The Supreme Court of Texas

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Chambers of
Justice Nathan L. Hecht

September 22, 2006

Charles L. "Chip" Babcock
Chair, Supreme Court Rules Advisory Committee
Jackson Walker, L.L.P.
1401 McKinney, Suite 1900
Houston, TX 77010

Re: Referral of Various Proposed Changes to Rules of Civil and Appellate Procedure
Via e-mail

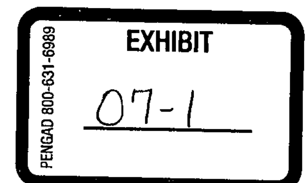
Dear Chip:

The Court requests the Advisory Committee's recommendations on a number of proposed changes to the Rules of Civil Procedure and Rules of Appellate Procedure. These proposals are summarized in two attached appendices. Appendix A contains three proposals submitted to the Court by the State Bar Rules Committee. Appendix B contains proposals submitted to the Court over the past six months or so from various sources: members of the bar, members of the Advisory Committee, and members of the Court or the Court's staff. Although a number of rules proposals received by the Court are not being referred at this time, the Court believes that the proposals discussed in the attached appendices warrant the Committee's evaluation.

The Court greatly appreciates the Committee's thoughtful consideration of these issues, for its dedication to the rules process, and for your continued leadership on the Committee. I look forward to seeing you all in October.

Sincerely,

Nathan L. Hecht
Justice



Rule: 199 (**Depositions Upon Oral Examination**)

Text:

199.2 Procedure for Noticing Oral Deposition
(a) *Time to Notice Deposition.* A notice of intent to take an oral deposition must be served on the witness and all parties a reasonable time before the deposition is taken. An oral deposition may be taken prior to the appearance of all parties only by agreement of the parties or with leave of court. An oral deposition may be taken outside the discovery period only by agreement of the parties or with leave of court.

Summary of Issue:
The State Bar Rules Committee recommends the above change in response to the observation that there have been times where a party has sought an early deposition prior to appearance of all parties to a lawsuit for strategic purposes only. The SBRC notes that the proposed change would restrict the first deposition to occurring after all parties had appeared unless otherwise agreed or with leave of court.

Rule: TRCP 245 **(Assignment of Cases for Trial)**

Text of Existing Rule:

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. Non-contested 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.

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.

Proposed New Text (proposed additions underlined):

1. The court may set contested cases on written request of any party or on the court's own motion. Unless all parties agree otherwise, the court shall give reasonable notice of the first setting for trial of not less than seventy-five [75] days to the parties who have appeared when notice is given.
2. When a case previously has been set for trial, the court may reset the case to a later date on any reasonable notice to the parties who have appeared or by agreement of those parties. Non-contested 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.
3. If a party is joined or appears after a case has been set for trial, the court shall give reasonable notice of the trial setting to that party of not less than seventy-five [75] days after that party has appeared, unless that party agrees otherwise. For good cause, the court has discretion to shorten the notice to the newly joined or appearing party of an existing trial setting; provided, that the court shall grant that party a reasonable period to resolve its pretrial motions and conduct discovery.
4. 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.

Summary of Issue:

The State Bar Rules Committee felt that two matters had rendered the 45-day period under the existing rule insufficient time to prepare for trial. First, the SBRC notes that changes in statutory law and rules of procedure made it difficult to resolve a number of pre-trial motions (including motions for summary judgment, change of venue, and forum non conveniens, and designation of responsible third parties and of experts) before trial if a case is set shortly after it is filed. Second, the rule does not provide a minimum notice period for parties first joined after the case is set for trial.

Rule: TRCP 296 **(Requests for Findings of Fact and Conclusions of Law)**

Text:

In any case tried in the district or county court without a jury, or in any matter where findings are required or permitted, any party may request the court to state in writing its findings of fact and conclusions of law. Such request shall be entitled "Request for Findings of Fact and Conclusions of Law" and shall be filed within twenty days after judgment is signed with the clerk of the court, who shall immediately call such request to the attention of the judge who tried the case. The party making the request shall serve it on all other parties in accordance with Rule 21a. The findings of fact shall only include the elements of each ground of recovery or defense.

Comment: The trial court is not required to support its findings of fact with recitals of the evidence.

Summary of Issue:

The State Bar Rules Committee observes that many courts and practitioners feel compelled to make or propose voluminous and detailed findings of fact, out of fear that omitting a single key fact may undermine the validity of a subsequent judgment or broaden the basis for appeal. This is said to be time-consuming and a waste of both judicial economy and the litigants' resources.

The SBRC proposes that a solution to this problem may lie in a combination of the proposed additional language to Rule 296 and the comment that follows. The proposed comment and rule text would clarify that while the elements of each ground of recovery or defense must be contained in findings of fact, a trial court would not be required to support its findings with recitals of the evidence on which its findings are based, or to make findings on every controverted fact.

Rule: TRCP 306a (**Periods to Run From Signing of Judgment**)

Current text:

1. **Beginning of Periods.** The date of judgment or order is signed as shown of record shall determine the beginning of the periods prescribed by these rules for the court's plenary power to grant a new trial or to vacate, modify, correct or reform a judgment or order and for filing in the trial court the various documents that these rules authorize a party to file within such periods including, but not limited to, motions for new trial, motions to modify judgment, motions to reinstate a case dismissed for want of prosecution, motions to vacate judgment and requests for findings of fact and conclusions of law; but this rule shall not determine what constitutes rendition of a judgment or order for any other purpose.

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4. **No Notice of Judgment.** If within twenty days after the judgment or other appealable order is signed, a party adversely affected by it or his attorney has neither received the notice required by paragraph (3) of this rule nor acquired actual knowledge of the order, then with respect to that party all the periods mentioned in paragraph (1) [the trial court's plenary power to grant a new trial or to vacate, modify, correct, or reform a judgment or order] shall begin on the date that such party or his attorney received such notice or acquired actual knowledge of the signing, whichever occurred first, but in no event shall such periods begin more than ninety days after the original judgment or other appealable order was signed.

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.

Summary of Issue:

TRAP 4.2 generally mirrors TRCP 306a by granting additional time to file post-judgment pleadings when a party did not receive notice of judgment within 20 days after it was signed. The main difference is that TRCP 306a addresses pleadings governed by the rules of civil procedure (such as a motion for new trial), whereas TRAP 4.2 addresses pleadings governed by the rules of appellate procedure (such as a notice of appeal). However, unlike TRCP 306a, TRAP 4.2(c) also specifically requires the trial court to "sign a written order that finds the date when the party or the party's attorney first either received notice or acquired actual knowledge that the judgment or order was signed." The issue for

the Committee's study is whether this or similar language should be added to TRCP 306a(5) to require the trial court to specify the date a party received late notice of judgment. See *In re The Lynd Co.*, No. 05-0432 (holding that TRAP 4.2(c)'s required finding stating the date of late notice cannot be implicitly read into TRCP 306a, and disapproving court of appeals decisions holding otherwise).

Rule: TRAP 13 (**Court Reporters and Court Recorders**)

Current text:

13.2 Additional Duties of Court Recorder

The official court recorder must also:**(a)** ensure that the recording system functions properly throughout the proceeding and that a complete, clear, and transcribable recording is made;**(b)** make a detailed, legible log of all proceedings being recorded, showing:

(1) the number and style of the case before the court;**(2)** the name of each person speaking;**(3)** the event being recorded such as the voir dire, the opening statement, direct and
cross-examinations, and bench conferences;**(4)** each exhibit offered, admitted, or excluded;**(5)** the time of day of each event; and**(6)** the index number on the recording device showing where each event is recorded;

(c) after a proceeding ends, file with the clerk the original log;

(d) have the original recording stored to ensure that it is preserved and is accessible; and

(e) ensure that no one gains access to the original recording without the court's written order.

Summary of Issue:

This proposal was submitted to the Court by Justice David Gaultney. He notes that TRAP 13 currently places no duty on the court recorder to transcribe the electronic recording of the trial. He further observes that parties to appeals often must request extensions of time because the electronic recordings of the trial have not been transcribed at the time the parties file them with the court of appeals, which is the event that triggers the countdown for filing briefs (assuming the clerk's record has already been filed), and that needless delay results while the parties obtain a transcription. He proposes to amend TRAP 13.2 to address the duty of transcribing electronic recordings by expressly assigning that duty to the recorder, or, in the alternative, by allowing parties to prepare transcriptions from a certified copy of the recording provided by the recorder.

Rule: TRAP 20.1 (**When Party Is Indigent**)

Current text:

20.1 Civil Cases

(a) *Establishing Indigence.* A party who cannot pay the costs in an appellate court may proceed without advance payment of costs if:

(1) the party files an affidavit of indigence in compliance with this rule.

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(c) *When and Where Affidavit Filed.*

(1) Appeals. An appellant must file the affidavit of indigence in the trial court with or before the notice of appeal. An appellee who is required to pay part of the cost of preparation of the record under Rule 34.5(b)(3) or 34.6(c)(3) must file an affidavit of indigence in the trial court within 15 days after the date when the appellee becomes responsible for paying that cost.

Summary of Issue:

The rule requires an indigent appellant to file an affidavit "in the trial court with or before the notice of appeal." TRAP 20.1(c)(1). Although indigence affidavits previously submitted for trial purposes are literally filed "before the notice of appeal," several courts of appeals have held that such trial affidavits do not satisfy the affidavit requirement of TRAP 20.1(c)(1). *See In re J.B.*, 2003 WL 1922835 at *1 n.1 (Tex. App.—Tyler 2003, no pet.); *Holt v. F.F. Enters.*, 990 S.W.2d 756, 758 (Tex. App.—Amarillo 1998, pet. denied). The Committee is asked to consider whether TRAP 20.1 should be amended to clarify that an affidavit of indigence filed at trial does not satisfy TRAP 20.1.

Proponents would argue that the rule should be clarified to remove any ambiguity suggesting that prior trial affidavits can satisfy the appellate requirement. Pro se litigants are generally held to the standard of an attorney responsible for following the rules of procedure; however, pro se and other litigants may find it difficult to perceive from the rule itself the necessity of a new affidavit at the time appeal is perfected. Proponents would argue that, while it is reasonable to require indigents to file a new affidavit at the time appeal is perfected, even if they had previously filed one for trial purposes, the rule should be amended to clarify that the trial affidavit does not satisfy the requirement of TRAP 20.1.

The Court recently issued a *per curiam* opinion in *Higgins v. Randall County Sheriff's Office*, No. 05-0095, holding that because the indigence-affidavit requirement on appeal is not jurisdictional, courts of appeals must allow a reasonable time to cure the defect. 2006 WL 1450042, at *1. To the extent that non-compliance results from the failure of pro se litigants and others to look beyond the text of TRAP 20.1, the *Higgins* decision may not

resolve the ambiguity concern described above. However, the decision arguably makes the perceived need for clarification less urgent, as it clarifies that the initial failure to file an appeal affidavit will not result in immediate dismissal.

Rule: TRAP 24 (**Suspension of Enforcement of Judgment Pending Appeal in Civil Cases**)

Current text:

24.2. Amount of Bond, Deposit or Security

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(c) *Determination of Net Worth.*

(1) Judgment Debtor's Affidavit Required; Contents; Prima Facie Evidence. A judgment debtor who provides a bond, deposit, or security under (a)(2) in an amount based on the debtor's net worth must simultaneously file an affidavit that states the debtor's net worth and states complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained. The affidavit is prima facie evidence of the debtor's net worth.

(2) Contest; Discovery. A judgment creditor may file a contest to the debtor's affidavit of net worth. The contest need not be sworn. The creditor may conduct reasonable discovery concerning the judgment debtor's net worth.

(3) Hearing; Burden of Proof; Findings. The trial court must hear a judgment creditor's contest promptly after any discovery has been completed. The judgment debtor has the burden of proving net worth. The trial court must issue an order that states the debtor's net worth and states with particularity the factual basis for that determination.

24.4 Appellate Review

(a) *Motions; review.* On a party's motion to the appellate court, that court may review:

(1) the sufficiency or excessiveness of the amount of security, but when the judgment is for money, the appellate court must not modify the amount of security to exceed the limits imposed by rule 24.2(a)(1);
(2) the sureties on any bond;
(3) the type of security;
(4) the determination whether to permit suspension of enforcement; and
(5) the trial court's exercise of discretion under 24.3(a).

Summary of Issues:

(1) TRAP 24.2(c) does not presently address the situation in which the judgment debtor files a net worth affidavit that is either facially defective (*i.e.*, it fails to state "complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained"), or is facially sufficient in that respect but is found not to be credible. An example of the latter situation was presented in *In re Smith*, No. 06-0107, and *In re Main Place Homes*, No. 06-0108, which were decided in a per curiam opinion of the Supreme Court issued May 5, 2006. In those cases, which involved separate mandamus petitions arising from the same trial, the judgment debtor submitted a net worth affidavit supported by an accounting statement, but the trial court's finding of an alter ego led the court to attribute to the debtor a significantly higher net worth than the debtor claimed.

The present rule notes that "[t]he judgment debtor has the burden of proving net worth," and it requires the trial court to make a net worth finding that "states with particularity the factual basis for that determination." TRAP 24.2(c)(3). However, it is arguably unclear whether a net worth affidavit that is deficient or is found to lack credibility serves to supersede the judgment pending appeal—particularly where the judgment creditor did not provide competing financial data sufficient to let the trial court make a net worth finding supported by detailed evidence, as required by the rule. Accordingly, the Committee is requested to consider:

- whether Rule 24 should be amended to state that a judgment is not superseded when the judgment debtor fails to obtain a net worth finding in line with his net worth affidavit; and

- whether Rule 24 should be amended to explicitly allow a judgment creditor to file a motion to strike a net worth affidavit for facial deficiencies, providing for a hearing on the motion within a relatively short time, and providing that the judgment is no longer superseded if the trial court grants the motion to strike.

(2) TRAP 24.4(a) provides that, "[o]n a party's motion to the appellate court, that court may review" various aspects of a trial court's supersedeas rulings. The 1990 amendment to former TRAP 49, which changed "court of appeals" to "appellate court," introduced uncertainty in at least two respects. First, it is unclear whether the current rule gives either a court of appeals or the Supreme Court jurisdiction over a supersedeas ruling when there is no appeal of the underlying case yet pending before the court. Second, if the rule authorizes an appellate court to review supersedeas rulings when the underlying case is not before it, the rule does not specify by what procedural vehicle supersedeas issues should be presented to the Supreme Court, *i.e.*, whether by motion or by mandamus. (The Supreme Court is

an "appellate court" as defined by TRAP 3.1(b)). The Court addressed this issue in *Smith/Main Place Homes* by treating the "Tex. R. App. P. 24.4 Motion" as a mandamus petition. *In re Smith*, 2006 WL 1195327, at *3 (Tex. May 5, 2006). The Committee is further asked to address whether Rule 24 should be amended to address either of the above issues.

Rule: TRAP 41 (**Panel and En Banc Decision**)

Current text (with potential revisions shown):

41.1 Decision by Panel
(a) *Constitution of panel.* Unless a court of appeals with more than three justices votes to decide a case en banc, a case must be assigned for decision to a panel of the court consisting of three justices, although not every member of the panel must be present for argument. If the case is decided without argument, three justices must participate in the decision. A majority of the panel, which constitutes a quorum, must agree on the judgment. Except as otherwise provided in these rules, a panel's opinion constitutes the court's opinion, and the court must render a judgment in accordance with the panel opinion.

(b) *When panel cannot agree on judgment.* After argument, if for any reason a member of the panel cannot participate in deciding a case, the case may be decided by the two remaining justices. If they cannot agree on a judgment, the chief justice of the court of appeals must designate another justice of the court to sit on the panel to consider the case, request the assignment of a qualified ~~retired or former~~ justice or judge to sit on the panel to consider the case, or convene the court en banc to consider the case. The reconstituted panel or the en banc court may order the case reargued.

(c) *When court cannot agree on judgment.* After argument, if for any reason a member of a court consisting of only three justices cannot participate in deciding a case, the case may be decided by the two remaining justices. If they cannot agree on a judgment, that fact must be certified to the Chief Justice of the Supreme Court. The Chief Justice may then temporarily assign a justice of another court of appeals or a qualified ~~retired or former~~ justice or judge to sit with the court of appeals to consider the case. The reconstituted court may order the case reargued.

Summary of Issue:

In 2003, Section 74.003 of the Government Code, which delineates the qualifications of a justice or judge serving on assignment in the appellate courts, was amended to add subsection (h):

> Notwithstanding any other provision of law, an active district court judge may be assigned to hear a matter pending in an appellate court.

This new provision permitted the Chief Justice of the Supreme Court, for the first time, to use active district court judges for assignments in the intermediate appellate courts. Many appellate courts prefer using active district judges to avoid using visiting judge funds. The Committee is asked to consider whether the limitation on the qualifications of assigned

judges contained in the TRAP 41.1 should be revised in light of the statutory amendment, perhaps by replacing the term "retired or former justice or judge" with "qualified justice or judge," as suggested above.

Rule: TRAP 49 (**Motion and Further Motion for Rehearing**)

Current text:

49.7 En Banc Reconsideration.
While the court of appeals has plenary jurisdiction, a majority of the en banc court may, with or without a motion, order en banc reconsideration of a panel's decision. If a majority orders reconsideration, the panel's judgment or order does not become final, and the case will be resubmitted to the court for en banc review and disposition.

Summary of Issue:

TRAP 49.7 provides that a majority of an en banc court of appeals may, "with or without a motion," order en banc reconsideration at any time "[w]hile the court of appeals has plenary jurisdiction." Although Rule 49 contemplates the filing of en banc motions, it does not specify a deadline for filing them—only that the court of appeals can consider them within its plenary jurisdiction. The court of appeals's plenary power expires "30 days after the court overrules all timely filed motions for rehearing, including motions for en banc reconsideration of a panel's decision under Rule 49.7...." TRAP 19.1. Thus, under the current rules, an en banc motion would presumably have to be filed within 30 days after the overruling of a motion for rehearing; if so, the appellate court's plenary power extends until 30 days after it overrules the en banc motion. The Court's recent decision in *City of San Antonio v. Hartman*, No. 05-0147, holds that an en banc motion counts as a motion for rehearing for purposes of the 45-day rule in TRAP 53.7. In light of that decision, the Committee is asked to consider whether TRAP 49 should be amended to provide specific procedural guidelines governing motions for en banc reconsideration, such as:

- whether to clarify or shorten the existing deadline for when such motions must be filed;
- whether they should be subject to the 15-day extension rule in TRAP 49.8;
- the page limit applicable to such motions;
- whether the rule should specify procedures for responses, as in TRAP 49.2;
- whether an en banc motion can be filed in the same motion with a motion for panel rehearing, or whether separate motions can simultaneously be filed, or whether a party can or must wait to file an en banc motion until after its motion for panel rehearing is denied;
- whether, as in Fifth Circuit practice, the en banc motion is initially to be treated as a motion for rehearing by the panel if no motion for rehearing was previously filed (See "Handling of Petition by the Judges" following Fifth Circuit local rule 35.6);
- when it is appropriate to seek en banc reconsideration, *compare* FRAP 35(b)(1) (requiring statement that panel decision either (1) conflicts with precedent from the U.S. Supreme Court or the court to which the en banc motion is addressed, or (2)

involves questions of exceptional importance), *with* TRAP 41.2(c) (noting that "en banc consideration is not favored and should not be ordered unless necessary to secure or maintain uniformity of the court's decisions or unless extraordinary circumstances require en banc reconsideration").

- whether the TRAP rule should specify the availability of sanctions, to discourage frivolous en banc motions. *See* Fed. Local R. App. P. 35.1 (noting that court is "fully justified in imposing sanctions on its own initiative . . . for manifest abuse of the procedure").

Rule: TRAP 52 (**Original Proceedings**)

Current text:

Rule 52.3 Original Proceedings; Form and Content of Petition
All factual statements in the petition must be verified by affidavit made on personal knowledge by an affiant competent to testify to the matters stated. [Remainder of paragraph omitted]

Summary of Issues:

Some appellate practitioners have asked the Court to modify TRAP 52 to account for situations in which the Relator's attorney cannot verify, based on personal knowledge, that all facts stated in the mandamus petition are true and correct. These proponents argue that the purpose of Rule 52's verification requirement would be satisfied by including in the mandamus record a copy of the witness's sworn affidavit, and they suggest amending TRAP 52 to allow sworn testimony or affidavits in the record to satisfy the verification requirement.

In practice, an attorney will often lack the personal knowledge of the facts demanded by the verification requirement, unless the facts relevant to the mandamus concern events witnessed by the attorney at trial. Thus, to comply with the requirement, it may be necessary to obtain sworn statements from witnesses or others with personal knowledge of the facts. However, mandamus petitions often must be prepared and filed on little notice due to circumstances beyond the attorney's control. Thus, the Committee is asked to consider whether a central purpose of the verification requirement—to avoid factual disputes in mandamus proceedings—might be achieved in a manner that is less burdensome to practitioners. *See Cantrell v. Carlson*, 313 S.W.2d 624, 626 (Tex. Civ. App.—Dallas 1958, no writ) (noting that verification must constitute a positive statement of factual knowledge as to support a charge of perjury if the facts were found to be untrue); *see also Hooks v. Fourth Court of Appeals*, 808 S.W.2d 56, 60 (Tex. 1991) (appellate courts may not deal with disputed factual matters in mandamus proceedings).

Several other issues are raised when the facts pertinent to the mandamus are neither within the attorney's personal knowledge nor the personal knowledge of any single witness. Must the petition be verified by multiple affiants? If so, how should their verifications reflect those facts to which each respective affiant is competent to swear? The Committee is further asked to consider whether TRAP 52.3 should be amended to address these issues.

Rule: none

Current text: none

Summary of Issue:

Government Code §22.010 states: "The supreme court shall adopt rules establishing guidelines for the courts of this state to use in determining whether in the interest of justice the records in a civil case, including settlements, should be sealed." Pursuant to that statutory requirement, the Court in 1990 promulgated TRCP 76a, which governs sealing records in trial courts. However, there is no comparable TRAP rule that governs requests to seal records in the appellate courts. Accordingly, the Committee is asked to consider whether the Appellate Rules should contain a provision that governs requests to seal records in the appellate courts.

MEMORANDUM

To: SCAC Members

From: Bill Dorsaneo

cc: Jody Hughes

Date: January 8, 2007

Re: Nathan Hecht Letter 9/22/06

Here are the proposed revisions discussed and voted on at our October meeting with the exception of proposed revisions to 24.2 and 41.2, which are new. The version of 24.2 contained in this draft contains my proposed revisions to Elaine Carlson's earlier draft. In addition, proposed revisions to 20.1 and 41.1 need additional discussion. The modifications to 20.1 are based on suggestions made by Stephen Yelenosky to improve the draft contained in the 12/6/06 memorandum. Proposed changes to 41.1 and 41.2 come primarily from Jody Hughes and from me. More remedial work may be needed on 41. In my view, 41.1(a) is a particularly poor effort. Proposed revisions to 52.3, including the alternative version previously emailed to all SCAC members, will need to be revisited.

13.2 Additional Duties of Court Recorder. The official court recorder must also:

(a)

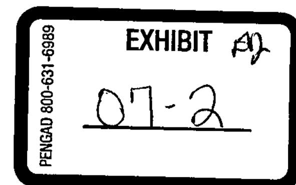
(b)

(c)

(d)

(e)

(f) if requested by any party to the appeal, prepare and file a transcription of the proceedings along with the reporter's record as provided in Rule 34.6(a)(2).



19.1 Plenary Power of Courts of Appeals. A court of appeals' plenary power over its judgment expires:

(a) 60 days after judgment if no timely filed ~~motion to extend time or~~ motion for rehearing, timely filed motion for en banc reconsideration, or timely filed motion to extend time to file a motion for rehearing or for en banc reconsideration is then pending.

(b) 30 days after the court overrules all timely filed motions for rehearing and all timely filed motions for en banc reconsideration of a panel's decision under Rule 49.7, and timely motions to extend time to file a motion for rehearing or a motion for en banc reconsideration under Rule 49.8.

20.1 Civil Cases

(a) *Establishing indigence.* A party who cannot pay the costs in an appellate court may proceed without advance payment of costs if:

(1) the party files an affidavit of indigence in a compliance with this rule.

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

(b) *Contents of affidavit.*

(c) *IOLTA Certificate.* If the party was represented by an attorney in the trial court who provided free legal services, without contingency, because of the party's indigency and the attorney provided services either directly or by referral from a program funded by the Interest on Lawyers Trust Accounts (IOLTA) program and the attorney filed an IOLTA certificate confirming that the IOLTA-funded program screened the party for income eligibility under the IOLTA income guidelines, the attorney may file an additional IOLTA certificate confirming that the IOLTA-funded program rescreened the party for income eligibility under the IOLTA income guidelines after entry of the trial court's judgment.

OR

(c) *IOLTA Certificate.* If the appellant proceeded in the trial court without payment of fees pursuant to an IOLTA certificate, the attorney who filed the certificate may file an additional IOLTA certificate confirming that the IOLTA funded program rescreened the party for income eligibility under IOLTA income

guidelines after entry of the trial court's judgment.

A party's affidavit of inability accompanied by an attorney's IOLTA certificate may not be contested.

~~(c)~~(d) *When and Where Affidavit Filed.*

(1) Appeals. An appellant must file the affidavit of indigence in the trial court with or before the notice of appeal. The prior filing of an affidavit of indigence in the trial court pursuant to Civil Procedure Rule 145 does not meet the requirements of this rule, which requires a separate affidavit and proof of current indigence. An appellee who is required to pay part of the cost. . . must file an affidavit of indigence in the trial court within 15 days after the date when the appellee becomes responsible for paying that cost.

(3) Extension of time. The appellate court ~~may extend the time to file and affidavit if, within 15 days after the deadline for filing the affidavit, the party files in the appellate court a motion complying with Rule 10.5(b)~~ must allow the appellant a reasonable time to correct the appellant's failure to file an affidavit of indigence or the appellant's failure to file a sufficient affidavit of indigence before dismissing the appeal or affirming or reversing the trial court's judgment, as provided in Rule 44.3.

See Higgins v. Randall County Sheriff's Office 193 S.W.3d 898 (Tex. 2006).

24.2 Amount of Bond, Deposit or Security

(c) *Determination of Net Worth*

(1) Judgment Debtor's Affidavit Required; Contents; Prima Facie Evidence. A judgment debtor who provides a bond, deposit, or security under (a)(2) in an amount based on the debtor's net worth must simultaneously file with the trial court clerk an affidavit that states the debtor's net worth and states complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained. ~~The affidavit is prima facie evidence of the debtor's net worth.~~ A trial court clerk must receive and file a net worth affidavit tendered for filing by a judgment debtor. A net worth affidavit filed with the trial court clerk is prima facie evidence of the debtor's net worth for the

purpose of establishing the amount of the bond, deposit or security required to suspend enforcement of the judgment.

(2) ~~Contest; Discovery~~ *Motion to Strike Insufficient Affidavit*. A judgment creditor may move to strike a net worth affidavit that does not [state the debtor's net worth or that does not state complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained] *or* [comply with Rule 24.2(c)(1)]. If the trial court determines that the affidavit is deficient, the court must inform the judgment debtor why the affidavit is deficient and afford the judgment debtor a reasonable opportunity to comply with Rule 24.2(c)(1). If an affidavit conforming with the trial court's order is not filed in accordance with the court's order, the trial court may order that enforcement of the judgment is no longer suspended as to that judgment debtor.

(3) Contest; Discovery; Hearing. A judgment creditor may file a contest to the debtor's claimed net worth. The contest need not be sworn. The creditor may conduct reasonable discovery concerning the judgment debtor's net worth.

The trial court must hear a judgment creditor's contest of the claimed net worth of the judgment debtor promptly after any discovery has been completed. The judgment debtor has the burden of proving net worth. The trial court must issue an order that states the debtor's net worth and states with particularity the factual basis for that determination. If the trial court orders additional or other security to supersede the judgment, the enforcement of the judgment will be suspended for twenty days after the trial court's order. If the judgment debtor does not comply with the order within that period, the judgment may be enforced against the judgment debtor.

24.4 Appellate Review

(a) Motions; Review. On a party's motion to the appellate court, that court may review:

(1) the trial court's ruling on a Rule 24.2(c)(2) motion to strike a net worth affidavit;

(~~1~~2) the sufficiency or excessiveness of the amount of security, but when the judgment is for money, the appellate court must not modify the amount of security to exceed the limits imposed by Rule 24.2(a)(1);

(~~2~~3) the sureties on any bond;
(~~3~~4) the type of security;
(45) the determination whether to permit suspension of enforcement; and
(~~5~~6) the trial court's exercise of discretion under Rule 24.3(a).

(b) *Grounds of Review.* Review may be based both on conditions as they existed at the time the trial court signed an order, and on changes in those conditions afterward.

(c) *Temporary Orders.* The appellate court may issue any temporary orders necessary to preserve the parties' rights.

(d) *Appellate Court.* A motion filed under paragraph (a) should be filed in the court of appeals having potential appellate jurisdiction over the underlying judgment. The court of appeals ruling is subject to review on motion to the Texas Supreme Court.

(~~d~~e) *Action by Appellate Court.* The motion must be heard at the earliest practicable time. The appellate court may require that the amount of a bond, deposit, or other security be increased or decreased, and that another bond, deposit, or security be provided and approved by the trial court clerk. The appellate court may require other changes in the trial court order. The appellate court may remand to the trial court for entry of findings of fact or for the taking of evidence.

(~~e~~f) *Effect of Ruling.* If the appellate court orders additional or other security to supersede the judgment, enforcement will be suspended for 20 days after the appellate court's order. If the judgment debtor does not comply with the order within that period, the judgment may be enforced. When any additional bond, deposit, or security has been filed, the trial court clerk must notify the appellate court. The posting of additional security will not release the previously posted security or affect any alternative security arrangements that the judgment debtor previously made unless specifically ordered by the appellate court.

34.6 Reporter's Record.

(1)

(a) *Contents*

(1) Stenographic recording.

. . .

(2) Electronic recording.

. . .

(b) *Request for preparation.*

(1) Request to court reporter or court recorder. At or before the time for perfecting the appeal, the appellant must request in writing that the official reporter or recorder prepare the reporter's record. The request must designate the exhibits to be included. A request ~~to the court reporter but not the court recorder~~ must also designate the portions of the proceedings to be included.

35.3 Responsibility for Filing Record

(b) *Reporter's record.* The official or deputy court reporter or court recorder is responsible for preparing, certifying and timely filing the reporter's record if:

(1) a notice of appeal has been filed;

(2) the appellant has requested the reporter's record be prepared; and

(3) the party responsible for paying for the preparation of the reporter's record has paid the reporter's or the recorder's fee, or has made satisfactory arrangements with the reporter or recorder to pay the fee, or is entitled to appeal without paying the fee.

38.5 *Appendix for cases recorded electronically.* In cases where the proceedings were electronically recorded, the following rules apply:

(a) *Appendix.*

(1) In general. At or before the time a party's brief is due, the party must file one copy of an appendix containing a transcription of all portions of the recording that the party considers relevant to the appellate issues or points. A transcription prepared and filed by the court recorder at the request of a party pursuant to Rules 13.2(f) and 34.6(b)(1) satisfies this requirement. Unless another party objects, the transcription will be presumed accurate.

41.1 Decision by Panel

(a) *Constitution of panel.* Unless a court of appeals with more than three justices votes to decide a case en banc, a case must be assigned for decision to a panel of the court consisting of three justices, although not every member of the panel must be present for argument. If the case is decided without argument, three justices must participate in the decision. A majority of the panel, which constitutes a quorum, must agree on the judgment. Except as otherwise provided in these rules, a panel's opinion constitutes the court's opinion, and the court must render a judgment in accordance with the panel opinion.

(b) *When panel cannot agree on judgment.* After argument, if for any reason a member of the panel cannot participate in deciding a case, the case may be decided by the two remaining justices. If they cannot agree on a judgment, the chief justice of the court of appeals must designate another justice of the court to sit on the panel to consider the case, request the temporary assignment by the Chief Justice of the Supreme Court of an active court of appeals justice from another court of appeals, a [qualified] retired or former appellate justice or appellate judge [who is qualified for appointment by Chapters 74 and 75 of the Government Code] or an active district court judge to sit on the panel to consider the case, or convene the court en banc to consider the case. The reconstituted panel or the en banc court may order the case reargued.

(c) *When court cannot agree on judgment.* After argument, if for any reason a member of a court consisting of only three justices cannot participate in deciding a case, the case may be decided by the two remaining justices. If they cannot agree on a judgment, that fact must be certified to the Chief Justice of the Supreme Court. The Chief Justice may then temporarily assign a justice of another court of appeals or a [qualified] retired or former appellate justice or appellate judge [who is qualified for appointment by Chapters 74 and 75 of the Government Code] or an active district court judge to sit with the court of appeals to consider the case. The reconstituted court may order the case reargued.

41.2 Decision by En Banc Court

(a) [No change]

(b) *When en banc court cannot agree on judgment.* If a majority of an en banc court cannot agree on a judgment, that fact must be certified to the Chief Justice of the Supreme Court. The Chief Justice may then temporarily assign a justice of another court of appeals or a [qualified] retired or former [appellate] justice or appellate judge [who is qualified for appointment by Chapters 74 and 75 of the Government Code] or an active district court judge to sit with the court of appeals to consider the case. The reconstituted court may order the case reargued.

49.7 En Banc Reconsideration. A party may file a motion for en banc reconsideration, as a separate motion, with or without filing a motion for rehearing, within 15 days after the court of appeals judgment or order is rendered. Alternatively a motion for en banc reconsideration may be filed by a party no later than 15 days after the overruling of the same party's timely filed motion for rehearing or further motion for rehearing. While the court has plenary power, as provided in Rule 19, a majority of the en banc court may, with or without a motion, order en banc reconsideration of a panel's decision . . .

49.8 Extension of Time

A court of appeals may extend the time for filing a motion for rehearing or a further motion for rehearing or a motion for en banc reconsideration if a party

files a motion complying with Rule 10.5(b) no later than 15 days after the last date for filing the motion.

49.9 **Not Required for Review.** A motion for rehearing is not a prerequisite to filing a motion for en banc reconsideration as provided by Rule 49.7 or a petition for review in the Supreme Court or a petition for discretionary review in the court of Criminal Appeals nor is it required to preserve error.

52.3 **Original Proceedings; Form and Content of Petition.** All factual statements in the petition, not otherwise supported by sworn testimony, affidavit or other competent evidence, must be verified by an affidavit or affidavits made on personal knowledge by affiants competent to testify to the matters stated. . .

53.7 **Time and Place of Filing.**

(a) *Petition.* The petition must be filed with the Supreme Court within 45 days after the following:

(1) the date the court of appeals rendered judgment, if no motion for rehearing or motion for en banc reconsideration is timely filed; or

(2) the date of the court of appeals' last ruling on all timely filed motions for rehearing and all timely filed motions for en banc reconsideration.

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Review of Texas Rule of Appellate Procedure 24

Pursuant to HB 4, Texas Rule of Appellate Procedure 24 was amended in 2003 to reflect the right of a judgment debtor to post appellate security at the lesser of $25 million or fifty percent of its net worth consistent with Chapter 52 of the Civil Practice & Remedies Code.

Justice Hecht, by letter dated September 22, 2006, requested SCAC review of the four TRAP 24 issues that have arisen under this new practice.

I. Should (TRAP) rule 24 be amended to state that a judgment is not superseded when the judgment debtor fails to obtain a net worth finding in line with his net worth affidavit?

II. Whether (TRAP) rule 24 should be amended to explicitly allow a judgment creditor to file a motion to strike a net worth affidavit for facial deficiencies, providing for a hearing on the motion within a relatively short time, and providing that the judgment is no longer superseded if the trial court grants the motion to strike?

Currently, a judgment debtor wishing to suspend enforcement of a judgment pending appeal based upon its net worth must file with the trial court clerk "an affidavit that states the debtor's net worth and states complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained. The affidavit is prima facie evidence of the debtor's net worth." The debtor is to also file simultaneously a supersedeas bond or its cash equivalent reflecting 50 % of the debtor's claimed net worth. TRAP 24.2(c) Once approved by the trial court clerk, the bond (or its cash equivalent) is "effective". TRAP 24.1(b)(2) The clerk is to hold the deposit until the conditions of liability in 24.1(d) are extinguished.

A judgment creditor may file a contest to the debtor's affidavit of net worth and conduct reasonable discovery on that matter. The trial court "must" hear a net worth contest promptly after any discovery has been completed and must issue an order that states the debtor's net worth and states with particularity the factual basis for that determination. TRAP 24.2(c)(2)-(3).

TRAP 24 does not address the procedures a judgment creditor should follow to contest the facial sufficiency of a net worth affidavit. Rather, the rule implicitly assumes that the trial court clerk will not accept a deficient affidavit and is capable of assessing

the net worth of a judgment debtor from the financial information provided in the affidavit.

If a trial court clerk approves the appellate security based upon the filing of the net worth affidavit and a supersedeas bond or its cash equivalent, the enforcement of the judgment is suspended. If the clerk does not approve the filing of the appellate security, the enforcement of the judgment is not suspended.

TRAP 24.2 (c) should be amended to allow a judgment creditor to contest the facial sufficiency of a judgment debtor's net worth affidavit. The following changes are suggested:

(c) **Determination of Net Worth.**

(1) *Judgment Debtor's Affidavit Required; Contents; Prima Facie Evidence.* A judgment debtor who provides a bond, deposit, or security under (a)(2) in an amount based on the debtor's net worth must simultaneously file with the trial court clerk an affidavit that states the debtor's net worth and states complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained. ~~The affidavit is prima facie evidence of the debtor's net worth.~~ A nonconforming affidavit ~~should not be accepted by the clerk.~~

The filing [~~or the clerk's acceptance~~] of a ~~conforming~~ affidavit is prima facie evidence of the debtor's net worth and serves to suspend enforcement of the judgment until further order of the trial court.

(2) *Contest.* ~~Discovery~~

~~A net worth affidavit may be contested for pleading deficiencies or substantively on the basis the judgment debtor's net worth affidavit is not accurate. The clerk's refusal to accept appellate security may also be contested in the trial court.~~

A judgment creditor may ~~contest~~ a net worth affidavit on the basis it fails to state complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained. The trial court may consider the motion on written or oral submission. Should the trial court sustain the motion to strike the affidavit, the debtor must be afforded a reasonable opportunity to amend the affidavit to cure the defects. If a conforming affidavit is not filed in accordance with the trial court's order, the trial court may order that enforcement of the judgment is no longer suspended as to that judgment debtor.

A judgment creditor may file a contest to the debtor's claimed net worth. The contest need not be sworn. The creditor may conduct reasonable discovery concerning the judgment debtor's net worth.

(3) *Hearing.*

The trial court must hear a judgment creditor's contest of the claimed net worth of the judgment debtor promptly after any discovery has been complete. The judgment

debtor has the burden of proving net worth. The trial court must issue an order that states the debtor's net worth and states with particularity the factual basis for that determination. If the trial court orders additional or other security to supersede the judgment, the enforcement of the judgment will be suspended for ten days. If the judgment debtor does not comply with the order within that period, the judgment may be enforced against the judgment debtor.

too short? twenty?

III. Does a court or appeals or the Texas Supreme Court have jurisdiction over a supersedeas ruling when there is no appeal of the underlying case yet pending before the court?

Enforcement of a judgment may not be suspended unless an appeal is perfected. *See* TEX. R. APP. P. 24.1(d)(1); *Summit Savs. Ass'n v. Garcia*, 727 S.W.2d 106, 107 (Tex. App.—San Antonio 1987, orig. proceeding) (refusing to supersede turnover order in absence of perfected appeal); *EMW Mfg. Co. v. Lemons*, 724 S.W.2d 425, 427 (Tex. App.—Fort Worth 1987, no writ) (holding that temporary injunction will not issue in lieu of supersedeas to stay execution). The judgment creditor has property rights in the judgment and if an appeal is not perfected the judgment is subject to enforcement. Once appellate court jurisdiction is invoked, an appellate court is empowered to entertain TRAP 24.4 motions. Following the Pennzoil decision, the legislature enacted Chapter 52 of the Civil Practices & Remedies Code and in so doing empowered both the Court of Appeals and the Texas Supreme Court to review motions pertaining to appellate security that arise under TRAP 24 rulings. The legislature, in section 52.005 made clear that the Supreme Court was not to interfere with the legislative provisions pertaining to appellate security:

> § 52.005 CONFLICT WITH TEXAS RULES OF APPELLATE PROCEDURE
> (a) To the extent that this chapter conflicts with the Texas Rules of Appellate Procedure, this chapter controls.
> (b) Notwithstanding Section 22.004, Government Code, the supreme court may not adopt rules in conflict with this chapter.
> (c) The Texas Rules of Appellate Procedure apply to any proceeding, cause of action, or claim to which Section 52.002 does not apply.

The jurisdiction of the Texas Supreme Court to consider a TRAP 24.2 motion when no appeal was yet pending before the Supreme Court was raised in *In re Smith*, 192 S.W.3d 564 (Tex. 2006). The non-movant argued the Court lacked jurisdiction as there was no appealable judgment before it. The movant argued the court had express jurisdiction pursuant to Section 52.006 of the Civil Practices & Remedies Code. The movant noted in its brief, that the Supreme Court comment to the 1990 change to the predecessor rule (TRAP 49) allowing for review of lower court orders pertaining to appellate security was to ""[t]o make it clear that within any jurisdictional limitations, all appellate courts may review a trial court for insufficiency or excessiveness".

Article 5, section 3(a) of the Texas Constitution provides:
The Supreme Court shall exercise the judicial power of the state except as otherwise provided in this Constitution. Its jurisdiction shall be coextensive with the limits of the State and its determinations shall be final except in criminal law matters. Its appellate jurisdiction shall be final and shall extend to all cases except in criminal law matters and as otherwise provided in this Constitution or by law. The Supreme Court and the Justices thereof shall have power to issue writs of habeas corpus, as may be prescribed by law, and under such regulations as may be prescribed by law, the said courts and the Justices thereof may issue the writs of mandamus, procedendo, certiorari and such other writs, as may be necessary to enforce its jurisdiction. The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State.

The Texas Supreme Court in *Garza v. Garcia*, 137 S.W.3d 36, 40 (Tex. 2004), recognized the expansive power of the legislature in determining its jurisdiction, noting "While appellate justices may chafe at restrictions on appellate review, the Texas Constitution generally allows the Legislature to expand or limit such review as it sees fit". Citation: Tex. Const. art. V, § 3(a) (providing jurisdiction of Supreme Court "shall extend to all cases except in criminal law matters and as otherwise provided in this Constitution or by law"); id. § 6(a) (providing courts of appeals "have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law"); see Collins v. Ison-Newsome, 73 S.W.3d 178, 180 (Tex.2001) ("Our jurisdictional analysis begins with the basic principle that we do not have jurisdiction in the absence of an express constitutional or legislative grant.") (citing Chenault v. Phillips, 914 S.W.2d 140, 141 (Tex.1996)).

Pertinent legislative provisions delineating the jurisdiction of the Texas Supreme Court are set forth below.

The Texas Government Code section 22.001(a) provides:

(a) The supreme court has appellate jurisdiction, except in criminal law matters, coextensive with the limits of the state and extending to all questions of law arising in the following cases when they have been brought to the courts of appeals from appealable judgment of the trial courts:

(1) a case in which the justices of a court of appeals disagree on a question of law material to the decision;
(2) a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case;
(3) a case involving the construction or validity of a statute necessary to a determination of the case;
(4) a case involving state revenue;
(5) a case in which the railroad commission is a party; and

(6) any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction, but excluding those cases in which the jurisdiction of the court of appeals is made final by statute.

The Texas Government Code section 22.002(a) states:

(a) The supreme court or a justice of the supreme court may issue writs of procedendo and certiorari and all writs of quo warranto and mandamus agreeable to the principles of law regulating those writs, against a statutory county court judge, a statutory probate court judge, a district judge, a court of appeals or a justice of a court of appeals, or any officer of state government except the governor, the court of criminal appeals, or a judge of the court of criminal appeals.

The Texas legislature specifically empowered the Texas Supreme Court to entertain TRAP 24 motions pertaining to appellate security in Section 52.006(d) of the Texas Civil Practices & Remedies Code:

> An appellate court may review the amount of security as allowed under Rule 24, Texas Rules of Appellate Procedure, except that when a judgment is for money, the appellate court may not modify the amount of security to exceed the amount allowed under this section.

The Rules of Appellate Procedure define appellate court as "the courts of appeals, the Court of Criminal Appeals, and the Supreme Court." TEX. R. APP. P. 3.1(b). Consistent with this definition and section 52.006, Appellate Rule 24.4 provides:

24.4 Appellate Review

(a) *Motions; Review.* On a party's motion to the appellate court, that court may review:
(1) the sufficiency or excessiveness of the amount of security, but when the judgment is for money, the appellate court must not modify the amount of security to exceed the limits imposed by rule 24.2(a)(1);
(2) the sureties on any bond;
(3) the type of security;
(4) the determination whether to permit suspension of enforcement; and
(5) the trial court's exercise of discretion under 24.3(a).
(b) *Grounds of Review.* Review may be based both on conditions as they existed at the time the trial court signed an order, and on changes in those conditions afterward.
(c) *Temporary Orders.* The appellate court may issue any temporary orders necessary to preserve the parties' rights.
(d) *Action by Appellate Court.* The motion must be heard at the earliest practicable time. The appellate court may require that the amount of a bond, deposit, or other security be increased or decreased, and that another bond, deposit, or security be provided and approved by the trial court clerk. The appellate court may require other changes in the trial court order. The appellate court may remand to the trial court for entry of findings of fact or for the taking of evidence.
(e) *Effect of Ruling.* If the appellate court orders additional or other security to

supersede the judgment, enforcement will be suspended for 20 days after the appellate court's order. If the judgment debtor does not comply with the order within that period, the judgment may be enforced. When any additional bond, deposit, or security has been filed, the trial court clerk must notify the appellate court. The posting of additional security will not release the previously posted security or affect any alternative security arrangements that the judgment debtor previously made unless specifically ordered by the appellate court.

Conclusion:

In my opinion, the clear legislative intent is to provide expedited review of appellate security orders by both the intermediate courts and the Texas Supreme Court, once an appeal has been perfected. If the Supreme Court declined review until (and unless) the Court had granted discretionary review over the underlying case, most appellate security orders would not reach the court. Further, appellate security orders are extraordinarily important and often have a significant impact as a practical matter on the ability to appeal. If judgment enforcement is not suspended pending appeal, the judgment loser risks execution on its assets and in many cases is effectively precluded from continuing its business without those assets. The legislature intended in its original promulgation of Chapter 52 in 1989 as well by its adoption of 52.006 as part of HB4 tort reform, to protect a judgment debtor's right to meaningful access to appellate review.

IV. If the rule authorizes an appellate court to review supersedeas rulings when the underlying case is not yet before the appellate court, what is the procedural vehicle to present the issues (whether by motion or mandamus)?

The standard of review of an appellate security order, whether the appellate court treats the matter as a 24.4 motion or as a request for mandamus relief, is an abuse of discretion. (The intermediate courts are not consistent in the treatment of 24.4 motions. Most intermediate courts treat them as a discreet motion, a few courts treat the motions as a request for mandamus relief.). Arguably, the abuse of discretion standard is more onerous to meet in the context of mandamus review as compared to ordinary appellate review. See W. Wendell Hall, *Standards of Review in Texas*, 34 St. Mary's L.J. 1, 16-17 (2002). (" Because the abuse of discretion standard applies in both appeals and mandamus actions, the question arises whether there is any distinction between the standard of review on appeal and that required for the issuance of mandamus. With regard to whether "error" has in fact occurred for purposes of mandamus, writs of mandamus issue only for a "clear" abuse of discretion. The standard of review on appeal is couched in terms of a simple abuse of discretion--without any requirement that the abuse be "clear."). In addition, a party seeking mandamus relief must establish no adequate remedy through the appellate process, thus making review under mandamus standards more onerous. Finally, the deference given to a trial court's factual finding in the context of mandamus review is nearly absolute. A relator attacking a trial court ruling must establish, under the circumstances of the case, that the facts and law permit the trial court to make but one decision.

The movant in *In re Smith* requested the Court to rule on its 24.4 motion or

alternatively treat it as a request for mandamus relief. Section 52.006 of the TEX. CIV. PRAC. & REM. CODE provides "An appellate court may review the amount of security..." but does not specify the procedural vehicle to be used in seeking that review. Recently, the Texas Supreme Court acknowledged that a trial court's determination of net worth for purposes of determining the appropriate amount of appellate security is subject to a legal and factual sufficiency review. *In re Smith*, 192 S.W.3d 564, 570 (Tex. 2006). The Texas Supreme Court noted it lacked no jurisdiction over factual sufficiency matters and thus its review of a lower court's determination of net worth is conducted under a legal sufficiency analysis. (Fn 3, Page 568). Further, the Court treated the TRAP 24.2 motion as a request for mandamus relief and granted the relief on the basis the trial court abused its discretion in failing to state with particularity the factual basis for its determination of net worth. The trial court abuses its discretion if the evidence is legally or factually insufficient to support its findings. *G. M. Houser, Inc. v. Rodgers*, --- S.W.3d ----, 2006 WL 3028930 (Tex. App.-Dallas, Oct. 26, 2006) (ruling on a Rule 24.2 motion and determining that because the judgment debtor established a negative net worth the appellate security to supersede the $685,840.10 judgment was "set at $0".); *Ramco Oil & Gas, Ltd. v. Anglo Dutch L.L.C.*, 171 S.W.3d 905, 910 (Tex. App.-Houston [14 Dist.] 2005) (ruling on a Rule 24.2 motion).

APPENDIX : Chapter 52 of the Civil Practices & Remedies Code & Current TRAP 24

Civil Practices & Remedies Code Chapter 52

§ 52.001 DEFINITION
In this chapter, "security" means a bond or deposit posted, as provided by the Texas Rules of Appellate Procedure, by a judgment debtor to suspend execution of the judgment during appeal of the judgment

§ 52.005 CONFLICT WITH TEXAS RULES OF APPELLATE PROCEDURE
(a) To the extent that this chapter conflicts with the Texas Rules of Appellate Procedure, this chapter controls.
(b) Notwithstanding Section 22.004, Government Code, the supreme court may not adopt rules in conflict with this chapter.
(c) The Texas Rules of Appellate Procedure apply to any proceeding, cause of action, or claim to which Section 52.002 does not apply.

§ 52.006 AMOUNT OF SECURITY FOR MONEY JUDGMENT.
(a) Subject to Subsection (b), when a judgment is for money, the amount of security must equal the sum of:
(1) the amount of compensatory damages awarded in the judgment;
(2) interest for the estimated duration of the appeal; and
(3) costs awarded in the judgment.
(b) Notwithstanding any other law or rule of court, when a judgment is for money, the amount of security must not exceed the lesser of:
(1) 50 percent of the judgment debtor's net worth; or
(2) $25 million.
(c) On a showing by the judgment debtor that the judgment debtor is likely to suffer substantial economic harm if required to post security in an amount required under Subsection (a) or (b), the trial court shall lower the amount of the security to an amount that will not cause the judgment debtor substantial economic harm.
(d) An appellate court may review the amount of security as allowed under Rule 24, Texas Rules of Appellate Procedure, except that when a judgment is for money, the appellate court may not modify the amount of security to exceed the amount allowed under this section.
(e) Nothing in this section prevents a trial court from enjoining the judgment debtor from dissipating or transferring assets to avoid satisfaction of the judgment, but the trial court may not make any order that interferes with the judgment debtor's use, transfer, conveyance, or dissipation of assets in the normal course of business.

Rule 24. Suspension of Enforcement of Judgment Pending Appeal in Civil Cases (Current Version)

24.1 Suspension of Enforcement

(a) *Methods*. Unless the law or these rules provide otherwise, a judgment debtor may supersede the judgment by:

(1) filing with the trial court clerk a written agreement with the judgment creditor for suspending enforcement of the judgment;
(2) filing with the trial court clerk a good and sufficient bond;
(3) making a deposit with the trial court clerk in lieu of a bond; or
(4) providing alternate security ordered by the court.
(b) *Bonds.*
(1) A bond must be:
(A) in the amount required by 24.2;
(B) payable to the judgment creditor;
(C) signed by the judgment debtor or the debtor's agent;
(D) signed by a sufficient surety or sureties as obligors; and
(E) conditioned as required by (d).
(2) To be effective a bond must be approved by the trial court clerk. On motion of any party, the trial court will review the bond.
(c) *Deposit in Lieu of Bond.*
(1) Types of Deposits. Instead of filing a surety bond, a party may deposit with the trial court clerk:
(A) cash;
(B) a cashier's check payable to the clerk, drawn on any federally insured and federally or state-chartered bank or savings-and-loan association; or
(C) 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.
(2) Amount of Deposit. The deposit must be in the amount required by 24.2.
(3) Clerk's Duties. The clerk must promptly deposit any cash or a cashier's check in accordance with law. The clerk must hold the deposit until the conditions of liability in (d) are extinguished. The clerk must then release any remaining funds in the deposit to the judgment debtor.
(d) *Conditions of Liability.* The surety or sureties on a bond, any deposit in lieu of a 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 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 trial court's judgment;
(2) the debtor does not perform an adverse judgment final on appeal; or
(3) the judgment is for the recovery of an interest in real or personal property, and the debtor does not pay the creditor the value of the property interest's rent or revenue during the pendency of the appeal.
(e) *Orders of Trial Court.* The trial court may make any order necessary to adequately protect the judgment creditor against loss or damage that the appeal might cause.
(f) *Effect of Supersedeas.* Enforcement of a judgment must be suspended if the judgment is superseded. Enforcement begun before the judgment is superseded must cease when the judgment is superseded. If execution has been issued, the clerk will promptly issue a writ of supersedeas.

24.2 Amount of Bond, Deposit or Security

(a) *Type of Judgment.*

(1) For Recovery of Money. When the judgment is for money, the amount of the bond, deposit, or security must equal the sum of compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment. But the amount must not exceed the lesser of:
(A) 50 percent of the judgment debtor's current net worth; or
(B) $25 million dollars.
(2) For Recovery of Property. When the judgment is for the recovery of an interest in real or personal property, the trial court will determine the type of security that the judgment debtor must post. The amount of that security must be at least:
(A) the value of the property interest's rent or revenue, if the property interest is real; or
(B) the value of the property interest on the date when the court rendered judgment, if the property interest is personal.
(3) Other Judgment. When the judgment is for something other than money or an interest in property, the trial court must set the amount and type of security that the judgment debtor must post. The security must adequately protect the judgment creditor against loss or damage that the appeal might cause. But the trial court may decline to permit the judgment to be superseded if the judgment creditor posts security ordered by the trial court in an amount and type that will secure the judgment debtor against any loss or damage caused by the relief granted the judgment creditor if an appellate court determines, on final disposition, that that relief was improper.
(4) Conservatorship or Custody. When the judgment involves the conservatorship or custody of a minor or other person under legal disability, enforcement of the judgment will not be suspended, with or without security, unless ordered by the trial court. But upon a proper showing, the appellate court may suspend enforcement of the judgment with or without security.
(5) For a Governmental Entity. When a judgment in favor of a governmental entity in its governmental capacity is one in which the entity has no pecuniary interest, the trial court must determine whether to suspend enforcement, with or without security, taking into account the harm that is likely to result to the judgment debtor if enforcement is not suspended, and the harm that is likely to result to others if enforcement is suspended. The appellate court may review the trial court's determination and suspend enforcement of the judgment, with or without security, or refuse to suspend the judgment. If security is required, recovery is limited to the governmental entity's actual damages resulting from suspension of the judgment.
(b) *Lesser Amount.* The trial court must lower the amount of the security required by (a) to an amount that will not cause the judgment debtor substantial economic harm, if, after notice to all parties and a hearing, the court finds that posting a bond, deposit, or security in the amount required by (a) is likely to cause the judgment debtor substantial economic harm.
(c) *Determination of Net Worth.*
(1) Judgment Debtor's Affidavit Required; Contents; Prima Facie Evidence. A judgment debtor who provides a bond, deposit, or security under (a)(2) in an amount based on the debtor's net worth must simultaneously file an affidavit that states the debtor's net worth and states complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained. The affidavit is prima facie evidence of the debtor's net worth.

(2) Contest; Discovery. A judgment creditor may file a contest to the debtor's affidavit of net worth. The contest need not be sworn. The creditor may conduct reasonable discovery concerning the judgment debtor's net worth.
(3) Hearing; Burden of Proof; Findings. The trial court must hear a judgment creditor's contest promptly after any discovery has been completed. The judgment debtor has the burden of proving net worth. The trial court must issue an order that states the debtor's net worth and states with particularity the factual basis for that determination.
(d) *Injunction.* The trial court may enjoin the judgment debtor from dissipating or transferring assets to avoid satisfaction of the judgment, but the trial court may not make any order that interferes with the judgment debtor's use, transfer, conveyance, or dissipation of assets in the normal course of business.

24.3 Continuing Trial Court Jurisdiction; Duties of Judgment Debtor

(a) *Continuing Jurisdiction.* Even after the trial court's plenary power expires, the trial court has continuing jurisdiction to do the following:
(1) order the amount and type of security and decide the sufficiency of sureties; and
(2) if circumstances change, modify the amount or type of security required to continue the suspension of a judgment's execution.
(b) *Duties of Judgment Debtor.* If, after jurisdiction attaches in an appellate court, the trial court orders or modifies the security or decides the sufficiency of sureties, the judgment debtor must notify the appellate court of the trial court's action.

24.4 Appellate Review

(a) *Motions; Review.* On a party's motion to the appellate court, that court may review:
(1) the sufficiency or excessiveness of the amount of security, but when the judgment is for money, the appellate court must not modify the amount of security to exceed the limits imposed by rule 24.2(a)(1);
(2) the sureties on any bond;
(3) the type of security;
(4) the determination whether to permit suspension of enforcement; and
(5) the trial court's exercise of discretion under 24.3(a).
(b) *Grounds of Review.* Review may be based both on conditions as they existed at the time the trial court signed an order, and on changes in those conditions afterward.
(c) *Temporary Orders.* The appellate court may issue any temporary orders necessary to preserve the parties' rights.
(d) *Action by Appellate Court.* The motion must be heard at the earliest practicable time. The appellate court may require that the amount of a bond, deposit, or other security be increased or decreased, and that another bond, deposit, or security be provided and approved by the trial court clerk. The appellate court may require other changes in the trial court order. The appellate court may remand to the trial court for entry of findings of fact or for the taking of evidence.
(e) *Effect of Ruling.* If the appellate court orders additional or other security to supersede the judgment, enforcement will be suspended for 20 days after the appellate court's order. If the judgment debtor does not comply with the order within that period, the judgment may be enforced. When any additional bond, deposit, or security has been filed, the trial court clerk must notify the appellate court. The posting of additional security will not release the previously posted security or affect any alternative security arrangements that the judgment debtor previously made unless specifically ordered by the appellate court.

The Supreme Court of Texas

201 West 14th Street Post Office Box 12248 Austin TX 78711
Telephone: 512/463-1312 Facsimile: 512/463-1365

Chambers of
Justice Nathan L. Hecht

February 5, 2007

Mr. Charles L. "Chip" Babcock
Chair, Supreme Court Rules Advisory Committee
Jackson Walker L.L.P.
1401 McKinney, Suite 1900
Houston, TX 77010

Re: Referral of Proposed Changes to Rules of Appellate Procedure
via e-mail

Dear Chip:

The Court requests the Advisory Committee's recommendations on several potential changes to the Rules of Appellate Procedure, in addition to Justice Bland's proposal regarding oral-argument statements that was recently referred to the Committee. These additional potential amendments are summarized in the attached appendix. The first concerns whether the Appellate Rules should include a provision that requires parties in parental-rights-termination cases to identify minor children only by their initials, and that would allow courts to strike any appendices or exhibits containing minors' names. The second issue concerns the timing of filing a petition for review when a motion for rehearing or en banc reconsideration remains pending before the court of appeals. The third involves whether the rules should permit a longer page limit for mandamus replies filed in the court of appeals than in the Supreme Court (the default limit for both is eight pages).

The Court greatly appreciates the Committee's thoughtful consideration of these issues, for its dedication to the rules process, and for your continued leadership on the Committee. I look forward to seeing you all on February 16th.

Sincerely,

[signature]

Nathan L. Hecht
Justice

Rule: **none**

Current text: none

Summary of Issue:

It has been suggested that the Appellate Rules be amended to require litigants in parental-rights termination cases to refer to minor children only by their initials, for the protection of minors' privacy. Family Code §109.002(d) allows the appellate court, in an opinion in a SAPCR appeal, to identify the parties by their initials or by a fictitious name, but it appears to be discretionary and applies only to courts, not to parties. ("On the motion of the parties or on the court's own motion, the appellate court in its opinion may identify the parties by fictitious names or by their initials only."). If the Committee believes such a requirement is advisable, the Court would request that it also consider whether other changes are necessary to prohibit the inclusion of materials in exhibits or appendices identifying minors; and, if so, how to accommodate judgments, orders, and similar items that are required to be included with appellate briefs but may contain the names of minors. *See, e.g.*, Tex. R. App. P. 53.2(k)(1)(A) (requiring inclusion, in appendix to petition for review, of trial-court judgment); *id.* R. 38.1(j)(1)(A) (same requirement in appendix to appellant's brief in court of appeals).

Rule: **Tex. R. App. P. 53.7(b)**

Current text:

Premature filing. A party may not file a motion for rehearing in the court of appeals after that party has filed a petition for review in the Supreme Court unless the court of appeals modifies its opinion or judgment after the petition for review is filed. The filing of a petition for review does not preclude another party from filing a motion for rehearing or the court of appeals from ruling on the motion. If a motion for rehearing is timely filed after a petition for review is filed, the petitioner must immediately notify the Supreme Court clerk of the filing of the motion, and must notify the clerk when the last timely filed motion is overruled by the court of appeals. A petition filed before the last ruling on all timely filed motions for rehearing is treated as having been filed on the date of, but after, the last ruling on any such motion.

Summary of Issue:

On at least several occasions in recent memory, a petition for review has been filed while the same party's motion for rehearing was still pending in the court of appeals. Unless the clerk of the supreme court is notified that the motion remains pending below, this could lead to a situation in which the Court denies the petition before the court of appeals has ruled on the motion for rehearing.

The existing Appellate Rules address the simultaneous jurisdiction problem in several places. In addition to Rule 53.7(b) shown above, Rule 19.2 provides:

> *Plenary Power Continues After Petition Filed.* In a civil case, the court of appeals retains plenary power to vacate or modify its judgment during the periods prescribed in 19.1 even if a party has filed a petition for review in the Supreme Court.

While Rule 53.7(a) requires the petition to be filed within 45 days after the court of appeals either renders judgment or overrules the last of all timely motions for rehearing, it is perhaps not immediately clear that the rule prohibits a party from filing a petition before the court of appeals has ruled on all timely filed rehearing motions. A petition filed after a motion for rehearing is filed but while the motion for rehearing is still pending, while likely premature in the legal sense pursuant to Rule 53.7(a), is clearly premature in the practical sense that the supreme court presumably will prefer to delay ruling on the petition until after the court of appeals rules on the motion for rehearing. However, Rule 53.7(b) only prohibits a party from filing a motion for rehearing after filing a petition; it does not prohibit filing a petition while a rehearing motion remains pending. Also, while the rest of 53.7(b) likewise addresses the situation where a motion for rehearing is filed after the filing of the petition for review, the last sentence also applies to a petition filed after the motion for rehearing is filed but before the motion is ruled on, treating the petition as having been filed on the date of (but after) the motion for rehearing is ruled on.

Existing Rule 53.7(b) requires the petitioner to notify the Supreme Court of a pending motion for rehearing, but only when the petition was filed before the motion for rehearing was filed.

Although a petitioner in the petition-filed-while-motion for rehearing-pending situation might elect, on his own initiative, to keep the Court updated, Rule 53.7(b) doesn't require it as it does for petitions filed before rehearing motions. Thus, the last sentence of 53.7(b) creates the potential for a situation where a petition is denied before the date it is considered filed.

There appear to be at least two (and probably more) potential solutions to this problem:

1) Prohibit premature petition filing more clearly. Amend 53.7(a) to more clearly provide that, once a party has filed a motion for rehearing or en banc motion, it may not file a petition until after the court of appeals has disposed of the motion; or

2) Require Notice to Clerk's Office. Amend 53.7(b) to address the situation where the petition is filed while the motion for rehearing is pending by requiring such parties to notify the Court of the pending motion for rehearing when the petition is filed and of the court of appeals' subsequent ruling thereon.

Rule: 52.6

Current text:

Length of Petition, Response, and Reply. Excluding those pages containing the identity of parties and counsel, the table of contents, the index of authorities, the statement of the case, the statement of jurisdiction, the issues presented, the signature, the proof of service, and the appendix, the petition and response must not exceed 50 pages each if filed in the court of appeals, or 15 pages each if filed in the Supreme Court. A reply may be no longer than 8 pages, exclusive of the items stated above. The court may, on motion, permit a longer petition, response, or reply.

Summary of Issue:

Some practitioners have complained that the default page limit for a reply to a response to a mandamus petition filed in the court of appeals is too short, and that 8 pages, while commensurate with the 15-page default limit for a mandamus response in the Supreme Court, is too short for mandamus replies in the courts of appeals, where the default limit for both petitions and responses is 50 pages. One practitioner has suggested a 25-page limit for mandamus replies in the court of appeals, corresponding to the 25-page limit for replies in merits briefs under Rule 38.4, which also sets a 50-page default limit for opening briefs and responses.

RECEIVED

JAN 9 2007

JANE BLAND
JUSTICE, FIRST COURT OF APPEALS
1307 SAN JACINTO, 10TH FLOOR
HOUSTON, TEXAS 77002

January 8, 2007

The Honorable Nathan Hecht
The Honorable Scott Brister
Mr. Jody Hughes, Rules Attorney
The Supreme Court of Texas
201 West 14th Street, Room 104
Austin, Texas 78701

Professor William V. Dorsaneo III
Southern Methodist University School of Law
3300 University Blvd.
Dallas, Texas 75205

Re: Proposed Amendment to Texas Rule of Appellate Procedure 39 to include a statement regarding oral argument.

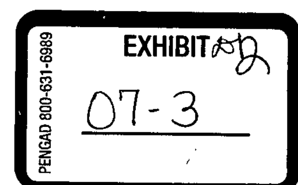
Dear Colleagues:

I write to ask that you refer to the Texas Supreme Court Rules Advisory Committee the following proposed amendment to Texas Rule of Civil Procedure 39.1, as an addition to the current text of the rule (the addition appearing in bold):

> 39.1 Right to Oral Argument
> Except as provided in 39.8, any party who has filed a brief and who has timely requested oral argument may argue the case to the court when the case is called for argument. **Any party may file a statement explaining why oral argument should, or need not, be permitted.**

The suggested language is a derivation of Federal Rule of Appellate Procedure 34.1 ("Party's Statement"). The federal rule does not mandate the length of any statement, nor its proper placement in a brief. If the committee or the Court determines that precision would be better, then we could require that it come before the statement of the case and be limited in length. The lack of precision does not seem, however, to have created any trouble on the federal side, with most parties adding a paragraph about oral argument at the outset of their brief.

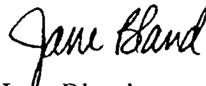
The purpose of the proposed amendment is to assist in the decision by counsel and by the intermediate courts of appeals to request, or to grant, respectively, oral argument. Rule 39.8 allows courts of appeals to advance a case without oral argument, and the trend in recent years is to grant far fewer of them. I attach a recent report provided by the Office of Court



Administration detailing the trend, compiled at the request of a member of the appellate bar in connection with a discussion at an annual conference last year. Although the actual numbers may be a little off due to timing and recording issues, the trend is steadily downward. When counsel could argue a case as of right, "Oral Argument Requested" or "Oral Argument Waived" on the cover of a brief was enough. As the attachment indicates, it is no longer. A statement about the benefit of argument in a particular case would assist a court of appeals in deciding about argument when the case is calendared and in fitting an appellate court's limited argument resources with those cases most in need of argument (perhaps stabilizing or reversing the current trend).

Thank you for your consideration of this matter. If I can be of further assistance, please do not hesitate to call me at (713) 655-2725.

Yours faithfully,



Jane Bland

cc: Mr. Chip Babcock
Chair, Texas Supreme Court Rules Advisory Committee

The Honorable Sherry Radack
Chief Justice
First Court of Appeals

The Honorable Terry Jennings
Justice
First Court of Appeals

	2001			2002			2003			2004			2005		
	Total Cases Disposed	Oral Arguments	% Oral Arguments	Total Cases Disposed	Oral Arguments	% Oral Arguments	Total Cases Disposed	Oral Arguments	% Oral Arguments	Total Cases Disposed	Oral Arguments	% Oral Arguments	Total Cases Disposed	Oral Arguments	% Oral Arguments
1st/Houston	1,568	135	8.6%	1,470	77	5.2%	1,349	63	4.7%	1,376	47	3.4%	1,315	52	4.0%
2nd/Fort Worth	1,070	157	14.7%	1,030	122	11.8%	1,035	138	13.3%	1,022	112	11.0%	1,064	146	13.7%
3rd/Austin	820	127	15.5%	817	108	13.2%	798	116	14.5%	714	130	18.2%	789	62	7 9%
4th/San Antonio	1,059	123	11.6%	963	111	11.5%	979	88	9.0%	966	61	6.3%	1,050	61	5.8%
5th/Dallas	2,614	61	2.3%	2,479	180	7.3%	2,679	152	5.7%	2,156	63	2.9%	2,196	277	12.6%
6th/Texarkana	455	107	23.5%	431	86	20.0%	448	85	19.0%	481	59	12.3%	372	42	11.3%
7th/Amarillo	658	N/A	N/A	623	132	21.2%	570	102	17.9%	547	79	14.4%	608	67	11 0%
8th/El Paso	559	180	32.2%	564	105	18.6%	531	80	15.1%	563	100	17.8%	525	85	16.2%
9th/Beaumont	445	38	8.5%	383	25	6.5%	489	13	2.7%	422	29	6.9%	542	30	5.5%
10th/Waco	477	80	16.8%	347	64	18.4%	384	24	6.3%	387	13	3.4%	602	54	9.0%
11th/Eastland	479	86	18.0%	457	62	13.6%	420	56	13.3%	393	43	10.9%	407	68	16.7%
12th/Tyler	374	34	9.1%	413	34	8.2%	415	18	4.3%	402	16	4.0%	396	20	5.1%
13th/Corpus Christi	917	172	18.8%	882	160	18.1%	1,009	117	11.6%	1,062	76	7.2%	990	11	1.1%
14th/Houston	1,637	429	26.2%	1,434	180	12.6%	1,323	144	10.9%	1,339	101	7.5%	1,202	94	7.8%
Total	12,474	1,729	13.9%	12,293	1,446	11.8%	12,429	1,196	9.6%	11,830	929	7.9%	12,058	1,069	8.9%

Does not include dispositions for Amarillo

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January 22, 2007

Re: Texas Supreme Court Advisory Committee

Honorable Nathan L. Hecht
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711-2248

Dear Justice Hecht:

As a follow up to our recent conversation, I enclose a redraft of the proposed amendment to Tex.R.Civ.P. 226a for your review and consideration. Please let me know if you have any questions.

Very truly yours,

David J. Beck

DJB/bb
Enclosure
cc: Charles L. Babcock Esq.
Alistair Dawson, Esq. [Firm]

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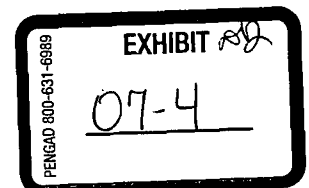

"Before the attorneys begin their questioning, I would like to say a few words about our judicial system. You need to be aware that our judicial system is an adversary system. This is a system where the interested parties participate in the decisional process by presenting evidence of their claims or defenses through their attorneys, who are their advocates. This procedure enables the jurors to have before them the relevant admissible evidence from each party so that the jury can determine the true facts and arrive at a just verdict based on such evidence.

Under the rules of our adversary system, each attorney is devoted to the interest of the client and is required (within the confines of the rules governing attorneys and the trial of this case) to zealously, vigorously and using the attorney's utmost skill and ability, present the client's claims or defenses, which the attorney believes there is a basis for so doing that is not frivolous. The attorney acts for and seeks for the client, remedies and defenses that are authorized by law. Our system has served us well for over 200 years, and trial attorneys have been and continue to be a critical part of the adversary process.

Although an attorney is ethically obligated to represent zealously his or her client, you should not take what I have just said as an endorsement by me of any particular conduct of the attorneys during the trial of this case. All attorneys also must act in this Court in a professional manner and follow our rules and procedures."