to multiple plaintiffs.

- Wisconsin requires a plaintiff suing multiple defendants under multiple theories to make separate settlement offers. Wisconsin also allows defendants who are jointly and severally liable to submit joint offers of judgments to an individual plaintiff. [24]

- ABA Proposal. When there are multiple plaintiffs or multiple defendants, this provision shall not apply unless: 1) in the case of multiple plaintiffs, the right of each such plaintiff to recovery is identical to the right of every other plaintiff and only one award of damages may be made; and 2) in the case of multiple defendants, the liability of each such defendant is joint and not several.

f) Admissability. An offer of judgment is served by the offeror upon the offeree. It is not filed with the court and is inadmissible except on the issue of costs and attorneys' fees. The court will see the offer only if the offeror puts it at issue to recover its litigation expenses.

3) Time Period for Keeping the Offer Open

Revocability of Offer. Should an offer be irrevocable for a time period? How long should an offer be open to constitute an offer of judgment?

4) Terms of the Acceptance

Should the acceptance of the offer be unconditional to be effective for purposes of cost shifting?

5) The Fee Shifting Formula

a. What Litigation Costs Should be Shifted? Costs only, costs x10, attorney's fees, some cap on recovery of attorney's fees, expert fees?

[24] January 2, 2002 Memo from Megan Cooley to Dee Kelly re Offer of Judgment.

b) Costs. Should costs include both taxable[25] and non-taxable costs?
c) Limits. Should the rule limit the offeror's recovery of costs, including attorneys' fees, to the total amount of the judgment.?

d) Fees. Plaintiff's Recovery of Contingent Fees. Ordinarily, Plaintiffs do not keep hourly time records, how would Plaintiff prove up reasonableness of fee after offer of judgment rejected by the Defense? Would a lodestar apply? Should factors for reasonable of attorney's fees be included in any offer of judgment rule?

e) Statutory Basis Exists Already for Recovery of Attorney's Fees. Does that mean a prevailing Plaintiff under the Offer of Judgment rule, gets to recover double as to those fees incurred after the Defense rejects the offer and the Plaintiff obtains a more favorable option? One option is to prohibit double recovery.

6) What is a more favorable judgment?

a) Is a more favorable judgment limited to a verdict, does it include summary judgment, or other final disposition of the case?

b) Fees and Costs incurred after the expiration of a refused offer. Should the same be excluded in determining whether a judgment is more favorable than the offer?

- Much of the comparison depends on the details and terms of the offer. (E.g. if costs and fees are independently specified in the offer)

- The Unadopted Amendments to FRCP 68 exclude costs, attorney's fees, and other items after the expiration of a refused offer.

    ? E.g. A defendant offered a lump sum of $50,000, and the plaintiff received a $45,000 judgment. The judgment would be "more favorable" to the plaintiff if the costs, attorney's fees, and other items awarded for the period before the offer expired total more than $5,000.

[25] See Allen & Ellis, "What are Taxable Costs in Texas?" 36 Houston Lawyer 14, October 1998.

- **Colorado's** rule provides that any amount of the final judgment representing interest subsequent to the date of the settlement offer should not be considered when comparing the amount of the judgment and the amount of the settlement.

- **Oklahoma** subtracts attorney's fees and costs from the judgment when calculating the difference between the offer and judgment. **Wisconsin** also compares the offer and judgment exclusive of costs.[26]

c) Should a take-nothing judgment be considered a more favorable judgment for the defendant who has made an offer that was rejected by the Plaintiff? The U.S. Supreme Court held federal offer of judgment rule does not apply to a take-nothing judgment applying the literal language of the rule. (Delta Airlines v. August). "The virtue of this literal interpretation of the rule…is to prevent defendants from making token, rater than serious, offer for small amounts (say $1) in order to invoke fee shifting in every case in which there is a defendant's verdict." On the other hand, it is ironic that a Plaintiff may fare better by a take nothing judgment than a very small judgment in its favor. A majority of the subcommittee believes that a take nothing judgment is a more favorable judgment for the Defendant.

d) Remittiturs. Should the offer of judgment rule expressly include a provision that takes into account a remittitur in determining the ultimate judgment?

e) Should an offer of judgment rule apply to cases seeking injunctive or declaratory relief[27] and, if so, how should a court compare a Rule 166b offer to the final judgment when injunctive relief has been offered or awarded?

f) Non-Monetary Relief. What constitutes a favorable judgment? We should clarify how the rule would apply in cases seeking equitable relief. Proposal:

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[26] January 2, 2002 Memo from Megan Cooley to Dee Kelly re Offer of Judgment

[27] Rhodes v. Stewart, 488 U.S. 1, 2 (1988) (per curiam). (Obtaining a declaratory judgment does not automatically mean that a party has prevailed within the meaning of the Fees Act. Citing its "equivalency doctrine," the Court held that a plaintiff only achieves prevailing party status if the litigation affects the "behavior of the defendant towards the plaintiff.").

The terms of the offer must address all non-monetary relief. A judgment is not more favorable unless it includes substantially all non-monetary relief requested.

g) Non-Monetary and Monetary Relief. What constitutes a favorable judgment? Any offer of judgment rule should clarify how the rule would apply in cases where a party recovers one but not the other requested relief.

7) Exemptions:

a) Class Actions? Derivative suits? DTPA? Family law cases? Workers Comp?

b) Statutory Cap Damage Cases. Won't the defense (in a clear liability case) always make an offer 25% below the cap so as to shift the post-offer expense of fees and cost to the Plaintiff? Should statutory cap cases be exempted from the offer of judgment rule, or should the Defendant be required to offer the cap, before the fee shifting under an offer of judgment rule would apply?

c) Exempt action between a landlord and tenant affecting the tenant's residence. Perhaps exempt all actions brought before a justice court?

8) Withdrawal of Offers and Subsequent Offers

a) Withdrawal. Should withdrawal of an offer be forbidden within the time period during which the offer stated that it would remain open? Should the court have the discretion to permit withdrawal for good cause shown and to prevent manifest injustice?

b) Subsequent Offers. Should subsequent offers be allowed? It would seem so. Even if an offeror has locked in an offeree with an unaccepted offer, the offeror may want to improve its chances of recovery of its costs and attorneys' fees by improving the offer which thereby improves the chances of settlement, thereby fulfilling the objective of the rule.

9) Court Discretion to Deny Fee Shifting.

"The ABA proposal contains a broad discretionary grant to the court to reduce or eliminate cost shifting to avoid undue hardship, in the interest of justice, or for other compelling reason to seek judicial resolution."

Rule 166b(9)(c). Do we need a more precise standard for the court's discretion to decline to award litigation costs under the rule, other than "the amount as justice requires"?

Should parties be able to "opt out" of an offer of judgment rule? Should the court have discretion, on motion of a party, to determine that the offer of judgment rule will be inapplicable to the case at hand?

10) Collateral estoppel implications.

What are the collateral estoppel implications when a defendant offers a judgment, as to other cases involving the same incident or transaction? One option is to provide in the rule or by comment, that a judgment reached under the rule is not the basis for collateral estoppel in other proceedings.

VII. Alternative Proposals Discussed

Amend the Cost Rules.

Clarify that costs may be taxed against a prevailing party for the unreasonable rejection of an offer of judgment. Rule 131 provides that a prevailing party is entitled to costs "unless the court otherwise directs." The rule could be amended to make clear that the trial court may consider an unreasonable rejection of a settlement offer when determining whether to award costs to a prevailing party, to deny such costs, or even to award them to a losing party who made a good faith settlement offer that was unreasonably rejected. The addition of the following sentence to Texas Rule of Civil Procedure 131 is suggested:

> When a plaintiff receives less than the amount offered by a Defendant before trial, the trial court has the discretion to tax all or part of the costs against the Plaintiff.

Alternate suggestion: provide for shifting of costs under offer of judgment principles in cases in which "the judgment finally entered is not more favorable to the offeree than the rejected offer", and provide for taxation to up

to ten times taxable costs.[28]

Amend the Sanctions Rules.

Sanctions rules could be amended to provide that all offers of settlement and refusals of such offers must not be presented for any improper purpose, as well as be "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law" and be supported by evidence obtained after a reasonable pre-offer (or pre-refusal) inquiry.[29] Alternatively, provide for shifting of attorneys' fees only when settlement offers were rejected "frivolously, in bad faith, or for an improper purpose." [30] Our subcommittee rejected this idea.

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[28] See Roy D. Simon, Jr., The Riddle of Rule 68, 54 GEO. WASH. L. REV. 1, 12-16 (1986).

[29] See Professor Burbank, Proposals to Amend Rule 68--Time to Abandon Ship, 19 U. MICH. J.L. REF. 425 (1986); Merenstein, "More Proposals To Amend Rule 68: Time To Sink the Ship Once and For All", 184 F.R.D. 145,165 (1999).

[30] See Roy D. Simon, Jr., The Riddle of Rule 68, 54 GEO. WASH. L. REV. 1, 12-16 (1986).

Subcommittee Recommendation

Appendix A

Revised 2/01/02

PROPOSED RULE 166b

1. Definitions.

(a.) "Claim" means a claim to recover monetary damages or for other relief, and includes a counterclaim, cross-claim, or third-party claim.

(b.) "Claimant" means a person making a claim.

(c.) "Defendant" means a person from whom a claimant seeks recovery of damages or other relief on a claim, including a counterdefendant, cross-defendant, or third-party defendant.

(d.) "Litigation costs" means costs actually incurred that are directly related to preparing an action for trial and actual trial expenses which are incurred after the date of the rejected offer to settle which is used to measure an award under Section 9 of this rule, including:

(1) attorneys' fees, including fees earned pursuant to a valid contingency fee contract;

(2) costs of court;

(3) reasonable deposition costs; and

(4) reasonable fees for necessary testifying expert witnesses.

(e.) "Offer to settle" means an offer to settle or compromise a claim made in compliance with Section 5.

2. Applicability and Effect.

(a.) This rule does not apply to:

(1) a class action;

(2) an action brought under the Deceptive Trade Practices-Consumer Protection Act (Sections 17.41 et seq., Business & Commerce Code);

(3) an action brought under the Family Code; or

(4) an action to collect workers' compensation benefits under Subtitle A, Title 5, Labor Code.

(b.) This rule does not limit or affect the ability of any person to make an offer to settle or compromise a claim that does not comply with this rule. A party's offer to settle or compromise that does not comply with subsection 5 of this rule does not entitle the party to recover litigation costs under this rule.

3. **Election By Governmental Units; Waiver.**

(a.) This rule does not apply to an action by or against the state, any unit of state government, or any political subdivision of the state unless the governmental unit expressly elects both to seek recovery of litigation costs under this rule and to waive immunity from liability for litigation costs awarded under this rule.

(b.) To be effective as an election and waiver, the governmental unit must make the election and waiver specifically and affirmatively by a writing filed with the court within 45 days of the filing of the governmental unit's original petition or original answer.

(c.) An election and waiver is effective only in the action in which it is filed, even if the action is subsequently joined or consolidated with another action.

4. **Service.** When this rule requires a writing to be served on another party, service is adequate if it is performed in a manner described in Rules 4, 5 and 21a, Texas Rules of Civil Procedure.

5. **Offer To Settle.**

(a.) A party may serve on an opposing party an offer to settle all the claims in the action between that party and the opposing party.

(b.) The offer to settle:

(1) must be in writing;

(2) must state that it is an offer to settle all claims pursuant to this section;

(3) must specify the terms by which the claims may be settled;

(4) must specify a deadline by which the offer must be accepted;

(5) may not include a demand for litigation costs except for costs of court;

(6) must offer to allow a judgment to be entered consistent with the terms of the offer; and

(7) must be served on the party to whom the offer is made.

(c.) A party may not make an offer to settle under this section after the tenth day before the date set for trial, except that a party may make an offer to settle that is a counteroffer on or before the seventh day before the date set for trial.

(d.) The parties are not required to file with the court an offer to settle.

(e.) A party may only make an offer to settle under this rule during the course of the litigation but may make successive offers to settle.

6. Acceptance of Offer.

(a.) A party may accept an offer to settle on or before 5:00 p.m. on the 14th day after the date the party received the offer to settle or before the deadline specified in the offer, whichever is later.

(b.) Acceptance of an offer must be:

(1) in writing; and

(2) served on the party who made the offer.

(c.) Upon acceptance of an offer to settle, either party may file the offer and notice of acceptance together with proof of service thereof, and thereupon the court shall enter judgment in accordance with the offer and acceptance except that the Court may not seal any judgment without first complying with Rule 76a, T.R.C.P..

7. Withdrawing an Offer

(a.) A party may withdraw an offer to settle by a writing served on the party to whom the offer was made before the party accepts the offer. A party may not accept an offer to settle after it is withdrawn. A party may not withdraw an offer to settle after it has been accepted.

(b.) If a party withdraws an offer to settle, that offer does not entitle the party to recover litigation costs.

8. Rejection of Offer. For purposes of this rule, an offer to settle a claim is rejected if:

(a.) the party to whom the offer was made rejects the offer by a writing served on the party making the offer; or

(b.) the offer is not withdrawn and is not accepted before the deadline for accepting the offer.

9. Award of Litigation Costs.

(a.) A party who made an offer to settle the claims between that party and the party to whom the offer was made may recover litigation costs provided:

(1) the offer to settle was rejected;

(2) the court entered a judgment on the claims and;

(3) if a party sought monetary damages.

(A) the amount of monetary damages awarded on the claims in the judgment is more favorable to the party who made the offer than the offer to settle the claims; and

(B) the difference between the amount of monetary damages awarded on the claims in the judgment and the amount of the offer to settle the claims is equal to or greater than twenty-five percent of the amount of the offer to settle the claims; or

(4) if a party sought nonmonetary relief, the judgment is more favorable to the party who made the offer to settle the claims.

(b.) Each element of litigation costs awarded under this rule must be both reasonable and necessary to the prosecution or defense of the action.

(c.) The court will determine the amount of "Litigation Costs" under this rule and may reduce, but not enlarge, the amount as justice requires.

(d.) The amount of litigation costs awarded against the claimant may not exceed the amount of the damages recovered by the claimant in any action for personal injury or death.

10. <u>Attorney's Fees.</u>

(a.) A party may not recover attorneys' fees as litigation costs under this rule unless the party was represented by an attorney.

(b.) If Litigation Costs are contested, the court may award additional Litigations Costs for the reasonable and necessary amount expended to pursue or dispute the claimed Litigation Costs.

11. <u>Evidence Not Admissible.</u>

(a.) Evidence relating to offers to settle is not admissible except in an action to enforce the settlement or in a proceeding to obtain litigation costs under this rule.

(b.) Except in an action or proceeding described in Subsection 11(a), the provisions of this rule may not be made known to the jury through any means, including voir dire, introduction into evidence, instruction, or argument.

Appendix B

Proposed 1984 Amendments to Rule 68 Offer of Judgment Rule Incorporating Unreasonable Rejection of Offer As Prerequisite to Recovery of Attorney's Fees.

> "At any time more than 60 days after the service of the summons and complaint on a party but not less than 90 days (or 75 days if it is a counteroffer) before trial, either party may serve upon the other party but shall not file with the court a written offer, denominated as a[n] offer under this rule, to settle a claim for the money, property, or relief specified in the offer and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly. The offer shall remain open for 60 days unless sooner withdrawn by a writing served on the offeree prior to acceptance by the offeree. An offer that remains open may be accepted or rejected in writing by the offeree. An offer that is neither withdrawn nor accepted within 60 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude a subsequent offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine sanctions under this rule.
>
> "If, upon a motion by the offeror within 10 days after the entry of judgment, the court determines that an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of the litigation, it may impose an appropriate sanction upon the offeree. In making this determination the court shall consider all of the relevant circumstances at the time of the rejection, including (1) the then apparent merit or lack of merit in the claim that was the subject of the offer, (2) the closeness of the questions of fact and law at issue, (3) whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer, (4) whether the suit was in the nature of a "test case," presenting questions of far-reaching importance affecting non-parties, (5) the relief that might reasonably have been expected if the claimant should prevail, and (6) the amount of the additional delay, cost, and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged.
>
> "In determining the amount of any sanction to be imposed under this

rule the court also shall take into account (1) the extent of the delay, (2) the amount of the parties' costs and expenses, including any reasonable attorney's fees incurred by the offeror as a result of the offeree's rejection, (3) the interest that could have been earned at prevailing rates on the amount that a claimant offered to accept to the extent that the interest is not otherwise included in the judgment, and (4) the burden of the sanction on the offeree. "This rule shall not apply to class or derivative actions under Rules 23, 23.1, and 23.2." 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 (Sept. 1984), reprinted in 102 F.R.D. 407, 432-433 (1985).

Appendix C A.B.A. Report on Offer-of-Judgment Legislation

§1. Offer of Judgment

At any time in a suit in which the claims are for monetary damages, or where any non-monetary claims are ancillary and incidental to the monetary claims, but at least 60 days after the service of the complaint and not later than 60 days before the trial date, any party may make an offer to an adverse party to settle all the claims between the offeror and another party in the suit and to enter into a stipulation dismissing such claims or to allow judgment to be entered according to the terms of the offer.

When there are multiple plaintiffs or multiple defendants, this provision shall not apply unless: 1) in the case of multiple plaintiffs, the right of each such plaintiff to recovery is identical to the right of every other plaintiff and only one award of damages may be made; and 2) in the case of multiple defendants, the liability of each such defendant is joint and not several.

§ 2. Form of Offer of Judgment

An offer of judgment must be in writing and state that it is made under this rule; must be served upon the opposing party to whom the offer is made but not be filed with the court except under the conditions stated in § 11; must specify the total amount of money offered; and must state whether the total amount of money offered is inclusive or exclusive of costs, interest, attorney's fees and any other amount which the offeror may be awarded pursuant to statute or rule. Only items expressly referenced shall be deemed included in the offer.

§ 3. Determination of Applicability

At any time after the commencement of the action, any party may seek a ruling from the court that this rule shall not apply as between the moving party or parties and any opposing party or parties by reason of the fact that an exception to the rule exists or that one or more of the circumstances set forth in Section 11(e) for eliminating the application of the rule exists. The court, upon receiving and considering any such application, may grant the application, deny the application, or, in its discretion, defer a ruling on the application until a later time including a time after the entry of judgment. Any

moving party obtaining the relief sought under such a motion prior to judgment may not, itself, use the rule as to any opposing party to which the motion is applied.

§ 4. Time Period During Which Offer Remains Open.

An offer may state the time period during which it remains open, which in no event may be less than 60 days. An offer that states a time period of less than 60 days is an invalid offer. An offer that does not state the time period during which it remains open is deemed to remain open for 60 days, and thereafter indefinitely until 60 days before the date set for trial unless withdrawn pursuant to the provisions of § 8 in which case it shall have no further consequence under this rule.

§ 5. Extension of Time Period During Which Offer Remains Open

Upon the application of the offeree, the court may, for good cause shown, extend the time period during which an offer remains open. If the court extends the time period during which an offer may remain open, the offeror has the option of withdrawing the offer.

§ 6. Acceptance of Offer.

An offer is accepted when a party receiving an offer of judgment serves written notice on the offeror, within the time period during which the offer remains open, that the offer is accepted without qualification.

§ 7. Refusal of Offer.

An offer is deemed to be refused if it is not accepted within the time period during which the offer remains open.

§ 8. Withdrawal of Offer.

An offer may not be withdrawn, except with the consent of the court for good cause shown and to prevent manifest injustice, before the expiration of the time period during which the offer stated that it would remain open. An offer not made subject to an expressly stated time period may be withdrawn after 60 days by serving the offeree with written notice of the withdrawal and

shall have no further consequence under this rule.

§ 9. Inadmissibility of An Offer Not Accepted.

Evidence of an offer not accepted is not admissible for any purpose except in a proceeding to determine costs and attorney's fees under a statute or rule permitting recovery thereof or pursuant to an entry of judgment under § 11.

§ 10. Subsequent Offers.

The fact than an offer is made but not accepted does not preclude any party from making subsequent offers. If more than one offer made by an offeror is not accepted within the time period during which the offers remained open, and therefore are deemed to be rejected, the offeror would be entitled to seek fee- shifting under § 11(a) or (b) as to any one of such offers.

§ 11. Effect of Rejection of an Offer.

If an offer made by a party is not accepted and is not withdrawn before final disposition of the claim that is the subject of the offer, the offeror may file with the clerk of the court, within 10 days after the final disposition is entered, the offer and proof of service thereof. A final disposition is a verdict, order on motion for summary judgment, or other final order on which a judgment can be entered, including a final judgment, but a judgment based on a settlement agreement will not result in cost-shifting unless the parties expressly agree to cost-shifting rights under this rule. The court, after due deliberation and after providing the parties to the offer an opportunity to submit proposed findings, will enter judgment as follows:

(a) If a final judgment obtained by a claimant who did not accept an offer from an adverse party is not greater than 75% of the amount of the offer, the claimant offeree shall pay the offeror's costs, including all reasonable attorney's fees and expenses, but excluding expert witness fees and expenses, incurred after the date the offer was made, except that the fee award may not exceed the total money amount of the judgment. Such recovery shall be in addition to any right of the offeror to recover any other costs pursuant to statute or rule, except that the offeror may not recover twice for the same costs, attorney's fees, or expenses. If an offeree subject to attorneys fees under this rule is entitled to attorneys fees under court rule or contract, the

(f) The amount of any attorney's fees to be paid under subsections (a) and (b) shall be a reasonable attorney's fee for services incurred in the case as to the claims for monetary damages after the date the offer was made, calculated on the basis of an hourly rate which may not exceed as to the claims for monetary damages that which the court considers acceptable in the jurisdiction of final disposition of the action, taking into account the attorney's qualifications and experience and the complexity of the case, except that any attorney's fees to be paid by an offeree shall not:

(1) exceed the actual amount of the attorney's fees incurred by the offeree as to the claims for monetary damages after the date of the offer; or

(2) if the offeree had a contingency fee agreement with its attorney, exceed the amount of the reasonable attorney's fees that would have been incurred by the offeree as to the claims for monetary damages on an hourly basis for the services in connection with the case.

§ 12. Nonapplicability.

This provision does not apply to an offer made in an action certified as a class or derivative action, involving family law or divorce, between a landlord and a tenant as to a residence, or in which there are claims based on state or federal constitutional rights.

This provision for fee shifting also does not apply to any case in which attorneys fees are statutorily available to a prevailing party to insure the ability of claimants to prosecute a claim in implementation of the public policy of the statute.

Eviction Rules 4, 143a, 216, 190, 245 Ver. 7.8 5/07/02

RULE 4. COMPUTATION OF TIME

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday. Saturdays, Sundays and legal holidays shall not be counted for any purpose in any time period of five days or less in these rules, except that Saturdays, Sundays and legal holidays shall be counted for purposes of the three-day periods in rules 21 and 21a, extending other periods by three days when service is made by registered mail or by telephonic document transfer, and for purposes of the five-day periods provided for under Rules 740, 744, 748, 749, 749a, ~~749b~~, ~~and~~ ~~749c~~ ~~750~~ and 754.

(Note to committee: This needs to be changed because under the current rules 5 days may be longer than 6 days.
Example: A defendant is served with citation for an eviction on a Wednesday so under Rule 739 the trial can be held as early as the following Tuesday. However, under rule 744 the defendant can request a jury trial within 5 days of service, and under rule 4 you cannot count holidays, Saturdays or Sundays in that 5 day calculation. If the tenant was served on Wednesday you would count Thursday and Friday as day 1 and 2, exclude Saturday and Sunday and then count Monday as day 3, Tuesday as day 4 and Wednesday as day 5. Therefore a defendant could come in on Wednesday to timely request a jury trial under rule 744 one day after the trial could have been set under rule 739. If service occurred the Wednesday before thanksgiving then day five would be Friday of the following week or 3 days after the trial. Adding rule 744 to rule 4 would seem to solve this problem. Other changes to the rules necessitate deleting rules 749b and 749c, and adding rules 750 and 754.)

Rule 143a. COST ON APPEAL TO COUNTY COURT

If the appellant fails to pay the cost 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. Payment of costs on appeal from an eviction action are governed by Rules 749, 749b, and 749c.

(Added July 22, 1975, eff. Jan. 1, 1976.)

RULE 190 DISCOVERY LIMITATIONS

190.1 Discovery Control Plan Required. Except in eviction cases, every case must be governed by a discovery control plan as provided in this Rule. A plaintiff must allege in the first numbered paragraph of the original petition whether discovery is intended to be conducted under Level 1, 2, or 3 of this Rule.

RULE 216 REQUEST & 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.

c. This Rule does not apply in eviction cases.

Notes and Comments

Comment to 2001 change: Rule 744 governs request & fee for jury trials in eviction cases in justice court, and Rule 754 governs request & fee for jury trials in eviction appeals in county court.

Rule 245. ASSIGNMENT OF CASES FOR TRIAL

The court may set contested cases on written request of any party, or on the court's own motion, with reasonable notice of not less than forty-five days to the parties of a first setting for trial, or by agreement of the parties; provided, however, that when a case previously has been set for trial, the Court may reset said contested case to a later date on any reasonable notice to the parties or by agreement of the parties. Noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time. The forty-five day notice required in the preceding sentence will not apply to cases set for trial in justice court, including eviction cases, nor will it apply to the de novo trial of appeals of eviction cases in county court.

A request for trial setting constitutes a representation that the requesting party reasonably and in good faith expects to be ready for trial by the date requested, but no additional representation concerning the completion of pretrial proceedings or of current readiness for trial shall be required in order to obtain a trial setting in a contested case.

(Amended July 22, 1975, eff. Jan. 1, 1975; Dec. 5, 1983, eff. April 1, 1984; April 24, 1990, eff. Sept. 1, 1990.)

SUPREME COURT ADVISORY COMMITTEE

700 SERIES SUB-COMMITTEE

Eviction Rules 4, 143a, 216, 190, 245 Clean Version 1.0 (6/10/02)

RULE 4. COMPUTATION OF TIME

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday. Saturdays, Sundays and legal holidays shall not be counted for any purpose in any time period of five days or less in these rules, except that Saturdays, Sundays and legal holidays shall be counted for purposes of the three-day periods in rules 21 and 21a, extending other periods by three days when service is made by registered mail or by telephonic document transfer, and for purposes of the five-day periods provided for under Rules 740, 744, 748, 749, 749a, and 754.

Rule 143a. COST ON APPEAL TO COUNTY COURT

If the appellant fails to pay the cost 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. Payment of costs on appeal from an eviction action are governed by Rules 749, 749b, and 749c.

RULE 190 DISCOVERY LIMITATIONS

190.1 Discovery Control Plan Required. Except in eviction cases, every case must be governed by a discovery control plan as provided in this Rule. A plaintiff must allege in the first numbered paragraph of the original petition whether discovery is intended to be conducted under Level 1, 2, or 3 of this Rule.

RULE 216 REQUEST & 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.

c. This Rule does not apply in eviction cases.

Notes and Comments

Rule 744 governs request & fee for jury trials in eviction cases in justice court, and Rule 754 governs request & fee for jury trials in eviction appeals in county court.

Rule 245. ASSIGNMENT OF CASES FOR TRIAL

The court may set contested cases on written request of any party, or on the court's own motion, with reasonable notice of not less than forty-five days to the parties of a first setting for trial, or by agreement of the parties; provided, however, that when a case previously has been set for trial, the Court may reset said contested case to a later date on any reasonable notice to the parties or by agreement of the parties. Noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time. The forty-five day notice required in the preceding sentence will not apply to cases set for trial in justice court, including eviction cases, nor will it apply to the de novo trial of appeals of eviction cases in county court.

A request for trial setting constitutes a representation that the requesting party reasonably and in good faith expects to be ready for trial by the date requested, but no additional representation concerning the completion of pretrial proceedings or of current readiness for trial shall be required in order to obtain a trial setting in a contested case.

SUPREME COURT ADVISORY COMMITTEE
700 Series Subcommittee

Proposed Eviction Rules 738-755 Clean Version 1.0 (6/10/02)

SECTION 3. EVICTIONS

RULE 738. JOINDER OF ADDITIONAL CLAIMS

A suit for rent, contractual late charges, attorney's fees, and post judgment interest may be joined with an eviction action. The court in rendering judgment for possession, may at the same time render judgment for any rent, contractual late charges, attorney's fees, and post judgment interest, due the landlord by the renter. The justice may also award court costs against the unsuccessful party.

Notes and Comments

Comment: Whenever the word eviction is used in this section it is intended that it also include forcible entry and detainer and forcible detainer. Back rent, late charges authorized by lease or contract, attorney's fees, and post judgment interest, may be sought subject to the jurisdictional limit of the justice court.

RULE 739. CITATION

When the plaintiff or the plaintiff's authorized agent shall file a written sworn complaint, the justice shall immediately issue citation directing the defendant or defendants to appear for trial before such justice at a time and place named in such citation, such time being not more than ten days nor less than six days from the date of service of the citation.

The citation shall inform the parties that, upon timely request and payment of a jury fee, the case shall be heard by a jury. The citation must also inform the defendant that the request for a jury trial, if desired, and the payment of a jury fee must be made within five days after the defendant is served with citation. The five day period is calculated in calendar days except if the fifth day is a Saturday, Sunday, or legal holiday, the defendant has until the next calendar day which is not a Saturday, Sunday or legal holiday to

request a jury trial and pay the jury fee. The citation must also inform the defendant that the information the plaintiff is required to file pursuant to Rule 741 is on file at the justice's office and is available for inspection during regular business hours.

Rule 740 Version #1 (Jury trial permitted, trials to be held within 6 days or as soon as possible)

RULE 740. EMERGENCY POSSESSION-COMPLAINANT MAY HAVE IMMEDIATE POSSESSION

(a) If the plaintiff alleges in the sworn petition that the defendant, or the defendant's authorized occupants or guests have engaged in serious criminal activity within the previous ten days that constitutes a threat to the health, safety, or security of plaintiff, plaintiff's agents or other tenants, the plaintiff may file a complaint seeking immediate possession. The plaintiff must, at the time of filing the complaint, execute and file a possession bond to be approved by the justice in such amount as the justice may fix as the probable amount of cost of suit and damages which may result to defendant in the event that the suit has been improperly instituted, and conditioned that the plaintiff will pay defendant all such costs and damages as shall be adjudged against plaintiff The plaintiff may seek a judgment for possession, costs, and attorney's fees but no other grounds of recovery listed in Rule 738 may be joined with an action for immediate possession. The trial held under this rule will be the only trial held in this cause

(b) The justice court shall notify the defendant that plaintiff has filed a possession bond. Such notice must be served on the defendant, in the same manner as service of citation in an eviction suit and shall inform the defendant of the following:

(1) The answer date on the citation shall be the trial date which must be set no less than four days and no more than seven days from the date of service, and such trial date shall be clearly noted on the citation.

(2) In order to obtain a jury trial, the defendant must demand the same on or before two days from the date the defendant is served with citation, and pay the jury fee. The justice must hold the jury trial as soon as practicable.

(3) The officer or other authorized person serving the notice of a complaint for immediate possession shall return such notice to the justice who issued same within one day after service.

(c) If the defendant fails to appear for trial, or if the verdict or judgment after trial is for the plaintiff for possession, costs, and attorney's fees, then the plaintiff may request a writ of possession from the justice court after the expiration of three days from the date the judgment is signed by the justice. Whenever a justice court signs a judgment under this rule either party may appeal in the same manner provided for a non-emergency eviction trial.

Rule 740 Version #2 (No jury trials, bench trials to be held within 4 to 7 days)

RULE 740. EMERGENCY POSSESSION-COMPLAINANT MAY HAVE IMMEDIATE POSSESSION

(a) If the plaintiff alleges in the sworn petition that the defendant, or the defendant's authorized occupants or guests have engaged in serious criminal activity within the previous ten days that constitutes a threat to the health, safety, or security of plaintiff, plaintiff's agents or other tenants, the plaintiff may file a complaint seeking immediate possession. The plaintiff must, at the time of filing the complaint, execute and file a possession bond to be approved by the justice in such amount as the justice may fix as the probable amount of cost of suit and damages which may result to defendant in the event that the suit has been improperly instituted, and conditioned that the plaintiff will pay defendant all such costs and damages as shall be adjudged against plaintiff The plaintiff may seek a judgment for possession, costs, and attorney's fees but no other grounds of recovery listed in Rule 738 may be joined with an action for immediate possession. The trial held under this rule will be the only trial held in this cause

(b) The justice court shall notify the defendant that plaintiff has filed a possession bond. Such notice must be served on the defendant, in the same manner as service of citation an eviction suit and shall inform the defendant of the following:

(1) The answer date on the citation shall be the trial date which must be set no less than four days and no more than seven days from the date of service, and such trial date shall be clearly noted on the citation.

(2) Because this is an emergency proceeding, no jury trial will be afforded and the any trial held under this rule will be a trial by judge.

(3) The officer or other authorized person serving the notice of a complaint for immediate possession shall return such notice to the justice who issued same within one day after service.

(c) If the defendant fails to appear for trial, or if the verdict or judgment after trial is for the plaintiff for possession, costs, and attorney's fees, then the plaintiff may request a writ of possession from the justice court after the expiration of three days from the date the judgment is signed by the justice. Whenever a justice court signs a judgment under this rule either party may appeal in the same manner provided for a non-emergency eviction trial.

Notes and Comments

A defendant must be served with a possession bond in the same manner as citation in a forcible entry and detainer suit. The trial held under this rule must be a trial

by judge because of the severe time limits imposed. If a trial is requested by the defendant under this rule then it will take the place of the trial referenced in the original citation.

RULE 741. REQUISITES OF COMPLAINT

An eviction complaint shall describe the lands, tenements or premises, the possession of which is claimed, with sufficient certainty to identify the same. The complaint shall be in writing, on paper measuring approximately 81/2 inches by 11 inches, and signed and sworn to by the plaintiff, the plaintiff's attorney, or the plaintiff's authorized agent.

(a) The complaint must state that the premises at issue is located within the precinct where the complaint is filed.

(b) The complaint must state that the justice court where the complaint is filed has jurisdiction over the suit.

(c) The complaint must state when and how the notice to vacate was given and a copy of any written notice to vacate must be attached to the petition.

(d) If the complaint seeks judgment for rent and/or contractual late charges then the complaint must state the frequency with which the rent is paid, the day on which it becomes due, and the amount of rent the tenant is obligated to pay on that day. The complaint must also state the total rent and contractual late charges, if any, which are alleged to be owing at the time the petition is filed and how those late charges are calculated.

(e) The complaint must state facts which entitle the plaintiff to the possession authorized under Chapter 24 of the Texas Property Code.

    (1) If the suit for possession is based on non-payment of rent and contractual late charges, then the plaintiff must attach to the complaint a copy of any relevant sections of a written lease, if any, including the parties to the lease, the term of the lease, the provisions relating to rent, the signatories to the lease, and any other sections relevant to the suit. In addition, the plaintiff must attach a copy of any relevant written payment records for the period in dispute.

    (2) If the suit for possession is based on a breach of a lease other than non payment of rent, then the plaintiff must attach a copy of any relevant sections of a written lease, if any, including the parties to the lease, the term of the lease, any provisions of the lease alleged to have been breached, the signatories to the lease, and any other sections relevant to the suit.

    (3) If the suit for possession is based on the termination of an executory contract, or a foreclosure then the plaintiff must attach to the complaint a copy of any relevant sections of documents which form the basis for the suit for possession.

    (4) If the suit for possession is based on the tenant's holding over after the termination of the tenant's right to possession then the plaintiff must

attach to the complaint copies of the relevant sections of any written documents which form the basis for the suit for possession.

(5) If the suit for possession is based on grounds other than 1-4 above then the plaintiff must attach copies of the relevant sections of any written documents, if any, which form the basis for the suit for possession.

(f) If the complaint fails to attach any information required by this rule then the trial may be postponed on motion of any party or on the court's own initiative, in accordance with Rule 745. Failure by the plaintiff to attach any information required by this rule is not grounds for the dismissal of the suit.

(g) The grounds under which the plaintiff is entitled to possession and other damages authorized by Rule 738 is limited by the facts stated in the complaint. The complaint may be amended by the plaintiff at any time prior to trial. If the complaint is amended, the defendant may request a continuance in accordance with Rule 745.

(h) Any information required to be filed under this rule, other than the complaint, are considered to be exhibits. If there is an appeal all exhibits must be sent to the county court along with the other papers in the case. If there is no appeal of the case then the justice court must retain the exhibits for 30 days from the date the judgment is signed. After the expiration of this 30 day period the exhibits may be returned to the plaintiff or disposed of by the justice court. It is not necessary for the justice court to make and retain copies of any exhibits required to be filed under this rule.

Notes and Comments

This rule sets forth more formal pleading requirements and limits the complainants grounds for the recovery of a judgment to those facts stated in the complaint. While the complaint may be amended, it would allow the defendant to request a continuance to prepare an additional defense. The complainant is also required to attach copies of any documents relevant to the suit to the complaint The failure of the plaintiff to attach relevant documents would be grounds to request a continuance but would not be grounds for the dismissal of the suit. If the documents were relevant, and were not voluntarily provided by the plaintiff, then the defendant could make a request for discovery under Rule 743.

RULE 742. SERVICE OF CITATION

(a) Person Authorized to Serve Citation in eviction actions.

Persons authorized to serve citation in eviction actions include (1) any sheriff or constable or other person authorized by law or, (2) any person authorized by law or written order of the court who is not less than 18 years of age. No person who is a party to, or interested in the outcome of a suit shall serve any process.

(b) Method of Service of Citation
The officer or other person authorized to serve citation shall execute the citation by delivering a copy of it to the defendant, or by leaving a copy thereof with some person over the age of sixteen years, at the premises at issue, at least six days before the trial day as shown on the citation. The person serving the citation shall return the citation, noting the action taken thereon, to the justice who issued the citation at least one day before the trial day named in the citation.

RULE 742a. SERVICE BY DELIVERY TO PREMISES

If the sworn complaint lists the address of the premises at issue as well as any other alternate addresses of the defendant or defendants as contained in a written lease agreement, and if service of citation cannot be effected under Rule 742 then service of citation may be by delivery to the premises at issue as follows:

If the officer or other person authorized to serve citation in eviction actions is unsuccessful in serving citation under Rule 742, the officer or other authorized person shall no later than five days after receiving such citation execute a sworn statement based on personal knowledge, confirming that diligent efforts have been made to serve such citation on at least two occasions at all addresses of the defendant in the county where the premises are located as may be shown on the sworn complaint, stating the times and places of attempted service. Such sworn statement shall be filed with the justice. After promptly considering the sworn statement the justice may then authorize service by written order as follows:

(a) The officer or other authorized person shall place the citation inside the premises through a door mail chute or by slipping it under the main entry door to the premises; and if neither method is possible or practical, to securely affix the citation to the main entry door to the premises; and

(b) The officer or other authorized person shall that same day deposit in the mail a true copy of such citation with a copy of the sworn complaint attached thereto, including any attachments, addressed to the defendant at the premises in question and sent by first class mail; and

(c) The officer or other authorized person shall note on the return of such citation the date of delivery under (a) above and the date of mailing under (b) above. The return of the citation by an authorized person shall be verified; and

(d) Such delivery and mailing to the premises shall occur at least six days before the trial day as shown on the citation; and at least one day before the trial day named in the

citation. the officer or other authorized person accomplishing service shall return such citation noting the action taken thereon, to the justice who issued the same.

It shall not be necessary for the plaintiff or the plaintiff's authorized agent to make a request for or motion for alternative service pursuant to this rule.

RULE 743. DOCKETED

The cause shall be docketed and tried as other cases. If the defendant shall fail to enter an appearance upon the docket in the justice court or file an answer at or before the time the case is called for trial, the allegations of the complaint may be taken as admitted and judgment by default entered accordingly. If the plaintiff shall fail to appear when the case is called for trial, the case may be dismissed for want of prosecution. The justice shall have authority to issue subpoenas for witnesses to enforce their attendance, and to punish for contempt.

Generally, discovery is not appropriate in eviction actions; however, the justice has the discretion to allow reasonable discovery of limited scope, which does not unduly delay the trial.

RULE 744. DEMANDING JURY

Any party shall have the right of trial by jury, by making a request to the court on or before five days from the date the defendant is served with citation, and by paying the jury fee required by law for requesting a jury trial in justice court. Upon such request, a jury shall be summoned at the earliest opportunity, as in other justice court proceedings. This rule will not apply to suits for emergency immediate possession conducted under Rule 740.

RULE 745. TRIAL POSTPONED

For good cause shown, supported by affidavit of either party, the trial may be postponed for a period not exceeding seven days. Upon a showing of exceptional circumstances, supported by affidavit of either party, or on the court's own initiative, the trial may be postponed for a longer period. The trial may not be postponed for any additional period except upon the agreement of all parties provided such agreement is made in writing and filed with the court, or if the agreement is made in open court and noted on the docket.

RULE 746. ONLY ISSUE

Except as provided in rule 738, the only issue in an eviction action under Section 24.001 of the Texas Property Code is the right to actual possession and the merits of the title shall not be adjudicated.

Notes and Comments

The issue to be determined in an eviction is the right to actual possession, and the merits of title are not to be adjudicated. Thus, whenever conflicting claims of title must be adjudicated in order to determine which party has the right of possession, the justice court will not have jurisdiction. Although the defendant may assert a question of title, if a genuine question of title is not raised, then the justice court would have jurisdiction. Merely questioning the merits of title without evidence of a genuine dispute will not cause the justice court to lose jurisdiction. The justice court may inquire into the merits of title in order to determine whether or not the court has jurisdiction, and may even accept into evidence proof of title, not for the purposes of determining title, but in order to establish the jurisdiction of the court and to resolve the question of actual possession.

RULE 747. TRIAL

If no jury is demanded by either party, the justice shall try the case. If a jury is demanded by either party, the jury shall be impaneled as soon as practicable and sworn as in other cases; and after hearing the evidence it shall return its verdict in favor of the plaintiff or the defendant as it shall find.

RULE 747a. REPRESENTATION BY AGENTS

In eviction cases for non-payment of rent or holding over beyond the rental term, the parties may represent themselves or be represented by their authorized agents, who need not be attorneys. In any eviction suit in justice court, an authorized agent requesting or obtaining a default judgment need not be an attorney.

RULE 748. JUDGMENT AND WRIT

If the judgment or verdict is in favor of the plaintiff, the justice shall give judgment for plaintiff for possession of the premises, and costs. The justice may also give judgment jurisdiction of the court. If the judgment or verdict is in favor of the defendant, the justice shall give judgment for defendant against the plaintiff for costs and for possession of the

premises. The justice may also award a defendant who prevails against the plaintiff on the issue of possession, a judgment for attorney's fees if authorized and established by proof, and provided that such claim is within the jurisdiction of the court. If the judgment is for the plaintiff for possession, the justice must issue a writ of possession except that no writ of possession shall issue until the expiration of five days from the day the judgment is signed, except that a writ of possession may be issued only in accordance with Section 94.203 of the Texas Property Code if the defendant is leasing a manufactured home lot subject to that section. Subject to the provisions of this Rule, if the plaintiff is entitled to a writ of possession, it must be issued without delay.

(a) An eviction judgment shall be in writing in a separate document and contain the full names of the parties, as stated in the pleadings, and state for and against whom the judgment is rendered. The judgment shall recite who is awarded:
   (1) possession of the premises:
   (2) back rent, if any, and contractual late charges, if any, and in what amount.
   (3) attorney's fees, if any, and in what amount;
   (4) court costs and in what amount.
   (5) post judgment interest and at what rate.

(b) An eviction judgment shall contain findings which must include the following:
   (1) whether there is an obligation to pay rent on the part of the defendant;
   (2) a determination of the rent paying period;
   (3) a determination of the day of rent is due;
   (4) a determination of the amount of rent due each rent paying period, and if the rental agreement provides that all or part of the tenant's rental obligation is subsidized by the government then a determination as to how much rent is to be paid by the tenant and how much rent is to be paid by the federal government;
   (5) a determination of the date through which the judgment for back rent, and contractual late charges is calculated;
   (6) a determination of what rate of post judgment interest will apply.

(c) If there is no obligation on the part of the tenant to pay rent then the judge shall make a finding as to the fair market rental value of the premises per month as if there was an obligation to pay rent.

(d) If the judgment of the justice court is not appealed then it remains in force and a prevailing party may enforce their rights under the judgment in the justice court. If the appeal from the justice court is perfected in accordance with Rule 749b, and the county courts jurisdiction is invoked then the justice court may not enforce the judgment, except that the justice court retains jurisdiction to enforce the judgment in accordance with Rule 750 for ten days after the judgment is signed. The judgment of the justice court will be vacated upon final judgment in the case by the county court.

(e) The county court may rely on the justice court judgment in determining when and in

what amount rent is due to be paid by the appellant into the registry of the county court during the pendency of the appeal. The county court may also rely on the judgment of the justice court in determining whether or not to issue a writ of possession in the event rents are not timely paid into the registry of the county court. Nothing in this rule prohibits the county court from making an independent determination, either on its own initiative or on sworn motion of either party, as to the amounts and due dates of rents to be paid into the registry of the county court during the pendency of the appeal.

Notes and Comments

The main issue in an eviction action is possession, however a plaintiff may join a claim for rent, contractual late charges, costs, and attorney's fees to the issue of possession. The rules also allow a defendant who prevails to recover any costs, attorney's fees, and post judgment interest to which they are entitled and although a defendant may not file a counterclaim, any available defenses may be raised at trial. Recovery under any other grounds is not permitted under this section. This amendment to the rule also sets out a requirement that judgments in an eviction case be in writing in a separate document and that the judgment contains specific information, including findings about the rent. This is necessary in order to determine the amount of the appeal bond and the supersedeas bond, and for the county court to determine when and how much rent the defendant/appellant should pay into the registry of the court when the appeal is pending in county court.. Part (c) requires a finding by the court of the fair market rental value of the premises if there is no contractual obligation for the defendant to pay rent. This is necessary where there is no obligation to pay rent, such as after a foreclosure or the termination of an executory contract.

Once an appeal is perfected to the county court in accordance with Rule 749b, the county court's jurisdiction is invoked. Should the county court dismiss the appeal for want of jurisdiction, that ruling is reviewable by the court of appeals.

RULE 749. MAY APPEAL

(a) Eviction cases in which there has been an evidentiary trial on the merits no motions for new trial may be filed. A justice may set aside a default judgment or a dismissal for want of prosecution as justice requires anytime before the expiration of five days from the date the judgment was signed.

(b) A party may appeal from a final judgment in an eviction case to the county court of the county in which the judgment is signed.

(c) A defendant may appeal by filing with the justice, not more than five days after the

judgment is signed, an appeal bond, deposit, or security to be approved by said justice in an amount equal to the court costs incurred in justice court.

(d) A plaintiff may appeal by filing a written notice of appeal with the justice not more than five days after the day the judgment is signed. The notice of appeal must identify the justice court, plaintiff, defendant and the cause number, and state that the plaintiff desires to appeal. The notice of appeal must be signed by the plaintiff or the plaintiff's authorized agent.

(e) The party appealing the judgment must also pay to the justice court, the filing fee required by that county to appeal a case to county court. The justice court will forward the filing fee to the county clerk along with all other papers in the case. The filing fee must be made payable to the county clerk of the county in which the case was heard.

(f) If an appeal bond is posted it must meet the following criteria:
(1) It must be in an amount required by this rule,
(2) It must be made payable to the county clerk of the county in which the case was heard,
(3) It must be signed by the judgment debtor or the debtor's authorized agent,
(4) It must be signed by a sufficient surety or sureties as approved by the court. If an appeal bond is signed by a surety or sureties, then the justice court may, in its discretion, require evidence of the sufficiency of the surety or sureties prior to approving the appeal bond.

(g) Deposit in lieu of appeal bond. Instead of filing a surety appeal bond, a party may deposit with the justice court:
(1) cash;
(2) a cashier's check payable to the county clerk of the county where the case was heard, drawn on any federally insured and federally or state chartered bank or savings and loan association; or
(3) with leave of court, a negotiable obligation of the federal government or of any federally insured and federally or state chartered bank or savings and loan association.

(h) Any motions challenging the sufficiency of the appeal bond or deposit in lieu of appeal bond must be filed with the county court.

(i) Within five days following the filing of an appeal bond by a defendant, or the filing of a notice of appeal by a plaintiff, the party appealing shall give notice in accordance with Rule 21a of the filing of an appeal bond or the filing of a notice of appeal to the adverse party. No judgment shall be taken by default against the adverse party in the county court to which the cause has been appealed without first showing substantial compliance with this subsection.

Rule 749a Affidavit of Indigence

(a) Establishing indigence

A party who cannot pay the costs to appeal to the county court may proceed without advance payment of costs if:

(1) the party files an affidavit of indigence in compliance with this rule within five days after the justice court judgment is signed; and

(2) the claim of indigence is not contested or, if contested, the contest is not sustained by a timely written order.

(b) Contents of affidavit.

The affidavit of indigence must identify the party filing the affidavit and must state what amount of costs, if any, the party can pay. The affidavit must also contain complete information about:

(1) the nature and amount of the party's current employment income, government-entitlement income, and other income;

(2) the income of the party's spouse and whether that income is available to the party;

(3) real and personal property the party owns;

(4) cash the party holds and amounts on deposit that the party may withdraw;

(5) the party's other assets;

(6) the number and relationship to the party of any dependents;

(7) the nature and amount of the party's debts;

(8) the nature and amount of the party's monthly expenses;

(9) the party's ability to obtain a loan for court costs;

(10) whether an attorney is providing free legal services to the party, without a contingent fee;

(11) whether an attorney has agreed to pay or advance court costs.

(c) When and Where Affidavit Filed

An appellant must file the affidavit of indigence in the justice court within five days after the justice court judgment is signed

(d) Duty of Clerk or Justice of the Peace

Upon the filing of an affidavit of indigence the justice of the peace or clerk of the court shall notice the opposing party, and the county clerk of that county, of the filing of the affidavit of indigence within one working day of its filing by written notification accomplished by first class mail.

(e) No contest filed

Unless a contest is timely filed, no hearing will be conducted, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs.

(f) Contest to affidavit

The appellee or county clerk, may contest the claim of indigence by filing a contest to the affidavit. The contest must be filed in the justice court within five days after the date when the notice of the filing of the affidavit was mailed by the clerk or justice of the peace to the opposing party. The contest need not be sworn.

(g) Burden of Proof
If a contest is filed, the party who filed the affidavit of indigence must prove the affidavit's allegations. If the indigent party is incarcerated at the time the hearing on a contest is held, the affidavit must be considered as evidence and is sufficient to meet the indigent party's burden to present evidence without the indigent party's attending the hearing.

(h) Hearing and decision in the trial court
(1) Notice required
If the affidavit of indigence is filed in the justice court and a contest is filed, the justice court must set a hearing and notify the parties of the setting.
(2) Time for hearing.
The justice court must either hold a hearing and rule on the matter or sign an order extending the time to conduct a hearing within five days from the date a contest is filed.
(3) Extension of time for hearing.
The time for conducting a hearing must not be extended for more than five days from the date the order is signed.
(4) Time for written decision; effect.
Unless—within the period set for the hearing--the justice court signs an order sustaining the contest, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs.

(i) Appeal from the justice court order disapproving the affidavit of indigence
(1) No writ of possession may issue pending the hearing by the county court of the appellant's right to appeal on an affidavit of indigence.
(2) If a justice of the peace disapproves the affidavit of indigence, appellant may, within five days thereafter, bring the matter before the county court for a final decision, and, on request, the justice shall certify to the county court appellant's affidavit, the contest thereof, and all documents, and papers thereto. The county court shall hold a hearing de novo and rule on the matter within five days from the date the matter is brought to the county court, or within that five day period, sign an order extending the time to conduct a hearing. The time for conducting a hearing must not be extended for more than five days from the date the order is signed. If the affidavit of indigence is approved by the county court, it shall direct the justice to transmit to the clerk of the county court, the transcript, records, and papers of the case. If the county court disapproves the affidavit of indigence, appellant may perfect an appeal by filing an appeal bond, deposit, or security with the justice court in the amount required by this rule within five days thereafter. If no appeal bond is filed within five days thereafter, the justice court may issue a writ of possession.

(j) Costs defined
As used in this rule, costs means:
(1) a filing fee paid in justice court to initiate the eviction action:
(2) any other costs sustained in the justice court; and
(3) a filing fee paid to appeal the case to the county court.

Rule 749b Appeal Perfected

When the defendant timely files an appeal bond, deposit, or security in conformity with Rule 749, and the filing fee required for the appeal of cases to the county court is paid, or an affidavit of indigence approved in conformity with Rule 749a, the appeal by the defendant shall be perfected. When the plaintiff timely files a notice of appeal in conformity with Rule 749 and the filing fee required for the appeal of cases to county court is paid, or an affidavit of indigence approved in conformity with Rule 749a, the appeal by the plaintiff shall be perfected. When an appeal has been perfected, the justice court shall make out a transcript of all the entries made on it's docket of the proceedings had in the case and immediately file the same, together with the original papers, any money in the court registry pertaining to that case, and the appeal bond, deposit, or security filed in conformity with Rule 749, or the affidavit of indigence approved in conformity with Rule 749a with the county clerk of the county in which the case was heard. The county clerk shall docket the case and the trial shall be de novo.

The perfection of an appeal in an eviction case does not suspend enforcement of the judgment. Enforcement of the judgment, may proceed in the justice court in accordance with Rule 750 for up to ten days after the day the judgment was signed, and thereafter in the county court unless the enforcement of the judgment is suspended in accordance with rule 750. If the appeal does contest a judgment for possession and the tenant fails to post a supersedeas bond, when required, the appellee may seek a writ of possession, and the issue of possession may not be further litigated in the eviction action in the county court.

No factual determination in an eviction action, including determination of the right to possession, will be given preclusive effect in other actions that may be brought between the parties.

Notes and Comments

A defendant contesting a judgment for rent, contractual late charges, attorney's fees, and court costs may appeal without appealing the issue of possession. However, if the appeal contests a judgment for possession and the defendant fails to post a supersedeas bond, the plaintiff may seek a writ of possession. No factual determination in an eviction action, including a determination of the right to possession, will be given any preclusive effect in other actions that may be brought between the parties. A defendant dispossessed under a writ of possession is not precluded under res judicata or collateral estoppel principles from bringing a wrongful eviction action.

If a defendant perfects the appeal to the county court by the approval of an affidavit of indigence, it is not necessary for the defendant to post a supersedeas bond, deposit, or security to suspend the enforcement of the judgment and to remain in possession.

RULE 749c FORM OF APPEAL BOND

The appeal bond authorized in the preceding rule may be substantially as follows:

_____, Plaintiff — The State of Texas,

Vs. — County of

_____, Defendant — Cause Number

"WHEREAS, in the above entitled and numbered eviction case in the Justice Court of precinct _____ of _____ County, Texas, judgment was signed on the _____day of _____, _____ in favor of _____ appellee., and against _____ appellant from which judgment the said appellant, wishes to appeal to the county court; now, therefore, the said appellant, and sureties, covenant that appellant will prosecute said appeal with effect and pay all cost and damages which may be adjudged against the appellant, provided the sureties shall not be liable in an amount greater than $_____, said amount being the amount of the bond herein.

NOW, THEREFORE, WE _____, appellant, as principal, and _____, as surety at _____ (address of surety), and at the following telephone numbers, Work_____, and Home_____, and_____ as surety at _____ (address of surety), and at the following telephone numbers, Work_____, and Home_____, acknowledge ourselves as bound to pay to _____ county clerk of _____ County, Texas, the sum of $ _____, conditioned that appellant shall prosecute the appeal with effect and will perform an adverse judgment final on appeal.

" Given under our hands this _____day of _____, A.D. ____."

_____
Signature of Defendant

_____
Signature of Surety

_____
Signature of Surety

The Appeal Bond Is:

____ Approved
____ Disapproved For The Following Reason:

_____
_____
_____

Signed this ____day of _____, 20____.

_____
Presiding Judge

Rule 750 SUSPENDING ENFORCEMENT OF AN EVICTION JUDGMENT PENDING APPEAL TO COUNTY COURT

(a) Even though an appeal of an eviction judgment has been perfected, the justice court will retain jurisdiction over the enforcement of the judgment for ten days after the judgment is signed. During that ten day period the justice may;

(1) issue a writ of possession after the expiration of five days, from the day the judgment is signed, if the defendant has not posted a supersedeas bond or other security, or
(2) approve the filing of a supersedeas bond or other security.

(b) Once the appeal has been perfected and ten days have expired since the day the judgment was signed, any actions to enforce the judgment, request a writ of possession, to suspend the enforcement of the judgment under this rule, or to modify an existing justice court order suspending the enforcement of the judgment, must be filed in the county court where the appeal is pending

(c) An appellant who has perfected an appeal of an eviction judgment under these rules shall be entitled to suspend the enforcement of the judgment and, where applicable, stay in possession of the premises during the pendency of the appeal, by complying with the following procedure:

(1) filing with the court a written agreement with the appellee for suspending enforcement of the judgment; or
(2) filing with the court a good and sufficient supersedeas bond; or

(3) making a deposit with the court in lieu of a supersedeas bond; or
(4) providing alternate security as ordered by the court.

(d) Supersedeas Bonds
(1) must be in an amount required by this rule;
(2) must be made payable to the judgment creditor;
(3) must be signed by the appellant or the appellant's agent;
(4) must be signed by a sufficient surety or sureties as approved by the justice court.
(5) the court may, in its discretion require evidence of the sufficiency of the surety or sureties prior to approving the supersedeas bond.

(e) Deposit in lieu of supersedeas bond.
Instead of filing a surety supersedeas bond, a party may deposit with the court;
(1) cash;
(2) a cashier's check payable to the judgment creditor, drawn on any federally insured and federally or state chartered bank or savings and loan association; or
(3) with leave of court, a negotiable obligation of the federal government or of any federally insured and federally or state chartered bank or savings and loan association.

(f) Conditions of Liability
The surety or sureties on a bond, any deposit in lieu of a supersedeas bond, or any alternate security ordered by the court is subject to liability for all damages and costs that may be awarded against the debtor—up to the amount of the supersedeas bond, deposit, or security—if;
(1) the debtor does not perfect an appeal or the debtor's appeal is dismissed, and the debtor does not perform the justice court's judgment; or
(2) the debtor does not perform an adverse judgment final on appeal.

(g) Effect of supersedeas. Enforcement of a judgment must be suspended once the judgment is superseded. Enforcement begun but not completed before the judgment is superseded must cease when the judgment is superseded. If a judgment is properly superseded before execution, a writ of supersedeas shall be issued promptly. A party that has been evicted pursuant to a writ of possession may not supersede that portion of the judgment

(h) Amount of supersedeas bond, deposit or security.
The amount of the supersedeas bond, deposit or security must be at least in an amount to cover;
(1) the amount of the judgment, and interest on the judgment for the estimated duration of the appeal;
(2) the amount of attorney's fees awarded for the appellee;
(3) the amount of rent owed by the appellant for the current rent paying period less any portion of that rent reflected in the judgment, except that if the appellant was the plaintiff in justice court then the supersedeas bond need not include any rent; or

(4) if there is no obligation on the part of the appellant to pay rent then an amount equal to the fair market rental value for the current month.
(5) lesser amount. The court may order a lesser amount than required by subsections 1-4 above if the justice court finds that;
(A) posting a supersedeas bond, deposit, or security in the amount required by subsections 1-4 above will irreparably harm the appellant; and
(B) that posting a supersedeas bond, deposit or security in a lesser amount will not substantially impair the appellee's ability to recover under the judgment after all appellate remedies are exhausted.

(i)When the enforcement of the judgment has been suspended the justice court shall stay all further proceedings on the judgment and shall immediately make out a transcript of all the entries on the court's docket of the proceedings related to the suspension of the judgment; and shall immediately file same, together with the supersedeas bond, deposit, or security with the clerk of the county court. The justice court will immediately issue whatever writs of supersedeas are needed, or take other actions to suspend the enforcement of the judgment. . All motions to contest the sufficiency of the sureties must be filed in the county court where the appeal is pending,

(j) If the appeal is perfected by the approval of an affidavit of indigence, the defendant need not post a supersedeas bond, deposit, or security with the justice court in order to remain in possession, or to suspend the enforcement of the judgment.

Rule 750a Form of Supersedeas Bond

The supersedeas bond authorized in the preceding article may be substantially as follows:

SUPERSEDEAS BOND

_____Plaintiff
VS.
_____Defendant

The State of Texas
County of _____
Cause No_____

WHEREAS, in the above entitled and numbered eviction in the Justice Court of Precinct _____ of _____ County, Texas, judgment was signed on the _____ day of _____, _____ in favor of _____ (plaintiff/defendant), hereinafter referred to as appellee against _____ (plaintiff/defendant), hereinafter referred to as appellant for;
____Possession,
____Court costs of $_____,

____Back rent and contractual late charges of $_____ ,
____Attorney's fees of $_____,
together with interest thereon from the date of the judgment, at the rate of ____percent per annum, from which judgment appellant has appealed to the county court of _____ County, Texas.

WHEREAS, appellant desires to suspend enforcement of the judgment pending determination of said appeal:

NOW, THEREFORE, WE _____ (appellant), as principal, and_____ as surety at _____ (address of surety), and the following telephone numbers, Work_____, and Home_____, and _____ as surety at _____ (address of surety), and the following telephone numbers, Work_____, and Home_____, acknowledge ourselves as bound to pay to _____ (appellee), the sum of $_____, said sum being at least the amount of the judgment, interest, and costs, plus estimated interest from the date of the judgment until final disposition of the appeal, conditioned that appellant shall prosecute the appeal with effect; and in case the judgment of the county court be against appellant, appellant shall perform its judgment, sentence or decree, and pay all such damages as the court may award against appellant up to the amount of the bond.

Given under our hands this _____day of _____, _____.

_____
Signature of Appellant

_____
Signature of Surety

_____
Signature of Surety

Notes and Comments

This is a new rule, which provides a suggested form for the supersedeas bond provided by rule 750.

RULE 751 OBLIGATION TO PAY RENT DURING THE PENDENCY OF THE APPEAL

(a) During the pendency of the appeal defendant must pay rent, or the amount determined to be a fair market rental value of the premises as set forth in Rule 748, into

the registry of the county court as it becomes due. Upon sworn motion filed in county court, either party may contest the findings set forth in the justice court judgment as to rent or fair market rental value. The court may hold a hearing on the motion.

(b) Effect of defendant's not paying rent or the amount of fair market value into the registry of the county court.

(1) If the defendant fails to make timely payments into the registry of the county court as it becomes due, the plaintiff may file a notice of default in the county court where the cause is pending. Upon sworn motion by the plaintiff, and a showing of default by the defendant in making payments into the registry of the county court as they become due, the court must issue a writ of possession.

(2) During the appeal, if a governmental agency is responsible for payment of a portion of the rent and does not pay that portion to the landlord or into the registry of the county court, the plaintiff may file a motion with the county court requesting that the defendant be required to pay the full amount of the rent into the county court registry as a condition for remaining in possession. After notice and hearing, the court may grant the motion only if the plaintiff;
(A) did not cause the agency to cease making the payments, and
(B) is not able to take an action that will cause the agency to resume making payments or to otherwise pay all or part of the rent.

(3) The county court may allow the plaintiff to withdraw any or all rent or the amount determined to be a fair market rental value from the county court registry upon;
(A) sworn motion and hearing, prior to final determination of the case, showing the right to receive payment;
(B) dismissal of the appeal, or
(C) order of the court upon final hearing.

(4) All hearings and motions under this rule shall be entitled to precedence in the county court.

(c) If the appeal is perfected and the defendant does not pay rent into the registry of the county court as it becomes due, the county court, where the appeal is pending, may issue a writ of possession at any time. The duty of the defendant to pay rent into the registry of the county court as it becomes due exists even if the appeal is perfected by the approval of an affidavit of indigence.

RULE 752. DAMAGES

On the trial de novo of the cause in the county court the plaintiff and defendant shall be permitted to plead, prove and recover damages, if any, suffered for withholding or defending possession of the premises during the pendency of the appeal.

Damages may include but are not limited to loss of rentals during the pendency of the appeal and reasonable attorney fees in the justice and county courts provided, as to attorney fees, that the requirements of Section 24.006 of the Texas Property Code have been met. Only the party prevailing in the county court shall be entitled to recover damages against the adverse party.

RULE 753. DUTY OF CLERK TO NOTIFY PARTIES

The county clerk shall immediately notify all parties to the justice court judgment of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court. The notice shall admonish the defendant that a default judgment may be taken unless a written answer is filed with the clerk within eight days after the transcript is filed in the county court.

RULE 753a. JUDGMENT BY DEFAULT

Said cause shall be subject to trial at any time after the expiration of eight days after the date the transcript is filed in the county court. If the defendant has filed a written answer in the justice court, the same shall be taken to constitute the defendant's appearance and answer in the county court, and such answer may be amended as in other cases. If the defendant made no answer in writing in the justice court, and if he fails to file a written answer within eight days after the transcript is filed in the county court, the allegations of the complaint may be taken as admitted and judgment by default may be entered accordingly.

RULE 754. TRIAL OF THE CASE IN COUNTY COURT

(a) The trial of an eviction appeal as well as all hearings and motions shall be entitled to precedence in the county court.

(b) No jury trial shall be had in any appeal of an eviction, 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 five days in advance. The fee required by law for requesting a jury trial in county court must be deposited with the county clerk within the time for making a written request for jury trial. The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.

(c) Generally, discovery is not appropriate in an eviction appeal, however, the county court has the discretion to allow reasonable discovery of limited scope, which does not unduly delay the trial.

(d) The eviction appeal shall be subject to trial de novo at any time after the expiration of eight days after the date the transcript is filed in the county court. The county court may set appeals of eviction cases for trial on written motion of any party or on the court's own initiative, with reasonable notice to the parties of a first setting for trial, or by agreement of the parties. The case shall be docketed in the county court in the name of the plaintiff in the justice court as plaintiff, and in the name of the defendant in the justice court as defendant. Regardless of which party appealed from the judgment in the justice court, only the plaintiff in the county court may take a non-suit. If the county court's jurisdiction is invoked, then it must dispose of all parties and issues before the court, including the issue of possession.

(e) On written motion by the appellee contesting the sufficiency of the appeal bond or the supersedeas bond, the county court upon the request of any party shall promptly hold a hearing on the appellee's motion. If upon review of the appeal bond or the supersedeas bond, the county court should find the bond to be deficient, the court may disapprove the bond and allow the appellant five days from the date the bond is disapproved to correct the deficiencies with the bond. If the deficiencies are corrected then the bond may be approved. If the deficiencies on the appeal bond are not corrected then the appeal may be dismissed. If the deficiencies on a supersedeas are not corrected then the appellee may proceed with the enforcement of judgment including seeking a writ of possession

(e) When the appellant fails to prosecute the appeal with effect or the county court renders judgment against the appellant, then the county court must render judgment against the sureties on the appellant's appeal bond and on the supersedeas bond, if any, for the performance of the judgment up to the amount of the bond.

Notes and Comments

This rule provides guidance to the county court in procedures to use in the trial of the case. When the county court invokes jurisdiction of a case it must dispose of all issues and parties before the court. If the case is dismissed, once the county court has invoked jurisdiction, then the dismissal must address the issue of possession

RULE 755. WRIT OF POSSESSION

The writ of possession, or execution, or both, shall be issued by the clerk of the county court according to the judgment rendered, and the same shall be executed by the sheriff or constable, as in other cases; and such writ of possession shall not be suspended or superseded in any case by appeal from such final judgment in the county court, unless the premises in question are being used for residential purposes only. However, if the defendant is leasing a manufactured home lot, the writ of possession shall be issued as provided in Section 94.203 of the Texas Property Code. A judgment of a county court may not under any circumstances be stayed pending appeal unless, within ten days of the signing of the judgment, the appellant files a supersedeas bond in an amount set by the county court.

Chris Griesel

From: George Allen [george@taa.org] **Sent:** Thu 6/13/2002 3:09 PM
To: Supreme Court Advisory Committee
Cc: Larry Niemann
Subject: Texas Apartment Association Concerns with Proposed JP Court Rules
Attachments: TAASCACltr-2.doc(52KB) ATT372518.txt(64B)

Ladies and Gentlemen of the Committee,

Attached please find a letter expressing the concerns of the Texas Apartment Association with the latest draft (June 10) of the Justice Court rules that the Supreme Court Advisory Committee will be discussing on June 14 and June 15. TAA Legal Counsel Larry Niemann will be attending the meeting and we trust he will have an opportunity to explain the rationale for our concerns and the alternatives we feel should be considered and adopted by the Committee.

TAA represents over 10,000 members who own or manage over 1.5 million rental housing units throughout the state of Texas. Our members handle tens of thousands of eviction cases each year and are more directly impacted by the eviction rules than any other aspect of the judicial system. We embrace the majority of the changes in the rules, and commend the Committee for its hard work. In the simplest sense, time is money in eviction cases, and we want to insure the most efficient and expedient process possible, while maintaining the ability of owners and tenants to represent themselves in the vast majority of the cases.

Thank you for your consideration of this critical issue to the apartment industry in Texas.

George B. Allen
TAA Executive Vice President

<< TAASCACltr-2.doc >> << ATT372517.txt >>

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June 13, 2002

To: The Members of the Supreme Court Advisory Committee

On behalf of the Texas Apartment Association, I am writing this letter for two purposes: (1) to commend the members of the Subcommittee on Eviction Rules on the tireless work and excellent job they have done on the June 10, 2002 version of the rules, and (2) to voice our objections and concerns about five of the proposed rules. If adopted in their current form, there will be significant delays and added expenses in the eviction process.

Below I have discussed each of the five rules, and I have explained the reasons for our concerns and the ways in which we believe they should be modified. Our comments are made with the goal of preserving the efficiency and expediency of the current eviction process, while maintaining: (1) fairness; (2) constitutionality; (3) the simplicity that is needed when cases are tried before non-lawyer justices; and (4) the ability of laypersons to handle rent and holdover cases without having to retain a lawyer (as specifically allowed by statute). We are very cognizant of problems in the eviction process throughout the state since our owners and managers handle tens of thousands of evictions annually in both urban and rural areas of our state.

1. DISCOVERY. TAA is opposed to the discovery provisions in proposed Rule 743. We believe the rule will slow down the eviction process and make it more complicated for tenants, landlords, and justices of the peace. The proposed rule will result in some landlords having to hire an attorney to respond to unreasonable discovery motions. It will necessitate court hearings on discovery requests and disputes. The Subcommittee's proposal opens the door for interrogatories, depositions, production motions, etc. It opens the doors for abuse of the discovery process by tenants, tenant lawyers, and even some JPs. It can do nothing but make the process longer, more complicated, and more costly.

TAA's position is to not allow discovery in eviction cases in JP court.

2. CHECKLIST FOR COMPLAINT CONTENT AND ATTACHMENTS. The June 10th SCAC Subcommittee proposal of Rule 741 requires the eviction sworn complaint to contain a detailed list of information and to attach certain documents. The penalty for missing one item of information or missing one attachment is possible postponement by the court.

It may be easy for lawyers to make certain that a comprehensive list of information and attachments are satisfied. But it is much more difficult for a layperson. Such a checklist is a virtual trap for laypersons—one slip-up and they are likely to get their case delayed and the tenant will get a longer free-rent ride as a practical matter. The eviction process needs to be kept as simple as possible and not incorporate these kinds of obstacles. When appearing before this Committee last February, I don't believe Fred Fuchs (who represents Legal Aid) advocated a long complaint checklist for content and mandated attachments as called for in the Subcommittee's draft of proposed rule 741. Instead, he advocated discovery.

The two pages of text the Subcommittee's proposed Rule 741 should be deleted. In lieu thereof, TAA would recommend the following:

> Rule 741. Requisite of Complaint. The sworn complaint shall describe the ~~lands, tenements or~~ premises, the possession of which is claimed, with sufficient certainty to identify same. The complaint shall also state the facts that entitle the plaintiff to possession and authorize the suit under Chapter 24 of the Texas Property Code; and it must be sworn to by plaintiff or plaintiff's authorized agent either on personal knowledge or upon information and belief. The grounds under which the plaintiff is entitled to possession and other damages authorized by Rule 738 are limited by the grounds stated in the complaint. The complaint may be amended by the plaintiff at any time prior to trial. If the complaint is amended, the defendant may request a continuance in accordance with Rule 745.

At the appropriate spot, either in the above rule or in proposed Rule 743, it would be appropriate to add language to the following effect:

> "Prior to trial, the defendant may deliver to the plaintiff a request in writing for a copy of the plaintiff's notice to vacate, lease, executory deed, or foreclosure documents. If so requested, plaintiff must provide such document(s) to the defendant prior to the trial date designated in the citation. At the time of trial, if the justice finds that (1) defendant made such request, (2) plaintiff failed to provide such documents, and (3) defendant's defense is prejudiced by such failure, the justice can order the plaintiff to promptly furnish such documents and continue case for no longer than one business day."
>
> Advantages: The above will fill the need for some defendants to see the critical documents prior to trial without any delay of the trial--unless the plaintiff's failure to furnish the critical documents has prejudiced the defendant. If the JP finds prejudice to the defendant, the judge can order their production and delay the trial, if necessary. The modified language is simple. It is self-administering. It doesn't involve motions or hearings before the judge. It minimizes the need for lawyers. And it saves everyone's time and reduces the court's paperwork load. It eliminates the need for subsequent purging of attachments by the justice court clerks to make room for more files. It is a minimum encroachment on judicial efficiency and does not adversely affect the speed of resolving the case. It does not open the door to total justice "discretion" in discovery.

3. Trial postponement. The SCAC Subcommittee's proposed revision of Rule 745 is acceptable except for the right of the judge to grant a postponement for "exceptional circumstances." As written, there is no limit on the length of time of such a postponement. Most justices of the peace will not abuse this right to postpone, but some will—and in certain parts of the state, this unlimited discretion will result in unfair treatment of rental housing owners and even longer time periods before an eviction trial is actually set by some justices who are biased or who feel overworked or who try to force private resolution of evictions by not setting trials. TAA would recommend changes to the Subcommittee's proposal, as follows:

> Rule 745. Trial Postponed. For good cause shown, supported by affidavit of either party, the trial may be postponed for a period not exceeding seven days. Upon a showing of exceptional circumstances, supported by affidavit of either party, or on the court's own initiative, the trial may be postponed ~~for a longer period~~ for an additional period of time, not exceeding seven days. The trial may not be postponed for any additional period except upon the agreement of all parties provided such agreement is made in writing and filed with the court, or if the agreement is made in opinion court and noted on the docket.
>
> Advantages: The loophole of a "longer period" without any limitation on number of days is avoided, and therefore the potential for abuse and delay is avoided, while still accommodating the reasonable needs of the parties. Please remember that a postponement period in an eviction case means, as a practical matter, a "free rent" period for the tenant since the vast majority of eviction cases are based on non-payment of rent. When a justice postpones an eviction based on unpaid rent, it usually means money out of the landlord's pocket because of the resulting delay in the landlord's ability to rerent the premises.

4. SET-A-SIDES OF DEFAULT JUDGMENTS AND DISMISSALS. The Subcommittee's Rule 749 proposal to allow set-a-sides of default judgments and dismissals opens the door for both plaintiffs and defendants to lie and cheat their way to a second chance for trial after they have already lost by not appearing at the

trial on the date designated by the judge. TAA realizes that the Subcommittee's proposal cuts both ways, benefiting the plaintiff who forgets or who is late as well as the defendant who does likewise. But this "second chance" at the trial is going to be badly abused by tenants—just as the loophole of the pauper's affidavit under current rules has been abused by tenants who are not truly paupers. TAA would request that the Subcommittee's proposed Rule 749(a) be revised as follows:

> Rule 749. May Appeal. (a) ~~Eviction cases in which~~ After there has been an evidentiary trial on the merits in an eviction case, ~~no motions, for new trial may be filed~~ the justice may not grant a new trial. A justice may not set aside a default judgment or a dismissal for want of prosecution ~~as justice requires anytime before the expiration of five days from the date of the judgment was signed~~.
>
> Advantages: This solution avoids game playing and abuse by tenants, conserves court's time and prevents an imposition on the time of the party who conscientiously shows up for trial. The fairest way for a defendant to take advantage of a meritorious defense in these situations is to appeal to county court. For the plaintiff whose case is dismissed for failure to show, the proper course is to refile the case and not be late for the next trial.
>
> If the Subcommittee's proposal is going to be adopted instead of TAA's suggested revision, then at the very least the rule should add a sentence that says: "The new trial must be requested no later than 2 days after judgment and may be held no later than 3 days after it is requested." Such addition is necessary to close the door on potential tenant and JP abuse.

5. STOPPING OR DELAYING ISSUANCE OF THE WRIT OF POSSESSION BY MERELY FILING AN AFFIDAVIT OF INDIGENCY. The Subcommittee's inclusion of Subsection (j) in proposed Rule 750 is of greatest concern to TAA. Subsection (j) says "If the appeal is perfected by the approval of an affidavit of indigence, the defendant need not post a supersedeas bond, deposit, or security with the justice court in order to remain in possession, or to suspend the enforcement of the judgment."

The abuse and game-playing of the existing eviction process is being continued by the inclusion of Subsection (j). Here is why: Clever tenants are going to file affidavits of indigence after losing, and then if the landlord contests the affidavit and wins, the tenant will appeal the non-indigence ruling and get an extra 15 to 20 days of free rent (as a practical matter) while the justice clerk gets the appeal to the county clerk, the clerk dockets the case, the judge or clerk sets the JP's indigency ruling for a hearing, the county judge rules no indigence, and sends the case back to the justice court for the supersedeas bond to be filed by the tenant who wants to avoid the writ.

Has this happened in the past? Yes. Rampantly. It has gotten so bad in some areas, that the JPs are automatically approving all pauper affidavits and refusing to hold hearings on pauper affidavit contests, regardless of whether the affidavit is frivolous. This occurs because the JPs are trying to keep an unknowing landlord out of the two-or-three week delay trap when the clever tenant appeals the JP's finding of "non-pauper status." Also, the JP understandably wants to avoid what is a waste of the JP's time and the county court's time in playing the game of "let's appeal the JP's ruling of non-pauper status." That is a sad commentary on the state of the current rules, and virtually nothing has been done about this problem in the proposed rules—in fact the potential for delay has gotten worse under the proposed rules because of set-a-sides and discretionary discovery.

There is a solution that has been agreed to by the landlords, the tenants, and the justices of the peace associations, and the solution is constitutional. It involves requiring a tenant who files an affidavit of indigence in an unpaid rent case in order to perfect his appeal, to also tender into JP court one rental pay period rent (or less if the tenant's rent is government-subsidized). Doing so will stop the issuance of the writ of possession during the 10 days after judgment, as contemplated for non-indigents who fail to file a supersedeas bond. This solution will allow the truly inidigent tenant who is being evicted for alleged non-payment of rent to perfect his appeal by affidavit in lieu of appeal bond and county court cost tender. Any supersedeas bond would be reduced by the amount of tender. And if such indigent tenant does not tender the required rent at the JP court level, the writ of possession can issue--but the tenant can still litigate the issue of possession on appeal in order to remove the JP eviction judgment from the tenant's credit record and rental history record.

The above will put a stop to the pauper affidavit abuse by tenants while still protecting the bona fide pauper and the good faith landlord. The principles of the foregoing recommendation have been agreed to by the landlords, the tenants and the JPs--but for unknown reason, the recommendation has been rejected by the Subcommittee.

The above should pass constitutional muster since it does not interpose any payment of cash as a condition of perfecting appeal for paupers. A pauper is still allowed to litigate the issue of possession in county court. The above is no less constitutional than making a tenant who has appealed tender his rent, as it becomes due, to the county court during appeal as a condition of preventing county court issuance of a writ of possession (as is contemplated by the Subcommittee's proposed rules).

We appreciate the proposed rule that requires a pauper to tender rent as it becomes due during the county court appeal, but that does not overcome the problem of a tenant in bad faith or frivolously filing a pauper's affidavit in JP court to appeal the case and avoid having to pay rent or post a supersedeas bond.

Accordingly, the Texas Apartment Association respectfully requests that the Supreme Court Advisory Committee not adopt Rules 741, 743, 745, 749, and 750 as submitted by the SCAC Subcommittee and instead modify such proposed rules in accordance with this letter. Thank you for your time and consideration.

Sincerely yours,

NIEMANN & NIEMANN, LLP

By /s/ Larry Niemann
Larry Niemann

xc: Judge Sandy Prindle, Texas JP and Constable Association via fax 817-481-8138

taa/scacltr-2.doc

Wednesday, June 5, 2002
10:00 am Draft

PROPOSED RULE 741. REQUISITE OF COMPLAINT

The sworn complaint shall describe the premises, the possession of which is claimed, with sufficient certainty. It shall also state the facts that entitle the plaintiff to possession and authorize the suit under Section 24.001-24.004 of the Property Code. The complaint must be sworn to by plaintiff or plaintiff's authorized agent either on personal knowledge or upon information and belief.

[Note to SCAC: Under this proposed rule, a recommended sworn complaint form (to be substantially complied with) would be in the commentary to the rules, as set forth below. The form would be intended as guidance for parties and justices of the peace and would not be intended to foreclose parties or their attorneys from drafting a petition to fit their particular case.]

Cause No. _____

Plaintiff: _____ In the Justice Court

v.

Defendant(s): _____ Precinct _____ Place _____

_____

_____

_____ County of _____, Texas

SWORN COMPLAINT FOR EVICTION

1. COMPLAINT. Plaintiff files this sworn complaint against the above-named defendant(s) to evict defendant(s) from plaintiff's premises which is located in the above precinct and which is described below.

_____

Street Address Unit No. (if any)

_____

City County State Zip

2. CURRENT OCCUPANCY BY DEFENDANT(S). *(check only one)*
   - ☐ Rental agreement: Defendant(s) are occupying the premises under a written rental agreement, either as tenants or permitted occupants under the rental agreement. The rental agreement ☐ does ☐ does not involve the rental of land on which the defendant(s) have placed a manufactured home.
   - ☐ Foreclosure: Defendant(s) continue to occupy the premises after foreclosure sale.
   - ☐ Contract for deed: Defendant(s) continue to occupy the premises after a default under a contract of deed.
   - ☐ Trespass: Defendant(s) entered the premises without authority and are trespasser(s).
   - ☐ Other: *(briefly describe)* _____

     _____

3. SUIT FOR MONEY. Plaintiff *(check one)* ☐ does ☐ does not seek judgment for rent (or rental value if there is no rental agreement), or late charges.

4. SERVICE OF CITATION. Plaintiff requests service of citation on defendant(s) by personal service at the above described premises. If any other addresses of defendant(s) are listed in the rental agreement, such address(es) are as follows: _____

   _____

5. NOTICE TO VACATE. Plaintiff delivered to defendant(s) a written notice to vacate in accordance with the applicable notice requirements of Section 24.005 or Section 24.006, Texas Property Code; or if the premises was for occupancy by a manufactured home not owned by plaintiff, notice to vacate was delivered under Section 94.203, Texas Property Code. Notice to vacate was delivered on the _____ day of _____, _____ by the following method: *(check one or more as applicable)* ☐ personal delivery to defendant(s), ☐ personal delivery to any person residing at the premises who is 16 years of age or older, ☐ affixing the notice to the inside of the main entry door of the premises, ☐ regular mail, registered mail, or certified mail return receipt requested, to the premises, or ☐ other method of delivery authorized under Section 24.005, Texas Property Code.

6. ☐ GROUNDS FOR EVICTION—BREACH OF RENTAL AGREEMENT. *(check and fill in as applicable)* Defendant(s) have violated the rental agreement between plaintiff and defendant(s) and have refused to vacate after notice from plaintiff. The rental agreement violation involved one or more of the following:

   ☐ Unpaid rent or late charges. Defendant(s) failed to pay the rent or late charges which are still due and unpaid, as follows:
   Rent: $_____ Late charges: $_____ Due date:_____ For rental period: _____
   Rent: $_____ Late charges: $_____ Due date:_____ For rental period: _____
   Other unpaid rent or late charges, with due date(s) and rental period(s): _____
   Plaintiff also seeks judgment for rent and late charges accruing after date of filing and becoming due thereafter, prorated daily through date of judgment.

   ☐ Holding over. Defendants are unlawfully holding over *(check one)* ☐ after the rental term or renewal period has expi
   expiration or termination date, prorated daily at $_____ per day through date of judgment.

   ☐ Other sums due and unpaid. Monies other than rent or late charges are due and unpaid by defendant(s) under the rental agreement for: *(briefly state)* _____
   _____

   ☐ Conduct in violation of rental agreement. The rental agreement has been violated by the following conduct of defendant(s) or other persons for whom defendant(s) are responsible: *(state facts briefly)*_____
   _____
   _____
   _____

   ☐ Other grounds. Other grounds for eviction of defendant(s) are as follows: *(state facts briefly)*
   _____
   _____
   _____

   If the rental agreement is for the rental of land on which a manufactured home has been placed by the defendant(s), all other notices and time requirements in Section 94.203, Texas Property Code, have been complied with by plaintiff; and the name(s) and address(es) of all lienholders on the manufactured home are:
   _____

7. ☐ GROUNDS FOR EVICTION—FORECLOSURE. Plaintiff owns the premises as a result of purchase at a tax foreclos
   complied with. *(state facts briefly)* _____
   _____
   _____

8. ☐ GROUNDS FOR EVICTION—CONTRACT FOR DEED. Plaintiff is the seller in a contact for deed. Defendant(s) hav
   Texas Property Code. *(state facts briefly)* _____
   _____
   _____

9. ☐ GROUNDS FOR EVICTION—TRESPASS. Plaintiff is entitled to possession of the premises since the premises are either owned by plaintiff, leased by the owner to plaintiff, or under contract for deed to plaintiff. Defendant(s) entered on the premises without authority and are trespassers. Defendant(s) have refused to vacate after notice from plaintiff.

10. ☐ GROUNDS FOR EVICTION—OTHER. Paragraph 6 through 9 do not cover plaintiff's grounds for eviction. Plaintiff is entitled to possession of the premises because *(state facts briefly)* _____

_____

_____

_____

11. JUDGMENT REQUESTED. Plaintiff requests judgment for eviction and issuance of a writ of possession. Additionally, plaintiff requests the following: *(check as applicable)*
    - ☐ Rent and late charges. If eviction is based on a rental agreement, plaintiff requests judgment for *(check as applicable)* ☐ unpaid rent and ☐ unpaid late fees, through date of judgment. Judgment for other sums (except post-judgment interest and attorney's fees) may only be recovered in a separate suit.
    - ☐ Rental value. If eviction is not based on a rental agreement, Plaintiff requests judgment for fair rental value for the time period from the unlawful occupancy of the premises by defendant(s) through date of judgment.
    - ☐ Attorney's fees. If plaintiff engages an attorney, plaintiff requests judgment for attorney's fees because *(check only one)* ☐ a written agreement; binding on defendant(s) contains a provision entitling plaintiff to attorney's fees, or ☐ plaintiff gave the 10-day notice as provided in Section 24.006, Texas Property Code.
    - ☐ Post-judgment interest. If plaintiff is granted judgment for rent, late charges, or attorney's fees, plaintiff requests judgment for post-judgment interest as allowed by statute or the rental agreement.

The Court may send any notice to plaintiff via U.S. mail, email, telephone, or fax, as follows:

Plaintiff's Street address_____
agent
City, state, zip _____
_____
Phone number, if any _____
Fax number, if any _____
Email address, if any _____

PLAINTIFF: _____
(as stated at top of page 1)

By _____
Signature of plaintiff or plaintiff's authorized

Printed name of person signing_____
Title of person signing _____
The above signature is: (*check one below*)
☐ signature of plaintiff, or ☐ plaintiff's agent

STATE OF TEXAS
COUNTY OF _____

This complaint is sworn to and subscribed before me by the above signatory on personal knowledge or upon information and belief, on the _____ day of _____, _____.

_____
Justice Court Clerk or
Notary Public for the State of Texas,
Date Commission expires _____

Memo from LN to Judge Lawrence
June 10, 2002 4:00 pm

RIGHT TO APPEAL AND LITIGATE POSSESSION IN COUNTY COURT IF RENT IS NOT TENDERED BY DEFENDANT IN JP COURT IN RENT EVICTION CASE

The following language should be inserted as a new sentence at the end of the third paragraph of the Subcommittee's Proposed Rule 749b in lieu of the sentence that says "and the issue of possession may not be further litigated in the forcible detainer action in the county court."

> "If the justice court granted possession to the plaintiff and the defendant thereafter vacated the premises voluntarily or as a result of the writ of possession issued by the justice court, the defendant may not reacquire possession by appealing and prevailing in a trial de novo in county court. However, the defendant may still litigate the issue of possession in county court for the sole purpose of being able to remove the justice court judgment from the tenant's credit record and rental history.

Reasoning: This above language is important to uphold tender of rent into JP court in unpaid rent cases. This tender is essential to protect the landlord since supersedeas bonds are worthless in most cases and since an affidavit of indigency is useless to keep the landlord from losing 3 or 4 more weeks of rent during appeal. The Dillingham case says in effect that a party doesn't have to put up money to cover the judgment *as a condition for appealing.* Our TAA proposal only requires the defendant to put up one month's rent (or less) *to stop issuance of the writ* which the tenant is appealing by appeal bond or affidavit of indigency and supersedeas bond or affidavit of indigency. Under TAA's proposed Rule 750 (May 13th draft), no money to secure the judgment for possession or rent is required to perfect the tenant's appeal under any circumstances. But allowing continued litigation of the possession issue is important so that there will be something to appeal and so the tenant is not deprived of appeal by any theory of mootness when the JP issues the writ because of nonpayment of one month's rent in an eviction for unpaid rent. Also, remember the JP and county court decision would not be res judicata; and any tenant who was wrongfully evicted can still sue the landlord for money damages. The tenants (via Fred Fuchs) have agreed in principle to TAA's proposed Rule 750 (except for Subsection (C)(3) regarding prerequisites for tendering less than one month' rent if there is a third-party subsidy). The tenants have also agreed to the above quoted language for continued litigation in county court.

In the Bluewater case, the tenant was required to put up one month's rent even in a case *not involving* unpaid rent...and the rent tender requirement in that case was tantamount to having to put up money in order *to perfect the appeal.* Both of those problems are avoided by (1) limiting posting one month's rent (or less) to non-payment-of-rent evictions, (2) clarifying that non-tender of on-month's rent (or less) to the JP court is not a condition for perfecting an appeal, and (3) providing that the possession issue can still be litigated on appeal for purposes of removing the JP eviction judgment from the tenant's record.

BENCH TRIAL IN BOND FOR POSSESSION CASES INVOLVING SAFETY/SECURITY

To avoid a delay from a jury trial and to remove any imminent danger to persons or property, as stated earlier, TAA has no problem limiting bond for possession cases to those involving threats or damage to safety or security of others and on-going significant damage to property of others.

On the subject of bench-trials-only in these cases, it appears that Article 1 Section 15 of the Texas Constitution may require retention of the right to trial by jury in any kind of an eviction case. It says: "The right to trial by jury shall remain inviolate." Texas courts appear to have held that if a right to jury trial existed in a type of case at common law, such jury trial right cannot constitutionally be taken away by the legislature. A forcible detainer and forcible entry and detainer action did exist under common law at that time, and I could find no statute or case law that existed in 1876 that foreclosed the right to a jury trial in a forcible case. Nonetheless, if it can be confirmed that a jury trial was not available for eviction cases in 1876, TAA would still support the proposition of only bench trials in bond for possession cases.

SUPREME COURT ADVISORY COMMITTEE
700 Series Sub-committee

List of Votes Taken on the Eviction Rules
(Rules in **bold** reflect that the committee has approved the rule in its entirety)

Rule	Action Taken
4	May 18, 2002 no vote taken until we resolve the possession bond issue, which will affect which rules are exempted from the five day rule.
143a	May 18, 2002 voted to accept the proposed rule by a unanimous vote
190	May 18, 2002 no vote taken until we resolve the discovery issue, which will affect the last sentence of the rule.
216	May 18, 2002 voted to accept the proposed rule by a unanimous vote.
245	May 18, 2002 voted to accept the proposed rule by a unanimous vote.
738	June 15, 2001 voted to accept proposed rule
739	June 15, 2001 voted to accept proposed rule November 2, 2001 the committee consensus was that the appearance date is the trial date, and the language was approved, but the sub-committee has made some minor changes based on comments at the last meeting.
740	November 2, 2001 voted to allow jury trials in possession bond cases by a vote of 10 to 7. Also voted to not require the jury trials to be held within 6 days in possession bond cases by a vote of 16 to 1. May 17, 2002 no vote taken on the rule until after the ad hoc committee looks at this rule.
741	May 17, 2002 no vote taken until we resolve the discovery issue which will affect the changes proposed as a result of the January meeting.
742	June 15, 2001 voted to accept proposed rule
742a	June 15, 2001 voted to accept proposed rule
743	May 17, 2002 the proposed rule is acceptable to everyone but a vote is delayed until the discovery issue is resolved which is provided for in the last sentence or sentences of the rule.

744 May 17, 2002 no vote taken until the possession bond issue is resolved, which may affect the last sentence of the rule.

745 May 18, 2002 voted to accept the proposed rule after a few minor changes to the language by a unanimous vote.

746 May 18, 2002 voted to accept the proposed rule by a unanimous vote.

747 May 18, 2002 no vote taken because the issue of placing restrictions on the JP's as to how soon they must set the trial is not resolved.

747a May 18, 2002 voted to accept the proposed rule by a unanimous vote.

748 September 28, 2001 voted to give JP judgment presumptive validity after the perfection of the appeal, by an 8 to 7 vote. Also voted to require the party appealing to pay the county court filing fee into the registry of the JP court in order to perfect the appeal by a vote of 12 to 8.
May 18, 2002 no vote taken until the sub-committee reviews the language.

749 May 17, 2002 voted to accept the proposed rule by a vote of 11 to 0, except for (a) dealing with motions for new trial, which was referred to the ad hoc committee.

749a September 28, 2001 voted to allow defendants who are indigent to remain in possession pending the appeal without having to post a supersedeas bond by a vote of 13 to 3.
November 2, 2001 voted again to exempt indigents from posting a supersedeas bond in order to remain in possession during the pendency of the appeal.
May 17, 2002 voted to accept the proposed rule by a vote of 13 to 0.

749b November 2, 2001 voted to adopt the last two sentences of the proposed rule (appeal on issue of possession moot if tenant evicted because he failed to post a supersedeas or pay rent) by a vote of 8 to 6.
May 18, 2002 no vote taken until after the ad hoc committee meets to see if any changes are necessary.

749c May 17, 2002 voted to accept the proposed rule by a vote of 13 to 0, but the sub-committee has recommended some changes since the vote.

750 September 28, 2001 voted to require a tenant to post a supersedeas bond in order to remain in possession during the appeal by a vote of 11 to 9.
May 18, 2002 no vote was taken until the sub-committee performs a final review, after the ad hoc committee meets.

750a September 28, 2001 voted that rent be paid into the registry of the county court during the pendency of the appeal by a vote of 21 to 0.
May 18, 2002 no vote was taken because the ad hoc committee wanted to see if they could find a way rent could be paid into the registry of the JP court within five days after the appeal was perfected.

751 May 18, 2002 no vote taken in order to give sub-committee the opportunity to review language.

752 May 18, 2002 voted to accept the proposed rule by a unanimous vote.

753 May 18, 2002 no vote taken until warning notice language in the last sentence is approved at the next meeting.

753a May 18, 2002 voted to accept the proposed rule with some minor changes by a vote of 11 to 8.

754 May 18, 2002 voted to accept the proposed rule, except for (c), by a unanimous vote.

755 May 18, 2002 no vote taken until language about manufactured housing added to the rule.

TRCP 306a. PERIODS TO RUN FROM SIGNING OF JUDGMENT

1. Beginning of Periods. No change

2. Date to Be Shown. No change.

3. Notice of Judgment. No change.

4. No Notice of Judgment. No change.

5. Motion, Notice and Hearing. In order to establish the application of paragraph (4) of this rule~~, the party adversely affected is required to prove in the trial court, on sworn motion and notice, the date on which the party or his attorney first either received a notice of the judgment or acquired actual knowledge of the signing and that this date was more than twenty days after the judgment was signed.~~:

a. **Requisites of Motion, Amendment.** The party adversely affected must file a verified motion in the trial court setting forth:

(1) The date judgment or appealable order was signed;

(2) That neither the party nor its attorney received the notice required by paragraph (3) of this rule or acquired actual knowledge of the judgment or order within twenty days after the date the judgment or appealable order was signed; and

(3) The earliest date upon which either the party or its attorney first

(a) received the notice required by paragraph (3) of this rule; or

(b) acquired actual knowledge that the judgment or appealable order had been signed.

If an unverified motion is filed and the respondent does not object to the lack of a verification at any time before the hearing on the motion commences, the absence of a verification is waived. If an objection is timely made, the court must afford the movant a reasonable opportunity to cure the defect. In all other respects, a motion that is filed pursuant to but not in compliance with this paragraph may be amended with permission of the court at any time before an order determining the motion is signed.

b. **Time to File Motion.** A motion seeking to establish the application of paragraph (4) may be filed at any time.

c. **Hearing.** [See attachment]

d. **Order.** After hearing the motion, the court must promptly sign a written order expressly finding:

(1) whether the movant or its attorney received the notice required by paragraph (3) of this rule or acquired actual knowledge of the signing of the judgment or appealable order within twenty days after the date the judgment or appealable order was signed; and

(2) the earliest date upon which the party or its attorney first either received the notice required by paragraph (3) or acquired actual knowledge that the judgment or appealable order was signed.

Option 1 - Mandatory Hearing:

Within ten days of the filing of its motion, the movant must request a hearing on its motion, and the court must hear the motion as soon as practicable. The court shall determine the motion on the basis of the motion; the response, if any; any stipulations made by and between the parties; such affidavits and attachments as may be filed by the parties; the results of discovery processes; and any oral testimony. The affidavits, if any, shall be served at least seven days before the hearing, shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.

Option 2 - Hearing at the Option of the Trial Court

If the trial court determines that an oral hearing would be useful, it must schedule a hearing as soon as practicable. The court shall determine the motion on the basis of the motion; the response, if any; any stipulations made by and between the parties; such affidavits and attachments as may be filed by the parties; the results of discovery processes; and the oral testimony, if any. The affidavits, if any, shall be served at least seven days before the hearing, shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.

TRAP 4.2

(d) **Continuing Trial Court Jurisdiction.** Even after the trial court's plenary power expires, the trial court has jurisdiction to hear and determine motions filed pursuant to Texas Rule of Civil Procedure 306.a.5.

TO: **SCAC R. 300-330 Sub-committee**

FROM: Skip

RE: Justice Hecht's 5-26-01 e-mail to Chip Babcock concerning whether the holding of *Porter v. Vick*, 888 S.W.2d 789 (Tex. 1994), should be changed by rule in light of its application in *Ferguson v. Globe Texas, Co.*, 35 S.W.3d 688 (Tex.App. – Amarillo, 2000 pet. denied.).

PROBLEM

Some courts have limited a trial court's power to reinstate a judgment previously set aside by granting a motion for new trial, to 75 days after the judgment was originally signed. As a result, a court must re-try a case if it waits too long to re-enter judgment.

POSSIBLE SOLUTION

Amend Rule 329 b (h) to read:

"If a motion for new trial is granted, the judgment that has been set aside may be re-entered, modified, corrected or reformed, or a new judgment may be signed at any time prior to [the commencement of/close of evidence] in the new trial. The time for appeal shall run from the time the order granting judgment is re-entered, modified, corrected or reformed, or the new judgment is signed."

BACKGROUND

Ferguson v. Globe Texas, Co., 35 S.W.3d 688, 691-92 (Tex.App. – Amarillo, 2000, pet. denied) held that a "trial court may only vacate an order granting a new trial during the period when it continues to have plenary power" and that "the trial court's plenary power only continues for 75 days after the date judgment is signed."

In *Ferguson* the Amarillo court held that the trial court lacked plenary power to grant a motion to reinstate a judgment originally signed 100 days earlier, which had been set aside by a motion for new trial signed on day 71. It held that the plain meaning of Rule 329(e) limits trial courts' plenary power to the "grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after such timely filed motions are overruled." Thus, it reasoned, because no motion for new trial was overruled, the court's plenary power to reinstate judgment ended when the motion for new trial would have been overruled by operation of law. *Id.* at 690.

The court stated that Rule 329(e) was clear and unambiguous in specifying the types of powers it vested in trial courts and those powers did not expressly include the power to ungrant a new trial. It held the rule should not be construed to mean something other than its plain words "unless application of the literal language would produce an absurd result." *Id.* at 691.

The court did not consider whether it was an absurd result to require a district court to retry a case that could have been, and should have been, disposed of by entry of judgment mistakenly set aside by an order granting a new trial. The court did not consider whether the apparent basis for Rule 329(e)'s time limits (the need for a judgment to become final within a finite time after signing) did not apply when the judgment, and the finite plenary period its signing invoked, had been set aside by the granting of a new trial. The problem appears to be supreme court precedent.

The court of appeals relied on the supreme court's opinion in *Porter v. Vick*, 888 S.W.2d 789 (Tex. 1994), for its holding that a trial court may only vacate an order granting a new trial during the period when it continues to have plenary power. *Porter v. Vick* was a per curiam mandamus issued by the supreme court to set aside an order vacating an order of new trial. The trial had been non-jury. A new trial had been mistakenly granted by default by a visiting judge when opposing counsel's message to the trial judge that he had been delayed in another court was not relayed to the visiting judge at the new trial hearing. The default order granting new trial was set aside by the original judge who had presided over the trial and entered the judgment. Because the order vacating the new trial order was signed "long past the time for plenary power over the judgment, as measured from the date the judgment was signed," the supreme court held it was void. *Id.*, citing *Fulton v. Finch*, 346 S.W.2d 823, 826 (Tex. 1961).

However, as noted by Justice Hecht's e-mail, the holding in *Fulton v. Finch* was based on a prior version of Rule 329(b) that required that all motions for new trial "must be determined within not exceeding forty-five (45) days after the. . . .motion is filed. . . ." The language was dropped when the rule was rewritten in 1981. In *Porter v. Vick*, the per curiam court apparently relied on the holding of *Fulton v. Finch* without considering the reason for that holding.

The problem was fully briefed for the supreme court on Petition for Review in *Ferguson v. Globe Texas Co.* The Petition was denied after the court requested briefing. It may prefer to address the problem created by *Porter v. Vick* by clarifying the rule.

January 22, 2002

MEMO

To: SCAC Members

From: O. C. Hamilton, Jr.

Gentlemen:

In addition to what Skip Watson has included in his memo, I want to comment and mention a couple of cases.

I strongly believe that once the trial Court has granted a Motion for New Trial, the Court retains jurisdiction of the case for all purposes and should not be precluded from ungranting the Motion for New Trial at any time if the Court later decides that is the appropriate action to take.

The 14th Court of Appeals in Houston has essentially said the same thing in two cases, *Gates vs Dow Chemical Company*, 777 S.W.2d 120 (Tex.App–Houston [14th Dist.] 1989), judgment vacated by agreement, 783 S.W.2d 589 (Tex. 1989), and *Biaza vs. Simon*, 879 S.W.2d 349 (Tex. App. – Houston [14th Dist.] 1994 Pet Denied). In *Gates,* the 75 day period of Rule 329b expired on Saturday, September 26th and on Monday, September 28th, the Judge granted a new trial (which was held to be proper). However, on October 22nd, the Judge vacated the Order Granting a New Trial. That Court approved the "ungranting" of a new trial within the 105 day period following the Judgment, but stated,

> ... Once a new trial is granted, the trial court has exclusive jurisdiction in the case. (at page 123)
>
> ...
>
> ...There is no provision in the rule giving the trial court the power to vacate the granting of a new trial. The reason lies in common sense. Once a new trial is granted, the trial court is the only court having authority to rule on the case. The trial court has the sole discretion in ruling on the case. This discretion includes the power to enter orders which correct earlier errors. This is in contrast to where a motion for new trial is overruled. The trial court and the appellant court then have a quasi-concurrent jurisdiction in the case. The only step necessary for a litigant to invoke appellate court jurisdiction is to file an appeal bond. Nowhere does Rule 329b restrict the trial court from overturning an order for a new trial. Holding that the trial court lacked power to vacate its previous order would impair its authority to enter orders necessary for the efficient administration of its docket. (at page 124)

In *Biaza vs. Simon*, the Motion for New Trial was filed on January 14th. On March 22nd the trial court granted a Motion for New Trial, and on August 15th (eight months after the

judgment) set aside the order granting the Motion for New Trial and reinstated the order that had been signed December 14th of the preceding year. In that case, the 14th Court affirmed the trial court, saying,

> Appellants' argument presents the question of when a trial court may rescind its order granting a new trial and reinstate a previously vacated judgement. In *Fulton v. Finch*, 162 Tex. 351, 346 S.W.2d 823, 827 (1961), the court reasoned that it could be done at any time when the trial court had the power to deny the motion for a new trial in the first place. See also *Homart Dev. Co. v. Blanton*, 755 S.W.2d 158, 159 (Tex.App.– Houston [1st Dist.] 1988, orig. proceeding) (holding that any reconsideration of the order granting a new trial must be accomplished with 75-day period); TEX.R.CIV.P. 329b(c). Under the current Rules of Civil Procedure, that would mean that the trial court would have seventy-five days after judgment to "ungrant" a motion for new trial. See TEX.R.CIV.P. 329b(c).
>
> Two recent cases have added to the seventy-five day period the thirty days of plenary power that the court would have retained had the motion been denied on the seventy-fifth day, effectively giving a trial court 105 days to "ungrant" a motion for new trial. Gates v. Dow Chemical Co., 777 S.W.2d 120, 123 (Tex.Appl–Houston [14th Dist.] 1989), *judgement vacated by agr.*, 783 S.W.2d 589 (Tex. 1989); *Wood v. Component Constr. Corp.*, 722 S.W.2d 439, 442 (Tex.App.–Fort Worth 1986, no writ); *see* TEX.R.Civ.P. 329b(e). Thus, some courts hold that the trial court has seventy-five days to grant an order setting aside a previous order granting a motion for new trial; others hold that the court has 105 days.
>
> In the most recent Texas Supreme Court opinion on this issue, the court reaffirmed the trial court's power to "ungrant' a motion for new trial within the seventy-five days and held that the court of appeals erred in holding that a trial court does not have the authority to vacate an order for new trial during the seventy-five day period. *Fruehauf Corp. v. Carrillo*, 848, S.W.2d 83, 84 (Tex.1993) (citing Fulton, 346 S.W.2d at 827). However, in its reasoning, the court stated that a trial court has plenary power over its judgment until it becomes final and retains continuing control over interlocutory orders and has the power to set aside those orders any time before a final judgment is entered. *Carrillo*, 848 S.W2d at 84. Because an order granting a new trial is an unappealable, interlocutory order, *id.*, the court thus retains continuing control over orders granting new trials until a final judgment is entered. *See id.* Based on this reasoning, it appears that a new trial may be "ungranted" at any time before a new final judgment. *See id.* This appears to be the most logical result based on the well-established principle that orders granting new trials are interlocutory and it harmonizes these orders with the rules pertaining to other interlocutory orders. But see *Hunter v. O'Neill*, 854 S.W.2d 704, 705-06 (Tex.App.–Dallas 1993, orig. proceeding) (post-*Carrillo* case adhering to the 75-day rule).
>
> Several cases cited by appellant hold that a once a trial court grants a motion for new trial, the court is without authority to set aside that order and reinstate the

> vacated judgment without another trial. Most of these cases pre-date all of the cases cited above, and based on the holdings in *Fulton* and *Carrillo* have been implicitly overruled. We hold, based on the court's reasoning in *Carrillo,* that a trial court has authority to rescind its order granting a motion for new trial and reinstate the vacated judgment at any time before a new final judgement is signed. (at pages 356-357)

It is my opinion that the Houston court has correctly stated what the law ought to be and to the extent that it may be different as a result of *Porter vs. Vick*, I would urge the Advisory Committee to ask the court to overrule *Porter vs. Vick* by a change in Rule 329b. The change I would suggest would be an addition to Rule 329b of sub-paragraph (i), which would read:

> "Once a new trial is granted, the trial court has exclusive jurisdiction in the case until a final judgment is entered and the court's plenary power, as set forth in this rule, has expired."

REPORT ON WHETHER THE HOLDING OF *PORTER v. VICK* SHOULD BE CHANGED BY AMENDING RULE 329B

TO: Supreme Court Advisory Committee Members

FROM: Skip Watson

DATE: June 12, 2002

Assignment:

"The Court requests that the Advisory Committee consider whether the holding of *Porter* [*v. Vick*, 888 SW2d 789 (Tex. 1994)] should be changed by rule."

E-mail from Justice Hecht to Chip Babcock dated 5-26-01.

Context of Request:

The full text of Justice Hecht's message presents the background leading up to the Court's request:

> In Fulton v. Finch, 346 S.W.2d 823 (Tex. 1961), we held that a trial court lacked power to un-grant a motion for new trial more than 45 days after the motion was filed, based on TRCP 329b, s. 3, which then read: "All motions and amended motions for new trial must be determined within not exceeding forty-five (45) days after the original or amended motion is filed. . . ." The rule was completely rewritten in 1981 and no longer contains such language. However, in Porter v. Vick, 888 S.W.2d 789 (Tex. 1994) (per curiam), we cited Fulton as authority for the proposition that "any order vacating an order granting a new trial . . . signed outside the court's period of plenary power over the original judgment is void", without reference to the rule. Now the rules argument is that a trial court cannot ungrant a motion for new trial after its plenary jurisdiction would have expired, not because the rule prohibits it, but because the rule does not permit it -- is silent on the subject. See, e.g., Ferguson v. Globe-Texas Co., 35 S.W.3d 688 (Tex. App. -- Amarillo 2000, pet. denied). The court in Ferguson observed that a federal trial court may ungrant a motion for new trial at any time, subject to review for abuse of discretion. The Court requests that the Advisory Committee consider whether the holding of Porter should be changed by rule. As always, the Court greatly appreciates your service and that of the other members of the Committee.

Not addressed by Justice Hecht's message was the split among the courts of appeals created when two cases out of the Fourteenth Court that declined to apply *Fulton v. Finch* to orders vacating the granting of new trials, when the vacating orders were signed more than seventy-five days after the original judgment. The holdings of *Gates v. Dow Chemical Co.*, 777 S.W.2d 120, 123 (Tex. App.—Houston [14th Dist.] 1989), *judgment vacated by agr.*, 783 S.W.2d 589 (Tex. 1989), and *Biaza v. Simon*, 879 S.W.2d 349, 357 (Tex. App. –Houston [14th Dist.] 1994, writ dism'd) were considered and rejected by the Amarillo Court's opinion referenced in Justice Hecht's message, *Ferguson v. Globe Texas, Co.*, 35 S.W.3d 688, 691-92 (Tex. App. –Amarillo 2000, pet. denied). *Biaza*, in particular, had relied on an interim Supreme Court opinion, *Fruehauf Corp. v. Carrillo*, 848 S.W.2d 83, (Tex. 1993), which held that a trial court's plenary power over its judgment continues until it becomes final. *Fruehauf*, however, only involved reversal for failure to permit a trial court to reconsider its order granting new trial when the reconsideration occurred within the seventy-five day period, as was noted by the Court in *Porter v. Vick. Id.*

Recent Developments:

Since this issue was last considered by the Committee, the Fourteenth Court broke with its prior holdings in *Biaza* and *Gates* and ordered a trial court to vacate an amended final judgment entered after Hon. Harvey Brown concluded that a new trial ordered on the seventy-fifth day (apparently on sua sponte grounds) had been improvidently granted. *In re Luster*, _____ S.W.3d _____, 2002 WL 389669 (Tex. App. –Houston [14th Dist.] March 11, 2002, orig. pro./pet. pending), the Fourteenth Court considered itself bound by the Supreme Court's last pronouncement on the issue, *Porter v. Vick*, notwithstanding its prior holdings in *Biaza* and *Gates*. It also noted this Committee's efforts to address the problem and the pressing need for a resolution. A petition for mandamus is presently pending in the Supreme Court under number 02-0310, *In re Union Pacific R.R. Co.*

Options

A. Rewrite the Rule to set forth limits on plenary power after judgment has been set aside.

1. Amend Rule 329b to codify *Porter v. Vick* and *Ferguson v. Globe Texas* by re-imposing limits on trial courts' plenary power to reinstate or enter new judgments or to set aside orders for new trials signed more than seventy-five (75) days after the judgment that was set aside was originally signed.

Example: Amend Rule 329(c) to read:

(c) In the event an original or amended motion for new trial, or a motion to modify, correct, or reform a judgment, or a motion to enter judgment after a new trial has been granted, or to set aside the granting of a new trial, is not determined by written order signed within seventy-five (75) days after the judgment was signed, it shall be considered overruled by operation of law on expiration of that period.

2. **Amend Rule 329b to codify Porter v. Vick, but not Ferguson v. Globe Texas, by re-imposing limits on trial courts' plenary power to reinstate or enter new judgments or to set aside orders for new trials signed more than thirty (30) days after a motion for new trial was granted.**

Example: Amend Rule 329b(e) to read:

> (c) If a motion for new trial is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial, set aside an order granting a new trial, or to vacate, modify, correct, or reform the judgment, or enter a judgment, or re-enter a judgment set aside by granting a new trial or otherwise, until thirty (30) days after all such timely filed motions are overruled, either by a written and signed order or by operation of law, which ever occurs first.

B. Amend Rule 329b to make it clear that a trial court's plenary power over a case is not restricted to proceeding with a new trial, or otherwise, once the judgment that started the time limits on plenary power has been set aside by granting a new trial or other action by the court.

1. **Add language to the end of Rule 329b(h) clarifying that the trial court has the power to enter or re-enter a judgment after a motion for new trial has been granted.**

Example: (Watson)

> (h) If a judgment is modified, corrected or reformed in any respect, the time for appeal shall run from the time the modified, corrected, or reformed judgment is signed, but if a correction is made pursuant to Rule 316 after expiration of the period of plenary power provided by this rule, no complaint shall be heard on appeal that could have been presented in an appeal from the original judgment. If a motion for new trial is granted, judgment may be entered, or a judgment that has been set aside may be re-entered, modified, corrected or reformed at any time prior to announcements of "ready" in the new trial. The time for appeal shall run from the time the order granting judgment is re-entered, modified, corrected or reformed, or the new judgment is signed.

2. **Add a new subparagraph (i) at the end of Rule 329b to clarify that the trial courts' plenary power is unaffected in any way once a judgment has been set aside by granting a motion for new trial.**

Example: (Dorsaneo/Hamilton)

> (i) Once a new trial is granted, (or a judgment is otherwise set aside) the trial court has exclusive jurisdiction in the case until a final judgment is entered and the court's plenary power, as set forth in this rule, has expired. (Parenthetical by Watson.)

C. Suggest the Supreme Court change the problem created by Porter v. Vick by opinion, rather than by rule.

1. The opportunity to correct *Porter v. Vick* is presently pending before the Court.

2. *Stare Decisis* could be enhanced, rather than harmed, by courts admitting those rare occasions when mistakes are made.

Analysis:

When this issue was first considered, the Committee was at or near complete agreement that *Porter v. Vick* should be changed by amending Rule 329b to make it clear no restraints were placed on a trial court's plenary power once a judgment has been timely set aside. Setting aside a judgment necessarily stops the clock from counting down the time limits of power before it is appealable. The only remaining issue was whether, or when, to decide that too much had been invested in re-trying the case to stop and enter judgment based on the prior trial.

At the next meeting, a majority felt the same time limits should be placed on the trial courts' power to enter judgment on the prior trial, as exist for granting motions for new trial. Two reasons predominated:

Concerns that, given the opportunity, some lawyers will bombard trial courts with repetitive motions to set aside orders of new trial or to re-enter judgments may be as well founded in this instance as with any other interlocutory order. Trial courts that cannot control lawyers who file multiple motions for reconsideration of any motion may wish to impose a time limit by scheduling order entered promptly after a new trial has been granted. Failing that, the Committee may desire to assist judges by amending the rule to require that motions for entry or re-entry of judgment following the granting of a new trial, or motions to reconsider orders of new trial, be filed within thirty days of the signing of an order granting a new trial.

It also appeared that most favored placing constraints on this aspect of trial courts' plenary power out of concern for how some courts might exercise that power. At its core, restraining how a trial court handles a case on its docket requires careful, deliberate consideration, regardless of the outcome.

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January 11, 2002

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

Re: Supreme Court Advisory Committee - Ex Parte Communications and Physician-Patient Confidentiality

Dear Justice Hecht:

The recent case of Durst v. Hill County Memorial Hospital, San Antonio Court of Appeals No. 04-00-00540-CV, decided December 19, 2001, succinctly states what appears to be a serious problem with respect to confidential communications protected by the physician-patient relationship.

There is apparently no explicit procedure provided for parties to litigation to learn discoverable information from a party's treating physician. Accordingly, the San Antonio Court of Appeals has concluded that there is no bar to ex parte communications with a party's physician by attorneys for the opposing side.

Not all information in the hands of a treating physician is necessarily discoverable under exceptions to a physician-patient confidentiality. It would appear that the patient should be the first to determine if information in the hands of the patient's physician is discoverable, and, if the opposing party should disagree with the decision of the patient, then it should be the Court, not opposing party or opposing counsel, who makes the decision as to whether or not the information is discoverable.

At any rate, it would appear that discovery of medical evidence from a treating physician should be no different than discovery of any information from an expert witness, that is, with the permission of the opposing party or with notice to the opposing party and an opportunity for the opposing party to protect whatever privileges may exist.

It is requested that this matter be placed on the agenda of the Committee at the earliest possible time.

Thank you for your consideration of this matter.

Yours very truly,

William R. Edwards

WRE/bam

[redacted]

[redacted] *Plaintiffs,* v. [redacted] HOSPITAL, ET AL., *Defendants.*	IN THE COUNTY COURT OF DALLAS COUNTY [redacted]

ORDER BARRING *EX PARTE* COMMUNICATIONS WITH TREATING PHYSICIANS

On August 31, 2001, Plaintiffs filed a Motion for Protective Order Barring Ex-Parte Interviews Between Defense Counsel & Mrs. [redacted] Treating Physicians. Defendants requested an opportunity to brief the Court on that issue, and a hearing was therefore set on Plaintiffs' motion for September 5, 2001. At the hearing, all interested parties appeared and a record was made of the proceedings. Following the hearing, Plaintiffs presented additional authorities regarding the propriety of *ex parte* interviews between defense counsel and plaintiff's treating physicians.

As many of the authorities presented state, this issue is not settled in Texas. In this Court's opinion, however, the better-reasoned decisions are those that prohibit *ex parte* communications. In addition to all of the reasons set forth in the various cases, the mere fact that *ex parte* communications with Plaintiff's treating physicians are an issue in this case at all suggests the real-world significance of allowing or disallowing such communications. Although counsel for Defendants are to a person

highly competent and professional, whatever privileges[1] may remain between Mrs. [redacted] and her treating physicians, regardless how brief the treatment, are hers to assert, not Defendants.[2]

IT IS THEREFORE ORDERED that Defendants immediately cease communications with Mrs. [redacted] treating physicians or staff[3] regarding Mrs. [redacted] treatment at issue in this cause except as expressly authorized by Mrs. [redacted] the Texas Rules of Civil Procedure, or further order of this Court.

IT IS SO ORDERED this 5th day of September, 2001.

[redacted]

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[1] As the Court in *Perkins* wrote, "the problem is not *whether* the physicians' opinions are discoverable, the issue is the *manner* in which those opinions can be obtained." *Perkins v. United States*, 877 F. Supp. 33, 332 (E.D. Tex. 1995).

[2] Defense counsel, of course, have an ethical duty to zealously advocate Defendants' interests, and owe no such duty to Plaintiffs.

[3] That Defendants' employees might have privileged information of Mrs. [redacted] does not make that information any less privileged.

APPENDIX C-REVISED DRAFT APPROVED BY JUDICIAL COUNCIL

RULES OF JUDICIAL ADMINISTRATION

RULE 13. VISITING JUDGE PEER REVIEW.

13.1 Definitions. In this rule:

(a) *Peer Review Committee* means a committee established under ~~Section _____ of this rule~~Rule 13.4.

(b) *Presiding Judge* means the presiding judge of an administrative judicial region.

(c) *Visiting Judge* means a retired or former judge who is eligible for assignment in an administrative judicial region[1] under Section 74.055, Government Code.

13.2 Biennial Peer Review Required.[2] The performance of each visiting judge must be reviewed biennially by a peer review committee in each administrative judicial region in which the visiting judge is subject to assignment. A visiting judge must be reviewed as follows[3]:

(a) a judge whose last year of active service ended in an even-numbered year must be reviewed during each even-numbered calendar[4] year afterward in which the judge is subject to assignment in the administrative judicial region; and

(b) a judge whose last year of active service ended in an odd-numbered year must be reviewed during each odd-numbered calendar year afterward in which the judge is

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[1]Each administrative judicial region maintains its own list of visiting judges eligible to sit. *See* Tex. Govt. Code § 74.055.

[2]I reorganized the rule to emphasize the requirement of peer review rather than the composition and duties of the peer review committees.

[3]The substance of this sentence and the following has been moved from subpart (a) of the "Duties of Peer Review Committee" section in the original draft.

[4]My intent here is to clarify that the period in which the judge is to be reviewed runs between January and December of the even- or odd- numbered year, not from the date that the judge ceased active service. *See also* note 5, *infra.*

subject to assignment in the administrative judicial region.[5]

13.3 Procedures for Biennial Peer Review.

(a) ***In general.*** The peer review committee must evaluate the visiting judge's performance and make a recommendation — either "favorable" or "unfavorable" as concerning each of the judge's areas of specialization under Section 74.055(b) of the Government Code[6] — to the presiding judge.

(b) ***Considerations.***[7] The peer review committee must consider the following factors in evaluating the visiting judge's performance:

(1) the visiting judge's temperament and demeanor;

(2) the visiting judge's mental and perceptual capacity;

(3) the visiting judge's knowledge of law and procedure; ~~and~~

(4) the visiting judge's competence[8] in each of the judge's areas of specialization under Section 74.055(b) of the Government Code[9]; and

(5) any other factor that may be relevant in evaluating judicial performance.

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[5]Should these time periods be expressly linked to the period for which a visiting judge is certified under Section 74.055 of the Government Code? To be subject to assignment, a visiting judge must file an initial certification of willingness not to appear and plead effective for a two-year period beginning January 1 of the year in which the certificate is filed or the year in which the judge leaves full-time judicial service. Tex. Govt. Code § 74.0551. The certification is renewed automatically for every successive two-year period, beginning on January 1, unless the judge files a written revocation at least 30 days before the revocation is to take effect. *Id.*, § 74.0551(c).

[6]The Legislature requires that presiding judges divide the list of visiting judges in their regions according to areas of specialization, criminal, civil, or domestic relations, and assign judges only to cases within their areas of specialization. *See* Tex. Govt. Code § 74.055(b). Consistent with this legislative mandate, visiting judges should be reviewed according to each of their areas of specialization.

[7]Subparts (b)-(f) are taken from the "Duties of Peer Review" section in the original draft.

[8]Or "performance"?

[9]*See* note 6.

(c) ***Written comments or other information.*** In considering the factors in Subsection (b), the peer review committee must consider information submitted by:

(1) the presiding judge;

(2) any sitting judge in whose court the visiting judge's services were performed;

(3) any member of the bar who has participated in a case before the visiting judge;

(4) court staff and personnel who have worked with the visiting judge during the visiting judge's assignment; and

(5) any public citizen who resides in the region where the visiting judge is assigned or has formerly presided.[10]

(d) ***Response by Visiting Judge.***

(1) *Right to response.* A visiting judge need not submit materials to a peer review committee in support of a favorable recommendation.[11] However, a ~~Before the~~ peer review committee may not makes an unfavorable recommendation concerning a visiting judge unless it first gives ~~to the presiding judge, the committee must notify the visiting judge in writing and give~~ the visiting judge ~~an~~ reasonable opportunity to respond to it's a proposed unfavorable recommendation. ~~The committee shall simultaneously forward a copy of the written notice to the presiding judge. The peer review committee may not reveal the name of any person who submits comments or other evaluative information under this rule.~~

(2) *Procedure for requesting response.*

(A) Content of request. To request a response from a visiting judge as required by subparagraph (1), a peer review committee must serve written notice on the

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[10]Should these sources be limited solely to the region for which the judge is being peer reviewed? The original draft seemed to contemplate that visiting judges will be reviewed by different regions' peer review committees based on the same information. This suggests that a visiting judge could be "blackballed" statewide by a complaint within a single region. But perhaps this should be the case if the complaint concerns sufficiently egregious misconduct or incompetence.

[11]My draft makes such filings optional. Should the rule go farther to prohibit such filings?

visiting judge stating:

(1) the peer review committee is proposing to make an unfavorable recommendation or recommendations concerning the visiting judge;

(2) the area or areas of specialization that each proposed unfavorable recommendation concerns;

(3) the visiting judge has a right to respond to each proposed unfavorable recommendation; and

(4) the deadline and location for filing the response.

(B) Service on presiding judge. The peer review committee must also serve the presiding judge with a copy of the notice required by (A).

(e) ~~*Committee*~~ ***Recommendation.***

(1) *Time.* The peer review committee must make a recommendation concerning each of the visiting judge's areas of specialization under Section 74.055(b) of the Government Code n~~N~~ot later than the 30th day after the peer review committee completes its review.~~;~~[12]

(2) *Form.* T~~t~~he committee's recommendation must be in writing and must ~~make a written recommendation to the presiding judge stating~~ state only whether ~~the~~ recommendation concerning each area of specialization is "favorable" or "unfavorable." A "favorable" recommendation means that a ~~the~~ visiting judge should ~~or should not~~ continue to be assigned by the presiding judge to sit in cases within that area of specialization. An "unfavorable" recommendation means that a visiting judge should not continue to be assigned by the presiding judge to sit in cases within that area of specialization.

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[12]When does a peer review committee "complete its review"? What does this term mean?

(3) *Service.* The committee must serve the recommendation on the presiding judge.[13] ~~The committee must provide additional information to the presiding judge upon request of the presiding judge. Upon receipt of the recommendation, the presiding judge must forward copies of the recommendation to the administrative director of the Office of Court Administration and to the visiting judge. The administrative director shall retain a copy of a recommendation that is issued to the presiding judge for public inspection.~~

(f) ***Reconsideration and Amendment of Recommendation*** ~~**by Committee**~~**.**

(1) *Request for Reconsideration.* A visiting judge who receives an unfavorable recommendation ~~that the visiting judge not continue to be assigned~~ may submit a written request for reconsideration ~~by~~ to the peer review committee not earlier[14] than the 180th day after the date that the committee issued its recommendation.

(2) *Amendment of Recommendation.* ~~If at any time the~~ The peer review committee may, either in response to a request for reconsideration or on its own initiative at any time, serve the serve the presiding judge with an amended recommendation.[15] ~~determines that a recommendation submitted under this rule should be amended, the committee shall send the amended recommendation to the presiding judge. The presiding judge shall promptly forward a copy of the committee's amended recommendation to the visiting judge and to the administrative director of the Office of Court Administration. The administrative director shall retain a copy of the amended recommendation for public inspection.~~

(g) ***Powers and Duties of Presiding Judge.***[16]

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[13]The following text has been moved to the sections concerning the powers and duties of the presiding judge and the administrative director of OCA.

[14]Should this be not *later* than the 180th day?

[15]The following text has been moved to the sections concerning duties of the presiding judge and administrative director of OCA.

[16]The draft rule said nothing concerning whether a presiding judge is obligated to follow or even consider an unfavorable recommendation. Shouldn't the presiding judge be required at least to consider the recommendation, if not to defer to it altogether? Why would we require the peer review committee to review a visiting judge at great time and expense if the presiding judge is free to disregard the recommendation?

(1) *Obtaining additional information.* The presiding judge may, upon request, obtain additional information concerning a recommendation or a visiting judge from the peer review committee. ~~The committee must provide additional information to the presiding judge upon request of the presiding judge~~.

(2) *Dissemination of recommendation.* Upon ~~receipt of~~ receiving ~~the~~ a recommendation or recommendations or any amendments thereto, the presiding judge must forward copies ~~of the recommendation~~ to the administrative director of the Office of Court Administration and to the visiting judge.

(h) ***Duties of administrative director.*** The administrative director of the Office of Court Administration must ~~shall~~ retain a copy of ~~a~~ each recommendation or amendment ~~that is issued to the presiding judge~~ for public inspection.[17]

(i) ***Additional rules and procedures.*** The presiding judge may promulgate additional rules and procedures that are reasonably necessary to conduct biennial peer review of visiting judges under this rule, including procedures for obtaining comments concerning the performance of a visiting judge. The presiding judge may delegate this rulemaking power to the peer review committee.[18]

13.4 Peer Review Committee; Administration.

(a) *Composition~~Membership~~.* The presiding judge must appoint at least five persons to serve as members of a peer review committee. The peer review committee's membership must adhere to a ratio of 2/5 active judges, 2/5 citizen members who are members of the State Bar of Texas, and 1/5 citizen members who are not licensed to practice law.

I would recommend prohibiting a presiding judge from assigning a visiting judge to a case in an area of specialization in which the judge has received an unfavorable recommendation unless and until the judge sets forth good cause for the assignment in an order or other writing. I would also extend this prohibition or requirement to presiding judges' assignment of visiting judges to cases outside the visiting judges' areas of specialization. *See* Tex. Govt. Code § 74.055(b).

Alternatively, or in addition, parties might be permitted to strike without limit any visiting judge — whether a former judge or retired judge — who is appointed over an unfavorable recommendation.

[17]For how long?

[18]Should these rules be subject to this Court's approval?

(b) *Terms.* A member of the peer review committee serves a term of two years. The presiding judge may re-appoint a person to the committee whose term has expired.

(c) *Expenses.* A member of the peer review committee may not receive compensation for service on the committee. The presiding judge may use regional funds[19] to reimburse a member for actual and necessary expenses incurred in the performance of committee duties under this rule.

~~**(d)** *Rules and Procedures.*[20] The presiding judge may promulgate rules and procedures that are reasonably necessary to comply with this rule including procedures for obtaining comments about the performance of a visiting judge. The presiding judge may delegate to the peer review committee the authority to adopt procedures that are reasonably necessary for the performance of the committee's duties under this rule.~~

~~**Duties of Peer Review Committee.**~~

~~**(a)** *Biennial Review.* The peer review committee must conduct a biennial review of the performance of each visiting judge who is eligible for assignment in the region. For purposes of this rule, a visiting judge is subject to review as follows:~~

~~(1) for a judge whose last year of active service ended in an even-numbered year, the next even-numbered year and every two years afterward; or~~

~~(2) for a judge whose last year of active service ended in an odd-numbered year, the next odd-numbered year and every two years afterward.~~

~~**(b)** *Considerations.* The peer review committee must consider the following factors in evaluating the visiting judge's performance:~~

~~(1) the visiting judge's temperament and demeanor;~~

~~(2) the visiting judge's mental and perceptual capacity;~~

~~(3) the visiting judge's knowledge of law and procedure; and~~

~~(4) any other factor that may be relevant in evaluating judicial performance.~~

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[19]Is the meaning of this term sufficiently clear?

[20]The substance of this paragraph has been moved to the section concerning the presiding judge's powers and duties.

~~(c) *Written comments or other information.* In considering the factors in Subsection (b), the peer review committee must consider information submitted by:~~

~~(1) the presiding judge;~~

~~(2) any sitting judge in whose court the visiting judge's services were performed;~~

~~(3) any member of the bar who has participated in a case before the visiting judge;~~

~~(4) court staff and personnel who have worked with the visiting judge during the visiting judge's assignment; and~~

~~(5) any public citizen who resides in the region where the visiting judge is assigned or has formerly presided.~~

~~(d) *Response by Visiting Judge.* Before the peer review committee makes an unfavorable recommendation to the presiding judge, the committee must notify the visiting judge in writing and give the visiting judge an opportunity to respond to its proposed recommendation. The committee shall simultaneously forward a copy of the written notice to the presiding judge. The peer review committee may not reveal the name of any person who submits comments or other evaluative information under this rule.~~

~~(e) *Committee Recommendation.* Not later than the 30th day after the peer review committee completes its review, the committee must make a written recommendation to the presiding judge stating only whether the visiting judge should or should not continue to be assigned by the presiding judge. The committee must provide additional information to the presiding judge upon request of the presiding judge. Upon receipt of the recommendation, the presiding judge must forward copies of the recommendation to the administrative director of the Office of Court Administration and to the visiting judge. The administrative director shall retain a copy of a recommendation that is issued to the presiding judge for public inspection.~~

~~**Reconsideration by Committee.**~~

~~(a) *Request for Reconsideration.* A visiting judge who receives a recommendation that the visiting judge not continue to be assigned may submit a written request for reconsideration by the peer review committee not earlier than the 180th day after the date that the committee issued its recommendation.~~

~~(b) *Amendment of Recommendation.* If at any time the peer review committee determines that a recommendation submitted under this rule should be amended, the committee shall send the amended recommendation to the presiding judge. The presiding judge shall promptly forward a copy of the committee's amended recommendation to the visiting judge and to the administrative director of the Office of Court Administration.~~

5-31 D. 8e9

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May 30, 2002

Via Fax (713) 276-5555
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Dear Bobby:

As I recall from our last meeting, Chip asked you to head-up a review of Rule 202. Based upon personal experience, if the rule is retained, I believe it should have a provision added concerning fees and costs. Please let me explain the basis for that suggestion.

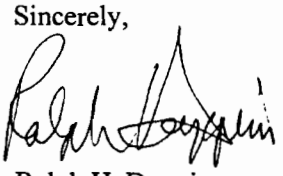
A couple of years ago, I was retained by a private school here in Fort Worth. The parents of a former middle school student initiated Rule 202 proceedings against the headmaster, middle school principal, middle school vice-principal and a middle school teacher in connection with disciplinary proceedings involving their child - - who was 12 at the time. The parents claimed that they needed to take depositions of those four persons to determine whether their conduct in connection with the disciplinary proceedings "was appropriate and consistent with existing school policies". There was absolutely no merit to nor basis for such a claim, or the discovery. We suspected that instead, the parents were working behind the scenes with three or four other parents who disliked the headmaster to use the Rule 202 proceedings and threat of litigation to force the headmaster to leave the school. Our suspicions turned out to be correct.

After the parents filed their Rule 202 petition, we had a hearing. The district court later entered an order permitting the four employees to be deposed and requiring production of certain documents. The depositions were scheduled a couple of months away. In the meantime, the controversy associated with the matter led to a decision by the school and the headmaster not to renew his employment. Although the terms of the settlement agreement between the headmaster and the school are confidential, the school was required to pay him a substantial settlement. It is my judgment that the school was boxed into a corner in connection with the problem, in large part because of the Rule 202 proceedings. What is particularly troubling is that just a day before the depositions were to take place, petitioners canceled the depositions on the pretense of needing additional documents. This announcement by petitioners came only days after it became known that the headmaster would be leaving. The petitioners never returned to court to seek the documents they claimed they had to have and they never took the depositions. Nearly a year later, the district judge dismissed the proceeding for want of prosecution. Petitioners didn't even bother to attend the hearing.

As a result of the proceeding, the school incurred substantial fees associated with defending itself and its employees for what turned out to be a sham proceeding. Yet Rule 202 contains no authority - - at least so far as I can see, that permits the court to award fees and costs to the responding witness or witnesses. Surely the district court should have discretion to award fees and costs in cases such as this where the rule is abused. Otherwise, as this example illustrates, the rule permits a petitioner to initiate and use Rule 202 proceedings for improper purposes.

Thank you for your consideration.

Sincerely,



Ralph H. Duggins

cc: The Honorable Nathan L. Hecht
Justice
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