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IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 08-9017

ORDER AMENDING TEXAS RULES OF APPELLATE PROCEDURE

ORDERED that:

1. Pursuant to Texas Government Code § 22.004, the Texas Rules of Appellate Procedure are amended as follows.

2. This Order approves changes to rules of appellate procedure in civil cases. The Court of Criminal Appeals is concurrently issuing a separate order approving amendments to rules of appellate procedure in criminal cases. Amendments to rules of appellate procedure that apply to both civil and criminal cases are thus jointly approved by both courts. For convenience, all of the appellate rule amendments are attached to both orders.

3. The comments appended to these rules are intended to inform the construction and application of the rules.

4. Comments on changes to rules in civil cases may be submitted to the Court in writing on or before June 30, 2008 addressed to Jody Hughes, Rules Attorney, P.O. Box 12248, Austin TX 78711, or may be emailed to him at jody.hughes@courts.state.tx.us.

5. These amended rules, with any changes made after public comments are received, take effect September 1, 2008.

6. The Clerk is directed to:

   a. file a copy of this Order with the Secretary of State;

   b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

   c. send a copy of this Order to each elected member of the Legislature before December 1; and

   d. submit a copy of this Order for publication in the *Texas Register*.

SIGNED AND ENTERED, this 10th day of March, 2008.

Wallace B. Jefferson, Chief Justice

Nathan L. Hecht, Justice

Harriet O'Neill, Justice

J. Dale Wainwright, Justice

Scott Brister, Justice

David M. Medina, Justice

Paul W. Green, Justice

Phil Johnson, Justice

Don R. Willett, Justice

Rule 8. Bankruptcy in Civil Cases

8.1 Notice of Bankruptcy. Any party may file a notice that a party is in bankruptcy. The notice must contain:

(a) the bankrupt party's name;

(b) the court in which the bankruptcy proceeding is pending;

(c) the bankruptcy proceeding's style and case number; and

(d) the date when the bankruptcy petition was filed.~~; and~~

~~(e) an authenticated copy of the page or pages of the bankruptcy petition that show when the petition was filed~~.

Comment to 2008 change: The amendment eliminates the former requirement that the bankruptcy notice contain certain pages of the bankruptcy petition, in recognition that electronic filing is now prevalent in bankruptcy courts and access to bankruptcy petitions is widely available through the federal PACER system.

Rule 9. Papers Generally

9.3 Number of Copies

(b) *Supreme Court and Court of Criminal Appeals.* Except as otherwise provided in this rule, a ~~A~~ party must file the original and 11 copies of any document addressed to either the Supreme Court or the Court of Criminal Appeals. In the Supreme Court, only an original and two copies of a motion for extension of time or a response to the motion must be filed. ~~; except that~~ In the Court of Criminal Appeals, only the original of the following must be filed ~~in the Court of Criminal Appeals~~:

(1) a motion for extension of time or a response to the motion; or

(2) a pleading under Code of Criminal Procedure article 11.07.

9.8 Protection of Minor Child's Identity in Appellate Proceedings Following Parental- Rights Termination Proceedings or Juvenile Court Proceedings

(a) *Redaction of Minors' Names Generally Required in Appellate Briefing and Opinions.*

(1) In an appeal or original proceeding following a trial at which the termination of parental rights was at issue, a minor child shall be identified only by one or more initial letters of the minor's name or by a fictitious name in any papers—except a docketing statement—submitted to an appellate court, or in any opinion issued by an appellate court, unless the court orders otherwise.

(2) In an appeal or original proceeding following trial proceedings under Title 3 of the Family Code, a minor child shall be identified only by one or more initial letters of the minor's name or by a fictitious name in any papers—except a docketing statement—submitted to an appellate court, or in any opinion issued by an appellate court.

(b) *Redaction of Parents' Names.*

(1) In an appeal or original proceeding described in paragraph (a)(1), an appellate court may substitute in an opinion, and may order parties and amici curiae to substitute in any papers submitted to the appellate court, one or more initial letters or a fictitious name for the name of a minor child's parent or other family member if the court determines that such substitution is necessary to protect the minor child's identity.

(2) In an appeal or original proceeding described in paragraph (a)(2), an appellate court must substitute in an opinion, and parties and amici curiae must substitute in any papers submitted to the appellate court, one or more initial letters or a fictitious name for the name of a minor child's parent or other family member.

(c) *Redaction of Children's Names In Copies of Appendix Items.* In an appeal or original proceeding described in paragraph (a)(1) or (a)(2), for any necessary or optional appendix items to be included with a brief, petition, or motion, copies of any appendix items containing the name of a minor child shall be redacted so that the minor is identified only by one or more initial letters of the minor's name or by a fictitious name.

(d) *Redaction of Parents' Names In Copies of Appendix Items.*

(1) In an appeal or original proceeding described in paragraph (a)(1), an appellate court may order the substitution of initials or a fictitious name for the name of a minor child's parents or other family members in any necessary or optional appendix items to be included with a brief, petition, or motion if the court determines that such substitution is necessary to protect the minor child's identity.

(2) In an appeal or original proceeding described in paragraph (a)(2), parties and amici curiae must substitute initials or a fictitious name for the name of a minor child's parents or other family members in any necessary or optional appendix items to be included with a brief, petition, or motion.

(e) *No Alteration of Appellate Record.* Nothing in this rule authorizes alteration of the original appellate record except as specifically authorized by court order.

Comment to 2008 change: This is a new rule. Family Code §109.002(d) authorizes appellate courts, in their opinions, to identify parties to suits affecting the parent-child relationship (SAPCR) by fictitious names or by initials only. This law allows courts to protect the privacy interests of minor children involved in SAPCR proceedings, including suits to terminate parental rights. Similarly, Family Code §56.01(j) prohibits identification of a minor child or his family in an appellate opinion related to juvenile court proceedings. However, as appellate briefing becomes more widely available through electronic media sources, appellate courts' efforts to protect minor children's privacy by disguising their identities in appellate opinions may be defeated if the same children are fully identified in briefs and other court papers available to the public. The rule provides for the use of initials or fictitious names to protect the identity of a minor child following a parental-rights termination proceeding or juvenile court proceeding. Any fictitious name used for a parent or child should not be pejorative or suggest the person's true identity. The rule does not limit an appellate court's authority to disguise parties' identities in appropriate circumstances in other cases.

Rule 10. Motions in the Appellate Court

10.1 Contents of Motions; Response

(a) *Motion.* Unless these rules prescribe another form, a party must apply by motion for an order or other relief. The motion must:

(5) in civil cases, except for motions for rehearing and motions for en banc reconsideration of panel decisions, contain or be accompanied by a certificate stating that the filing party conferred or made a reasonable attempt to confer with other parties about the merits of the motion and whether those parties oppose the motion.

10.2 Evidence on Motions. A motion need not be verified unless it depends on the following types of facts, in which case the motion must be supported by affidavit or other satisfactory evidence. The types of facts requiring proof are those that are:

(a) not in the record;

(b) not within the court's knowledge in its official capacity; ~~or~~ and

(c) not within the personal knowledge of the attorney signing the motion.

Comment to 2008 change: It is presumed that non-movants will oppose the relief sought in motions for rehearing and motions for en banc reconsideration. To encourage consistent application of the certificate-of-conference requirement, Rule 10.1(a)(5) is amended—and Rule 49.11 is added—to exempt those motions from the certificate requirement.

Rule 19. Plenary Power of the Courts of Appeals and Expiration of Term

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, ~~including~~ all timely filed motions for en banc reconsideration of a panel's decision under Rule 49.~~7~~6, and all timely motions to extend time to file a motion for rehearing or a motion for en banc reconsideration.

Comment to 2008 change: The provisions of Rule 19 governing the courts of appeals' plenary power are revised in conjunction with the amendments to Rules 49 and 53.7 concerning motions for en banc reconsideration.

Rule 20. When Party Is Indigent

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;

(2) the claim of indigence is not contested, is not contestable, or if contested, the contest is not sustained by written order; and

(3) the party timely files a notice of appeal.

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

(12) if applicable, the party's lack of the skill and access to equipment necessary to prepare the appendix, as required by Rule 38.5(d).

(c) *TAJF Certificate.* If the appellant proceeded in the trial court without payment of fees pursuant to an Interest on Lawyers Trust Accounts (IOLTA) or other Texas Access to Justice Foundation (TAJF) certificate, an additional TAJF certificate may be filed in the appellate court confirming that the TAJF-funded program rescreened the party for income eligibility under TAJF income guidelines after entry of the trial court's judgment. A party's affidavit of inability accompanied by an attorney's TAJF 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 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 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.

(3) *Extension of time.* The appellate court may extend the time to file an 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). But the appellate court may not dismiss the appeal or affirm the trial court's judgment on the ground that the appellant has failed to file an affidavit or a sufficient affidavit of indigence unless the court has first provided the appellant notice of the deficiency and a reasonable time to remedy it.

~~(d)~~(e) *Duty of Clerk.*

(1) *Trial court clerk.* If the affidavit of indigence is filed with the trial court clerk under (ed)(1), the clerk must promptly send a copy of the affidavit to the appropriate court reporter.

(2) *Appellate court clerk.* If the affidavit of indigence is filed with the appellate court clerk ~~under (c)(2)~~ and if the filing party is requesting the preparation of a record, the appellate court clerk must:

(A) send a copy of the affidavit to the trial court clerk and the appropriate court reporter; and

(B) send to the trial court clerk, the court reporter, and all parties, a notice stating the deadline for filing a contest to the affidavit of indigence.

~~(e)~~(f) *Contest to affidavit.* The clerk, the court reporter, the court recorder, or any party may challenge ~~the claim of indigence~~ an affidavit that is not accompanied by a TAJF certificate by filing—in the court in which the affidavit was filed—a contest to the affidavit of indigence. The contest must be filed on or before the date set by the clerk if the affidavit was filed in the appellate court, or within 10 days after the date when the affidavit was filed if the affidavit was filed in the trial court. The contest need not be sworn.

~~(f)~~(g) *No contest filed.* [no change to rule text]

~~(g)~~(h) *Burden of proof.* [no change to rule text]

~~(h)~~(i) *Decision in appellate court.* [no change to rule text]

~~(i)~~(j) *Hearing and decision in the trial court.* [no change to rule text]

~~(j)~~(k) *Record to be prepared without payment.* [no change to rule text]

~~(k)~~(l) *Partial payment of costs.* [no change to rule text]

~~(l)~~(m) *Later ability to pay.* [no change to rule text]

~~(m)~~(n) *Costs defined.* [no change to rule text]

Comment to 2008 changes: Rule 20 is revised to clarify that an affidavit of indigence filed during trial is insufficient to establish indigence on appeal; a separate affidavit must be filed with or before the notice of appeal. The amended rule also provides that an appellate court must give an appellant who fails to file a proper appellate indigence affidavit notice of the defect and an opportunity to cure it before dismissing the appeal or affirming the judgment on that basis. *See Higgins v. Randall County Sheriff's Office*, 193 S.W.3d 898 (Tex. 2006). As amended, Rule 20 mirrors Tex. R. Civ. P. 145 by providing that an appellate indigence affidavit accompanied by an IOLTA or other Texas Access to Justice Foundation (TAJF) certificate is not subject to challenge. In Rule 20.1(e)(2) (formerly (d)(2)), the limiting phrase "under (c)(2)" is deleted to clarify that the appellate clerk's duty to forward copies of the affidavit to the trial court clerk and the court reporter, along with a notice setting a deadline to contest the affidavit, applies to affidavits on appeal erroneously filed in the appellate court, not only to affidavits in other appellate proceedings properly filed in the appellate court under 20.1(c)(2).

Rule 24. Suspension of Enforcement of Judgment Pending Appeal in Civil Cases

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)(1)(~~a~~A) 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.

(2) Contest; Discovery. A judgment creditor may file a contest to the debtor's claimed ~~affidavit of~~ net worth. A net worth affidavit filed

with the trial court clerk and in compliance with Rule 24.2(c)(1) 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. 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; Additional Security. The trial court must hear a judgment creditor's contest of the judgment debtor's claimed net worth 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:

(5) the trial court's exercise of discretion under Rule 24.3(a).

(d) *Filing in 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 petition for writ of mandamus to the Texas Supreme Court.

(d)(e) *Action by Appellate Court.* [no change to rule text]

(e)(f) *Effect of Ruling.* [no change to rule text]

Comment to 2008 changes: Rule 24.2(c)(3) is amended to provide procedural guidance when the trial court orders additional security to supercede the judgment. New Rule 24.4(d) is added to clarify that an appellate motion seeking relief from a supersedeas order should be filed in the court of appeals that presumably will have jurisdiction when appeal of the underlying case is perfected. The same provision also specifies that a petition for writ of mandamus is the proper procedural vehicle to seek Supreme Court review of a court of appeals' ruling on a supersedeas motion. *See In re Smith / In re Main Place Custom Homes, Inc.*, 192 S.W.3d 564, 568 (Tex. 2006) (per curiam).

Rule 26. Time to Perfect Appeal

26.2. Criminal Cases

(b) *By the State.* The notice of appeal must be filed within ~~15~~ 20 days after the day the trial court enters the order, ruling, or sentence to be appealed.

Rule 28. Accelerated Appeals in Civil Cases

28.1 Civil Cases—Appeal As of Right

(a) *Types of Accelerated Appeals.* Appeals from interlocutory orders (when allowed as of right by statute), appeals in quo warranto proceedings, appeals required by statute to be accelerated or expedited, and appeals required by law to be filed or perfected within less than 30 days after the date of the order or judgment being appealed are accelerated appeals.

(b) *Perfection of Accelerated Appeal.* Unless a statute expressly prohibits modification or extension of any statutory appellate deadlines, an accelerated appeal is perfected by filing a notice of appeal in compliance with Rule 25 within the time allowed by Rule 26.1(b) or as extended by Rule 26.3, regardless of any statutory deadlines. Filing a motion for new trial, any other post-trial motion, or a request for findings of fact will not extend the time to perfect an accelerated appeal.

(c) *Appeals of Interlocutory Orders.* The trial court need not, but may—within 30 days after the order is signed—file findings of fact and conclusions of law.

(d) *Quo Warranto Appeals.* The trial court may grant a motion for new trial timely filed under Texas Rule of Civil Procedure Rule 329b (a) – (b) until 50 days after the trial court's final judgment is signed. If not determined by signed written order within that period, the motion will be deemed overruled by operation of law on expiration of that period.

(e) *Record and Briefs.* In lieu of the clerk's record, the appellate court may hear an accelerated appeal on the original papers forwarded by the trial court or on sworn and uncontroverted copies of those papers. The appellate court may allow the case to be submitted without briefs. The deadlines and procedures for filing the record and briefs in an accelerated appeal are provided in Rules 35.1 and 38.6.

28.2 Agreed Interlocutory Appeals in Civil Cases

(a) *Perfecting appeal.* To perfect an appeal of an interlocutory order under Civil Practice and Remedies Code §51.014(d), a party to the trial court proceeding must:

(1) file a notice of accelerated appeal with the trial court clerk not later than the 20th day after the date the trial court signs a written order granting permission to appeal, unless the court of appeals extends the time for filing pursuant to Rule 26.3;

(2) file with the clerk of the appellate court a copy of the notice of accelerated appeal, as specified in Rule 25.1, and a docketing statement, as specified in Rule 32.1;

(3) pay to the clerk of the appellate court all required fees authorized to be collected by the clerk; and

(4) serve a copy of the notice of accelerated appeal on all parties to the trial court proceeding.

(b) *Contents of Notice.* The notice of accelerated appeal must contain, in addition to the items required by Rule 25.1(d), the following:

(1) a list of the names of all parties to the trial court proceeding and the names, addresses and telefax numbers of all trial and appellate counsel;

(2) a copy of the trial court's order granting permission to appeal;

(3) a copy of the trial court order appealed from;

(4) a statement that all parties to the trial court proceeding agreed to the trial court's order granting permission to appeal;

(5) a statement that all parties to the trial court proceeding agreed that the order granting permission to appeal involves a controlling question of law as to which there is a substantial ground for difference of opinion;

(6) a brief statement of the issues or points presented; and

(7) a concise explanation of how an immediate appeal may materially advance the ultimate termination of the litigation.

(c) *Jurisdiction.* If the court of appeals determines that a notice of appeal filed under this section does not demonstrate the court's jurisdiction, it

may order the appellant to file an amended notice of appeal. The court of appeals may also, on a party's motion or its own motion, order the appellant or any other party to file briefing addressing whether the appeal satisfies the criteria specified in Civil Practice and Remedies Code §51.014(d), and may require the parties to file supporting evidence. If, after providing an opportunity to file an amended notice of appeal or briefing addressing potential jurisdictional defects, the court of appeals concludes that jurisdictional defects exist, it may dismiss the appeal for want of jurisdiction at any stage of the appeal.

(d) *Record; briefs.* The rules governing the filing of the appellate record and briefs in accelerated appeals apply. A party may address in its brief any issues related to the court of appeals' jurisdiction, including whether the appeal satisfies the criteria specified in Civil Practice and Remedies Code §51.014(d).

(e) *No automatic stay of proceedings in trial court.* An appeal under Civil Practice and Remedies Code §51.014(d) does not stay proceedings in the trial court unless the parties agree to—and the trial court, the court of appeals, or a justice of the court of appeals orders—a stay of the proceedings.

Comment to 2008 changes: The provisions of prior Rule 28 are amended and reorganized as new Rule 28.1 to more clearly define accelerated appeals and provide a uniform appellate timetable. Many statutes provide for accelerated or expedited appellate timetables, including, among others, appeals of final judgments in a suit in which termination of the parent-child relationship is in issue as provided in Family Code §109.002. Unless a statute expressly prohibits rulemaking that would alter a statutory appellate deadline, Rule 28 is made expressly applicable to all such appeals.

New Rule 28.2 is added to provide procedures governing an appeal of an interlocutory order under Civil Practice and Remedies Code §51.014(d). The Legislature deleted former subsection (f) of §51.014 in 2005, eliminating the provision that gave the court of appeals discretion as to whether to permit an agreed appeal. New Rule 28.2 reflects the statutory procedure as modified by the 2005 amendment.

Rule 29. Orders Pending Interlocutory Appeal in Civil Cases

29~~5~~. **Further Proceedings in Trial Court.** While appeal from an interlocutory order is pending, the trial court retains jurisdiction of the case and unless prohibited by statute may make further orders, including one dissolving the order complained of on appeal. ~~appealed from, and i~~If permitted by law, the trial court may proceed with a trial on the merits. But the court must not make an order that:

(a) is inconsistent with any appellate court temporary order; or.

(b) interferes or impairs the jurisdiction of the appellate court or effectiveness of any relief sought or that may be granted on appeal.

Comment to 2008 changes: Rule 29.5 is amended to correspond with Civil Practice and Remedies Code §51.014(b), as amended in 2003, staying all proceedings in the trial court pending resolution of interlocutory appeals of class certification orders, denials of summary judgments based on assertions of immunity by governmental officers or employees, and orders granting or denying a governmental unit's plea to the jurisdiction.

Rule 38. Requisites of Briefs

38.1 Appellant's Brief. The appellant's brief must, under appropriate headings and in the order here indicated, contain the following:

(a) ***Identity of parties and counsel.*** The brief must give a complete list of all parties to the trial court's judgment or order appealed from, and the names and addresses of all trial and appellate counsel, except as otherwise provided in Rule 9.8.

(e) *Statement Regarding Oral Argument.* The brief may include a statement explaining why oral argument should, or should not, be permitted. Any such statement must not exceed one page and should address how the court's decisional process would, or would not, be aided by oral argument. As required by Rule 39.7, any party requesting oral argument must note that request on the front cover of its brief.

(e)(f) *Issues Presented.* [no change to rule text]

(f)(g) *Statement of Facts.* [no change to rule text]

(g)(h) *Summary of the Argument.* [no change to rule text]

(h)(i) *Argument.* [no change to rule text]

(i)(j) *Prayer.* [no change to rule text]

(j)(k) *Appendix in Civil Cases.* [no change to rule text]

38.4 Length of Briefs. An appellant's brief or appellee's brief must be no longer than 50 pages, exclusive of the pages containing the identity of parties and counsel, any statement regarding oral argument, the table of contents, the index of authorities, the statement of the case, the issues presented, the signature, the proof of service, and the appendix.

Comment to 2008 changes: Rule 38 is amended to provide for an optional statement regarding oral argument in an appellant's or appellee's brief. The optional statement is limited to one page, which does not count toward the briefing page limit.

Rule 39. Oral Argument; Decision Without Argument

39.1 Right to Oral Argument. ~~Except as provided in 39.8, a~~ 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.~~ before a panel of three justices unless the court, after examining the briefs, decides that oral argument is unnecessary for any of the following reasons:

(1) the appeal is frivolous;

(2) the dispositive issue or issues have been authoritatively decided;

(3) the facts and legal arguments are adequately presented in the briefs and record; or

(4) the decisional process would not be significantly aided by oral argument.

~~**39.8 Cases Advanced Without Oral Argument.** In its discretion, the court of appeals may decide a case without oral argument if argument would not significantly aid the court in determining the legal and factual issues presented in the appeal.~~

39.98 Clerk's Notice. [no change to rule text]

Comment to 2008 changes: Rule 39 is amended to modify the procedures for determining whether oral argument will be heard in a particular case. The amended rule provides for oral argument unless the court determines it to be unnecessary. The rule lists four reasons for denying oral argument, modeled on Federal Rule of Appellate Procedure 34(a)(2); however, the members of the court need not agree on, and generally should not announce, a specific reason or reasons for declining oral argument.

Rule 41. Panel and En Banc Decision

41.1 Decision by Panel

(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 a court

of appeals justice from another court of appeals, a retired or former appellate justice or appellate judge who is qualified for appointment by law, 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 law, 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

(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 law, 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.

41.3 Precedent in Transferred Cases. In cases transferred by the Supreme Court from one court of appeals to another, the court of appeals to which the case is transferred must decide the case in accordance with the precedent of the transferor court under principles of stare decisis if the transferee court's decision otherwise would have been inconsistent with the precedent of the transferor court. The court's opinion may state whether the outcome would have been different had the transferee court not been required to decide the case in accordance with the transferor court's precedent.

Comment to 2008 changes: Rules 41.1 and 41.2 are amended to reflect the 2003 legislative amendment adding subsection (h) to Government Code §74.003, which authorizes the Chief Justice of the Supreme Court to temporarily assign an active district court judge to hear a matter pending in an appellate court. The statutory provisions governing the assignment of judges to appellate courts are located in chapters 74 and 75 of the Government Code. Other minor changes are made for consistency.

New Rule 41.3 is added to require, in appellate cases transferred by the Supreme Court under Government Code §73.001 for docket equalization or other purposes, that the transferee court must generally resolve any conflict between the precedent of the transferor court and the precedent of the transferee court (or that of any other intermediate appellate court the transferee court otherwise would have followed) by following the precedent of the transferor court, unless it

appears that the transferor court itself would not be bound by that precedent. The rule requires the transferee court to "stand in the shoes" of the transferor court so that an appellate transfer will not produce a different outcome, based on application of substantive law, than would have resulted had the case not been transferred. However, the transferee court is not expected to follow the local rules of the transferor court or otherwise supplant its own local procedures with those of the transferor court.

Rule 47. Opinions, Publication, and Citation

47.2 Designation and Signing of Opinions; Participating Justices.

(a) *Civil and Criminal Cases.* A majority of the justices who participate in considering the case must determine whether the opinion will be signed by a justice or will be per curiam and whether it will be designated an opinion or memorandum opinion. The names of the participating justices must be noted on all written opinions or orders of the court or a panel of the court.

(b) *Criminal Cases.* In addition, each opinion and memorandum opinion in a criminal case must bear the notation "publish" or "do not publish" as determined—before the opinion is handed down—by a majority of the justices who participate in considering the case. Any party may move the appellate court to change the notation, but the court of appeals must not change the notation after the Court of Criminal Appeals has acted on any party's petition for discretionary review or other requests for relief. The Court of Criminal Appeals may, at any time, order that a "do not publish" notation be changed to "publish."

(c) *Civil Cases.* Opinions and memorandum opinions in civil cases issued on or after January 1, 2003 shall not be designated "do not publish."

47.7 Citation of Unpublished Opinions.

(a) *Criminal Cases.* Opinions and memorandum opinions not designated for publication by the court of appeals under these or prior rules have no precedential value but may be cited with the notation, "(not designated for publication)."

(b) *Civil Cases.* Opinions and memorandum opinions designated "do not publish" under these rules by the court of appeals prior to January 1, 2003 have no precedential value but may be cited with the notation, "(not designated for publication)." If an opinion or memorandum opinion issued on or after that date is erroneously designated "do not publish," the erroneous designation will not affect the precedential value of the decision.

Comment to 2008 changes: Effective January 1, 2003, Rule 47 was amended to discontinue in civil cases, on a prospective basis, the practice of allowing courts of appeals to designate opinions as either "published" or "unpublished." Rule 47.7 was amended to eliminate the prior prohibition against citing unpublished opinions and to clarify that, in civil cases, only unpublished opinions issued prior to the 2003 amendment would lack precedential value, because following the 2003 amendment such cases were not to be designated either as published or unpublished. But the phrase "opinions not designated for publication," which was intended to apply only to opinions affirmatively designated "do not publish," could be misread as suggesting that all opinions in civil cases published after 2002—none of which should be affirmatively designated for publication—lack precedential value. The 2008 amendments clarify that, with respect to civil cases, only opinions issued prior to the 2003 amendment and affirmatively designated "do not publish" should be considered "unpublished" cases lacking precedential value. The provisions governing citation of unpublished opinions in criminal cases are substantively unchanged; Rules 47.2 and 47.7. are amended to clarify that memorandum opinions are subject to those rules.

Rule 49. Motion ~~and Further Motion~~ for Rehearing and En Banc Reconsideration

49.1 Motion for Rehearing. A motion for rehearing may be filed within 15 days after the court of appeals' judgment or order is rendered. The motion must clearly state the points relied on for the rehearing. After a motion for rehearing is decided, another motion for rehearing may be filed within 15 days of the court's action only if the court:

(a) modifies its judgment;

(b) vacates its judgment and renders a new judgment; or

(c) issues an opinion in overruling a motion for rehearing.

~~**49.5 Further Motion for Rehearing.** After a motion for rehearing is decided, a further motion for rehearing may be filed within 15 days of the court's action if the court:~~

~~(a) modifies its judgment;~~

~~(b) vacates its judgment and renders a new judgment; or~~

~~(c) issues an opinion in overruling a motion for rehearing.~~

49.6~~5~~ Amendments. A motion for rehearing or a motion for en banc reconsideration may be amended as a matter of right anytime before the 15-day period allowed for filing the motion expires, and with leave of the court, anytime before the court of appeals decides the motion.

49.7~~6~~ 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 last timely filed 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. 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.

49.87 **Extension of Time.** A court of appeals may extend the time for filing a motion for rehearing or a ~~further motion for rehearing~~ 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.

49.98 **Not Required for Review.** A motion for rehearing is not required to preserve error and is not a prerequisite to filing:

(a) a motion for en banc reconsideration as provided by Rule 49.6;

(b) a petition for review in the Supreme Court; or

(c) a petition for discretionary review ~~in~~ to the Court of Criminal Appeals ~~nor is it required to preserve error~~.

49.~~10~~9 **Length of Motion and Response.** A motion or response must be no longer than 15 pages.

49.10 **Relationship to Petition for Review.** 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.

49.11 **Certificate of Conference Not Required.** A certificate of conference is not required for a motion for rehearing or for a motion for en banc reconsideration of a panel's decision.

Comment to 2008 changes: Rule 49 is revised in several respects. Former Rule 49.5 is relocated to Rule 49.1, which omits the former rule's "further" motion language but retains its provisions limiting the circumstances in which another rehearing motion can be filed. Former Rule 49.7, now Rule 49.6, is amended to include procedures governing the filing a motion for en banc reconsideration. New Rule 49.10 consists of those provisions of former Rule 53.7(b) that address motions for rehearing; the provisions of Rule 53.7(b) that address petitions for review are

retained. New Rule 49.11 mirrors Rule 10.1(a)(5)'s new provision exempting motions for rehearing and motions for en banc reconsideration from the certificate-of-conference requirement.

Rule 50. Reconsideration on Petition for Discretionary Review

Within 60 ~~30~~ days after a petition for discretionary review is ~~has been~~ filed with the clerk of the court of appeals that delivered the decision, ~~a majority of~~ the justices who participated in the decision may, as provided by subsection (a), ~~summarily~~ reconsider and correct or modify the court's opinion or judgment. Within the same period of time, any of the justices who participated in the decision may issue a concurring or dissenting opinion.

(a) If the court's original opinion or judgment is corrected or modified, that ~~the original~~ opinion or judgment is ~~must be~~ withdrawn and the modified or corrected opinion or judgment is ~~must be~~ substituted as the opinion or judgment of the court. No further opinions may be issued by the court of appeals. The original petition for discretionary review is not dismissed by operation of law, unless the filing party files a new petition in the court of appeals. In the alternative, the petitioning party shall submit to the court of appeals copies of the corrected or modified opinion or judgment as an amendment to the original petition.

(b) Any party may then file with the court of appeals a new petition for discretionary review seeking review of the corrected or modified opinion or judgment, including any dissents or concurrences, under Rule 68.2.

Rule 52. Original Proceedings

52.3 Form and Contents 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.~~ The petition must, under appropriate headings and in the order here indicated, contain the following:

(d) *Statement of the Case.* The petition must contain a statement of the case that should seldom exceed one page and should not discuss the facts. The statement must contain the following:

(5) if the petition is filed in the Supreme Court after a petition requesting the same relief was filed in the court of appeals:

(D) the citation of the court's opinion~~, if available, or a statement that the opinion was unpublished~~;

(g) *Statement of Facts.* The petition must state concisely and without argument the facts pertinent to the issues or points presented. Every statement of fact in the petition must be supported by citation to competent

evidence included in ~~The statement must be supported by references to~~ the appendix or record.

(j) *Certification.* The person filing the petition must certify that he or she has reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record.

(~~j~~)(k) *Appendix.* (no change to rule text)

52.6 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, the certification, 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 25 pages if filed in the court of appeals or 8 pages if filed in the Supreme Court, exclusive of the items stated above. The court may, on motion, permit a longer petition, response, or reply.

Comment to 2008 changes: Rule 47 was amended effective January 1, 2003 to eliminate in civil cases, on a prospective basis, the former distinction between "published" and "unpublished" decisions. Rule 52.3(d)(5)(D) is now amended to recognize that an opinion in a civil appeal decided after 2002 should not be described as "unpublished" in the statement of the case even if the opinion was not published in the South Western Reporter, because Rule 47 no longer authorizes the courts of appeals to designate an opinion in a civil appeal either as "published" or "unpublished." If no South Western Reporter citation is available, a LEXIS or Westlaw citation may be provided.

Rule 52.3 is further amended to delete the requirement of verifying all factual statements by affidavit. Instead, the filer must certify that all factual statements are supported by citation to competent evidence in the appendix or record.

Rule 53. Petition for Review

53.2 Contents of Petition

(d) *Statement of the Case.* The petition must contain a statement of the case that should seldom exceed one page and should not discuss the facts. The statement must contain the following:

(8) the citation for the court of appeals' opinion~~, if available, or a statement that the opinion was unpublished~~; and

(9) the disposition of the case by the court of appeals, including the court's disposition of any motions for rehearing or motions for en banc reconsideration. If any motions for rehearing or motions for

en banc reconsideration are pending in the court of appeals at the time the petition for review is filed, that information also must be included in the statement of the case.

53.7 Time and Place of Filing

(a) *Petition.* Unless the Supreme Court for good cause orders an earlier filing deadline, ~~T~~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.

(b) *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 and motions for en banc reconsideration is treated as having been filed on the date of, but after, the last ruling on any such motion. If a party files a petition for review while a motion for rehearing or motion for en banc reconsideration is pending in the court of appeals, the party must include that information in its petition for review, as required by Rule 53.2(d)(9).

Comment to 2008 change: Rule 53.7(a) is amended to clarify that (1) the Supreme Court may shorten the time for filing a petition for review, and (2) the timely filing of a motion for en banc reconsideration tolls the commencement of the 45-day period for filing a petition for review until the motion is overruled. Rule 53.2(d)(9) is amended to require a party that prematurely files a petition for review to notify the Supreme Court of any panel rehearing or en banc reconsideration motions still pending in the court of appeals. Rule 53.7(b) is revised to reference this new requirement and to relocate to new Rule 49.10 those provisions governing motions for rehearing. Rule 53.2(d)(8) is amended to delete the outdated reference to unpublished opinions in civil cases, similar to the change made to Rule 52.3(d)(5)(D).

Rule 68. Discretionary Review With Petition

68.7. Court of Appeals Clerk's Duties

(b) *Reply.* The opposing party has 30 days after the timely filing of the petition in the court of appeals to file a reply to the petition with the clerk of the court of appeals. Upon receiving a reply to the petition, the clerk for the court of appeals must file the reply and note the filing on the docket.

(c)~~(b)~~ *Sending Petition and Reply to Court of Criminal Appeals.* Unless a petition for discretionary review is dismissed under Rule 50, the clerk of the court of appeals must, within 60 ~~30~~ days after the petition is filed, send to the clerk of the Court of Criminal Appeals the petition and any copies furnished by counsel, the reply, if any, and any copies furnished by counsel, together with the record, copies of the motions filed in the case, and copies of any judgments, opinions, and orders of the court of appeals. The clerk need not forward any nondocumentary exhibits unless ordered to do so by the Court of Criminal Appeals.

~~**68.9 Reply**~~

~~The opposing party has 30 days after the timely filing of the petition in the Court of Criminal Appeals--unless additional time is allowed--to file a reply to the petition with the Clerk of the Court of Criminal Appeals. When a reply is filed or the time for filing a reply has expired, the petition will be treated as submitted to the Court and ready for disposition.~~

Rule 70. Brief on the Merits

70.3 Brief Contents and Form. Briefs must comply with the requirements of Rule 38, except that they need not contain the appendix (Rule 38.1(jk)). Copies must be served as required by Rule 68.11.

71.3 Briefs. Briefs in a direct appeal should be prepared and filed in accordance with Rule 38, except that the brief need not contain an appendix (Rule 38.1(jk)), and the brief in a case in which the death penalty has been assessed may not exceed 125 pages. All briefs must be filed in the Court of Criminal Appeals. The brief must include a short statement of why oral argument would be helpful, or a statement that oral argument is waived.

Proposed Rule of Appellate Procedure 28.1(a)-(b) defines "accelerated appeals" to include all appeals required by law to be filed or perfected in fewer than 30 days, and provides that all accelerated appeals are governed by the 20-day deadline of Rule 26.1(b) regardless of any statutory deadlines. In other words, under proposed Rule 28.1(b), the provisions in the appellate rules "trump" contrary statutory deadlines providing fewer than 30 days for appeal.

28.1 Civil Cases—Appeal As of Right

(a) *Types of Accelerated Appeals.* Appeals from interlocutory orders (when allowed as of right by statute), appeals in quo warranto proceedings, appeals required by statute to be accelerated or expedited, and appeals required by law to be filed or perfected within less than 30 days after the date of the order or judgment being appealed are accelerated appeals.

(b) *Perfection of Accelerated Appeal.* Unless a statute expressly prohibits modification or extension of any statutory appellate deadlines, an accelerated appeal is perfected by filing a notice of appeal in compliance with Rule 25 within the time allowed by Rule 26.1(b) or as extended by Rule 26.3, regardless of any statutory deadlines. Filing a motion for new trial, any other post-trial motion, or a request for findings of fact will not extend the time to perfect an accelerated appeal.

Following is a list of statutory appellate deadlines that would be effectively repealed by proposed Rule 28.1(b). Although the Supreme Court has the statutory power to repeal statutory provisions governing procedure in civil cases, to effectuate this power the Court must identify any such statutes in a list provided to the Secretary of State. *See* Tex. Gov't Code §22.004(c).[1]

The statutory appellate timetables summarized below (statutory text follows in separate appendices) would be altered by proposed Tex. R. App. P. 28.1(b):

Election Code §232.014

Summary: In a contest of a primary election, an appellant's bond, affidavit, or cash deposit for costs of appeal must be made not later than the fifth day after the date the district court's judgment in the contest is signed. If the appellant is not required to give security for the costs of appeal, the notice of appeal must be filed by the same deadline.

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[1]Tex. Gov't Code §22.004(c) provides:

> So that the supreme court has full rulemaking power in civil actions, a rule adopted by the supreme court repeals all conflicting laws and parts of laws governing practice and procedure in civil actions, but substantive law is not repealed. At the time the supreme court files a rule, the court shall file with the secretary of state a list of each article or section of general law or each part of an article or section of general law that is repealed or modified in any way. The list has the same weight and effect as a decision of the court.

Family Code §56.03(c)

Summary: The state's appeal of various court orders in juvenile case in which the grand jury has approved a petition (effectively issued an indictment) alleging habitual felony conduct or any of several serious offenses (murder, kidnapping, sexual assault, etc.) must be brought within 15 days of the order or ruling to be appealed.

Health & Safety Code §81.191

Summary: A notice of appeal from an order for the management of a person with a communicable disease, or from a renewal or modification of an order, must be filed within 10 days of the order.

Health & Safety Code §462.076

Summary: A notice of appeal of an order requiring court-ordered treatment for chemical dependency must be filed not later than 10 days after the date the order is signed.

Health & Safety Code §574.070

Summary: A notice of appeal of an order requiring court-ordered treatment for chemical dependency must be filed not later than 10 days after the date the order is signed.

Labor Code §102.075

Summary: An appeal of district court's decision in labor arbitration case must be filed within 10 days after judgment.

In addition, there are many statutes that provide for interlocutory, accelerated, or preferential appeal that would be subject to proposed Rule 28.1(b) but for which the proposed rule would not repeal the statutory provisions regarding appeal. Below are several statutory appellate timetables that, for the reasons provided, I believe are likely *not* repealed by proposed Rule 28.1:

Utilities Code §39.001(f)

Summary: A person challenging the validity of a competition rule must file the notice of appeal within 15 days after the rule is published in the Texas Register; but the court of appeals may, for good cause, modify the filing deadlines. The statute also provides that the Appellate Rules "apply to an appeal brought under this section to the extent not inconsistent with this section." Because the statute contemplates that its provisions trump any inconsistent provisions in the Appellate Rules, proposed 28.1(b) would not trump this statute.

Utilities Code §39.303(f):

Summary: An appeal of a PUC financing order to recover an electric utility's regulatory assets must be filed in district court within 15 days to PUC, and any direct appeal to the Texas Supreme Court must be filed within 15 days after district court's judgment. However, proposed 28.1 wouldn't affect the appeal to district court, and I also don't think it would trump the direct appeal provision due to the exception in Rule 57.1, which provides that rules governing appeals to courts of appeals also apply to direct appeals to the Texas Supreme Court "except when inconsistent with

a statute or this rule."

Civil Practice and Remedies Code §15.0642

Summary: this statute provides deadlines for filing a mandamus to enforce mandatory venue provisions. However, Rule 28 applies only to appeals, not to original proceedings, so this statute creates no conflict.

Tex. R. Discip. P. 12.07

Summary: this rule provides that an appeal of a BODA judgment denying a lawyer's petition for reinstatement must be filed in the Supreme Court w/in 14 days after receipt of the BODA determination. Proposed Rule 28.1(b) provides that Rule 26.1(b)'s deadlines apply to all appeals required to be perfected in fewer than 30 days, "regardless of any *statutory* deadlines" (emphasis added). Because the shorter appeal provisions of Disciplinary Procedure Rule 12.07 are not statutory, they are not rescinded by proposed Rule 28.1(b).

§232.014. Accelerated Appeal in Primary Contest.

(a) This section applies only to the contest of a primary election.

(b) To be timely, an appellant's bond, affidavit, or cash deposit for costs of appeal must be made not later than the fifth day after the date the district court's judgment in the contest is signed. If the appellant is not required to give security for the costs of appeal, the notice of appeal must be filed by the same deadline.

(c) If an appellant files an affidavit of inability to pay costs of appeal, a challenge to the affidavit must be filed not later than the fifth day after the date the affidavit is filed.

(d) As soon as practicable after an appeal in a contest is perfected, the district judge shall set the deadline for filing the trial court record in the appellate court. The judge may make any other orders to expedite an appeal that are reasonable and appropriate, including reducing the time normally allowed for filing appellate briefs, subject to review by the appellate court on motion of a party.

(e) The court of appeals may refuse to permit a motion for rehearing to be filed or may reduce the time for filing the motion.

(f) The decision of the court of appeals is not reviewable by the supreme court by certified question or any other method.

§56.03. Appeal by State in Cases of Violent or Habitual Offender.

(a) In this section, "prosecuting attorney" means the county attorney, district attorney, or criminal district attorney who has the primary responsibility of presenting cases in the juvenile court. The term does not include an assistant prosecuting attorney.

(b) The state is entitled to appeal an order of a court in a juvenile case in which the grand jury has approved of the petition under Section 53.045 if the order: (1) dismisses a petition or any portion of a petition; (2) arrests or modifies a judgment; (3) grants a new trial; (4) sustains a claim of former jeopardy; or (5) grants a motion to suppress evidence, a confession, or an admission and if: (A) jeopardy has not attached in the case; (B) the prosecuting attorney certifies to the trial court that the appeal is not taken for the purpose of delay; and (C) the evidence, confession, or admission is of substantial importance in the case.

(c) The prosecuting attorney may not bring an appeal under Subsection (b) later than the 15th day after the date on which the order or ruling to be appealed is entered by the court.

§ 53.045. Violent or Habitual Offenders.

(a) Except as provided by Subsection (e), the prosecuting attorney may refer the petition to the grand jury of the county in which the court in which the petition is filed presides if the petition alleges that the child engaged in delinquent conduct that constitutes habitual felony conduct as described by Section 51.031 or that included the violation of any of the following provisions: (1) Section 19.02, Penal Code (murder); (2) Section 19.03, Penal Code (capital murder); (3) Section 19.04, Penal Code (manslaughter); (4) Section 20.04, Penal Code (aggravated kidnapping); (5) Section 22.011, Penal Code (sexual assault) or Section 22.021, Penal Code (aggravated sexual assault); (6) Section 22.02, Penal Code (aggravated assault); (7) Section 29.03, Penal Code (aggravated robbery); (8) Section 22.04, Penal Code (injury to a child, elderly individual, or disabled individual), if the offense is punishable as a felony, other than a state jail felony; (9) Section 22.05(b), Penal Code (felony deadly conduct involving discharging a firearm); (10) Subchapter D, Chapter 481, Health and Safety Code, if the conduct constitutes a felony of the first degree or an aggravated controlled substance felony (certain offenses involving controlled substances); (11) Section 15.03, Penal Code (criminal solicitation); (12) Section 21.11(a)(1), Penal Code (indecency with a child); (13) Section 15.031, Penal Code (criminal solicitation of a minor); (14) Section 15.01, Penal Code (criminal attempt), if the offense attempted was an offense under Section 19.02, Penal Code (murder), or Section 19.03, Penal Code (capital murder), or an offense listed by Section 3g(a)(1), Article 42.12, Code of Criminal Procedure; (15) Section 28.02, Penal Code (arson), if bodily injury or death is suffered by

any person by reason of the commission of the conduct; (16) Section 49.08, Penal Code (intoxication manslaughter); or (17) Section 15.02, Penal Code (criminal conspiracy), if the offense made the subject of the criminal conspiracy includes a violation of any of the provisions referenced in Subdivisions (1) through (16).

(b) A grand jury may approve a petition submitted to it under this section by a vote of nine members of the grand jury in the same manner that the grand jury votes on the presentment of an indictment.

(c) The grand jury has all the powers to investigate the facts and circumstances relating to a petition submitted under this section as it has to investigate other criminal activity but may not issue an indictment unless the child is transferred to a criminal court as provided by Section 54.02 of this code.

(d) If the grand jury approves of the petition, the fact of approval shall be certified to the juvenile court, and the certification shall be entered in the record of the case. For the purpose of the transfer of a child to the Texas Department of Criminal Justice as provided by Section 61.084(c), Human Resources Code, a juvenile court petition approved by a grand jury under this section is an indictment presented by the grand jury.

(e) The prosecuting attorney may not refer a petition that alleges the child engaged in conduct that violated Section 22.011(a)(2), Penal Code, or Sections 22.021(a)(1)(B) and (2)(B), Penal Code, unless the child is more than three years older than the victim of the conduct.

§ 81.191. Appeal.

(a) An appeal from an order for the management of a person with a communicable disease, or from a renewal or modification of an order, must be filed in the court of appeals for the county in which the order is entered.

(b) Notice of appeal must be filed not later than the 10th day after the date on which the order is signed.

(c) When an appeal is filed the clerk shall immediately send a certified transcript of the proceedings to the court of appeals.

(d) The trial judge in whose court the cause is pending may: (1) stay the order and release the person from custody before the appeal if the judge is satisfied that the person does not meet the criteria for protective custody under this chapter; and (2) if the person is at liberty, require an appearance bond in an amount set by the court.

(e) The court of appeals and supreme court shall give an appeal under this section preference over all other cases and shall advance the appeal on the docket. The courts may suspend all rules relating to the time for filing briefs and docketing cases.

§ 462.076. Appeal.

(a) The appeal of an order requiring court-ordered treatment must be filed in the court of appeals for the county in which the order is issued.

(b) Notice of appeal must be filed not later than the 10th day after the date on which the order is signed.

(c) When the notice of appeal is filed, the clerk shall immediately send a certified transcript of the proceedings to the court of appeals.

(d) Pending the appeal, the trial judge in whose court the case is pending may: (1) stay the order and release the person from custody pending the appeal if the judge is satisfied that the person does not meet the criteria for protective custody under Section 462.065; and (2) if the person is at liberty, require an appearance bond in an amount set by the court.

(e) The court of appeals and supreme court shall give an appeal under this section preference over all other cases and shall advance the appeal on the docket. The courts may suspend any rule concerning the time for filing briefs and docketing cases.

§ 574.070. Appeal.

(a) An appeal from an order requiring court-ordered mental health services, or from a renewal or modification of an order, must be filed in the court of appeals for the county in which the order is entered.

(b) Notice of appeal must be filed not later than the 10th day after the date on which the order is signed.

(c) When an appeal is filed, the clerk shall immediately send a certified transcript of the proceedings to the court of appeals.

(d) Pending the appeal, the trial judge in whose court the cause is pending may: (1) stay the order and release the patient from custody before the appeal if the judge is satisfied that the patient does not meet the criteria for protective custody under Section 574.022; and (2) if the proposed patient is at liberty, require an appearance bond in an amount set by the court.

(e) The court of appeals and supreme court shall give an appeal under this section preference over all other cases and shall advance the appeal on the docket. The courts may suspend all rules relating to the time for filing briefs and docketing cases.

§102.075. Appeals.

(a) Either party to an arbitration case decided by a district court may file an appeal of the district court's decision not later than the 10th day after the date on which the judgment is entered.

(b) The decision of the court of appeals under this section is final. The clerk of the court of appeals shall certify the decision and the district court shall enter the judgment.

(c) If the court of appeals sustains the exception, it shall set aside the award, but the parties may agree on a judgment to be entered disposing of the dispute. A judgment on an agreement entered into under this subsection has the same force and effect of law as a judgment entered on an award by a board of arbitration.

TRAP 40.1(c)

Ins. C. Art. 1.04 "shall have precedence"

- FAMILY CODE §6.507 ("An order under this sub-chapter [providing for temporary restraining orders and temporary injunctions in divorce suits], except an order appointing a receiver, is not subject to interlocutory appeal.").
- FAMILY CODE §262.112(b) ("In any proceeding in which an expedited hearing is held under Subsection(a), the department, parent, guardian, or other party to the proceeding is entitled to an expedited appeal on a ruling by a court that the child may not be removed from the child's home."). *See also id.* §262.112(c).
- FAMILY CODE §263.405(a) ("An appeal of a final order rendered under this subchapter is governed by the rules of the supreme court for accelerated appeals in civil cases and the procedures provided by this section.").
- HEALTH & SAFETY CODE §81.191(a) (dealing with "[a]n appeal from an order for the management of a person with a communicable disease . . ."). HS 962.076
- HEALTH & SAFETY CODE §574.070(a) (dealing with "[a]n appeal from an order requiring court-ordered mental health services..."). § 574.070 (e)
- GOVERNMENT CODE §1205.068 (dealing with an appeal in a declaratory judgment action relating to validity of public securities). *See also id.* §1205.105. No conflict - appeals governed by accel. appeal rules + take priority
- ELECTION CODE §232.014 (providing for accelerated appeal of final judgment of district court in election contests). *See also id.* §232.015.
- NATURAL RESOURCES CODE §85.253 (allowing appeal of order granting or refusing temporary injunctive relief in suit against Natural Resources Commission to test validity of conservation law or order of Commission relating to oil or gas).
- OCCUPATION CODE §2301.756(a) (allowing motor vehicle dealer and other licensee to appeal interlocutory orders described in subdivisions 3 and 6 of TEX. CIV. PRAC & REM. CODE §51.014(a)).
- TEX.REV.CIV.STAT. art. 4447cc §7(e) (allowing "interlocutory appeal to an appropriate appellate court of order requiring disclosure of environmental, health, and safety audit"). no conflict
- RULE 173.7, TEX. R. CIV. P. ("Any party seeking mandamus review of an order appointing a guardian ad litem or directing a guardian ad litem's participation in the litigation. Any party and a guardian ad litem may

appeal an order awarding the guardian ad litem compensation) (effective October 7, 2004).

- RULE 28.2, TEX. R. APP. (providing for accelerated "appeal in a quo warranto proceeding.").

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 08-9004

ORDER PROMULGATING RULE OF JUDICIAL ADMINISTRATION 15

It is hereby ORDERED that:

1. Pursuant to the Texas Constitution, article V, §31(a), and Texas Government Code §74.024, the Texas Rules of Judicial Administration are amended by adding Rule 15, which addresses appeals from trial courts located in counties assigned to multiple appellate districts, as follows.

2. Comments on these revisions may be submitted to the Court in writing on or before June 30, 2008. Comments should be directed to Jody Hughes, Rules Attorney, P.O. Box 12248, Austin TX 78711, or may be emailed to him at jody.hughes@courts.state.tx.us.

3. This rule, with any changes made after public comments are received, takes effect September 1, 2008.

4. The Clerk is directed to:

   a. file a copy of this Order with the Secretary of State;

   b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

   c. send a copy of this Order to each elected member of the Legislature before December 1; and

   d. submit a copy of this Order for publication in the *Texas Register*.

SIGNED AND ENTERED, this 10th day of March, 2008.

Wallace B. Jefferson, Chief Justice

Nathan L. Hecht, Justice

Harriet O'Neill, Justice

J. Dale Wainwright, Justice

Scott Brister, Justice

David M. Medina, Justice

Paul W. Green, Justice

Phil Johnson, Justice

Don R. Willett, Justice

Rule 15. Appeals from Trial Courts in Counties Assigned to Multiple Appellate Districts.

15.1 Applicability. This rule applies to appeals to a court of appeals from an order or judgment issued by a trial court in a county assigned by law to more than one court of appeals district, except where assignment of such appeals is governed by statute. This rule does not apply to appeals to the First or Fourteenth Court of Appeals from trial courts in counties in the districts of the First or Fourteenth Court of Appeals, as assignment of such appeals is governed by Tex. Gov't Code §22.202(h).

15.2 When Consolidation Required. If notices of appeal filed by two or more parties from a single judgment or order designate two courts of appeals that both have jurisdiction of the appeal because the county in which the trial court sits is assigned to more than one appellate district, the appeals must be consolidated in one of the courts of appeals.

15.3 Consolidation by Agreement; Notice to Courts of Appeals.

(a) *Appealing parties to confer regarding consolidation.* When any appealing party learns that two or more parties have properly designated two different courts of appeals, that party must promptly confer with lead counsel for all other appealing parties (if represented, otherwise counsel must confer with the pro se party) and determine if all appealing parties will agree to consolidate the appeals in one of the courts of appeals.

(b) *Time to provide notice.* No later than 30 days—20 days in an accelerated appeal—after the filing date of the first-filed notice of appeal described in paragraph (a), the parties must submit to the clerks of both courts of appeals written notice either of the appealing parties' agreement to consolidate the appeals or of the appealing parties' inability to reach agreement regarding consolidation.

(c) *Contents of notice.* The notice must identify each appealing party and the party's counsel (if represented, or state that the party is pro se), and must either identify the court of appeals designated by agreement or state that the appealing parties were unable to agree to consolidate all appeals in a particular court. The notice must also contain a certificate stating that the filing parties conferred, or made a reasonable attempt to confer, with all other appealing parties regarding consolidation of the appeals. If the notice states that all appealing parties have agreed to consolidation, it must identify every party or party's attorney who agreed to the consolidation.

(d) *Consolidation by agreement of all appealing parties.* If the clerks of both courts of appeals receive notice that all appealing parties have agreed to consolidation, the Chief Justices of both courts shall request the Chief Justice of the Supreme Court to transfer all pending appeals in the case to the court of appeals designated by the parties' agreement.

15.4 Consolidation When Appealing Parties Unable to Agree.

(a) *Clerks of courts of appeals to jointly notify trial court clerk.*

(i) If both courts of appeals receive notice of the appealing parties' inability to reach agreement regarding consolidation, the clerks of both appellate courts must jointly notify the clerk of the trial court in writing of that fact.

(ii) If the period described in Rule 15.3(b) has passed and the clerks of the two courts of appeals have not received any notice from the appealing parties regarding consolidation, the Chief Justices of the two courts of appeals shall confer and instruct the clerks of their respective courts to jointly notify the clerk of the trial court in writing that the appealing parties failed to timely submit notice of agreement regarding consolidation, and instruct the clerk to perform the selection process in Rule 15.4(b).

(b) *Consolidation by trial court clerk.* After the trial court clerk receives notice from the clerks of the courts of appeals regarding either the appealing parties' inability to reach agreement as to consolidation or their failure to timely submit notice of agreement, the clerk shall write the numbers of the two courts of appeals on identical slips of paper and place the slips in a container folded in half or otherwise arranged so that the numbers are completely hidden from view. The trial court clerk shall draw a number from the container at random, in a public place, and shall assign the case to the court of appeals for the corresponding number drawn.

15.5 All Appeals From Same Judgment or Order to be Consolidated Together. When appeals to multiple courts of appeals have been consolidated pursuant to this rule, other parties' appeals from the same judgment or order underlying the consolidated appeals must be assigned to the same court of appeals in which the previous appeals were consolidated.

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

September 25, 2007

issues
(1) put ~~JNOV deadline~~ JNOV filing deadline in TRCP 301

(2) clarify whether pre-~~JNOV~~ jmt JNOV mtn extends appellate deadline

Skip Watson: in pre-jmt JNOV, if also contains ~~plea for~~ factual insufficiency, then you've just created a Brookshire problem

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 Rules Issues

Via e-mail

Dear Chip:

The Court requests the Advisory Committee's recommendations on several potential changes to the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Uniform Format Manual for Texas Court Reporters. These proposals are summarized in the attached appendix A. A copy of the SBOT Rules Committee proposal to amend Tex. R. Civ. P. 301 and Tex. R. App. P. 26.1(a) is separately attached in electronic format.

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 October 19th.

Jan + March 1996

Vote: No change/ revisit all: 19-1 revisit
SBOT proposal ~~as~~: 5-9

Sincerely,

Nathan L. Hecht
Justice

RULES OF CIVIL PROCEDURE

Rule: 301
Current Text:
Rule 301 Judgments. The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity. Provided, that upon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any jury finding on a question that has no support in the evidence. Only one final judgment shall be rendered in any cause except where it is otherwise specially provided by law. Judgment may, in a proper case, be given for or against one or more of several plaintiffs, and for or against one or more of several defendants or intervenors.

Summary of Issue:

The State Bar of Texas (SBOT) Rules Committee recently submitted to the Court a proposal to amend Rule 301 to provide a clear post-judgment deadline for filing a motion for judgment non obstante veredicto (JNOV). *See Gomez v. Tex. Dep't of Criminal Justice*, 896 S.W.2d 176, 176-77 (Tex. 1995) (per curiam) (holding that "bill of review" filed within 30 days of judgment extended time to perfect appeal under former Appellate Rule 41(a)(1) because it "assailed the trial court's judgment"); *Kirschberg v. Lowe*, 974 S.W.2d 844, 847-48 (Tex. App.CSan Antonio 1998, no pet.) (noting that Tex. R. Civ. P. 301 provides no explicit time limit to file JNOV motion, but concluding that, under *Gomez*, JNOV motion filed within time for filing motion for new trial extends appellate timetable). The Advisory Committee is asked to consider the SBOT Rules Committee's proposed revisions to Rule 301, which are set forth below, as well as its corresponding proposal to amend Appellate Rule 26.1(a), shown on page 3.

Proposed Revised Text:
Rule 301 Judgments.

1. The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the parties all the relief to which each may be entitled either in law or equity.

2. After the verdict has been entered under Rule 293, upon motion and reasonable notice the court may render judgment not withstanding the verdict if a directed verdict would have been proper. The court may, upon like motion and notice, set aside any jury finding on a question that has no support in the evidence. Such motions and any amended motions shall be filed not later than the time for filing a motion for new trial under Rule 329b. Any timely filed motion or amended motion shall extend the trial court's plenary power to grant a judgment notwithstanding the verdict, set aside any jury finding, grant a new trial or to vacate, modify, correct, or reform the judgment or appealable order for the same period as would a timely filed motion for new trial under Rule 329b. In the event an original or amended motion under this rule is not determined by written order signed within seventy-five days after the judgment was signed, it shall be considered overruled by operation of law on the expiration of that period.

3. Only one final judgment shall be rendered in any cause except where it is otherwise specially provided by law. Judgment may, in a proper case, be given for or against one or more of several plaintiffs, and for or against one or more of several defendants or intervenors.

SDuncan opposes; & is skip; TC should be able to grant JNOV anytime w/in plenary power

RULES OF APPELLATE PROCEDURE

Rule: 26.1(a)
Current Text (with proposed changes shown):
26.1Civil Cases. The notice of appeal must be filed within 30 days after the judgment is signed, except as follows:
(a)the notice of appeal must be filed within 90 days after the judgment is signed if any party timely files:
(1)a motion for new trial;
(2)a motion to modify the judgment;
(3)a motion to reinstate under Texas Rule of Civil Procedure 165a; ~~or~~
(4)a motion for judgment notwithstanding the verdict or to disregard jury findings under Texas Rule of Civil Procedure 301; or
(45)a request for findings of fact and conclusions of law if findings and conclusions either are required by the Rules of Civil Procedure or, if not required, could properly be considered by the appellate court;

Summary of Issue:
The SBOT Rules Committee proposes amending Tex. R. App. P. 26.1(a) as shown in conjunction with its proposal, summarized above on pages 2-3, to amend Tex. R. Civ. P. 301. The Court requests the Advisory Committee's analysis of this proposal.

Rule: 53.7(a)
Current Text:
53.7Time and Place of Filing.
(a)*Petition.* The petition must be filed with the Supreme Court clerk within 45 days after the following:
(1)the date the court of appeals rendered judgment, if no motion for rehearing is timely filed; or
(2)the date of the court of appeals' last ruling on all timely filed motions for rehearing.

Summary of Issue:
Appellate Rule 4.3(a) provides that if the trial-court judgment is modified in any respect while the trial court has plenary power, any period that runs from the signing of the judgment is extended to run from the date the modified judgment is signed. But Rule 53.7(a), which governs the time period for filing a petition for review, does not contain any provision extending the time to file if the court of appeals alters its judgment or opinion during its plenary powerCunless the modification is made in conjunction with the court of appeals's ruling on a timely filed motion for rehearing, in which case the ruling on the motion extends the time to file under Rule 53.7(a)(2). The Committee is asked to consider whether Rule 53.7(a) or another Appellate Rule should be amended to address this issue.

UNIFORM FORMAT MANUAL FOR TEXAS COURT REPORTERS

Provision: Section 16.16

Current text:

16.16 Audio/Video Recordings. Generally, audio/video recordings played in court are entered as an exhibit in the proceedings. When the exhibits are played in court, a contemporaneous record of the proceedings will not be made unless the Court so orders.

Summary of Issue:

At the 2007 State Bar Advanced Civil Appellate Practice Course, Stephen Tipps noted that the above provision appears to conflict with Appellate Rule 13.1, which requires the official court reporter or court recorder to, "unless excused by agreement of the parties, attend court sessions and make a full record of the proceedings." Tex. R. App. P. 13.1(a). Mr. Tipps notes that when videotape deposition excerpts or other audio or audiovisual recordings are played for the jury, court reporters sometimes rely on Uniform Format Manual ' 16.16 and do not transcribe the recording being played. Although this may not be problematic if a prior transcription of the recording is offered in evidence, in other casesCwhere either no transcription exists, or an existing transcription is never admitted in evidenceCthe trial reporter's failure to transcribe may result in no transcription of the material presented appearing in the appellate record, potentially frustrating appellate review. The Committee is asked to consider the relationship between the TRAP and UFM provisions governing transcription and recommend whether either set of rules should be amended to address the issue.

MEMORANDUM

TO: Sarah Duncan October 5, 2007

FROM: Jody Hughes

RE: Revised Version of SBOT Rules Committee Proposals on TRCP 301, TRAP 26.1

The draft below reflects my attempt to re-tool the substance of the State Bar Rules Committee proposal on TRCP 301 and TRAP 26.1 (attached) using the modernized concepts and language from the Recodification draft. Bill has reviewed this draft and we discussed his suggested edits, and with those included he is comfortable with the draft. He mentioned your work on the Recodification drafting and thought would also be interested in this issue, which I believe will be referred to your SCAC subcommittee if Chip has not done so already. I had asked Bill to review this draft initially with the thought that your subcommittee could use it as a starting point if you want.

The most significant changes are to Rule 301, particularly the addition of new rules 301a-c, which mostly are taken verbatim (except for the rule numbering) from the Recodification provisions. I inserted Recodification rule references in brackets for tracking the origins of particular rule provisions. I also eliminated references to motions to correct and reform in Rule 329b, and have tried to make changes to other rules (300, 306a) as required by the changes to Rules 301 and 329b, and minor style edits. Other than TRAP 38.2(b) below, I don't think these changes would require any amendments to the existing TRAPs, as Rule 26.1 refers only to motions to modify the judgment.

Bill and I discussed whether a motion to vacate the judgment should be added as a separate subspecies of motion to modify under Rule 301c, or instead simply subsumed within the motion to modify as motions to correct or reform are in the current draft. I had observed that the modify/vacate dichotomy appears in the TRAPs, both with respect to trial-court judgments, *see, e.g.,* TRAP 27.3 ("If Appealed Order Modified or Vacated"), and appellate-court judgments, *see* TRAP 19.2 (court of appeals retains plenary power to vacate or modify its judgment during periods prescribed in Rule 19.1 even after PFR filed in supreme court). However, Bill noted Judge Guittard's view that the rules should not provide for a party to file a motion to vacate, although a trial court would have the power to vacate its own judgments. Accordingly, I have left rule 301c as drafted, with no separate provision for a motion to vacate the judgment.

We also discussed whether Rule 316's language that refers to correcting the *record of* a judgment should be revised to match TRAP 4.3(b), which refers to the nunc pro tunc action under Rule 316 simply as correcting or reforming the judgment. This discrepancy caused me some confusion in light of existing Rule 329b(g), which refers to both substantive motions to correct or reform the judgments as well as nunc pro tunc motions under Rule 316. TRCP 329b(g) ("motion to modify, correct, or reform a judgment (as distinguished from [a] motion to correct the record of a judgment under Rule 316...."). However, as Bill and I discussed today, the Recodification language used below largely solves this problem by collapsing substantive (non-316) motions to correct or reform into the motion to modify under new Rule 301c. Existing Rule 329b(f) clearly provides that the trial court can make nunc pro tunc corrections to the record "at any time," so I don't think that eliminating the other "correct or reform" references elsewhere in 329b will cause any substantive changes.

Rule 300. Court to Render Judgment

Where a special verdict is rendered, or the conclusions of fact found by the judge are separately stated the court shall render judgment thereon unless the court renders judgment as a matter of law, grants a motion to disregard a jury finding, or grants a new trial ~~set aside or a new trial is granted, or judgment is rendered notwithstanding verdict or jury finding~~ under these rules.

Comment to 2007 change: Consistent with the contemporaneous amendments to Rule 301, the reference in former Rule 300 to judgment notwithstanding the verdict is replaced with the motion for judgment as a matter of law, described in new Rule 301b.

Rule 301. Judgments

The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity. ~~Provided, that upon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any jury finding on a question that has no support in the evidence.~~ Only one final judgment shall be rendered in any cause except where it is otherwise specially provided by law. Judgment may, in a proper case, be given for or against one or more of several plaintiffs, and for or against one or more of several defendants or intervenors.

Comment to 2007 change: the former rule's provisions for seeking judgment non obstante veredicto, also known as judgment NOV or judgment notwithstanding the verdict, are deleted and replaced with the motion for judgment as a matter of law in new Rule 301b and the motion to modify the judgment under new Rule 301c. No substantive change is intended; the terminology is revised to eliminate confusion resulting from the interplay between Rule 301 and Rule 329b. Under former rule 301, a JNOV motion could be filed either post-verdict and pre-judgment or post-judgment, but only a post-judgment JNOV motion could constitute a motion to modify the judgment that extended a trial court's plenary power and the time to perfect appeal under Rule 329b. Under the amended rules, what was formerly styled a JNOV motion is now, if filed pre-judgment, a motion for judgment as a matter of law under new Rule 301b; any post-judgment motion that seeks to modify the judgment (other than a motion to correct a clerical mistake under Rule 316), including what was formerly a post-judgment JNOV motion, is now a motion to modify the judgment under Rule 301c. Similarly, a request to disregard jury findings can be included in a motion for judgment as a matter of law under Rule 301b, if the request is made prior to the entry of judgment, or, if the request is made post-judgment, in a motion to modify the judgment under Rule 301c.

Rule 301a. Motion for Judgment on the Jury Verdict

(a) A motion for judgment on the jury verdict may be presented at any time before a final judgment has been signed. A motion for judgment on the jury verdict is overruled by operation of law when a final judgment is signed that does not grant the motion. [Recod R. 101(b)]

(b) A motion for judgment can be made without waiving objections to the verdict if the movant's objections are clearly stated in a motion for judgment as a matter of law or otherwise brought to the trial court's attention in a timely and proper manner. [Roger Hughes proposal]

Comment to 2007 change: this is a new rule adopted in conjunction with the contemporaneous amendments to Rule 301, as discussed in the comment following that rule.

Rule 301b. Motion for Judgment as a Matter of Law

(a) A party may move for judgment as a matter of law, and include a request to disregard a jury finding as a matter of law, on a claim or defense:

(1) if the evidence, after the adverse party rests its evidence, or at the close of all the evidence, or after the verdict in a jury case and before judgment,

(i) is legally insufficient for a reasonable jury to find against the movant on a particular issue of fact or if the evidence conclusively establishes the issue in the movant's favor, and

(ii), if, under the controlling law, a judgment cannot properly be rendered against the movant on that claim or defense without a finding adverse to the movant on an issue that has been disregarded, and a judgment as a matter of law should be rendered for the movant as to that claim or defense; or

(2) if the application of controlling law to a claim or defense otherwise determines a claim or defense as a matter of law, unless the movant waived application of controlling law by failing to preserve a complaint that the court's charge affirmatively misstates controlling law. [Recod R. 101(b)]

(b) A motion for judgment as a matter of law may be presented after the adverse party rests its evidence, or at the close of all the evidence, or after the verdict in a jury trial and before judgment, and shall not be considered waived if not presented earlier. A motion for judgment as a matter of law shall not be presented after a final judgment has been signed. A ground in a motion for judgment as a matter of law is overruled as a matter of law when a final judgment is signed that does not grant that ground. [Recod R. 104(b)]

(c) A party moving for judgment as a matter of law may move in the alternative, in the same or a separate pleading, for judgment on the jury verdict without waiving objections to the verdict if the movant's objections are clearly stated in the motion for judgment as a matter of law or otherwise brought to the trial court's attention in a timely and proper manner. [Roger Hughes proposal]

Comment to 2007 change: this is a new rule adopted in conjunction with the contemporaneous amendments to Rule 301, as discussed in the comment following that rule.

Rule 301c. Motion to Modify Judgment

(a) A party may move to modify a judgment as a matter of law, including a request to disregard a jury finding as a matter of law, after a judgment has been rendered:

(1) if the evidence is legally insufficient for a reasonable jury to find against the movant on a particular issue of fact or if the evidence conclusively establishes the issue in the movant's favor;

(2) if the application of controlling law to a claim or defense otherwise determines a claim or defense as a matter of law, unless the movant waived application of controlling law by failing to preserve a complaint that the court's charge

affirmatively misstates controlling law; or

(3) if the judgment should be vacated, modified, reformed, or corrected in any respect for any reason. [Recod. R. 101(c)]

(b) A motion to modify a judgment must be in writing, must be signed by the filing party or attorney, and must specify the respects in which the judgment should be modified. The time periods for a party to file, and for a trial court to rule on, a motion to modify a judgment are stated in Rule 329b. A motion for judgment as a matter of law is not a prerequisite to a motion to modify a judgment. [source: first sentence is derived from existing R. 329b(g); the second sentence is new; and the third sentence is the last sentence of Recod. R. 101(c)]

Comment to 2007 change: this is a new rule adopted in conjunction with the contemporaneous amendments to Rule 301, as discussed in the comment following that rule. Although the time periods for a party to file, and for the court to rule on, a motion to modify the judgment remain the same under Rule 329b(g), new Rule 301c more clearly delineates the reasons for filing a motion to modify.

Rule 306a. Periods to Run from Signing of Judgment

1. **Beginning of Periods.** The date of judgment or the date an order is signed as shown of record ~~shall~~ determines the beginning of the periods prescribed by these rules for the court's plenary power to grant a new trial or to vacate, or 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.

Comment to 2007 change: rule 306a is amended consistent with the contemporaneous amendments to Rule 329b, which eliminates motions to correct or reform judgments; any request to alter a judgment (other than a motion to correct the record under Rule 316) should now be made as a motion to modify the judgment under new Rule 301c. Other non-substantive changes are made.

Rule 324. Prerequisites of Appeal

(c) **Judgment ~~Notwithstanding Findings~~ as a Matter of Law; Cross-Points.** When judgment is rendered ~~non obstante verdicto or notwithstanding the findings of a jury~~ as a matter of law under Rule 301b on one or more questions, the appellee may bring forward by cross-point contained in his brief filed in the Court of Appeals any ground which would have vitiated the verdict or would have prevented an affirmance of the judgment had one been rendered by the trial court in harmony with the verdict, including although not limited to the ground that one or more of the jury's findings have insufficient support in the evidence or are against the overwhelming preponderance of the evidence as a matter of fact, and the ground that the verdict and judgment based thereon should be set aside because of improper argument of counsel.

N.B.: Bill notes that this rule is misplaced in the TRCP and questions whether it is necessary at all, in light of TRAP 38.2. It could probably be deleted altogether.

Rule 329b. Time for Filing Motions

The following rules shall be applicable to motions for new trial and motions to modify~~, correct, or reform~~ judgments (other than motions to correct the record of a judgment under Rule 316) in all district and county courts:

(a) A motion for new trial, if filed, shall be filed prior to or within thirty days after the judgment or other order complained of is signed.

(b) One or more amended motions for new trial may be filed without leave of court before any preceding motion for new trial filed by the movant is overruled and within thirty days after the judgment or other order complained of is signed.

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

(d) The trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate~~,~~ or modify~~, correct, or reform~~ the judgment within thirty days after the judgment is signed.

(e) If a motion for new trial is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate~~,~~ or modify~~, correct, or reform~~ the judgment until thirty days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.

(f) On expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law; provided that the court may at any time correct a clerical error in the record of a judgment and render judgment nunc pro tunc under Rule 316, and may also sign an order declaring a previous judgment or order to be void because signed after the court's plenary power had expired.

(g) A motion to modify~~, correct, or reform~~ a judgment (as distinguished from motion to correct the record of a judgment under Rule 316), if filed, shall be filed and determined within the time prescribed by this rule for a motion for new trial and shall extend the trial court's plenary power and the time for perfecting an appeal in the same manner as a motion for new trial. ~~Each such motion shall be in writing and signed by the party or his attorney and shall specify the respects in which the judgment should be modified, corrected, or reformed.~~ The overruling of ~~such~~ a motion to modify the judgment shall not preclude the filing of a motion for new trial,

nor shall the overruling of a motion for new trial preclude the filing of a motion to modify~~, correct, or reform~~.

(h) If a judgment is modified~~, corrected or reformed~~ in any respect, the time for appeal shall run from the time the modified~~, corrected, or reformed~~ judgment is signed, but if a correction is made pursuant to Rule 316 after expiration of the period of plenary power provided by this rule, no complaint shall be heard on appeal that could have been presented in an appeal from the original judgment.

Rules of Appellate Procedure

38.2 Appellee's Brief.

(b) ***Cross-points.***

(1) *Judgment ~~notwithstanding the verdict~~* as a matter of law. When the trial court renders judgment ~~notwithstanding the verdict~~ as a matter of law on one or more questions, the appellee must bring forward by cross-point any issue or point that would have vitiated the verdict or that would have prevented an affirmance of the judgment if the trial court had rendered judgment on the verdict. Failure to bring forward by cross-point an issue or point that would vitiate the verdict or prevent an affirmance of the judgment waives that complaint.

Jody Hughes

From: Duncan, Sarah [sduncan@lockelord.com]
Sent: Thursday, April 03, 2008 2:53 PM
To: Jody Hughes
Subject: FW: Time to file Motion for Jnov
Attachments: RECODIFICATION PROJECT.pdf; SCAC%20-%209-25-07%20referral%20letter%20from%20Justice%20Hecht[1].pdf

I should put you in my TRCP 300-30 list and will do it right now, Jody.

From: Duncan, Sarah
Sent: Thursday, April 03, 2008 2:45 PM
To: cwatson@lockeliddell.com; Frank Gilstrap; jeffersl@haynesboone.com; kfgreen@stx.rr.com; Mike Hatchell (mahatchell@lockeliddell.com); Ralph Duggins; stephen.tipps@bakerbotts.com
Cc: Duncan, Sarah
Subject: Time to file Motion for Jnov

Guys and Girl--

Belatedly, I write to ask you to please vote on the following issue:

A motion for judgment notwithstanding the verdict (or motion for judgment as a matter of law in the Recodification Draft) must be filed:

1. "not later than the time for filing a motion for new trial under Rule 329b." (SBOT Rules Committee proposal in J. Hecht's 9/25/07 letter) (attached)

OR

2. "A motion for judgment as a matter of law may be presented after the adverse party rests its evidence, or at the close of all the evidence, or after the verdict in a jury case and before judgment, and shall not be considered waived if not presented earlier. A motion for judgment as a matter of law shall not be presented after a final judgment has been signed." (Recodification Draft Rule 104(b), approved by the SCAC 10/17/97) (attached)

OR

3. something else

Thanks,
Sarah

Sarah B. Duncan
Of Counsel
Locke Lord Bissell & Liddell LLP

Redraft 7/18/97 WVD III

(Proposed Rules 100-105 are taken from the "Supreme Court Advisory Committee Proposed Amendments to Texas Rules of Civil Procedure 296-331" dated, July 31, 1996)

Section 8
JUDGMENTS; MOTIONS FOR JUDGMENT; NEW TRIALS

Rule 100. Judgments, Decrees and Orders

(a) Rendition, Signing and Filing. A judge shall render judgment on the facts found, either by the jury or the judge, unless a new trial is granted or a judgment is rendered as a matter of law. A judgment is rendered when the judge announces it in open court, or if it is not so announced, when it is signed by the judge. A judgment orally announced shall be promptly reduced to writing and signed by the judge. A signed judgment shall be promptly filed with the clerk of the court.

(b) Final Judgment.

(1) Definition. A final judgment for purposes of post-trial and appellate procedure in the same case is a signed order disposing of all parties and claims, either expressly or by implication.

(2) Disposition by Implication. A claim is disposed of by implication if a judgment is rendered on the merits after a conventional trial and no severance or separate trial of the claim has been ordered.

(3) Separate Orders, Conflicts. When different parties or separate claims are disposed of by separate orders, no one of which by its terms disposes of all parties and all claims, none of the orders is final until a judgment is signed that disposes of all parties and claims. A final judgment may incorporate by reference the provisions of an earlier signed interlocutory order, but if any provision of the earlier order conflicts with the final judgment, the final judgment controls, except that no relief previously granted may be nullified by a general provision in the final judgment that all relief not previously granted is denied.

(c) Form and Substance: General. A judgment shall:

(1) contain the names of the parties;

(2) conform to the pleadings, the facts proved, and the verdict, if any, unless a judgment is rendered as a matter of law;

(3) state the relief, either in law or in equity, granted or denied, to or against, each party; and

(4) if appropriate, direct the issuance of process and such writs as may be necessary to enforce the judgment.

(d) Form and Substance: Specific.

(1) Personal Property. A judgment for personal property may provide for a writ for seizure and delivery of such property.

(2) Foreclosure Proceedings. A judgment for foreclosure of a mortgage and or other lien shall provide for: (1) recovery of the debt, damages and costs; (ii) foreclosure of the lien on the property subject to the lien; (iii) an order to sell the property as under execution, except in judgments against personal representatives; and (iv) if the property cannot be found or if the proceeds of the sale are insufficient to satisfy the judgment, then execution on other property of the judgment debtor for the balance remaining unpaid. The judgment foreclosing a lien on real estate has the force and effect of a writ of possession as between the parties and any person claiming under the judgment debtor by right acquired pending suit and the judgment shall so provide. The judgment shall also direct the sheriff or other officer to place the purchaser of the property in possession within thirty days after the date of the foreclosure sale.

(3) Personal Representative. A judgment for the recovery of money against a personal representative, whether an executor, administrator or guardian shall state that it is to be paid in the due course of administration. No enforcement shall be attempted on a judgment against a

personal representative, but it shall be certified to the court, sitting in probate, to be enforced under the law, except that a judgment against an independent executor may be enforced against the property of the testator in the hands of the independent executor.

Rule 101. Motions Before and After Judgment

(a) Motion for Judgment on the Verdict. A party may move for judgment on the verdict of the jury.

(b) Motion for Judgment as a Matter of Law. A party may move for judgment as a matter of law, and include a request to disregard a jury finding as a matter of law, on a claim or defense:

(1) if the evidence, after the adverse party rests its evidence, or at the close of all of the evidence, or after the verdict in a jury case and before judgment, (i) is legally insufficient for a reasonable jury to find against the movant on a particular issue of fact or if the evidence conclusively establishes the issue in the movant's favor, and (ii) if, under the controlling law, a judgment cannot properly be rendered against the movant on that claim or defense without a finding adverse to the movant on an issue that has been disregarded, and a judgment as a matter of law should be rendered for movant as to that claim or defense; or

(2) if the application of controlling law to a claim or defense otherwise determines a claim or defense as a matter of law, unless the movant waived application of controlling law by failing to preserve a complaint that the court's charge affirmatively misstates controlling law.

(c) Motion to Modify Judgment. A party may move to modify a judgment as a matter of law, including a request to disregard a jury finding as a matter of law, after a judgment has been rendered:

(1) if the evidence is legally insufficient for a reasonable jury to find against the movant on a particular issue of a fact or if the evidence conclusively establishes the issue in the movant's favor;

(2) if the application of controlling law to a claim or defense otherwise determines a claim or defense as a matter of law, unless the movant waived application of controlling law by failing to preserve a complaint that the court's charge affirmatively misstates controlling law; or

(3) if the judgment should be vacated, modified, reformed, or corrected in any respect for any reason.

A motion for judgment as a matter of law is not a prerequisite to a motion to modify a judgment.

(d) Motion for New Trial. A party may move to set aside a judgment and seek a new trial pursuant to Rule 102.

(e) Motion for Judgment Record Correction. A party may move, with notice to all parties interested in a judgment, for correction or reformation of clerical mistakes made in reducing to writing the judgment rendered by the judge.

(f) Motion Practice. A motion identified in this rule must state the specific complaint or request for relief in such a way that the matter can be understood by the judge. A party may file one or more motions identified in this rule and may renew or refile an additional motion of the same type containing additional complaints and requests for relief despite the denial of any previous motion. A party may also submit a proposed judgment or order with the motion.

Rule 102. Motions for New Trial

(a) Grounds. For good cause, a new trial, or partial new trial under paragraph (f), may be granted and a judgment may be set aside on motion of a party or on the judge's own motion, in the following instances, among others:

(1) when the evidence is factually insufficient to support a jury finding;

(2) when a jury finding is against the overwhelming preponderance

of the evidence;

(3) when the damages awarded by the jury are manifestly too small or too large because of the factual insufficiency or overwhelming preponderance of the evidence;

(4) when the trial judge has made an error of law that probably caused rendition of an improper judgment;

(5) when injury to the movant has probably resulted from: (i) misconduct of the jury; or (ii) misconduct of the officer in charge of the jury; or (iii) improper communication to the jury; or (iv) a juror's erroneous or incorrect answer on voir dire examination;

(6) when new, non-cumulative evidence has been discovered that was not available at the trial by the movant's use of reasonable diligence and its unavailability probably caused the rendition of an improper judgment;

(7) when a default judgment should be set aside upon either legal or equitable grounds;

(8) when a judgment has been rendered on citation by publication, the defendant did not appear in person or by an attorney selected by the defendant and good cause for a new trial exists;

(9) when there is a material and irreconcilable conflict in jury findings;

(10) when any improperly admitted evidence, error in the court's charge, argument of counsel, or other trial court occurrence or ruling probably caused rendition of an improper judgment;

(11) when any other ground warrants a new trial in the interest of justice.

(b) Form. Complaints in general terms shall not be considered. Each complaint in a motion for new trial shall identify the matter of which complaint is made in such a way that the complaint can be understood by the judge.

(c) Affidavits. Supporting affidavits are required for complaints based on facts not otherwise in the record, such as:

(1) jury misconduct;

(2) newly discovered evidence;

(3) equitable grounds to set aside a default judgment; or

(4) good cause to set aside a judgment after citation by publication.

(d) Procedure For Jury Misconduct.

(1) Hearing. When the ground of the motion for new trial, supported by affidavit, is misconduct of the jury or of the officer in charge of the jury, or improper communication made to the jury, or a juror's erroneous or incorrect answer on voir dire examination, the judge shall hear evidence from members of the jury or others in open court and may grant a new trial if it reasonably appears from the evidence both on the hearing of the motion and from the record as a whole on the trial of the case that injury probably resulted to the complaining party.

(2) Testimony Of Jurors. A juror may not testify as to any matter or statement occurring during the jury's deliberations, or on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify whether: (i) any outside influence was improperly brought to bear upon any juror; or (ii) the juror was qualified to serve.

(e) Excessive Damages; Remittitur

(1) Excessive Damages. If the judge is of the opinion that the damages found by the jury are not supported by factually sufficient evidence, the judge may determine the greatest amount of damages supported by the evidence and may, as a condition of overruling a motion for new trial, suggest that the party claiming such damages file a remittitur of the excess within a specified period.

(2) Remittitur By Party. Any party in whose favor a judgment has been rendered may remit any part thereof in open court, or by executing and filing with the clerk a written remittitur signed by the party or the party's attorney of record, and duly acknowledged by the party or the party's attorney. Such remittitur shall be a part of the record of the cause. Execution may issue only for the balance of such judgment.

(f) Partial New Trial. If the judge is of the opinion that a new trial should be granted on a point or points that affect only a part of the matters in controversy that is clearly separable without unfairness to the parties, the judge may grant a new trial as to that part only, but a separate trial on unliquidated damages alone shall not be ordered if liability issues are contested.

Rule 103. Preservation of Complaints

(a) General Preservation Rule. As a prerequisite to the presentation of a complaint for appellate review, a timely request, objection, or motion must appear of record, stating the specific grounds for the ruling that the complaining party desired the trial court to make if the specific grounds were not apparent from the context. No complaint shall be considered waived if the ground stated is sufficiently specific to make the judge aware of the complaint. The judge's ruling upon the complaining party's request, objection or motion must also appear of record provided that the overruling by operation of law of a motion for new trial or a motion to modify the judgment is sufficient to preserve for appellate review the complaints properly made in the motion, unless the taking of evidence is necessary for proper presentation of the complaint in the trial court. A ruling may be shown in the judgment, in a signed separate order, in the statement of facts, or

in a formal bill of exceptions. If the trial judge refuses to rule, an objection to the judge's refusal to rule is sufficient to preserve the complaint. Formal exceptions to rulings or orders of the trial court are not required.

(b) When a Motion for New Trial is Required. As a prerequisite to appellate review, the following complaints shall be made in a motion for new trial:

(1) jury misconduct, newly discovered evidence, equitable grounds to set aside a judgment, or any other complaint on which evidence must be heard;

(2) the evidence is factually insufficient to support a jury finding;

(3) a jury finding is against the overwhelming preponderance of the evidence;

(4) the damages awarded by the jury are manifestly too large or too small because of the factual insufficiency or overwhelming preponderance of the evidence;

(5) an incurable jury argument, if not otherwise ruled on by the trial court;

(6) good cause to set aside a judgment after citation by publication; or

(7) a jury verdict that will not support any judgment.

(c) Nonjury Cases: Legal and Factual Sufficiency of Evidence. In a nonjury case, a complaint regarding the legal or factual insufficiency of the evidence, including a complaint that the damages found by the court are excessive or inadequate, as distinguished from a request that the judge amend a fact finding or make additional finding of fact, may be made for the first time on appeal in the complaining party's brief.

(d) Informal Bills Of Exception and Other Offers Of Proof. When

evidence is excluded, the offering party shall as soon as practicable, but before the charge is read to the jury or before the judgment is signed in a nonjury case, be allowed to make, in the absence of the jury, an offer of proof in the form of a concise statement. The judge may, or at the request of a party shall, direct the making of the offer in question and answer form. A transcription of the reporter's notes or of the electronic tape recording showing the offer, whether by concise statement or question and answer, showing the objections made, and showing the ruling, when included in the statement of facts certified by the reporter or recorder, shall establish the nature of the evidence, the objections and the ruling. The judge may add any other or further statement showing the character of the evidence, the form in which offered, the objection made and the ruling. No further offer need be made. No formal bills of exception are needed to authorize appellate review of exclusion of evidence. When the judge hears objections to offered evidence out of the presence of the jury and rules that the evidence be admitted, the objections are deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating them.

(e) Formal Bills of Exception. The preparation and filing of formal bills of exception shall be governed by the following rules:

(1) No particular form of words shall be required in a bill of exception, but the objection to the ruling or action of the judge and the ruling complained of shall be stated with such circumstances, or so much of the evidence as may be necessary to explain, and no more, and the whole as briefly as possible.

(2) When the statement of facts contains all the evidence requisite to explain the bill of exception, evidence need not be set out in the bill; but it shall be sufficient to refer to the same as it appears in the statement of facts.

(3) The ruling of the judge in giving or qualifying instructions to the jury shall be regarded as approved unless a proper and timely objection is made.

(4) Formal bills of exception shall be presented to the judge for his

allowance and signature.

(5) The judge shall submit the bill to the adverse party or the adverse party's counsel, if in attendance at the court, and if the adverse party finds it to be correct, the judge shall sign it without delay and file it with the clerk.

(6) If the judge finds the bill incorrect, the judge shall suggest to the parties or their counsel such corrections as the judge deems necessary, and if they are agreed to the judge shall make such corrections, sign the bill and file it with the clerk.

(7) Should the parties not agree to the judge's suggested corrections, the judge shall return the bill to the complaining party with the judge's refusal endorsed on it, and shall prepare, sign and file with the clerk such a bill of exception as will, in the judge's opinion, present the ruling of the court as it actually occurred.

(8) Should the complaining party be dissatisfied with the bill filed by the judge, the complaining party may, upon procuring the signatures of three respectable bystanders, citizens of this State, attesting to the correctness of the bill as originally presented, have it filed as part of the record of the cause. The truth of the matter may be controverted and maintained by affidavits, not exceeding five in number on each side, filed with the papers of the cause, within ten days after the filing of the bill. On appeal the truth of the bill shall be determined from the affidavits so filed.

(9) In the event of conflict between a formal bill and the statement of facts, the bill shall control.

(10) Anything occurring in open court or in chambers that is reported or recorded and so certified by the court reporter or recorder may be included in the statement of facts rather than in a formal bill of exception. A party requesting that all or part of the jury arguments or the voir dire examination of the jury panel be included in the statement of facts shall pay the cost thereof, which shall be separately listed in the certified

bill of costs, and may be taxed in whole or in part by the appellate court against any party to the appeal.

(11) Formal bills of exception shall be filed in the trial court within sixty days after the judgment is signed or if a timely motion for new trial, motion to modify, request for findings, or motion to reinstate pursuant to Rule 165a has been filed, formal bills of exception shall be filed within ninety days after the judgment is signed. When a formal bill of exception is filed, it may be included in the transcript or in a supplemental transcript.

Rule 104. Timetables

(a) Motion for Judgment on Jury Verdict. A motion for judgment on the jury verdict may be presented at any time before a final judgment has been signed. A motion for judgment on the jury verdict is overruled by operation of law when a final judgment is signed that does not grant the motion.

(b) Motion for Judgment as a Matter of Law. A motion for judgment as a matter of law may be presented after the adverse party rests its evidence, or at the close of all the evidence, or after the verdict in a jury case and before judgment, and shall not be considered waived if not presented earlier. A motion for judgment as a matter of law shall not be presented after a final judgment has been signed. A ground in a motion for judgment as a matter of law is overruled by operation of law when a final judgment is signed that does not grant that ground.

(c) Motion to Modify a Judgment and Motion for New Trial.

(1) Time to File. A motion to modify a judgment and a motion for new trial shall be filed within thirty days after the final judgment is signed. One or more amended or additional motions may be filed without leave of court within thirty days after the final judgment is signed regardless of whether a prior motion containing requests for the same relief has been overruled.

(2) When Motion Overruled. If a motion to modify a judgment or a motion for new trial is not determined by order signed within seventy-

five days after the final judgment was signed, any such motion shall be considered overruled by operation of law on expiration of that period.

(3) Special Deadline: Publication. In a case when judgment has been rendered on citation by publication and the defendant did not appear in person or by an attorney selected by the defendant, a motion for new trial shall be filed within two years after the final judgment was signed, unless a motion has been previously filed by such defendant or attorney pursuant to paragraph (c)(1).

(d) Motion to Correct Judgment Record. A motion to correct the judgment record may be filed at any time after a final judgment is signed, but if the motion is filed within thirty days after the final judgment is signed, the motion shall be considered a motion to modify a judgment filed within thirty days pursuant to paragraph (c) (1).

(e) Effective Dates and Beginning of Periods

(1) Beginning of Periods. The date a final judgment or appealable order is signed as shown of record determines the beginning of the period during which (i) the court may exercise plenary power to grant a motion to modify, a motion for new trial or a motion to correct the judgment record, a motion to reinstate a case dismissed for want of prosecution and a request for findings of fact and conclusions of law or to vacate a judgment, and (ii) a party may timely file any post-judgment document necessary to preserve the rights of the party on appeal.

(2) Date to be Shown. All judgments, decisions, and orders of any kind shall be reduced to writing and signed by the trial judge with the date of signing expressly stated in it. If the date of signing is not recited in the judgment or order, it may be shown in the record by a certificate of the judge or otherwise; the absence of a showing of the date in the record does not invalidate a judgment or an order.

(3) Notice of Judgment. When the final judgment or appealable order is signed, the clerk of the court shall immediately give notice of the

signing to each party or the party's attorney by first-class mail. Failure to comply with this rule shall not affect the periods mentioned in paragraph (e)(1), except under paragraph (e) (4).

(4) No Notice of Judgment: Additional Time. If a party affected by a final judgment or appealable order, or the party's attorney, has not within twenty days after the final judgment or appealable order was signed, received the notice required by paragraph (e)(3) and has not acquired actual knowledge of the signing of the final judgment or appealable order, then all periods provided in these rules that run from the date the final judgment or appealable order is signed shall begin for that party on the date that party, or the party's attorney, received notice or acquired actual knowledge of the signing of the final judgment or appealable order, whichever occurred first; provided, however, that in no event shall the periods begin more than ninety days after the final judgment or appealable order was signed.

(5) Procedure to Gain Additional Time. To establish the application of paragraph (e)(4), the party adversely affected must file a motion in the trial court stating the date on which the party or the party's attorney first either received a notice of the final judgment or appealable order or acquired actual knowledge of the signing of the final judgment or appealable order and that this date was more than twenty days after the final judgment or appealable order was signed. The trial judge shall promptly set the motion for hearing, and after conducting a hearing on the motion, shall find the date the party or the party's attorney first either received a notice of the final judgment or appealable order or acquired actual knowledge of the signing of the final judgment or appealable order and include this finding in a written order.

(6) Periods Affected by Modified Judgment. If a judgment is modified in any respect during the period of the trial court's plenary power, all periods provided in these rules that run from the date the final judgment is signed shall run from the time the modified judgment is signed. If a correction to a judgment is made pursuant to Rule 301(e) after expiration of the trial court's plenary power, all periods provided in these rules which run from the date the judgment is signed shall run from the date of the signing

of the corrected judgment for any complaint that would not apply to the original judgment.

(7) Citation by Publication. For a motion for new trial filed more than thirty days but within two years after the final judgment was signed under paragraph (c)(3) when citation was served by publication; the periods shall be computed as if the judgment were signed on the date of filing the motion.

(8) Premature Filing. A prematurely filed motion to modify a judgment or a motion for new trial is effective to preserve the complaints made in the motion and is deemed to have been overruled by operation of law on the date of, but subsequent to, the signing of the judgment the motion attacks. No motion to modify a judgment or a motion for new trial filed prior to the signing of the final judgment extends the trial court's plenary power provided in Rule 305 or any timetable prescribed in the Texas Rules of Appellate Procedure. A motion filed on the same day as the judgment is signed is not prematurely filed.

Rule 105. Plenary Power of the Trial Court

(a) Definition. Plenary power is the complete power of the court to act, within its jurisdiction, according to law or equity, on any issue of procedure or substance as to any party before the court. After the expiration of plenary power, a court may exercise only such power as is expressly authorized by rule or statute.

(b) Duration. Regardless of whether an appeal has been perfected, the trial court has plenary power to modify or vacate a judgment or grant a new trial:

(1) within thirty days after the judgment is signed, or

(2) if any party has timely filed a (i) motion for new trial, (ii) motion to modify the judgment, (iii) motion to reinstate a judgment after dismissal for want of prosecution, or (iv) request for findings of fact and conclusions of law, one hundred and five days after the judgment is signed.

(c) After Expiration. After expiration of the time prescribed by paragraph (b), the trial court cannot modify or vacate the judgment or grant a new trial, but the court may, after expiration of that time:

(1) correct a clerical error in the record of the judgment and;

(2) sign an order declaring a previous judgment or order to be void because signed after the court's power as prescribed in paragraph (b) had expired;

(3) issue any order or process or entertain any proceeding for enforcement of the judgment within the time allowed for execution;

(4) file findings of fact and conclusions of law if a timely request for such findings and conclusions has been filed;

(5) entertain and act for sufficient cause on any bill of review filed within the time allowed by law;

(6) grant a new trial for good cause on a motion filed within the time allowed by Rule 304(e)(7) if citation was served by publication;

(7) grant a new trial or modify the judgment within the time allowed by Rule 304(e)(4) when the moving party did not have timely notice or knowledge of the judgment.

CLEAN VERSION

SUPREME COURT ADVISORY COMMITTEE
PROPOSED AMENDMENTS TO
TEXAS RULES OF CIVIL PROCEDURE 296-331

July 31, 1996

RULE 296. REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

(a) Entitlement. In any case: (a) tried to the court without a jury; (b) tried to a jury in which one or more ultimate issues are tried to the court by agreement; or (c) tried to a jury in which one or more ultimate issues must be tried to the court, a party may request the judge to state in writing findings of fact and conclusions of law. Trial of an issue of fact to a jury in the same case does not excuse the judge from making findings of fact on an ultimate issue tried to the judge unless the ground to which the issue is referable has been waived or an omitted element is deemed found as provided in Rule 279. Such request shall be entitled "Request for Findings of Fact and Conclusions of Law" and shall be filed within twenty days after the final 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. A request for findings of fact and conclusions of law is not proper, and has no effect, with respect to an appeal of a summary judgment.

(b) Prematurely Filed Documents. A request for findings of fact and conclusions of law is effective although prematurely filed. A premature request for findings of fact and conclusions of law is deemed to have been filed on the date of, but subsequent to, the signing of the judgment.

RULE 297. FILING FINDINGS OF FACT AND CONCLUSIONS OF LAW

(a) Time to File. The judge shall file findings of fact and conclusions of law within twenty days after a timely request is filed. The judge shall cause a copy of the findings and conclusions to be mailed to each party in the suit.

(b) Late Filing. If the judge fails to file timely findings of fact and conclusions of law, the party making the request shall, within thirty days after filing the original request, file with the clerk a "Notice of Past Due Findings of Fact and Conclusions of Law" which shall be immediately called to the attention of the judge by the clerk. Such notice shall state the date the original request was filed and the date the findings and conclusions were due. Upon filing this notice, the time for the judge to file findings of fact and conclusions of law is extended to forty days from the date the original request was filed.

(c) Form. The judge shall state the findings of fact on each ground of recovery or defense raised by the pleadings and evidence in broad form, whenever feasible, in the same manner as questions are submitted to the jury in a jury trial. The judge should make conclusions of law on each ground of recovery or defense necessary to support the judgment, but the failure to do so shall not be error. Each finding of fact and each conclusion of law should be stated by a separate numbered paragraph.

RULE 298. ADDITIONAL OR AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

(a) Time for Request. After the judge files original findings of fact and conclusions of law, any party may file a request for specified additional or amended findings or conclusions with the clerk within twenty days after the filing of the original findings and conclusions.

(b) Time for Judge's Response. The judge shall file any additional or amended findings and conclusions that are appropriate within ten days after the request is filed.

(c) Appellate Review. Refusal of the judge to make a finding requested shall be reviewable on appeal.

RULE 299. OMITTED GROUNDS AND PRESUMED FINDINGS

(a) Omitted Grounds. When findings of fact are filed by the trial judge they shall form the basis of the judgment upon all grounds of recovery or defense. Upon appeal, a ground or defense not conclusively established under the evidence, no element of which have been requested or found, is waived.

(b) Presumed Findings. When an element of a ground of recovery or defense has been found by the trial judge, a finding is presumed in support of the judgment on an omitted element of the ground to which the element found is necessarily referable, when supported by factually sufficient evidence. No finding, however, shall be presumed on an omitted element for which an additional finding has been requested.

RULE 299a. FINDINGS OF FACT TO BE SEPARATELY FILED AND NOT RECITED IN A JUDGMENT

Unless otherwise provided by law, findings of fact and conclusions of law shall be requested, prepared and filed with the clerk of the court as a document separate from the judgment. If findings of fact are recited in a judgment in violation of this rule, and if there is a conflict between the findings recited in the judgment and the findings made pursuant to Rules 297 and 298, the latter findings will control for appellate purposes.

RULE 300. JUDGMENTS, DECREES AND ORDERS

(a) Rendition, Signing and Filing. A judge shall render judgment on the facts found, either by the jury or the judge, unless a new trial is granted or a judgment is rendered as a matter of law. A judgment is rendered when the judge announces it in open court, or if it is not so announced, when it is signed by the judge. A judgment orally announced shall be promptly reduced to writing and signed by the judge. A signed judgment shall be promptly filed with the clerk of the court.

(b) Final Judgment.

(1) Definition. A final judgment for purposes of post-trial and appellate procedure in the same case is a signed order disposing of all parties and claims, either expressly or by implication.

(2) Disposition by Implication. A claim is disposed of by implication if a judgment is rendered on the merits after a conventional trial and no severance or separate trial of the claim has been ordered.

(3) Separate Orders, Conflicts. When different parties or separate claims are disposed of by separate orders, no one of which by its terms disposes of all parties and all claims, none of the orders is final until a judgment is signed that disposes of all parties and claims. A final judgment may incorporate by reference the provisions of an earlier signed interlocutory order, but if any provision of the earlier order conflicts with the final judgment, the final judgment controls, except that no relief previously granted may be nullified by a general provision in the final judgment that all relief not previously granted is denied.

(c) Form and Substance: General. A judgment shall:

(1) contain the names of the parties;

(2) conform to the pleadings, the facts proved, and the verdict, if any, unless a judgment is rendered as a matter of law;

(3) state the relief, either in law or in equity, granted or denied, to or against, each party; and

(4) if appropriate, direct the issuance of process and such writs as may be necessary to enforce the judgment.

(d) Form and Substance: Specific.

(1) Personal Property. A judgment for personal property may provide for a writ for seizure and delivery of such property.

(2) Foreclosure Proceedings. A judgment for foreclosure of a mortgage and or other lien shall provide for: (1) recovery of the debt, damages and costs; (ii) foreclosure of the lien on the property subject to the lien; (iii) an order to sell the property as under execution, except in judgments against personal representatives; and (iv) if the property cannot be found or if the proceeds of the sale are insufficient to satisfy the judgment, then execution on other property of the judgment debtor for the balance remaining unpaid. The judgment foreclosing a

lien on real estate has the force and effect of a writ of possession as between the parties and any person claiming under the judgment debtor by right acquired pending suit and the judgment shall so provide. The judgment shall also direct the sheriff or other officer to place the purchaser of the property in possession within thirty days after the date of the foreclosure sale.

(3) **Personal Representative.** A judgment for the recovery of money against a personal representative, whether an executor, administrator or guardian shall state that it is to be paid in the due course of administration. No enforcement shall be attempted on a judgment against a personal representative, but it shall be certified to the court, sitting in probate, to be enforced under the law, except that a judgment against an independent executor may be enforced against the property of the testator in the hands of the independent executor.

RULE 301. MOTIONS BEFORE AND AFTER JUDGMENT

(a) Motion for Judgment on the Verdict. A party may move for judgment on the verdict of the jury.

(b) Motion for Judgment as a Matter of Law. A party may move for judgment as a matter of law, and include a request to disregard a jury finding as a matter of law, on a claim or defense:

(1) if the evidence, after the adverse party rests its evidence, or at the close of all of the evidence, or after the verdict in a jury case and before judgment, (i) is legally insufficient for a reasonable jury to find against the movant on a particular issue of fact or if the evidence conclusively establishes the issue in the movant's favor, and (ii) if, under the controlling law, a judgment cannot properly be rendered against the movant on that claim or defense without a finding adverse to the movant on an issue that has been disregarded, and a judgment as a matter of law should be rendered for movant as to that claim or defense; or

(2) if the application of controlling law to a claim or defense otherwise determines a claim or defense as a matter of law, unless the movant waived application of controlling law by failing to preserve a complaint that the court's charge affirmatively misstates controlling law.

(c) Motion to Modify Judgment. A party may move to modify a judgment as a matter of law, including a request to disregard a jury finding as a matter of law, after a judgment has been rendered:

(1) if the evidence is legally insufficient for a reasonable jury to find against the movant on a particular issue of a fact or if the evidence conclusively establishes the issue in the movant's favor;

(2) if the application of controlling law to a claim or defense otherwise determines a claim or defense as a matter of law, unless the movant waived application of controlling law by failing to preserve a complaint that the court's charge affirmatively misstates controlling law; or

(3) if the judgment should be vacated, modified, reformed, or corrected in any respect for any reason.

A motion for judgment as a matter of law is not a prerequisite to a motion to modify a judgment.

(d) Motion for New Trial. A party may move to set aside a judgment and seek a new trial pursuant to Rule 302.

(e) Motion for Judgment Record Correction. A party may move, with notice to all parties interested in a judgment, for correction or reformation of clerical mistakes made in reducing to writing the judgment rendered by the judge.

(f) Motion Practice. A motion identified in this rule must state the specific complaint or request for relief in such a way that the matter can be understood by the judge. A party may file one or more motions identified in this rule and may renew or refile an additional motion of the same type containing additional complaints and requests for relief despite the denial of any previous motion. A party may also submit a proposed judgment or order with the motion.

RULE 302. [Repealed]

NEW RULE 302. MOTIONS FOR NEW TRIAL

(a) Grounds. For good cause, a new trial, or partial new trial under paragraph (f), may be granted and a judgment may be set aside on motion of a party or on the judge's own motion, in the following instances, among others:

(1) when the evidence is factually insufficient to support a jury finding;

(2) when a jury finding is against the overwhelming preponderance of the evidence;

(3) when the damages awarded by the jury are manifestly too small or too large because of the factual insufficiency or overwhelming preponderance of the evidence;

(4) when the trial judge has made an error of law that probably caused rendition of an improper judgment;

(5) when injury to the movant has probably resulted from: (i) misconduct of the jury; or (ii) misconduct of the officer in charge of the jury; or (iii) improper communication to the jury; or (iv) a juror's erroneous or incorrect answer on voir dire examination;

(6) when new, non-cumulative evidence has been discovered that was not available at the trial by the movant's use of reasonable diligence and its unavailability probably caused the rendition of an improper judgment;

(7) when a default judgment should be set aside upon either legal or equitable grounds;

(8) when a judgment has been rendered on citation by publication, the defendant did not appear in person or by an attorney selected by the defendant and good cause for a new trial exists;

(9) when there is a material and irreconcilable conflict in jury findings;

(10) when any improperly admitted evidence, error in the court's charge, argument of counsel, or other trial court occurrence or ruling probably caused rendition of an improper judgment;

(11) when any other ground warrants a new trial in the interest of justice.

(b) Form. Complaints in general terms shall not be considered. Each complaint in a motion for new trial shall identify the matter of which complaint is made in such a way that the complaint can be understood by the judge.

(c) Affidavits. Supporting affidavits are required for complaints based on facts not otherwise in the record, such as:

(1) jury misconduct;

(2) newly discovered evidence;

(3) equitable grounds to set aside a default judgment; or

(4) good cause to set aside a judgment after citation by publication.

(d) Procedure For Jury Misconduct.

(1) Hearing. When the ground of the motion for new trial, supported by affidavit, is misconduct of the jury or of the officer in charge of the jury, or improper communication made to the jury, or a juror's erroneous or incorrect answer on voir

dire examination, the judge shall hear evidence from members of the jury or others in open court and may grant a new trial if it reasonably appears from the evidence both on the hearing of the motion and from the record as a whole on the trial of the case that injury probably resulted to the complaining party.

(2) **Testimony Of Jurors.** A juror may not testify as to any matter or statement occurring during the jury's deliberations, or on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify whether: (i) any outside influence was improperly brought to bear upon any juror; or (ii) the juror was qualified to serve.

(e) Excessive Damages; Remittitur

(1) **Excessive Damages.** If the judge is of the opinion that the damages found by the jury are not supported by factually sufficient evidence, the judge may determine the greatest amount of damages supported by the evidence and may, as a condition of overruling a motion for new trial, suggest that the party claiming such damages file a remittitur of the excess within a specified period.

(2) **Remittitur By Party.** Any party in whose favor a judgment has been rendered may remit any part thereof in open court, or by executing and filing with the clerk a written remittitur signed by the party or the party's attorney of record, and duly acknowledged by the party or the party's attorney. Such remittitur shall be a part of the record of the cause. Execution may issue only for the balance of such judgment.

(f) Partial New Trial. If the judge is of the opinion that a new trial should be granted on a point or points that affect only a part of the matters in controversy that is clearly separable without unfairness to the parties, the judge may grant a new trial as to that part only, but a separate trial on unliquidated damages alone shall not be ordered if liability issues are contested.

RULE 303. [Repealed]

NEW RULE 303. PRESERVATION OF COMPLAINTS

(a) General Preservation Rule. As a prerequisite to the presentation of a complaint for appellate review, a timely request, objection, or motion must appear of record, stating the specific grounds for the ruling that the complaining party desired the trial court to make if the specific grounds were not apparent from the context. No complaint shall be considered waived if the ground stated is sufficiently specific to make

the judge aware of the complaint. The judge's ruling upon the complaining party's request, objection or motion must also appear of record provided that the overruling by operation of law of a motion for new trial or a motion to modify the judgment is sufficient to preserve for appellate review the complaints properly made in the motion, unless the taking of evidence is necessary for proper presentation of the complaint in the trial court. A ruling may be shown in the judgment, in a signed separate order, in the statement of facts, or in a formal bill of exceptions. If the trial judge refuses to rule, an objection to the judge's refusal to rule is sufficient to preserve the complaint. Formal exceptions to rulings or orders of the trial court are not required.

(b) When a Motion for New Trial is Required. As a prerequisite to appellate review, the following complaints shall be made in a motion for new trial:

(1) jury misconduct, newly discovered evidence, equitable grounds to set aside a judgment, or any other complaint on which evidence must be heard;

(2) the evidence is factually insufficient to support a jury finding;

(3) a jury finding is against the overwhelming preponderance of the evidence;

(4) the damages awarded by the jury are manifestly too large or too small because of the factual insufficiency or overwhelming preponderance of the evidence;

(5) an incurable jury argument, if not otherwise ruled on by the trial court;

(6) good cause to set aside a judgment after citation by publication; or

(7) a jury verdict that will not support any judgment.

(c) Nonjury Cases: Legal and Factual Sufficiency of Evidence. In a nonjury case, a complaint regarding the legal or factual insufficiency of the evidence, including a complaint that the damages found by the court are excessive or inadequate, as distinguished from a request that the judge amend a fact finding or make additional finding of fact, may be made for the first time on appeal in the complaining party's brief.

(d) Informal Bills Of Exception And Offers Of Proof. When evidence is excluded, the offering party shall as soon as practicable, but before the charge is read to the jury or before the judgment is signed in a nonjury case, be allowed to make, in the absence of the jury, an offer of proof in the form of a concise statement. The judge may, or at the request of a party shall, direct the making of the offer in question and answer form. A transcription of the reporter's notes or of the electronic tape recording showing the offer, whether by concise statement or question and answer, showing the objections

made, and showing the ruling, when included in the statement of facts certified by the reporter or recorder, shall establish the nature of the evidence, the objections and the ruling. The judge may add any other or further statement showing the character of the evidence, the form in which offered, the objection made and the ruling. No further offer need be made. No formal bills of exception are needed to authorize appellate review of exclusion of evidence. When the judge hears objections to offered evidence out of the presence of the jury and rules that the evidence be admitted, the objections are deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating them.

(e) **Formal Bills of Exception.** The preparation and filing of formal bills of exception shall be governed by the following rules:

(1) No particular form of words shall be required in a bill of exception, but the objection to the ruling or action of the judge and the ruling complained of shall be stated with such circumstances, or so much of the evidence as may be necessary to explain, and no more, and the whole as briefly as possible.

(2) When the statement of facts contains all the evidence requisite to explain the bill of exception, evidence need not be set out in the bill; but it shall be sufficient to refer to the same as it appears in the statement of facts.

(3) The ruling of the judge in giving or qualifying instructions to the jury shall be regarded as approved unless a proper and timely objection is made.

(4) Formal bills of exception shall be presented to the judge for his allowance and signature.

(5) The judge shall submit the bill to the adverse party or the adverse party's counsel, if in attendance at the court, and if the adverse party finds it to be correct, the judge shall sign it without delay and file it with the clerk.

(6) If the judge finds the bill incorrect, the judge shall suggest to the parties or their counsel such corrections as the judge deems necessary, and if they are agreed to the judge shall make such corrections, sign the bill and file it with the clerk.

(7) Should the parties not agree to the judge's suggested corrections, the judge shall return the bill to the complaining party with the judge's refusal endorsed on it, and shall prepare, sign and file with the clerk such a bill of exception as will, in the judge's opinion, present the ruling of the court as it actually occurred.

(8) Should the complaining party be dissatisfied with the bill filed by the judge, the complaining party may, upon procuring the signatures of three

respectable bystanders, citizens of this State, attesting to the correctness of the bill as originally presented, have it filed as part of the record of the cause. The truth of the matter may be controverted and maintained by affidavits, not exceeding five in number on each side, filed with the papers of the cause, within ten days after the filing of the bill. On appeal the truth of the bill shall be determined from the affidavits so filed.

(9) In the event of conflict between a formal bill and the statement of facts, the bill shall control.

(10) Anything occurring in open court or in chambers that is reported or recorded and so certified by the court reporter or recorder may be included in the statement of facts rather than in a formal bill of exception. A party requesting that all or part of the jury arguments or the voir dire examination of the jury panel be included in the statement of facts shall pay the cost thereof, which shall be separately listed in the certified bill of costs, and may be taxed in whole or in part by the appellate court against any party to the appeal.

(11) Formal bills of exception shall be filed in the trial court within sixty days after the judgment is signed or if a timely motion for new trial, motion to modify, request for findings, or motion to reinstate pursuant to Rule 165a has been filed, formal bills of exception shall be filed within ninety days after the judgment is signed. When a formal bill of exception is filed, it may be included in the transcript or in a supplemental transcript.

RULE 304. [Repealed]

NEW RULE 304. TIMETABLES

(a) Motion for Judgment on Jury Verdict. A motion for judgment on the jury verdict may be presented at any time before a final judgment has been signed. A motion for judgment on the jury verdict is overruled by operation of law when a final judgment is signed that does not grant the motion.

(b) Motion for Judgment as a Matter of Law. A motion for judgment as a matter of law may be presented after the adverse party rests its evidence, or at the close of all the evidence, or after the verdict in a jury case and before judgment, and shall not be considered waived if not presented earlier. A motion for judgment as a matter of law shall not be presented after a final judgment has been signed. A ground in a motion for judgment as a matter of law is overruled by operation of law when a final judgment is signed that does not grant that ground.

2 **(c) Motion to Modify a Judgment and Motion for New Trial.**

(1) Time to File. A motion to modify a judgment and a motion for new trial shall be filed within thirty days after the final judgment is signed. One or more amended or additional motions may be filed without leave of court within thirty days after the final judgment is signed regardless of whether a prior motion containing requests for the same relief has been overruled.

(2) When Motion Overruled. If a motion to modify a judgment or a motion for new trial is not determined by order signed within seventy-five days after the final judgment was signed, any such motion shall be considered overruled by operation of law on expiration of that period.

(3) Special Deadline: Publication. In a case when judgment has been rendered on citation by publication and the defendant did not appear in person or by an attorney selected by the defendant, a motion for new trial shall be filed within two years after the final judgment was signed, unless a motion has been previously filed by such defendant or attorney pursuant to paragraph (c)(1).

(d) Motion to Correct Judgment Record. A motion to correct the judgment record may be filed at any time after a final judgment is signed, but if the motion is filed within thirty days after the final judgment is signed, the motion shall be considered a motion to modify a judgment filed within thirty days pursuant to paragraph (c) (1).

(e) Effective Dates and Beginning of Periods.

(1) Beginning of Periods. The date a final judgment or appealable order is signed as shown of record determines the beginning of the period during which (i) the court may exercise plenary power to grant a motion to modify, a motion for new trial or a motion to correct the judgment record, a motion to reinstate a case dismissed for want of prosecution and a request for findings of fact and conclusions of law or to vacate a judgment, and (ii) a party may timely file any post-judgment document necessary to preserve the rights of the party on appeal.

(2) Date to be Shown. All judgments, decisions, and orders of any kind shall be reduced to writing and signed by the trial judge with the date of signing expressly stated in it. If the date of signing is not recited in the judgment or order, it may be shown in the record by a certificate of the judge or otherwise; the absence of a showing of the date in the record does not invalidate a judgment or an order.

(3) Notice of Judgment. When the final judgment or appealable order is signed, the clerk of the court shall immediately give notice of the signing to each party or the party's attorney by first-class mail. Failure to comply with this rule

shall not affect the periods mentioned in paragraph (e)(1), except under paragraph (e) (4).

4. **No Notice of Judgment; Additional Time.** If a party affected by a final judgment or appealable order, or the party's attorney, has not within twenty days after the final judgment or appealable order was signed, received the notice required by paragraph (e)(3) and has not acquired actual knowledge of the signing of the final judgment or appealable order, then all periods provided in these rules that run from the date the final judgment or appealable order is signed shall begin for that party on the date that party, or the party's attorney, received notice or acquired actual knowledge of the signing of the final judgment or appealable order, whichever occurred first; provided, however, that in no event shall the periods begin more than ninety days after the final judgment or appealable order was signed.

(5) **Procedure to Gain Additional Time.** To establish the application of paragraph (e)(4), the party adversely affected must file a motion in the trial court stating the date on which the party or the party's attorney first either received a notice of the final judgment or appealable order or acquired actual knowledge of the signing of the final judgment or appealable order and that this date was more than twenty days after the final judgment or appealable order was signed. The trial judge shall promptly set the motion for hearing, and after conducting a hearing on the motion, shall find the date the party or the party's attorney first either received a notice of the final judgment or appealable order or acquired actual knowledge of the signing of the final judgment or appealable order and include this finding in a written order.

(6) **Periods Affected by Modified Judgment.** If a judgment is modified in any respect during the period of the trial court's plenary power, all periods provided in these rules that run from the date the final judgment is signed shall run from the time the modified judgment is signed. If a correction to a judgment is made pursuant to Rule 301(e) after expiration of the trial court's plenary power, all periods provided in these rules which run from the date the judgment is signed shall run from the date of the signing of the corrected judgment for any complaint that would not apply to the original judgment.

(7) **Citation by Publication.** For a motion for new trial filed more than thirty days but within two years after the final judgment was signed under paragraph (c)(3) when citation was served by publication; the periods shall be computed as if the judgment were signed on the date of filing the motion.

(8) **Premature Filing.** A prematurely filed motion to modify a judgment or a motion for new trial is effective to preserve the complaints made in the motion and is deemed to have been overruled by operation of law on the date of, but

subsequent to, the signing of the judgment the motion attacks. No motion to modify a judgment or a motion for new trial filed prior to the signing of the final judgment extends the trial court's plenary power provided in Rule 305 or any timetable prescribed in the Texas Rules of Appellate Procedure. A motion filed on the same day as the judgment is signed is not prematurely filed.

RULE 305. [Repealed]

NEW RULE 305. PLENARY POWER OF THE TRIAL COURT

(a) Definition. Plenary power is the complete power of the court to act, within its jurisdiction, according to law or equity, on any issue of procedure or substance as to any party before the court. After the expiration of plenary power, a court may exercise only such power as is expressly authorized by rule or statute.

(b) Duration. Regardless of whether an appeal has been perfected, the trial court has plenary power to modify or vacate a judgment or grant a new trial:

(1) within thirty days after the judgment is signed, or

(2) if any party has timely filed a (i) motion for new trial, (ii) motion to modify the judgment, (iii) motion to reinstate a judgment after dismissal for want of prosecution, or (iv) request for findings of fact and conclusions of law, one hundred and five days after the judgment is signed.

(c) After Expiration. After expiration of the time prescribed by paragraph (b), the trial court cannot modify or vacate the judgment or grant a new trial, but the court may, after expiration of that time:

(1) correct a clerical error in the record of the judgment and;

(2) sign an order declaring a previous judgment or order to be void because signed after the court's power as prescribed in paragraph (b) had expired;

(3) issue any order or process or entertain any proceeding for enforcement of the judgment within the time allowed for execution;

(4) file findings of fact and conclusions of law if a timely request for such findings and conclusions has been filed;

(5) entertain and act for sufficient cause on any bill of review filed within the time allowed by law;

(6) grant a new trial for good cause on a motion filed within the time

allowed by Rule 304(e)(7) if citation was served by publication;

(7) grant a new trial or modify the judgment within the time allowed by Rule 304(e)(4) when the moving party did not have timely notice or knowledge of the judgment.

RULE 306. [Repealed]

Comment: The provisions of Rule 306 have been relocated to Rule 300(c)

RULE 306a. [Repealed]

Comment: The provisions of Rule 306a have been relocated to Rule 304(e)(1)-(6))

RULE 306c. [Repealed]

Comment: The provisions of Rule 306c have been relocated to Rules 296(b) and 304(e)(8).

RULE 307. [Repealed]

RULE 308. [Repealed]

Comment: The provisions of Rule 308 have been relocated to Rule 300(d)(1)

RULE 308a. [Repealed]

RULE 309. [Repealed]

Comment: The provisions of Rule 309 have been relocated to Rule 300(d)(2)

RULE 310. [Repealed]

Comment: The provisions of Rule 310 have been relocated to Rule 300(d)(2)

RULE 311. [Repealed]

RULE 312. [Repealed]

RULE 313. [Repealed]

Comment: The provisions of Rule 313 have been relocated to Rule 300(d)(3)

RULE 314. [Repealed]

RULE 315. [Repealed]

Comment: The provisions of Rule 315 have been relocated to Rule 302(e)(2)

RULE 316. [Repealed]

Comment: The provisions of Rule 316 have been relocated to Rule 301(e)

RULE 320. [Repealed]

Comment: The provisions of Rule 320 have been relocated to Rule 302(a) and (f)

RULE 321. [Repealed]

Comment: The provisions of Rule 321 have been relocated to Rule 302(b).

RULE 322. [Repealed]

Comment: The provisions of Rule 322 have been relocated to Rule 302(b)

RULE 324. [Repealed]

Comment: The provisions of Rule 324 have been relocated to Rule 303(b) and proposed TRAP 74(e)

RULE 326. [Repealed]

RULE 327. [Repealed]

Comment: The provisions of Rule 327 have been relocated to Rule 302(d)

RULE 329. [Repealed]

Comment: Some of the provisions of Rule 329 have been relocated to Rule 302(a)(8), 302(c)(4) and 304(c)(3).

RULE 329b. [Repealed]

Comment: The provisions of Rule 329b have been relocated to Rule 304(c), 304(d), 305(b) and 305(c)

Jody Hughes

From: Stacy Stanley
Sent: Thursday, April 03, 2008 1:48 PM
To: Jody Hughes
Subject: Advisory Rules Committee

Thanks for the reply. Even if it's not up to be considered this time, as this particular problem has caused me some personal grief, I would like to weigh in on one of those suggestions--Rule 16.16 Uniform Court Reporters Manual (by the way, is the manual available anywhere on the website?) -- concerning whether court reporters need to report/transcribe video or audio tapes played during trials, or whether they can simply report "Tape played for jury"

We have had four cases show up in the last year involving exactly that sort of problem. Tape played for jury, not reported, video (or audio)tape arrived at court...twice with the added problem that only "Excerpts" of the tape were actually played--and you could not tell from the record what they were. This is a real problem--and allowing court reporters to not transcribe the tape played makes it measurably worse.

For whatever it's worth--it would make our job (as staff attorneys for courts of appeal) easier if we had the material played for the jury on paper--so we would at least know what the jury really heard and have it available like the rest of the record. Additionally, it would seem to be more...just...if merits alone were involved and we were not left with only the options of indulging presumptions or finding waiver instead.

Thanks again, and good luck.

Stacy Stanley
Chief Staff Attorney
6th Court of Appeals

CHIEF JUSTICE
JOSH R. MORRISS, III

JUSTICES
JACK CARTER
BAILEY C. MOSELEY

Court of Appeals
Sixth Appellate District
State of Texas

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TEXARKANA, TEXAS 75501
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November 13, 2007

The Honorable Nathan L. Hecht, Liaison
Supreme Court Advisory Committee
Supreme Court of Texas
201 West 14th Street, 3rd Floor
Austin, TX 78701

The Honorable Phil Johnson, Liaison
Council of Chief Justices
Supreme Court of Texas
201 West 14th Street, 3rd Floor
Austin, TX 78701

Re: Request for Referral to Supreme Court Advisory Committee

Dear Justice Hecht and Justice Johnson:

The Council of Chief Justices of the intermediate courts of appeals has directed me to ask for your assistance. It has been brought to our attention that the courts of appeals are split in whether they designate certain proceedings as criminal or civil. We find no guidance in the Rules of Appellate Procedure regarding this issue. This classification issue has recently been seen in mandamus proceedings based on, or arising out of, criminal matters, for example, mandamus cases resulting from officials attempting to collect criminal court costs from inmate trust accounts.

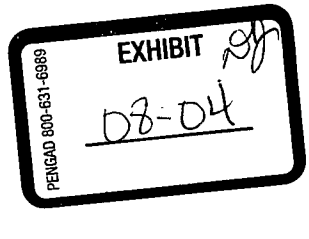
The classification of an action affects where subsequent relief is sought. If a court of appeals uses a criminal classification, then further relief is ordinarily sought in the Court of Criminal Appeals. A civil classification results in relief being sought in the Supreme Court.

On behalf of the Council, I ask that you refer this matter to the Supreme Court Advisory Committee to study whether the Rules of Appellate Procedure should provide guidance on how to classify certain cases as civil or criminal.

Sincerely,

Josh R. Morriss, III
(Chair, Council of Chief Justices)

cc: The Honorable Sharon Keller, Presiding Judge, Texas Court of Criminal Appeals



The Supreme Court of Texas

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

December 12, 2007

Hon. Josh R. Morriss III
Chair, Council of Chief Justices
The Court of Appeals for the
Sixth Appellate District of Texas
100 North State Line Avenue #20
Texarkana TX 75501

Re: Request for referral to Supreme Court Advisory Committee on case classifications as civil or criminal

Dear Chief Justice Morriss:

Thank you for your letter. A few times I have seen case numbers that caused me to wonder about the classification scheme, and I think it will be useful to clarify the matter. I appreciate your calling it to my attention.

Of course, the Advisory Committee and the Court will want the advice of the Council of Chief Justices.

Cordially,

Nathan L. Hecht
Justice

c: Hon. Phil Johnson, Justice
The Supreme Court of Texas
Hon. Sharon Keller, Presiding Judge
The Court of Criminal Appeals of Texas
Charles L. Babcock, Chair
The Supreme Court Advisory Committee
Jody Hughes, Rules Attorney
The Supreme Court of Texas

The Supreme Court of Texas

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RULES ATTORNEY
JODY HUGHES

December 12, 2007

Hon. Josh R. Morriss III
Chair, Council of Chief Justices
The Court of Appeals for the
Sixth Appellate District of Texas
100 North State Line Avenue #20
Texarkana TX 75501

Re: Request for referral to Supreme Court Advisory Committee on case classifications as civil or criminal

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Cordially,

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The Supreme Court of Texas
Hon. Sharon Keller, Presiding Judge
The Court of Criminal Appeals of Texas
Charles L. Babcock, Chair
The Supreme Court Advisory Committee
Jody Hughes, Rules Attorney
The Supreme Court of Texas

MEMORANDUM

TO: Bill Dorsaneo March 3, 2008

FROM: Jody Hughes

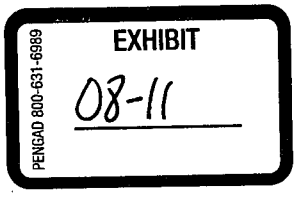
RE: Categorization of Certain Cases as Civil or Criminal

Chief Justice Morriss's letter to Justices Hecht and Johnson dated November 13, 2007 notes that "the courts of appeals are split in whether they designate certain proceedings as civil or criminal" and asked the Court to refer the matter to the Advisory Committee to study whether the Appellate Rules could provide more definitive guidelines. In an effort to better understand the problem, I asked the clerks of the courts of appeals to help identify categories of cases in which the civil/criminal designation is unclear or inconsistent, which they did; Sharri Roessler, Clerk of the Waco Court of Appeals, and Kay Waters, a staff attorney with the El Paso Court of Appeals, provided some particularly helpful insights and research materials. The following memo summarizes the law in several categories of proceedings.

The first category listed below—inmate trust fund litigation—reflects perhaps the widest divergence currently among the courts of appeals; however, the split may be resolved soon, as one case is currently pending in the Court of Criminal Appeals on petition for discretionary review. The next three categories—disclosure of grand jury proceedings, bail bond forfeitures, and habeas proceedings—reflect narrower disagreement over categorization but nonetheless could benefit from clarification. The next three categories—expunction of arrest records, juvenile cases, and a catchall "other proceedings ancillary to criminal prosecution"—do not reflect disagreement among the courts of appeals, but I included them because they seemed relevant to the larger issue of how cases are categorized as either civil or criminal.

The appellate courts have struggled to apply a consistent standard to decide what distinguishes a criminal case from a civil one. For example, in a robbery case where the jury found the defendant sane during the robbery but insane at the time of trial, and the trial court ordered further proceedings suspended until the defendant became sane, the Court of Criminal Appeals concluded that the appeal was not a criminal case over which the court had jurisdiction because the defendant had not been found guilty of anything and no punishment had been assessed. *See Hardin v. State*, 248 S.W.2d 487 (Tex. Crim. App. 1952). In a later case, the Court of Criminal Appeals dismissed for lack of jurisdiction an appeal of a denied motion to expunge arrest records, concluding that it was not a criminal case because there were no criminal penalties attached to the proceeding, it was not brought by or in the name of the State, and the defendant was not charged with a crime. *Ex parte Paprskar*, 573 S.W.2d 525 (Tex. Crim. App. 1978).

The court later disavowed *Paprskar*'s reasoning, however, noting that the case likely "would have been decided differently had there been a statute authorizing the appeal." *Kutzner v. State*, 75 S.W.3d 427, 430 (Tex. Crim. App. 2002) (concluding that a motion for DNA testing under Chapter 64 of the Code of Criminal Procedure is a criminal case for jurisdictional purposes because it is



"closely connected to, and could affect," the underlying criminal prosecution); *see also Weiner v. Dial*, 653 S.W.2d 786, 787 & n.1 (Tex. Crim. App. 1983) (rejecting argument that court lacked mandamus jurisdiction over petition filed by court-appointed defense attorney seeking payment for representing indigent defendant in appeal of denial of bail, and overruling *Paprskar* "[t]o the extent of any conflict") ("The provision for appointment and compensation of attorneys to represent indigents in criminal law matters is certainly itself a criminal law matter"). The Court of Criminal Appeals recently discussed these and other holdings and concluded: "'The overriding principle to be gleaned from all of these authorities is that this Court will entertain an appeal when it is expressly authorized by statute and when it is related to the 'standard definition' of a criminal case,' in which there has been a finding of guilt and an assessment of punishment." *Ex parte Burr*, 185 S.W.3d 451, 453 (Tex. Crim. App. 2006) (holding that appeal of denial of a registered sex offender's motion for non-publication of home address pursuant to statutory endangerment exception is a criminal matter).

I. Deduction of Court Costs From Inmate Trust Accounts

Appellate decisions addressing reimbursement of court costs and attorney's fees from non-indigent inmates have cited two statutes that take procedurally distinct approaches. Civil Practice & Remedies Code §63.007(a) provides that a writ of garnishment may be issued against an inmate trust fund to encumber monies in the fund held for the inmate's benefit, such as monies received during confinement. In addition, the Code of Criminal Procedure authorizes a court to order a non-indigent defendant to offset, to the extent he can pay them, the costs of legal services provided, including any expenses and costs; for convicted defendants, these amounts may be ordered paid as court costs. *See* Tex. Code Crim. Proc. art. 26.05(g).[1]

As discussed below, the appellate decisions differ as to whether garnishment procedures or other due process must be followed before court costs and legal fees can be deducted from an inmate's trust account. The courts of appeals are also split as to whether separate litigation over such costs is more properly characterized as civil or criminal in nature, a label that in some cases affects the appellate court's jurisdiction and the availability of appellate relief.

The Texarkana court has treated a dispute over deduction of court costs from an inmate trust account as civil in nature. *Abdullah v. State*, 211 S.W.3d 938 (Tex. App.—Texarkana 2006, no pet.) *Abdullah* docketed as a civil case an inmate's appeal of a 2006 order directing payment, from the inmate's trust account to the county clerk, of court costs incurred in his 1998 conviction. The trial court had apparently relied on Civil Practice and Remedies Code §14.006, which allows a court to order an inmate "who has filed a claim" to pay court costs; however, Abdullah had not filed a claim, and was instead only contesting the assessment of costs from his 1998 conviction. The court of appeals noted that a summary bill of costs documented the amount sought but the judgment itself

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[1]Tex. Code Crim. Proc. art. 26.05(g) provides: "If the court determines that a defendant has financial resources that enable him to offset in part or in whole the costs of the legal services provided, including any expenses and costs, the court shall order the defendant to pay during the pendency of the charges or, if convicted, as court costs the amount that it finds the defendant is able to pay."

assessed no costs against Abdullah. Citing Civil Practice & Remedies Code §63.007(a), the court reversed the order directing payment because the State had not followed garnishment procedures or otherwise provided Abdullah due process. *Id.* at 941-43.

By contrast, the Amarillo Court of Appeals has designated an inmate trust account appeal as a criminal case. *See Gross v. State*, 2007 WL 2089365 (Tex. App.—Amarillo 2007, no pet.). In *Gross*, the court disagreed with *Abdullah* while simultaneously distinguishing it on the basis that the judgment against Gross incorporated the assessment of court costs and attorney fees against him:

> Unlike the situation in *Abdullah*, appellant was assessed court costs and attorney fees at the conclusion of trial. The reimbursement of the expenses incurred by the taxpayers were incorporated into the judgment which was signed by the trial court on October 16, 2003. By virtue of the inclusion of these fees in the judgment, appellant had notice that he would be required to pay court costs and attorney fees. Hence, we conclude that the issue of recoupment of attorney fees is closely related to the criminal case.

2007 WL 2089365, at *1. Significantly, the court cited Tex. Code Crim. Proc. 26.05(g), which authorizes reimbursement of attorney's fees and costs from non-indigent defendants, whether convicted or not, and does not mention garnishment procedures.

Gross also relied on *Curry v. Wilson*, 853 S.W.2d 40 (Tex. Crim. App. 1993). That case arose when Judge Wilson concluded that Curry, a criminal defendant found not guilty after a jury trial, was not actually indigent, and ordered him to reimburse the county for the costs of his legal defense. Curry sought a writ of prohibition against Judge Wilson's attempt to enforce her order. As an initial matter, the Court of Criminal Appeals rejected Wilson's argument that the court lacked jurisdiction on the theory that the matter was civil in nature. *Id.* at 43 ("Disputes which arise over the enforcement of statutes governed by the Texas Code of Criminal Procedure, and which arise as a result of or incident to a criminal prosecution, are criminal law matters.") However, it denied Curry's petition for a writ of prohibition, concluding that: (1) Article 26.05 was not unconstitutional for authorizing collection of legal fees from a non-indigent defendant who is acquitted; and (2) Curry's acquittal did not divest the trial court of jurisdiction to order fees collected. *Id.* at 44-47.

A divided Waco Court of Appeals has consistently treated inmate trust account cases as criminal, in one case explicitly following *Gross*'s reasoning. *Zink v. State*, No. 10-07-00026-CR, 2007 WL 4260533 (Tex. App.—Waco 2007, no pet. h.) ("We agree with the Amarillo court's determination [in *Gross*] that this is a criminal case. The order being appealed is "closely connected" to the criminal case in which Zink was convicted.") (citation omitted); *Crawford v. State*, 226 S.W.3d 688 (Tex. App.—Waco 2006, no pet.) (dismissing, on appellant's motion, appeal of order allowing payment of court costs from inmate trust account) (per curiam); *id.* at 688-89 (Gray, C.J., dissenting) (discussing issues relevant to civil/criminal dichotomy, such as filing fees for civil cases and appointment of counsel in criminal cases, and noting that Crawford's complaint was that costs ordered withdrawn from account significantly exceeded amount shown in judgment and bill of costs, not that the wrong procedure was followed); *In re Keeling*, 227 S.W.3d 391 (Tex. App.—Waco 2007, orig. proceeding) (following *Abdullah* and granting mandamus relief to inmate

whose trust account was, without following garnishment procedures, debited for court costs from 1992 conviction in 2006 following parole release and subsequent re-incarceration); *but see id.* at 395 (Gray, C.J., dissenting) (objecting to majority's docketing of mandamus proceeding as criminal case, and concluding that court order was not void and that adequate legal remedies available to petitioner precluded mandamus relief).

In *Zink*, having deemed the matter a criminal appeal, the majority concluded that it lacked jurisdiction because no statute authorized the appeal in a criminal case. 2007 WL 4260533 at *1. In so holding, the majority cited—apparently to demonstrate the procedural distinction—its earlier *Keeling* decision granting mandamus relief in a different case where an inmate's trust fund was garnished without following garnishment procedures. *Id.* Chief Justice Gray concurred in the judgment, disagreeing with the majority's characterization of the case as criminal and noting his views previously expressed in *Keeling* and *Crawford*: "This is a civil garnishment proceeding. Pure and simple. It was brought to recover court costs and fees from a criminal defendant's trust account, funds being held by the State." *Id.* at *1 n.* (Gray, C.J., concurring).

In the most recent inmate trust case in the Waco Court of Appeals, an inmate's appeal was dismissed for lack of jurisdiction, but he subsequently sought and obtained mandamus relief. *See Goad v. State*, No. 10-07-00113-CR, 2007 WL 2994078 (Tex. App.—Waco 2008, no pet. h.) (dismissing appeal from 2006 order that "in effect, garnishes funds from Goad's inmate trust account to satisfy court costs from his July 17, 2003 conviction"); *In re Goad*, No. 10-07-00331-CR, 2008 WL 191637 (Tex. App.—Waco 2008, orig. proceeding) (concluding that order violated inmate's due process and granting mandamus relief, citing *Abdullah* and *Keeling*). In the mandamus proceeding, the State—represented by the district attorney—conceded that "*Keeling*'s procedural due process mandates have not been met" and that the trial court's were are therefore void. 2008 WL 191637, at *1. In a somewhat unusual twist, the trial judge has sought mandamus relief in the Court of Criminal Appeals. *See In re Matt Johnson v. Tenth Court of Appeals*, WR-69,327-01 (petition for writ of mandamus filed February 4, 2008). If review is granted, this proceeding may provide an answer to the question of whether inmate trust fund cases are criminal in nature.

Although the decisions discussed above reflect tension in the case law, the differences may stem more from the categorization of the cases as civil or criminal than from differing interpretations of the substantive law. If the attorney's fees and court costs are included in the judgment of conviction, but the inmate contests the costs at a later time (such as when they are ordered deducted from the trust account), then perhaps the garnishment procedures need not be followed, as the Amarillo Court of Appeals held in *Gross*, because the judgment itself provides sufficient notice. It is not yet clear whether deducting fees and costs from an inmate account requires the State to follow garnishment procedures, either because the taking of such funds is inherently a garnishment action or because §63.007(a) mandates it. Nor is it clear what procedures—if any—must be followed under article 26.05(g), to the extent the amount of fees sought to be deducted are fully reflected in the judgment.

A dispute over inmate trust funds seems more appropriately categorized as civil in nature. Reimbursement is not punitive in nature; a non-indigent defendant is required to make reimbursement under article 25.06(g) regardless of whether he was convicted or acquitted. But regardless, a defendant must have some opportunity to contest the deduction of fees from his trust account, particularly when—as in *Crawford*—the amount ordered deducted exceeds the amount reflected in the judgment. To foreclose the defendant's ability to appeal the cost order simply because the costs arose from the underlying criminal prosecution seems to be an unsatisfactory solution and inconsistent with the classification of other types of cases.

II. Disclosure of Grand Jury Proceedings

Article 20.02 of the Code of Criminal Procedure provides that "[t]he proceedings of the grand jury shall be secret." Tex. Code Crim. Proc. art. 20.02(a). Subsection (d) provides:

> The defendant may petition a court to order the disclosure of information otherwise made secret by this article or the disclosure of a recording or typewritten transcription under Article 20.012 as a matter preliminary to or in connection with a judicial proceeding. The court may order disclosure of the information, recording, or transcription on a showing by the defendant of a particularized need.

Id. art. 20.02(d). "A petition for disclosure under Subsection (d) must be filed in the district court in which the case is pending," and the "defendant must also file a copy of the petition with the attorney representing the state, the parties to the judicial proceeding, and any other persons required by the court to receive a copy of the petition." *Id.* art 20.02(e).

Litigation over the secrecy of grand jury proceedings—other than a criminal defendant's efforts within a prosecution to access information about the grand jury that indicted him—is usually considered civil in nature. *See United States Government v. Marks*, 949 S.W.2d 320 (Tex. 1997); *In re Reed*, 227 S.W.3d 273 (Tex. App.—San Antonio 2007, orig. proceeding); *Kelly v. State*, 151 S.W.3d 683 (Tex. App.—Waco 2004, no pet.); *Harrison v. Vance*, 34 S.W.3d 660 (Tex. App.—Dallas 2000, no pet.). I have found only one such appellate case docketed as a criminal matter. *In re Grand Jury Proceedings 198G.J.20*, 129 S.W.3d 140 (Tex. App.—San Antonio 2003, pet. denied).

Of the decisions cited above, *Kelly* is the only case that explicitly addressed the civil/criminal distinction. Kelly appealed the trial court's denial of her motion for disclosure of grand jury proceedings under Code of Criminal Procedure 20.02, which she filed three years after the State dismissed criminal charges against her. The Waco Court of Appeals held it was without jurisdiction to consider Kelly's appeal because it was a criminal matter and no statute authorized the appeal. 151 S.W.3d at 684-85. Kelly had argued that the case should be treated as civil because: (1) *In re Grand Jury Proceedings 198G.J.20* was treated as a civil appeal; (2) the matter did not arise during a pending prosecution; (3) Kelly's motion did not "concern the administration of penal justice;" (4) only private parties, and not the State, had appeared in the case; and (5) Kelly could not obtain relief through habeas corpus. *Id.* at 684.

While acknowledging that "some of these statements are true," the court declined to consider the matter a civil case. *Id.* at 685. Addressing Kelly's arguments, the court noted that (1) *In re Grand Jury Proceedings 198G.J.20* did not expressly consider the civil/criminal distinction; (2) the absence of a pending prosecution was held irrelevant in *Kutzner v. State*, 75 S.W.3d 427 (Tex. Crim. App. 2002), which concluded that a motion for DNA testing under Chapter 64 of the Code of Criminal Procedure is a criminal case for jurisdictional purposes because it is "closely connected to, and could affect," the underlying criminal prosecution; (3) the secrecy of grand jury proceedings is a fundamental component of the criminal justice system, and attempts to defeat such secrecy should be adjudicated by the Court of Criminal Appeals as the court of last resort; (4) the State was participating through the district attorney's and others' responses to Kelly's motion; and (5) habeas was not Kelly's only potential avenue for relief. *Id.* at 685-86. Chief Justice Gray concurred in the judgment of dismissal, noting that because there was no prosecution against Kelly when she filed her motion, Article 20.02 did not give the trial court jurisdiction. *Id.* at 687 (Gray, C.J., concurring).

In re Grand Jury Proceedings 198G.J.20 involved a motion to disclose grand jury testimony filed by Shields, who had been indicted for sexual assault of a minor. Shields did not match the minor's description of the perpetrator in several key respects, and after she recanted, the indictment was dismissed. Shields then sued for malicious prosecution and sought to depose grand jurors under Code of Criminal Procedure art. 20.02(d); Shields sought to ask the grand jurors if the prosecutor had presented certain exculpatory evidence. The trial court denied the motion, concluding that Shields could not demonstrate a particularized need for the information because Texas law does not require prosecutors to present exculpatory evidence to the grand jury.

A majority of the court of appeals affirmed on the same basis, docketing the appeal as a civil proceeding without discussing the civil versus criminal dichotomy. One justice dissented, opining that prosecutors should have a limited duty to present exculpatory evidence. *See id.* at 144 (Lopez, J., dissenting). The dissent also did not discuss the civil/criminal dichotomy. However, under the reasoning of *Kutzner* the motion for disclosure in this case presumably would be deemed more closely related to the civil suit for malicious prosecution than to the underlying criminal proceedings that were dismissed after indictment.

In the other cases cited above, the appellate court docketed as a civil matter an appellate or original proceeding concerning the secrecy of grand jury proceedings, without discussing the civil versus criminal dichotomy. Notably, unlike *Kelly* and *In re Grand Jury Proceedings 198G.J.20*, none of the other cases involved a person whose criminal indictment was dismissed before trial attempting to access information about the grand jury proceedings.

In *Marks*, the target of a federal grand jury investigation of his tax returns—Marks—sought under the predecessor to Tex. R. Civ. P. 202 a pre-suit deposition of Feldman, his former accountant and a witness in the investigation. Feldman moved to vacate an order permitting the deposition, and the federal government intervened. At a hearing on the motion to vacate, a lawyer for the federal government offered to tell the trial court enough about the investigation to show how Feldman's deposition might hamper it, but she refused to disclose the same information to Feldman, Marks, or anyone else because of federal rules prescribing secrecy for grand jury proceedings. The judge heard

counsel's statements in chambers and *ex parte* but had a court reporter transcribe them, and later sealed the court reporter's record. Marks later sued Feldman for accounting malpractice, but the courts continued to delay Feldman's deposition pending completion of the federal investigation. After Marks was indicted, the federal government withdrew its objection to Feldman's deposition and the deposition took place, but Marks pursued his efforts to disclose the record of the hearing through appeal and mandamus. The Supreme Court held that the sealing of the hearing record did not violate either Tex. R. Civ. P. 76a, due to the rule's exception for court documents "to which access is otherwise restricted by law," or Marks' due process rights. 949 S.W.2d at 325-26.

In *Reed*, the court of appeals denied a district attorney's petition for writ of mandamus or prohibition seeking to vacate the trial court's order quashing portions of grand jury summonses addressed to school officials. It held that the trial court did not clearly abuse its discretion in quashing the portion of the summons stating that the summons itself was confidential, because Texas law, unlike federal law, does not clearly make issuance of summonses confidential. The court docketed the matter as a civil proceeding but applied the stricter criminal mandamus standard.

In *Harrison v. Vance*, the court affirmed the trial court's dismissal as frivolous of a convicted felon's mandamus petition seeking disclosure of grand jury proceedings from the petitioner's criminal case that resulted in his incarceration. 34 S.W.3d at 663. The court noted that grand jury proceedings are not subject to disclosure under the Open Records Act; instead, they are generally secret under the Code of Criminal Procedure, although the trial court has limited discretion to allow disclosure when necessary to the administration of justice. *Id.* (citing *Stern v. State ex rel. Ansel*, 869 S.W.2d 614, 622 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (discussing the various Code of Criminal Procedure provisions requiring secrecy)).

Under *Kutzner*'s "closely connected" standard that the *Kelly* court applied to litigation over the secrecy of grand jury proceedings, *Harrison* perhaps would have been more appropriately docketed as a criminal case; presumably the inmate sought the grand jury proceedings in an effort to collaterally attack his conviction. *Reed*, however, is more difficult to categorize. On the one hand, the applicant below—the school district—was not a party, and was merely being asked to provide records relevant to a criminal investigation. On the other hand, because the criminal investigation was apparently ongoing, the prosecutor's desire to keep the summons secret was directly related to the apparently as-yet-unfiled criminal prosecution.

Marks appears to fall more clearly on the civil side. Although at the time he sought to depose Feldman there was a federal investigation against Marks—and later an indictment—Marks' efforts to depose Feldman were within the rules of civil procedure and took place in the context of what quickly became a separate civil suit against Feldman. While Feldman's testimony was evidently relevant to the criminal proceedings against Marks, it was more immediately relevant to the civil suit against Feldman. Perhaps more importantly, the trial court allowed the *ex parte* summary of the investigation and then sealed it to protect the integrity of the federal criminal proceedings, which the Supreme Court recognized in generally upholding the trial court's actions.

III. Bail Bond Forfeiture Proceedings

Bail bond forfeitures are governed by Chapter 22 of the Code of Criminal Procedure. If a defendant fails to appear in court when required, a judgment nisi is entered against him and his sureties on the bond. After entry of a judgment nisi, forfeiture proceedings are generally governed by the same rules as govern civil cases. *See* Tex. Code Crim. Proc. art. 22.10; *Roberts v. State*, 729 S.W.2d 624 (Tex. App.—Fort Worth 1988) (citing *Tinker v. State*, 561 S.W.2d 200, 201 (Tex. Crim. App. 1978)). However, the Court of Criminal Appeals and the Supreme Court both consider them to be criminal cases for purposes of review because the bail proceeding is too closely connected to the underlying criminal proceeding to separate them. *See Jeter v. State*, 26 S.W. 49 (Tex. 1894); *Ex parte Burr*, 185 S.W.3d 451, 453 (Tex. Crim. App. 2006); *State ex rel. Vance v. Routt*, 571 S.W.2d 903, 906 (Tex. Crim. App. 1978).

Civil court costs may be assessed in a bail bond forfeiture proceeding after entry of judgment nisi. *Dees v. State*, 865 S.W.2d 461, 462 (Tex. Crim. App. 1993). Intermediate appellate courts have held that all costs traditionally associated with a civil appeal, including the filing fee, should be imposed in an appeal from a bond forfeiture proceeding. *See Olivarez v. State*, 183 S.W.3d 59, 60 (Tex. App.—Waco 2005, no pet.) (per curiam). However, the Attorney General has opined that a bond forfeiture is not a "civil suit" for purposes of Local Government Code §133.154(a), which imposes a $37 filing fee "on the filing of any civil suit" to fund judicial pay raises, because a bond forfeiture is not generally considered to be a "civil case." Op. Tex. Att'y Gen. No. GA-0484, at 3 (2006) (citing *Burr* and *Jeter*). The same opinion concludes that a $4 fee generally required to be paid as court costs by a person "convicted of any offense" under Local Gov't Code §133.105(a) does not apply to bond forfeiture cases because they do not result in a criminal conviction. *Id.* at 4.

The El Paso Court of Appeals gives bond forfeiture cases a "CV" designation whether they are before the Court on direct appeal or in a mandamus proceeding. *See e.g., Safety Nat. Cas. Corp. v. State*, 225 S.W.3d 684 (Tex. App.—El Paso 2006, pet. granted);[2] *In re State ex rel. Rodriguez*, 166 S.W.3d 894 (Tex. App.—El Paso 2005, orig. proceeding). It does so because the cases arise from the trial court's civil docket and the court is required to collect fees and impose costs as in civil cases generally. Tex. R. App. P. 5. However, the Waco Court of Appeals designates them as criminal. *See Olivarez*, 183 S.W.3d at 60-61 (dismissing bail bond forfeiture appeal following appellant's failure to file docketing statement, but suspending Appellate Rule 5 and ordering clerk to "write off all unpaid filing fees in this case"); *but see id.* at 61 (Gray, C.J., dissenting) (objecting to majority's failure to collect filing fees in civil case as required by Rule 5, and to dismissal on unclear grounds); *id.* at 63 (per curiam) (withdrawing judgment of dismissal on rehearing after appellant filed docketing statement and paid filing fee).

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[2]Note, however, that despite the court of appeals' civil designation, a petition for discretionary review was submitted to—and has been granted by—the Court of Criminal Appeals. *See* PD-0413-07 (petition granted June 20, 2007; case submitted November 7, 2007).

IV. Habeas Corpus

The writ of habeas corpus may be used by a person restrained in her liberty may use to test the legality of her custody or restraint. Tex. Code Crim. Proc. art. 11.01. However, it is an extraordinary remedy, available only when there is no other adequate remedy at law, and is not to be used as a substitute for appeal. *Ex parte Weise*, 55 S.W.3d 617, 619 (Tex. Crim. App. 2001). The Texas Constitution provides that the writ of habeas corpus is a writ of right that shall never be suspended, and requires the Legislature to "enact laws to render the remedy speedy and effectual." Tex. Const. art. I, §12. Statutes governing the writ are found in Chapter 11 of the Code of Criminal Procedure, which "applies to all cases of habeas corpus for the enlargement of persons illegally held in custody or in any manner restrained in their personal liberty." Tex. Code Crim. Proc. art. 11.64.

The writ itself "is an order issued by a court or judge of competent jurisdiction, directed to any one having a person in his custody, or under his restraint, commanding him to produce such person, at a time and place named in the writ, and show why he is held in custody or under restraint." Tex. Code Crim. Proc. art. 11.02. A petition for writ of habeas corpus must state that the applicant is illegally restrained in his liberty, and by whom; include a copy of the order of confinement and a prayer for relief; and be supported by allegations sworn to be true by the applicant. art. 11.14. The writ must be granted "without delay" by the judge receiving it, unless it is manifest that the applicant is entitled to no relief. *Id.* art. 11.15. The writ is issued to the person having custody of the applicant, who then must make a return admitting whether the applicant is in his custody and showing authority for his detention. *Id.* art. 11.02, .27, .30. After the person confining the applicant brings the applicant before the court, the applicant is no longer detained on the original warrant or process, but under the authority of the habeas corpus. *Id.* art. 11.31, 32. After examining the return and hearing any testimony offered, the court shall, "according to the facts and circumstances of the case, proceed either to remand the party into custody, admit him to bail or discharge him." *Id.* art. 11.44. If it appears that there is no legal basis to maintain the applicant's confinement, the applicant must be discharged. *Id.* art. 11.40.

An initial distinction must be drawn between what are typically known as "post-conviction" writ applications, *see id.* arts. 11.07, .071, and other habeas proceedings. (For purposes of this memo, I include in the "post-conviction" category habeas petitions filed by confinees indicted on misdemeanor and felony charges, *see id.* arts. 11.08 - .09, as well as petitions filed by convicted defendants seeking relief from community supervision orders, *see id.* art. 11.072, since both likewise directly relate to a criminal prosecution.) Chapter 11 applies to all habeas petitions, not merely to post-conviction habeas petitions. *Id.* art. 11.64. While post-conviction applications always fall on the criminal side of the docket, with other habeas applications the court's jurisdiction depends on the nature of the underlying proceeding. However, this distinction is not always clear in the case law; moreover, habeas corpus proceedings are difficult to label, as the Court of Criminal Appeals has acknowledged.[3]

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[3]The Court of Criminal Appeals in *Rieck* discussed the general difficulty in labeling habeas proceedings:

A. Post-Conviction Habeas Applications

"[W]hen a person is confined for violating a criminal statute and files an application for a writ of habeas corpus challenging his confinement, the proceeding is criminal, not civil, in nature. *Aranda v. District Clerk*, 207 S.W.3d 785, 786 (Tex. Crim. App. 2006) (per curiam); *Ex parte Davis*, 542 S.W.2d 192, 198 (Tex. Crim. App.1976); *see also Ex parte Rieck*, 144 S.W.3d 510, 516 (Tex. Crim. App. 2004) ("Such proceedings are categorized as 'criminal' for jurisdictional purposes, and the Texas Rules of Civil Procedure do not ordinarily apply"). Post-conviction habeas petitions are under the criminal jurisdiction of the district courts and the Court of Criminal Appeals. *See* Tex. Code Crim. Proc. art. 11.07 (post-conviction habeas for felony convictions in which death penalty has not been assessed); *id.* art. 11.071 (post-conviction habeas for death penalty cases). The courts of appeals do not have jurisdiction to grant post-conviction habeas relief. *See id.* art. 11.05.

B. Restraints of Liberty Resulting from Actions Other than Criminal Conviction

The remainder of this section addresses habeas petitions filed by persons whose liberty has been restrained for reasons other than being convicted of or indicated for a crime. Perhaps the most commonly-seen example of non-conviction-based confinement is confinement for contempt of court.

1. Contempt

A court of appeals lacks jurisdiction to review a contempt order on direct appeal. *See Tex. Animal Health Comm'n v. Nunley*, 647 S.W.2d 951, 952 (Tex. 1983). Instead, a contempt order involving confinement may be reviewed by writ of habeas corpus.

The Supreme Court's authority to issue writs of habeas corpus is statutorily limited to restraints of liberty resulting from incidents in civil cases. *See* Tex. Gov't Code §22.002(e) ("The

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> To the extent that the criminal nature of a proceeding might be a stumbling block to characterizing the proceeding as a lawsuit, it should be observed that most jurisdictions have traditionally regarded habeas corpus as a civil remedy, even when the relief sought is from confinement in the criminal justice system. Yet courts have struggled with how to characterize habeas proceedings and have sometimes characterized them as "neither civil nor criminal but rather *sui generis*" or "an exercise of special constitutional and statutory jurisdiction." The United States Supreme Court has conceded that habeas corpus proceedings are characterized as "civil" but called that label "gross and inexact," stating that, "Essentially, the proceeding is unique." And while a habeas proceeding is considered in Texas to be separate from the criminal prosecution—being a collateral, rather than direct, attack on the judgment of conviction—Texas has gone further in eschewing the civil label for habeas proceedings arising from criminal prosecutions or convictions. Such proceedings are categorized as "criminal" for jurisdictional purposes, and the Texas Rules of Civil Procedure do not ordinarily apply.

Ex parte Rieck, 144 S.W.3d 510, 515-16 (Tex. Crim. App. 2004) (holding that statute allowing for forfeiture of good conduct time for the filing of frivolous lawsuits does not apply to habeas corpus proceedings) (citations omitted).

supreme court or a justice of the supreme court . . . may issue a writ of habeas corpus when a person is restrained in his liberty by virtue of an order, process, or commitment issued by a court or judge on account of the violation of an order, judgment, or decree previously made, rendered, or entered by the court or judge in a civil case.").[4] The courts of appeals likewise have jurisdiction to issue writs of habeas corpus when a person's liberty is restrained due to violation of a court order in a civil case.[5] Thus, habeas petitions filed by persons imprisoned for reasons other than being convicted of a crime are treated as civil matters if the underlying proceeding in which the behavior took place was civil in nature. *See In re Gawerc*, 165 S.W.3d 314 (Tex. 2005) (civil contempt for violation of child support orders); *Ex parte Sanchez*, 703 S.W.2d 955 (Tex. 1986) (denying habeas relief to court reporter held in contempt by court of appeals for failing to timely file reporter's record in civil case on appeal, when failure was partially due to reporter's imprisonment for failing to timely file record in criminal prosecution; and noting Court of Criminal Appeals' denial of reporter's habeas petition in connection with criminal case). The courts of appeals designate such habeas petitions as civil regardless of whether the *contempt* is civil in nature,[6] *see, e.g.*. *Ex parte Wong*, No. 08-06-00227-CV, 2006 WL 2844405 (Tex. App.—El Paso 2006, orig. proceeding) (civil contempt for non-compliance with divorce decree); criminal, *see, e.g., In re McGonagill*, No. 02-07-034-CV, 2007 WL 704888

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[4] The Texas Constitution grants both the Supreme Court and the Court of Criminal Appeals the power to issue writs of habeas corpus, mandamus, procedendo, certiorari, and other writs. *Compare* Tex. Const. art. V, §3(a) ("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."), *with id.* art. V, §5 ("Subject to such regulations as may be prescribed by law, the Court of Criminal Appeals and the Judges thereof shall have the power to issue the writ of habeas corpus, and, in criminal law matters, the writs of mandamus, procedendo, prohibition, and certiorari. The Court and the Judges thereof shall have the power to issue such other writs as may be necessary to protect its jurisdiction or enforce its judgments.").

[5] Section 22.201(d) provides:

> Concurrently with the supreme court, the court of appeals of a court of appeals district in which a person is restrained in his liberty, or a justice of the court of appeals, may issue a writ of habeas corpus when it appears that the restraint of liberty is by virtue of an order, process, or commitment issued by a court or judge because of the violation of an order, judgment, or decree previously made, rendered, or entered by the court or judge in a civil case. Pending the hearing of an application for a writ of habeas corpus, the court of appeals or a justice of the court of appeals may admit to bail a person to whom the writ of habeas corpus may be granted.

Tex. Gov't Code §22.201(d).

[6] Contempt proceedings are "quasi-criminal in nature" and "should conform as nearly as practicable to those in criminal cases." *Sanchez*, 703 S.W.2d at 957.

(Tex. App.—Fort Worth 2007, orig. proceeding) (criminal contempt for disobedience of court orders in divorce case); or both, *see, e.g., In re Garza*, No. 04-04-00140-CV, 2004 WL 839671 (Tex. App.—San Antonio 2004, orig. proceeding) (civil and criminal contempt for attorney's disobedience of discovery orders).

The Court of Criminal Appeals, by contrast, has broad statutory authority to grant habeas relief. *See* Tex. Code Crim. Proc. art. 11.05.[7] This includes the power to grant habeas relief to persons jailed for contempt that occurred during criminal proceedings. *See Ex parte Gibson*, 811 S.W.2d 594 (Tex. Crim. App. 1991) (granting habeas relief to prosecutor found in criminal contempt for remarks to judge during criminal trial); *Ex parte Curtis*, 568 S.W.2d 363 (Tex. Crim. App. 1978).

Notably, article 11.05 does not include the courts of appeals among the courts authorized to issue writs of habeas corpus. Given this omission, and Gov't Code §22.221(d)'s limitation on habeas jurisdiction to violations of orders in civil cases, several courts of appeals have concluded that they lack jurisdiction to issue a writ of habeas corpus to address a restraint of liberty resulting from contempt in a criminal proceeding. The El Paso Court of Appeals has stated:

> This Court's jurisdiction is not dependent upon characterization of the contempt proceeding as a civil case, nor is our jurisdiction limited to matters of civil contempt. Rather, our jurisdiction is limited by Section 22.221(d) to those situations in which the alleged contemnor violated an order, judgment or decree previously made, rendered, or entered by the court or judge in a civil case. Thus, under Section 22.221(d), this Court would have original habeas corpus jurisdiction to hear matters involving either civil contempt or criminal contempt, or both, so long as the order, judgment, or decree violated had been entered in a civil case. Applying that test to the facts before us, we find that the contempt judgment and Relator's subsequent restraint are not based upon a violation of an order entered by the trial court in a civil case. Rather, the order Relator was found to have violated, namely, an order to appear for trial, was entered in a criminal proceeding. Thus, this Court does not have original habeas corpus jurisdiction and we dismiss the petition for want of jurisdiction.

Ex parte Hawkins, 885 S.W.2d 586 (Tex. App.—El Paso 1994, orig. proceeding). The Beaumont Court of Appeals has reached a similar conclusion. *See Ex parte Powell*, 883 S.W.2d 775, 778 (Tex. App.—Beaumont 1994, orig. proceeding) (dismissing habeas petition of mother found in contempt of court and imprisoned for making false statement in connection withdrawal of funds in court registry set aide for use of minor daughter) ("Since the acts of contempt committed by the Relator were in fact criminal in nature, and did not arise from a violation of an order, judgment or decree in a civil case, the Court of Appeals does not have the power to issue a Writ of Habeas Corpus in this case nor to inquire into the punishment assessed against Relator."). *But see Gonzalez v. State*, 187

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[7]Article 11.05 provides: "The Court of Criminal Appeals, the District Courts, the County Courts, or any Judge of said Courts, have power to issue the writ of habeas corpus; and it is their duty, upon proper motion, to grant the writ under the rules prescribed by law."

S.W.3d 166 (Tex. App.—Waco 2006, orig. proceeding) (per curiam) (granting habeas relief to petitioner jailed on criminal contempt for violating bond condition in underlying drug prosecution).

It is not clear whether a court of appeals has jurisdiction to consider an appeal of a trial court's denial of a petition for habeas relief. An application for writ of habeas corpus filed in an appellate court is an original proceeding, and therefore presumably not appealable. *See* Tex. R. App. P. 52.1. However, it appears that a court of appeals may have appellate jurisdiction to consider an appeal of a trial court's denial of habeas relief. *See In re Commitment of Richards*, 202 S.W.2d 779 (Tex. App.—Beaumont 2006, no pet.) (holding that court lacked jurisdiction over direct appeal of biennial review order, and affirming trial court's denial of application for writ of habeas corpus); *Ex parte Woodall*, 154 S.W.3d 698 (Tex. App.—El Paso 2004, pet. ref'd) (affirming trial court's denial of habeas petition filed by smoker fined for violation of municipal anti-smoking ordinance).

2. Other Non-Conviction-Based Restraints on Liberty

A person's liberty also may be restrained under the sexually violent predator statute, which allows a court to place restrictions on a person's liberty though "outpatient civil commitment." *See* Tex. Health & Safety Code ch. 841; *In re Fisher*, 164 S.W.3d 637 (Tex. 2005) (concluding that the sexually violent predator statute is civil in nature, not punitive, and therefore due process does not require competence to stand trial). Restrictions imposed through outpatient civil commitment may be subject to challenge through habeas corpus. *See Richards*, 202 S.W.2d 779 (holding that court lacked jurisdiction over direct appeal of biennial review order, and affirming trial court's denial of application for writ of habeas corpus); *but see id.* at 794 (Gaultney, J., dissenting) (opining that court had jurisdiction over direct appeal, and that supervision and treatment requirements at issue were not proper subject of habeas proceeding under the circumstances) ("In my view, the majority's approach unnecessarily complicates the review process for commitment orders and makes the extraordinary habeas remedy the ordinary method for challenging commitment requirements.").

C. Conclusion

The distinctions between post-conviction habeas petitions and non-conviction habeas petitions—and of the latter type between civil and criminal matters—are not clearly explained in either the Code of Criminal Procedure. However, the only area where the case law appears to be in tension is to what extent the courts of appeals have jurisdiction over habeas applications filed by a person held in contempt in a criminal proceeding. By statute, the courts of appeals apparently lack such jurisdiction, although at least one court has concluded otherwise, and others have considered appeals of a trial court's denial of habeas relief. Also, the statutory outpatient civil commitment procedures for sexually violent predators are relatively new and have resulted in some disagreement as to the availability of habeas relief from liberty restrictions imposed under Chapter 841.

V. Expunction of Arrest Records

"A statutory expunction proceeding is civil rather than criminal in nature." *In re Expunction of J.A.*, 186 S.W.3d 592, 596 (Tex. App.—El Paso 2006, no pet.). The Supreme Court presumably

has jurisdiction of appellate expunction proceedings. *See State v. Beam*, 226 S.W.3d 392 (Tex. 2007); *Ex parte Elliot*, 815 S.W.2d 251 (Tex. 1991).

In *Ex parte Paprskar*, the Court of Criminal Appeals dismissed for lack of jurisdiction an appeal of a denied motion to expunge arrest records. 573 S.W.2d 525 (Tex. Crim. App. 1978). The court noted that Tex. Const. art. V, §5, gives the Court appellate jurisdiction over criminal cases only, and concluded that this was not a criminal case because there were no criminal penalties attached to the proceeding, it was not brought by or in the name of the State, and the defendant was not charged with a crime. It also declined to treat the matter as a habeas corpus application. Absent a statute authorizing appeal, the court concluded that it lacked jurisdiction. *See also Ex parte Burr*, 185 S.W.3d 451, 453 (Tex. Crim. App. 2006) (citing *Paprskar* and noting that expunction of arrest records is one type of proceeding related to a criminal case that itself is not criminal in nature).

Expunction of arrest records is governed by Code of Criminal Procedure art. 55.01. At least two other Texas statutes provide for judicial expunction in particular circumstances and do not require institution of a lawsuit, but would presumably be considered civil matters in light of *Paprskar*. *See* Tex. Code Crim. Proc. art. 45.055 (authorizing, after applicant's 18th birthday, expunction of conviction for failure to attend school and related records, upon payment of $30 fee to defray cost of notifying state agencies); Tex. Alco. Bev. Code §106.12 (authorizing, after applicant's 21st birthday, expunction of conviction for violation of Alcoholic Beverage Code and related records, upon payment of $30 fee to defray cost of notifying state agencies).

VI. Juvenile Cases

Juvenile cases are civil in nature. *L.G.R. v. State*, 724 S.W.2d 775, 776 (Tex. 1987); *In re J.R.R.*., 696 S.W.2d 382 (Tex.1985); *In re B.P.H.*, 83 S.W.3d 400, 405 (Tex. App.—Fort Worth 2002, no pet.). Accordingly, they "remain on the civil side of our justice system unless transferred to a criminal court." *Ex parte Valle*, 104 S.W.3d 888, 890 (Tex. Crim. App. 2003) (dismissing for want of jurisdiction habeas application of juvenile adjudicated as delinquent for committing capital murder; because juvenile adjudication is not a criminal conviction, statutory post-conviction habeas provisions inapplicable).

VII. Other Proceedings Ancillary to Criminal Prosecution

A. Matters Considered Criminal

1. Sex offender registration

An appeal of a trial court's denial of a registered sex offender's motion for non-publication of home address pursuant to statutory endangerment exception is a criminal matter. *Ex parte Burr*, 185 S.W.3d 451, 453-54 (Tex. Crim. App. 2006).

2. Post-conviction DNA testing

A post-conviction motion for DNA testing under Chapter 64 of the Code of Criminal Procedure is a criminal matter. *See Kutzner v. State*, 75 S.W.3d 427, 429 (Tex. Crim. App. 2002) (citing *Jeter*); *accord Rose v. State*, 198 S.W.3d 271, 272 (Tex. App.—San Antonio 2006, p.d.r. ref'd) (designating inmate's appeal from post-conviction DNA hearing as criminal case) ("A hearing on post-conviction DNA testing is a collateral attack on a judgment comparable to a habeas corpus proceeding.").

3. Appointment and compensation of defense counsel for indigents

The provision for appointment and compensation of attorneys to represent indigents in criminal law matters is a criminal law matter. *Weiner v. Dial*, 653 S.W.2d 786, 787 (Tex. Crim. App. 1983); *see also Burr*, 185 S.W.3d at 453 (citing *Wiener*).

4. Request for medical records

The Waco Court of Appeals dismissed for want of jurisdiction an inmate's appeal of an order, filed under the cause number of his criminal case and submitted to the court that convicted him, denying his request for certain medical records he apparently sought in connection with a potential civil suit against state and county officials. *See Reyes v. State*, 166 S.W.3d 333, 335 (Tex. App.—Waco 2005, no pet.) (Vance, J., concurring) (explaining original decision dismissing appeal, and interpreting additional filings as petition for discretionary review); *but see id.* at 333 (Gray, J., dissenting) (objecting to designation of appeal as criminal case, explaining that dismissal was appropriate for any of several reasons, and suggesting that court should treat Reyes's "petition for Coram Nobis" as motion for rehearing, grant the writ and withdraw the original opinion and judgment, and order cause number changed to reflect civil designation).

B. Matters Considered Civil

1. Forfeiture of contraband property

A proceeding for forfeiture of property derived from a criminal offense is a civil proceeding. *See Ex parte Rogers*, 804 S.W.2d 945, 948 (Tex. App.—Dallas 1990, orig. proceeding); *see also Burr*, 185 S.W.3d at 453 (citing *Rogers*). Similarly, *in rem* forfeiture proceedings under Article 18.18(b) of the Code of Criminal Procedure, which applies to certain contraband when "there is no prosecution or conviction following seizure," are of a civil nature and the rules of civil procedure apply. Tex. Code Crim. Proc. art. 18.18(b); *see id.* art. 59.05(b) (All cases under this chapter ["Forefeiture of Contraband"] shall proceed to trial in the same manner as in other civil cases."); *Hardy v. State*, 102 S.W.2d 123, 126-27 (Tex. 2003); *F & H Invs., Inc. v. State*, 55 S.W.3d 663, 667-68 (Tex. App.—Waco 2001, no pet.).

2. Malicious prosecution

Although arising from criminal proceedings, malicious prosecution is a civil matter over which the Supreme Court has jurisdiction. *See In re Bexar County Crim. Dist. Attorney's Office*, 224 S.W.3d 182 (Tex. 2007); *Kroger Tex. Ltd. P'Ship v. Suberu*, 216 S.W.3d 788 (Tex. 2006).

3. Application for restoration of property

The Code of Criminal Procedure provides that upon the conclusion of a prosecution for theft or other illegal acquisition of property, the court shall order the property returned to its owner. Tex. Code Crim. Proc. art. 47.02. The Code of Criminal Appeals has held that it lacks jurisdiction over an appeal from an order denying an application for restoration of property under article 47.02. *See Bretz v. State*, 508 S.W.2d 97 (Tex. Crim. App. 1974). The concurring opinion noted that "Texas law books are replete with confusing overlap, necessitated by the two courts of last resort." *Id.* at 98-99 (Roberts, J., concurring).

VIII. Inconsistent Docketing of Original Proceedings in the Courts of Appeals

An additional factor that complicates the problem of clearly defining civil versus criminal matters is that the courts of appeals are not all consistent about how cases are docketed. For example, in the Second, Third, and Fourteenth Courts of Appeals, every original proceeding is given a civil ("CV") designation. *See, e.g., In re Hancock*, No. 02-06-431-CV, 212 S.W.3d 922 (Tex. App.—Fort Worth 2007, orig. proceeding). This currently appears to be the generally accepted practice among most of the courts of appeals. However, some courts of appeals give criminal ("CR") designations to original proceedings related to criminal cases.[8] *See In re Goad*, No. 10-07-00331-CR, 2008 WL 191637 (Tex. App.—Waco 2008, orig. proceeding); *In re Hearon*, 10-07-00183-CR, 228 S.W.3d 466 (Tex. App.—Waco 2007, orig. proceeding); *In re Hayes*, No. 01-05-00899-CR, 2005 WL 2989878 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding); *In re State*, No. 08-03-00004-CR, 116 S.W.3d 376 (Tex. App.—El Paso 2003, orig. proceeding); *In re State*, No. 08-01-00203-CR, 50 S.W.3d 100 (Tex. App.—El Paso 2001, orig. proceeding).

The *In re Hayes* case cited above is particularly instructive, because the petitioner, a TDCJ inmate, filed similar mandamus petitions in numerous courts of appeals, in each case apparently seeking mandamus relief against the trial-court clerk for failing to file his tort claims against the director of TDCJ. The Waco Court of Appeals docketed Hayes's mandamus petition as a criminal case, but its memorandum opinion notes the disposition of Hayes's similar petitions by the Houston [Fourteenth], San Antonio, Texarkana, Amarillo, and Corpus Christi Courts of Appeals, each of which gave Hayes's mandamus petition a civil designation. *See In re Hayes*, No. 10-05-00304-CR, 2005 WL 2044924 (Tex. App.—Waco 2005, orig. proceeding) (listing cases).

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[8]Peggy Culp, Clerk of the Seventh Court of Appeals, reports that in deciding whether to give an original proceeding a "CR" or "CV" designation, the Amarillo court attempts to ascertain which court of last resort would have jurisdiction over the case.

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

March 5, 2008

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 Texas Rules of Evidence
Via e-mail

Dear Chip:

The Court requests the Advisory Committee's recommendations on a proposal, submitted by attorney Manuel Newburger of Austin, to amend Texas Rule of Evidence 902 to provide an authentication method for arbitration awards. Mr. Newburger describes the problem as follows:

> As you undoubtedly know, use of mandatory arbitration has been on the rise for a number of years. Unfortunately, the Texas Rules of Evidence appear to be silent on the question of how one proves up an arbitration award. In theory, the award should be provable by a request for admission. In reality, the respondent usually denies the request. In some counties the judges are then being rather difficult about confirming the awards. What should be a simplified process under Title 9 is becoming one that is cumbersome and inconsistent across the State. (I do not do confirmations, but I represent law firms and debt buyers who do, and I have heard complaints from collection industry members across the country.)
>
> Although business records affidavits are sometimes used, an award is really not a business record. It is the memorialization of the arbitrator's ruling, not a record of a regularly conducted business activity. I have argued that the award is not hearsay because it is offered merely as evidence of the arbitrator's ruling and not to prove the truth of the matter asserted therein. Unfortunately, even if I am correct there is still the question of how one authenticates the award.
>
> An award from an arbitration body such as AAA or NAF is not a public document, it is not a document which is ordinarily acknowledged, and it does not appear to fall under any of the other provisions of Tex. R. Evid. 902. I would respectfully urge you to consider the adoption of an amendment to Rule 902 to provide an authentication method for arbitration awards. The easiest

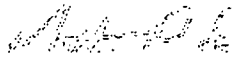
would be a simplified affidavit to be signed by either the arbitrator making the award or an officer of the arbitration body conducting the arbitration.

I do not think that this was an issue in the past because there was not the substantial volume of consumer arbitrations that we see today under credit card agreements from national banks. Today, however, this is an issue that pops up all over the State, and it is one that I think will require a Rules change to solve.

Mr. Newburger's suggested text for new subpart (11) of TRE 902 is shown on the following pages.

The Court greatly appreciates the Committee's thoughtful consideration of this proposal, for its dedication to the rules process, and for your continued leadership on the Committee. I look forward to seeing you all on April 4.

Sincerely,



Nathan L. Hecht
Justice

RULE 902. SELF-AUTHENTICATION

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic Public Documents Under Seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic Public Documents Not Under Seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign Public Documents. A document purporting to be executed or attested in an official capacity by a person, authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification. The final certification shall be dispensed with whenever both the United States and the foreign country in which the official record is located are parties to a treaty or convention that abolishes or displaces such requirement, in which case the record and the attestation shall be certified by the means provided in the treaty or convention.

(4) Certified Copies of Public Records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2) or (3) of this rule or complying with any statute or other rule prescribed pursuant to statutory authority.

(5) Official Publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and Periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade Inscriptions and the Like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged Documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial Paper and Related Documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Business Records Accompanied by Affidavit.

(a) *Records or photocopies; admissibility; affidavit; filing.* Any record or set of records or photographically reproduced copies of such records, which would be admissible under Rule 803(6) or (7) shall be admissible in evidence in any court in this state upon the affidavit of the person who would otherwise provide the prerequisites of Rule 803(6) or (7), that such records attached to such affidavit were in fact so kept as required by Rule 803(6) or (7), provided further, that such record or records along with such affidavit are filed with the clerk of the court for inclusion with the papers in the cause in which the record or records are sought to be used as evidence at least fourteen days prior to the day upon which trial of said cause commences, and provided the other parties to said cause are given prompt notice by the party filing same of the filing of such record or records and affidavit, which notice shall identify the name and employer, if any, of the person making the affidavit and such records shall be made available to the counsel for other parties to the action or litigation for inspection and copying. The expense for copying shall be borne by the party, parties or persons who desire copies and not by the party or parties who file the records and serve notice of said filing, in compliance with this rule. Notice shall be deemed to have been promptly given if it is served in the manner contemplated by Rule of Civil Procedure 21a fourteen days prior to commencement of trial in said cause.

(b) *Form of affidavit.* [omitted]

(11) **Sworn Copies of Arbitration Awards.** A copy of an arbitration award accompanied by a sworn certification by either the arbitrator making the award or an authorized records custodian of the arbitration body issuing the award stating that the document is a true copy of the original award that was issued. In the case of an award by a panel consisting of multiple arbitrators a certification by any one of the arbitrators shall be sufficient. Such an affidavit shall be sufficient if it identifies the parties to the arbitration proceeding and the case or docket number of such proceeding and states, under penalty of perjury, that the document attached thereto is a true and correct copy of the arbitration award issued in such proceeding.

(~~11~~12) **Presumptions Under Statutes or Other Rules.** Any signature, document, or other matter declared by statute or by other rules prescribed pursuant to statutory authority to be presumptively or prima facie genuine or authentic.

FRANK G. **GRUBER**, Appellant v. **CACV** OF COLORADO, LLC, Appellee
Tex.App.-Dallas,2008.

FRANK G. GRUBER, Appellant
v.
CACV OF COLORADO, LLC, Appellee
No. 05-07-00379-CV

Court of Appeals of Texas, Dallas.
April 2, 2008

On Appeal from the County Court at Law No. 1 Collin County, Texas Trial Court Cause No. 001-2683-06

Before Justices Morris, Wright, and Moseley

MEMORANDUM OPINION

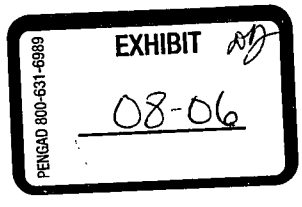
CAROLYN WRIGHT JUSTICE

Opinion By Justice Wright

Frank G. Gruber appeals the trial court's judgment confirming an arbitration award issued in favor of CACV of Colorado, LLC. In two issues, appellant contends we must reverse the trial court's judgment confirming the arbitration award because appellee failed to provide (1) evidence that the Texas General Arbitration Act applied to this award, or (2) admissible evidence of the arbitration award itself. For the following reasons, we reverse the trial court's judgment confirming the arbitration award.

Background

Appellee filed its petition seeking confirmation of an arbitration award and attached a copy of the award to the petition. Appellant answered with a plea to the jurisdiction and a general denial. At the hearing on its request for confirmation of the award, appellee offered Plaintiff's Exhibit 2 in support of its request. Plaintiff's Exhibit 2 consists of a letter notifying appellant of the award and a copy of the award against appellant. Appellant objected to the copy of the award as hearsay and because it was not properly authenticated. Appellee did not attempt to establish a foundation for admission of the award or otherwise attempt to authenticate the award. Rather, appellant asked the trial court to take judicial notice of the award because it had been presented to the trial court as an attachment to its petition and at the "formal pretrial where we were to exchange exhibits." Appellee objected that the copy of the arbitration award contained in the file was not the type of document suitable for judicial notice. After



some discussion, the trial court took "judicial notice that it's in the file." The trial court later confirmed the arbitration award. This appeal followed.

Discussion

In his second issue, appellant contends the trial court erred by confirming the award because there is no admissible evidence of an arbitration award in the record. Specifically, he claims the copy of the arbitration award attached to appellee's application is not suitable for judicial notice, and is hearsay and not a self-authenticating document. In response, appellee does not attempt to show there is evidence of the award in the record, but rather contends no such evidence is necessary. We agree with appellant.

Although section 171.087 provides that unless grounds are offered for vacating, modifying or correcting the arbitration award the court shall confirm the award upon application of the party, the party applying for confirmation must nevertheless establish there is an arbitration award to be confirmed. *Cf.*, *Brozo v. Shearson Lehman Hutton, Inc.*, 865 S.W.2d 509, 510 (Tex.App.-Corpus Christi 1993, no pet.)(citing *Ridgill Bros. v. Dupree*, 85 S.W. 1166, 1167 (Tex.Civ.App.1905, no pet.)(after plaintiff applied for and proved rendition of award, defendant had burden to establish facts that would relieve him from award's effect)). Thus, we must review the record to determine if there is any evidence establishing the arbitration award.

At the hearing on appellee's application, appellee requested the trial court to take judicial notice of the copy of the award attached to its application for confirmation of the arbitration award. Texas Rule of Evidence 201 provides that a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. TEX.R. EVID. 201; *Dallas Co. Constable Pct. 5 Michael Dupree v. KingVision Pay-Per-View, Ltd.*, 219 S.W.3d 602, 613 (Tex.App.-Dallas 2007, no pet.). A court may take judicial notice of pleadings that have been filed. However, a court may not take the pleadings to be true absent testimony, other proof, or admissions by the other party. *See Tschirhart v. Tschirhart*, 876 S.W.2d 507, 508 (Tex.App.-Austin 1994, no writ). The court taking judicial notice of the contents of its file does not elevate those averments into proof. *See Tex. Dep't of Pub. Safety v. Claudio*, 133 S.W.3d 630, 633 (Tex.App.-Corpus Christi 2002, no pet.)(judicial notice of pleadings legally insufficient evidence to support element of expunction);*Tex. Dep't of Pub. Safety v. Williams*, 76 S.W.3d 647, 651 (Tex.App.-Corpus Christi 2002, no pet.)(same). Nor are documents attached to pleadings evidence. *Ceramic Tile Intern., Inc. v. Balusek*,

137 S.W.3d 722, 725 (Tex.App.-San Antonio 2004, no pet.). Simply attaching a document to a pleading does not make the document admissible as evidence, dispense with proper foundational evidentiary requirements, or relieve a litigant of complying with other admissibility requirements. *Id.*

Here, the trial court took judicial notice that a copy of the arbitration award was in its file. However, that did not elevate the copy of the arbitration award attached to appellee's pleading to proof of the arbitration award. And, appellee did not attempt to provide the trial court with proper foundational requirements such as a business record affidavit nor did it show that the document was otherwise self-authenticating. *See*TEX.R. EVID. 902 (setting out requirements for self-authenticating documents). Thus, after reviewing the record, we agree with appellant that there is no evidence establishing an arbitration award. We sustain appellant's second issue. Having done so, we need not address appellant's first issue.

We reverse and set aside the trial court's judgment confirming the arbitration award.

070379F.P05

Tex.App.-Dallas,2008.
Gruber v. CACV of Colorado, LLC
Not Reported in S.W.3d, 2008 WL 867459
(Tex.App.-Dallas)

END OF DOCUMENT

CIVIL PRACTICE & REMEDIES CODE

CHAPTER 171. GENERAL ARBITRATION

SUBCHAPTER A. GENERAL PROVISIONS

§ 171.001. ARBITRATION AGREEMENTS VALID. (a) A written agreement to arbitrate is valid and enforceable if the agreement is to arbitrate a controversy that:

(1) exists at the time of the agreement; or

(2) arises between the parties after the date of the agreement.

(b) A party may revoke the agreement only on a ground that exists at law or in equity for the revocation of a contract.

Acts 1965, 59th Leg., p. 1593, ch. 689, § 1, eff. Jan. 1, 1966. Amended by Acts 1979, 66th Leg., p. 1708, ch. 704, § 1, eff. Aug. 27, 1979. Redesignated from Vernon's Ann.Civ.Stat. art. 224 and amended by Acts 1995, 74th Leg., ch. 588, § 1, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.002. SCOPE OF CHAPTER. (a) This chapter does not apply to:

(1) a collective bargaining agreement between an employer and a labor union;

(2) an agreement for the acquisition by one or more individuals of property, services, money, or credit in which the total consideration to be furnished by the individual is not more than $50,000, except as provided by Subsection (b);

(3) a claim for personal injury, except as provided by Subsection (c);

(4) a claim for workers' compensation benefits; or

(5) an agreement made before January 1, 1966.

(b) An agreement described by Subsection (a)(2) is subject to this chapter if:

(1) the parties to the agreement agree in writing to arbitrate; and

(2) the agreement is signed by each party and each party's attorney.

(c) A claim described by Subsection (a)(3) is subject to this chapter if:

(1) each party to the claim, on the advice of counsel, agrees in writing to arbitrate; and

(2) the agreement is signed by each party and each party's attorney.

Acts 1965, 59th Leg., p. 1593, ch. 689, § 1, eff. Jan. 1, 1966. Redesignated from Vernon's Ann.Civ.Stat. art. 225 and amended by Acts 1995, 74th Leg., ch. 588, § 1, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.003. UNIFORM INTERPRETATION. This chapter shall be construed to effect its purpose and make uniform the construction of other states' law applicable to an arbitration.

Acts 1965, 59th Leg., p. 1593, ch. 689, § 1, eff. Jan. 1, 1966. Redesignated from Vernon's Ann.Civ.Stat. art. 226 and amended by Acts 1995, 74th Leg., ch. 588, § 1, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

SUBCHAPTER B. PROCEEDINGS TO COMPEL OR STAY ARBITRATIONS

§ 171.021. PROCEEDING TO COMPEL ARBITRATION. (a) A court shall order the parties to arbitrate on application of a party showing:

(1) an agreement to arbitrate; and

(2) the opposing party's refusal to arbitrate.

(b) If a party opposing an application made under Subsection (a) denies the existence of the agreement, the court shall summarily determine that issue. The court shall order the arbitration if it finds for the party that made the application. If the court does not find for that party, the court shall deny the application.

(c) An order compelling arbitration must include a stay of any proceeding subject to Section 171.025.

Acts 1983, 68th Leg., p. 4748, ch. 830, eff. Aug. 29, 1983. Amended by Acts 1985, 69th Leg., ch. 338, § 1, eff. Aug. 26, 1985. Redesignated from Vernon's Ann.Civ.St. art. 238-20, § 1 to 2A and amended by Acts 1995, 74th Leg., ch. 588, § 1, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.022. UNCONSCIONABLE AGREEMENTS UNENFORCEABLE. A court may not enforce an agreement to arbitrate if the court finds the agreement was unconscionable at the time the agreement was made.

Acts 1983, 68th Leg., p. 4748, ch. 830, eff. Aug. 29, 1983. Amended

by Acts 1985, 69th Leg., ch. 338, § 2, eff. Aug. 26, 1985. Redesignated from Vernon's Ann.Civ.St. art. 238-20, § 3 and amended by Acts 1995, 74th Leg., ch. 588, § 1, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.023. PROCEEDING TO STAY ARBITRATION. (a) A court may stay an arbitration commenced or threatened on application and a showing that there is not an agreement to arbitrate.

(b) If there is a substantial bona fide dispute as to whether an agreement to arbitrate exists, the court shall try the issue promptly and summarily.

(c) The court shall stay the arbitration if the court finds for the party moving for the stay. If the court finds for the party opposing the stay, the court shall order the parties to arbitrate.

Acts 1983, 68th Leg., p. 4748, ch. 830, eff. Aug. 29, 1983. Redesignated from Vernon's Ann.Civ.St. art. 238-20, § 4 and amended by Acts 1995, 74th Leg., ch. 588, § 1, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.024. PLACE FOR MAKING APPLICATION. (a) If there is a proceeding pending in a court involving an issue referable to arbitration under an alleged agreement to arbitrate, a party may make an application under this subchapter only in that court.

(b) If Subsection (a) does not apply, a party may make an application in any court, subject to Section 171.096.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.025. STAY OF RELATED PROCEEDING. (a) The court shall stay a proceeding that involves an issue subject to arbitration if an order for arbitration or an application for that order is made under this subchapter.

(b) The stay applies only to the issue subject to arbitration if that issue is severable from the remainder of the proceeding.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.026. VALIDITY OF UNDERLYING CLAIM. A court may not refuse to order arbitration because:

(1) the claim lacks merit or bona fides; or

(2) the fault or ground for the claim is not shown.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

SUBCHAPTER C. ARBITRATION

§ 171.041. APPOINTMENT OF ARBITRATORS. (a) The method of appointment of arbitrators is as specified in the agreement to arbitrate.

(b) The court, on application of a party stating the nature of the issues to be arbitrated and the qualifications of the proposed arbitrators, shall appoint one or more qualified arbitrators if:

(1) the agreement to arbitrate does not specify a method of appointment;

(2) the agreed method fails or cannot be followed; or

(3) an appointed arbitrator fails or is unable to act and a successor has not been appointed.

(c) An arbitrator appointed under Subsection (b) has the powers of an arbitrator named in the agreement to arbitrate.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.042. MAJORITY ACTION BY ARBITRATORS. The powers of the arbitrators are exercised by a majority unless otherwise provided by the agreement to arbitrate or this chapter.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.043. HEARING CONDUCTED BY ARBITRATORS.

(a) Unless otherwise provided by the agreement to arbitrate, all the arbitrators shall conduct the hearing. A majority of the arbitrators may determine a question and render a final award.

(b) If, during the course of the hearing, an arbitrator ceases to act, one or more remaining arbitrators appointed to act as neutral arbitrators may hear and determine the controversy.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.044. TIME AND PLACE OF HEARING; NOTICE.

(a) Unless otherwise provided by the agreement to arbitrate, the

arbitrators shall set a time and place for the hearing and notify each party.

(b) The notice must be served not later than the fifth day before the hearing either personally or by registered or certified mail with return receipt requested. Appearance at the hearing waives the notice.

(c) The court on application may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.045. ADJOURNMENT OR POSTPONEMENT. Unless otherwise provided by the agreement to arbitrate, the arbitrators may:

(1) adjourn the hearing as necessary; and

(2) on request of a party and for good cause, or on their own motion, postpone the hearing to a time not later than:

(A) the date set by the agreement for making the award; or

(B) a later date agreed to by the parties.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.046. FAILURE OF PARTY TO APPEAR. Unless otherwise provided by the agreement to arbitrate, the arbitrators may hear and determine the controversy on the evidence produced without regard to whether a party who has been notified as provided by Section 171.044 fails to appear.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.047. RIGHTS OF PARTY AT HEARING. Unless otherwise provided by the agreement to arbitrate, a party at the hearing is entitled to:

(1) be heard;

(2) present evidence material to the controversy; and

(3) cross-examine any witness.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.048. REPRESENTATION BY ATTORNEY; FEES. (a) A

party is entitled to representation by an attorney at a proceeding under this chapter.

(b) A waiver of the right described by Subsection (a) before the proceeding is ineffective.

(c) The arbitrators shall award attorney's fees as additional sums required to be paid under the award only if the fees are provided for:

(1) in the agreement to arbitrate; or

(2) by law for a recovery in a civil action in the district court on a cause of action on which any part of the award is based.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.049. OATH. The arbitrators, or an arbitrator at the direction of the arbitrators, may administer to each witness testifying before them the oath required of a witness in a civil action pending in a district court.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.050. DEPOSITIONS. (a) The arbitrators may authorize a deposition:

(1) for use as evidence to be taken of a witness who cannot be required by subpoena to appear before the arbitrators or who is unable to attend the hearing; or

(2) for discovery or evidentiary purposes to be taken of an adverse witness.

(b) A deposition under this section shall be taken in the manner provided by law for a deposition in a civil action pending in a district court.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.051. SUBPOENAS. (a) The arbitrators, or an arbitrator at the direction of the arbitrators, may issue a subpoena for:

(1) attendance of a witness; or

(2) production of books, records, documents, or other evidence.

(b) A witness required to appear by subpoena under this section may appear at the hearing before the arbitrators or at a deposition.

(c) A subpoena issued under this section shall be served in

the manner provided by law for the service of a subpoena issued in a civil action pending in a district court.

(d) Each provision of law requiring a witness to appear, produce evidence, and testify under a subpoena issued in a civil action pending in a district court applies to a subpoena issued under this section.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.052. WITNESS FEE. The fee for a witness attending a hearing or a deposition under this subchapter is the same as the fee for a witness in a civil action in a district court.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.053. ARBITRATORS' AWARD. (a) The arbitrators' award must be in writing and signed by each arbitrator joining in the award.

(b) The arbitrators shall deliver a copy of the award to each party personally, by registered or certified mail, or as provided in the agreement.

(c) The arbitrators shall make the award:

(1) within the time established by the agreement to arbitrate; or

(2) if a time is not established by the agreement, within the time ordered by the court on application of a party.

(d) The parties may extend the time for making the award either before or after the time expires. The extension must be in writing.

(e) A party waives the objection that an award was not made within the time required unless the party notifies the arbitrators of the objection before the delivery of the award to that party.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.054. MODIFICATION OR CORRECTION TO AWARD. (a) The arbitrators may modify or correct an award:

(1) on the grounds stated in Section 171.091; or

(2) to clarify the award.

(b) A modification or correction under Subsection (a) may be made only:

(1) on application of a party; or

(2) on submission to the arbitrators by a court, if an application to the court is pending under Sections 171.087,

171.088, 171.089, and 171.091, subject to any condition ordered by the court.

(c) A party may make an application under this section not later than the 20th day after the date the award is delivered to the applicant.

(d) An applicant shall give written notice of the application promptly to the opposing party. The notice must state that the opposing party must serve any objection to the application not later than the 10th day after the date of notice.

(e) An award modified or corrected under this section is subject to Sections 171.087, 171.088, 171.089, 171.090, and 171.091.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.055. ARBITRATOR'S FEES AND EXPENSES. Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, with other expenses incurred in conducting the arbitration, shall be paid as provided in the award.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

SUBCHAPTER D. COURT PROCEEDINGS

§ 171.081. JURISDICTION. The making of an agreement described by Section 171.001 that provides for or authorizes an arbitration in this state and to which that section applies confers jurisdiction on the court to enforce the agreement and to render judgment on an award under this chapter.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.082. APPLICATION TO COURT; FEES. (a) The filing with the clerk of the court of an application for an order under this chapter, including a judgment or decree, invokes the jurisdiction of the court.

(b) On the filing of the initial application and the payment to the clerk of the fees of court required to be paid on the filing of a civil action in the court, the clerk shall docket the proceeding as a civil action pending in that court.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.083. TIME FOR FILING. An applicant for a court order under this chapter may file the application:

(1) before arbitration proceedings begin in support of those proceedings;

(2) during the period the arbitration is pending before the arbitrators; or

(3) subject to this chapter, at or after the conclusion of the arbitration.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.084. STAY OF CERTAIN PROCEEDINGS. (a) After an initial application is filed, the court may stay:

(1) a proceeding under a later filed application in another court to:

(A) invoke the jurisdiction of that court; or

(B) obtain an order under this chapter; or

(2) a proceeding instituted after the initial application has been filed.

(b) A stay under this section affects only an issue subject to arbitration under an agreement in accordance with the terms of the initial application.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.085. CONTENTS OF APPLICATION. (a) A court may require that an application filed under this chapter:

(1) show the jurisdiction of the court;

(2) have attached a copy of the agreement to arbitrate;

(3) define the issue subject to arbitration between the parties under the agreement;

(4) specify the status of the arbitration before the arbitrators; and

(5) show the need for the court order sought by the applicant.

(b) A court may not find an application inadequate because of the absence of a requirement listed in Subsection (a) unless the court, in its discretion:

(1) requires that the applicant amend the application to meet the requirements of the court; and

(2) grants the applicant a 10-day period to comply.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1,

1997.

§ 171.086. ORDERS THAT MAY BE RENDERED. (a) Before arbitration proceedings begin, in support of arbitration a party may file an application for a court order, including an order to:

(1) invoke the jurisdiction of the court over the adverse party and to effect that jurisdiction by service of process on the party before arbitration proceedings begin;

(2) invoke the jurisdiction of the court over an ancillary proceeding in rem, including by attachment, garnishment, or sequestration, in the manner and subject to the conditions under which the proceeding may be instituted and conducted ancillary to a civil action in a district court;

(3) restrain or enjoin:

(A) the destruction of all or an essential part of the subject matter of the controversy; or

(B) the destruction or alteration of books, records, documents, or other evidence needed for the arbitration;

(4) obtain from the court in its discretion an order for a deposition for discovery, perpetuation of testimony, or evidence needed before the arbitration proceedings begin;

(5) appoint one or more arbitrators so that an arbitration under the agreement to arbitrate may proceed; or

(6) obtain other relief, which the court can grant in its discretion, needed to permit the arbitration to be conducted in an orderly manner and to prevent improper interference or delay of the arbitration.

(b) During the period an arbitration is pending before the arbitrators or at or after the conclusion of the arbitration, a party may file an application for a court order, including an order:

(1) that was referred to or that would serve a purpose referred to in Subsection (a);

(2) to require compliance by an adverse party or any witness with an order made under this chapter by the arbitrators during the arbitration;

(3) to require the issuance and service under court order, rather than under the arbitrators' order, of a subpoena, notice, or other court process:

(A) in support of the arbitration; or

(B) in an ancillary proceeding in rem, including by attachment, garnishment, or sequestration, in the manner of and subject to the conditions under which the proceeding may be conducted ancillary to a civil action in a district court;

(4) to require security for the satisfaction of a court judgment that may be later entered under an award;

(5) to support the enforcement of a court order entered under this chapter; or

(6) to obtain relief under Section 171.087, 171.088, 171.089, or 171.091.

(c) A court may not require an applicant for an order under Subsection (a)(1) to show that the adverse party is about to, or may, leave the state if jurisdiction over that party is not effected by service of process before the arbitration proceedings begin.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.087. CONFIRMATION OF AWARD. Unless grounds are offered for vacating, modifying, or correcting an award under Section 171.088 or 171.091, the court, on application of a party, shall confirm the award.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.088. VACATING AWARD. (a) On application of a party, the court shall vacate an award if:

(1) the award was obtained by corruption, fraud, or other undue means;

(2) the rights of a party were prejudiced by:

(A) evident partiality by an arbitrator appointed as a neutral arbitrator;

(B) corruption in an arbitrator; or

(C) misconduct or wilful misbehavior of an arbitrator;

(3) the arbitrators:

(A) exceeded their powers;

(B) refused to postpone the hearing after a showing of sufficient cause for the postponement;

(C) refused to hear evidence material to the controversy; or

(D) conducted the hearing, contrary to Section 171.043, 171.044, 171.045, 171.046, or 171.047, in a manner that substantially prejudiced the rights of a party; or

(4) there was no agreement to arbitrate, the issue was not adversely determined in a proceeding under Subchapter B, and the party did not participate in the arbitration hearing without raising the objection.

(b) A party must make an application under this section not later than the 90th day after the date of delivery of a copy of the award to the applicant. A party must make an application under Subsection (a)(1) not later than the 90th day after the date the grounds for the application are known or should have been known.

(c) If the application to vacate is denied and a motion to modify or correct the award is not pending, the court shall confirm the award.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.089. REHEARING AFTER AWARD VACATED. (a) On vacating an award on grounds other than the grounds stated in Section 171.088(a)(4), the court may order a rehearing before new arbitrators chosen:

(1) as provided in the agreement to arbitrate; or

(2) by the court under Section 171.041, if the agreement does not provide the manner for choosing the arbitrators.

(b) If the award is vacated under Section 171.088(a)(3), the court may order a rehearing before the arbitrators who made the award or their successors appointed under Section 171.041.

(c) The period within which the agreement to arbitrate requires the award to be made applies to a rehearing under this section and commences from the date of the order.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.090. TYPE OF RELIEF NOT FACTOR. The fact that the relief granted by the arbitrators could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm the award.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.091. MODIFYING OR CORRECTING AWARD. (a) On application, the court shall modify or correct an award if:

(1) the award contains:

(A) an evident miscalculation of numbers; or

(B) an evident mistake in the description of a person, thing, or property referred to in the award;

(2) the arbitrators have made an award with respect to a matter not submitted to them and the award may be corrected without affecting the merits of the decision made with respect to the issues that were submitted; or

(3) the form of the award is imperfect in a manner not affecting the merits of the controversy.

(b) A party must make an application under this section not later than the 90th day after the date of delivery of a copy of the award to the applicant.

(c) If the application is granted, the court shall modify or correct the award to effect its intent and shall confirm the award as modified or corrected. If the application is not granted, the court shall confirm the award.

(d) An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.092. JUDGMENT ON AWARD. (a) On granting an order that confirms, modifies, or corrects an award, the court shall enter a judgment or decree conforming to the order. The judgment or decree may be enforced in the same manner as any other judgment or decree.

(b) The court may award:

(1) costs of the application and of the proceedings subsequent to the application; and

(2) disbursements.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.093. HEARING; NOTICE. The court shall hear each initial and subsequent application under this subchapter in the manner and with the notice required by law or court rule for making and hearing a motion filed in a pending civil action in a district court.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.094. SERVICE OF PROCESS FOR INITIAL APPLICATION. (a) On the filing of an initial application under this subchapter, the clerk of the court shall:

(1) issue process for service on each adverse party named in the application; and

(2) attach a copy of the application to the process.

(b) To the extent applicable, the process and service and the return of service must be in the form and include the substance required for process and service on a defendant in a civil action in a district court.

(c) An authorized official may effect the service of process.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.095. SERVICE OF PROCESS FOR SUBSEQUENT APPLICATIONS. (a) After an initial application has been made,

notice to an adverse party for each subsequent application shall be made in the same manner as is required for a motion filed in a pending civil action in a district court. This subsection applies only if:

(1) jurisdiction over the adverse party has been established by service of process on the party or in rem for the initial application; and

(2) the subsequent application relates to:

(A) the same arbitration or a prospective arbitration under the same agreement to arbitrate; and

(B) the same controversy or controversies.

(b) If Subsection (a) does not apply, service of process shall be made on the adverse party in the manner provided by Section 171.094.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.096. PLACE OF FILING. (a) Except as otherwise provided by this section, a party must file the initial application:

(1) in the county in which an adverse party resides or has a place of business; or

(2) if an adverse party does not have a residence or place of business in this state, in any county.

(b) If the agreement to arbitrate provides that the hearing before the arbitrators is to be held in a county in this state, a party must file the initial application with the clerk of the court of that county.

(c) If a hearing before the arbitrators has been held, a party must file the initial application with the clerk of the court of the county in which the hearing was held.

(d) Consistent with Section 171.024, if a proceeding is pending in a court relating to arbitration of an issue subject to arbitration under an agreement before the filing of the initial application, a party must file the initial application and any subsequent application relating to the arbitration in that court.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.097. TRANSFER. (a) On application of a party adverse to the party who filed the initial application, a court that has jurisdiction but that is located in a county other than as described by Section 171.096 shall transfer the application to a court of a county described by that section.

(b) The court shall transfer the application by an order comparable to an order sustaining a plea of privilege to be sued in

a civil action in a district court of a county other than the county in which an action is filed.

(c) The party must file the application under this section:

(1) not later than the 20th day after the date of service of process on the adverse party; and

(2) before any other appearance in the court by that adverse party, other than an appearance to challenge the jurisdiction of the court.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

§ 171.098. APPEAL. (a) A party may appeal a judgment or decree entered under this chapter or an order:

(1) denying an application to compel arbitration made under Section 171.021;

(2) granting an application to stay arbitration made under Section 171.023;

(3) confirming or denying confirmation of an award;

(4) modifying or correcting an award; or

(5) vacating an award without directing a rehearing.

(b) The appeal shall be taken in the manner and to the same extent as an appeal from an order or judgment in a civil action.

Added by Acts 1997, 75th Leg., ch. 165, § 5.01, eff. Sept. 1, 1997.

Kristal Voth

From: Hoffman, Lonny [LHoffman@Central.UH.EDU]

Sent: Wednesday, March 26, 2008 8:42 AM

To: Kristal Voth; levi_benton@justex.net; brown@wrightbrownclose.com; ecarlson@stcl.edu; ecarlson@houston.rr.com; sduncan@lockeliddell.com; tjacks@jackslawfirm.com; terry.jennings@1stcoa.courts.state.tx.us; bwade@cdmlaw.com

Subject: RE: Proposed amendment 902 (11new)

Another possibly interesting addition to the conversation. Take a look at the decision that the US Supreme Court's announced yesterday in Hall St. v. Mattel. Here's the link: http://www.supremecourtus.gov/opinions/07pdf/06-989.pdf. In it, the court notes that:

> "The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement understate statutory or common law, for example, where judicial review of different scope is arguable."

It distinguishes these other ways from the "the expeditious judicial review under sections 9, 10 and 11" of the FAA, and, in this connection, describes that expeditious judicial review process more fully:

> "An application for any of these orders will get streamlined treatment as a motion, obviating the separate contract action that would usually be necessary to enforce or tinker with an arbitral award in court.[3]"

My sense from reading these passages is that the Court is saying you follow what is in the FAA for confirming, vacating, modifying or correcting an award and that's it. period.

This suggests that any concern about the FAA not speaking specifically to how one first authenticates an arbitral award is misguided. The process is supposed to be expeditious. that means that all parties must do is follow the very specific and tailored requirements of the FAA in order to confirm, vacate, modify or correct an award. In other words, Hall St's description of the FAA seems entirely consistent with what I previously concluded in my memo in parsing the TGAA, which mirrors the FAA on these points.

Don't know if I'm right; this was just my first reaction after reading the case this morning.

Other thoughts?

From: Kristal Voth [mailto:kvoth@obt.com]
Sent: Tue 3/18/2008 8:57 AM
To: levi_benton@justex.net; brown@wrightbrownclose.com; ecarlson@stcl.edu; ecarlson@houston.rr.com; sduncan@lockeliddell.com; Hoffman, Lonny ; tjacks@jackslawfirm.com; terry.jennings@1stcoa.courts.state.tx.us; bwade@cdmlaw.com
Subject: Proposed amendment 902 (11new)

Dear Members:

I am attaching hereto the following:

1. Email from Lonny Hoffman dated March 17, 2008, 12:03pm which has attached a five page comment by Lonny dated Mach 17, 2008;

2. Email form Elaine Carlson dated March 17, 2008 at 9:44am, which contains a comment from Justice Frank Evans(2 pages);

3. Memo that I sent to Lonny Hoffman on March 17, 2008, at 3:52pm.

The purpose of my memo was not for any corrections or changes to Lonny's memo but merely to make us all aware of the federal Act. The only thing I overlooked concerning USCA 9, § 13 (Federal Arbitration Act) was to point out in paragraph C there is a reference to "affidavits". However, none of this changes my opinion concerning Lonny's memo and I follow the recommendation that he makes.

Please let me hear from each of you so that we will be prepared to report at our next full Supreme Court Advisory meeting on April 4th.

Thanks.

Buddy Low

To: Buddy Low

From: Lonny Hoffman

Re: Authentication of Arbitral Awards

Date: March 17, 2008

Introduction

You asked me to consider language that might be used as an alternative to the amendment to Texas Rule of Evidence 902 Manuel Newburger has proposed to the Texas Supreme Court Advisory Committee. I do so below. I first summarize and discuss the issue, and offer some commentary about it, based on initial research that I did into the question.

My bottom line conclusion is that the proposed amendment appears to be neither needed nor appropriate. I discuss both of these points below, before getting to some possible alternative formulations.

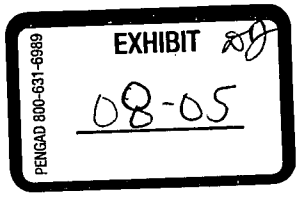
Summary of Issue

The SCAC has been asked to consider a new rule of evidence concerning authentication of arbitration awards. The Texas Arbitration Act has numerous provisions about venue and about enforcement of awards but, according to proponents of this rule amendment, there have been some disputes as to authentication of arbitration awards in court.

Is An Amendment Necessary?

Proponents of this amendment have offered no examples or further explanation for why a problem exists and why, therefore, their proposed reform is necessary. As a result, it is difficult to know either the extent or nature of the problem. As part of my work on this issue, I spoke with four different people, each of whom has extensive experience with arbitration [one, a long time judge on a court in a state where arbitration awards were routinely brought to him to enforce; the second, a lawyer in Texas who does work both for plaintiffs and defendants (though, predominantly plaintiffs) in arbitrations; the third, a law professor whose area of specialty is arbitration; and the fourth, a law professor whose area is also arbitration who spent many years as general in house counsel at the AAA). None of these people had even once had a situation where the authentication of the award proved problematic. [I should add a fifth expert view because Frank Evans also reports that he could recall no instances when authentication was a problem. See email from Elaine Carlson to SCAC subcommittee members, March 17, 2008.].

The former non-Texas state court judge did recount one occasion when there was a dispute as to what was the correct award (apparently the arbitrator had modified his award and



the debate turned on which was the correct award to enter); but this example seems to prove the point that there isn't an authentication gap problem, as the judge noted. This particular problem wasn't dealt with as an authentication issue. Rather, it was handled like any other challenge to the validity of the award: through substantive attack as the statute provides. And the complaint about the law in Texas being raised here does not seem to be that the Texas General Arbitration Act lacks sufficient mechanisms for raising this kind (or other kinds) of substantive attacks on the validity or correctness of an award.

What Does the Current Law Provide?

Now, having said that no problem may warrant reform, it is still necessary to look at the point proponents raise that there may be a gap in the existing law. Proponents argue that the Texas General Arbitration Act (TGAA, Ch. 171 of the Civil Practice & Remedies Code) does not contain a provision that expressly deals with the question of authentication. This issue is not clear, however. It seems to depend on how you read the statute.

CP & RC 171.053 does provide as follows:

> § 171.053. ARBITRATORS' AWARD.
> (a) The arbitrators' award must be in writing and signed by each arbitrator joining in the award.
> (b) The arbitrators shall deliver a copy of the award to each party personally, by registered or certified mail, or as provided in the agreement.
> (c) The arbitrators shall make the award:
> (1) within the time established by the agreement to arbitrate; or
> (2) if a time is not established by the agreement, within the time ordered by the court on application of a party.
> (d) The parties may extend the time for making the award either before or after the time expires. The extension must be in writing.
> (e) A party waives the objection that an award was not made within the time required unless the party notifies the arbitrators of the objection before the delivery of the award to that party.

Then, there is 171.081. This section that gives the court jurisdiction to enforce an arbitration award and render judgment on it.

> § 171.081. JURISDICTION. The making of an agreement described by Section 171.001 that provides for or authorizes an arbitration in this state and to which that section applies confers
> jurisdiction on the court to enforce the agreement and to render judgment on an award under this chapter.

That jurisdiction is invoked by the procedure in 171.082:

§ 171.082. APPLICATION TO COURT; FEES.
(a) The filing with the clerk of the court of an application for an order under this chapter, including a judgment or decree, invokes the jurisdiction of the court.
(b) On the filing of the initial application and the payment to the clerk of the fees of court required to be paid on the filing of a civil action in the court, the clerk shall docket the proceeding as a civil action pending in that court.

Finally, assuming that the jurisdiction has been properly invoked, 171.087 provides the statutory payoff:

§ 171.087. CONFIRMATION OF AWARD. Unless grounds are offered for vacating, modifying, or correcting an award under Section 171.088 or 171.091, the court, on application of a party, shall confirm the award.

These statutory sections, thus, arguably provide (explicitly, if not at least implicitly) that an award is authenticated for purposes of the TGAA when it complies with 171.053—that is, when it is in writing and is signed—and is then submitted as part of the 171.082 application for an enforcement order. Doing so, according to 171.081, "confers jurisdiction on the court to enforce the agreement and to render judgment on [the arbitration] award."

Contrasting Arbitration Awards With Domestication of Foreign Judgments

For judicial judgments from non-Texas courts, there are specific provisions that deal with how one domesticates them. *See* Ch. 35, Tex Civ. Prac & Rem. C. And under Rule 902(2) of the Texas Rules of Evidence, these judgments are self-authenticating. [There are also separate provisions about domesticating a judgment from another country (Ch. 36, Tex. Civ. Prac. & Rem. C.) and separate TRE rules on proving up the authenticity of these public records (TRE 902(3)]. So, if there are these rules about authenticating public documents and domesticating foreign judgments for enforcement in Texas, why it might be asked aren't there comparable provisions for proving up a private arbitration award?

This perhaps raises a related issue: How important is self-authentication anyway? If, as the experts I spoke with indicated, authentication challenges almost never arise, that might suggest no reform is needed. But what is the answer to the argument that even though such challenges rarely arise, that's no reason not to have a simple rule so that the party seeking enforcement doesn't have to jump through any unnecessary hoops in the rare instance in which there is an authentication challenge? Indeed, proponents might contend that if there is any substantive challenge to the award (including a challenge that the award being proferred is not, in fact, authentic), then the TGAA provides the opponent an opportunity to make that substantive challenge in the course of the enforcement case. So, it might be asked, what harm is there in having a rule that would make private arbitration awards self-authenticated, just like public judicial judgments.

Is Self-Authentication Appropriate?

One answer may be that there is simply but fundamentally a difference between private arbitration awards and public judicial orders. With public records, like foreign judgments, there is a degree of confidence we have about them that may explain why the TRE allow them to be self-authenticated. Perhaps there are (explicit or unstated) concerns that no such presumption of authenticity should extend to private arbitration awards.

This answer may just be another way of saying that the authenticity of arbitration awards may rarely be challenged but, because there isn't a self-authentication rule, the burden rests appropriately with the party trying to get a court to enforce the award to prove up its validity in all respects. Authenticity is one of those respects but certainly not the only respect that we should care about. So, we don't give a presumption of authenticity to private arbitration awards and, thus, leave for resolution the question of their ultimate validity to the substantive challenges, if any, made in the course of the proceeding brought by the party seeking to enforce the award.

Finally, I'll make the point that because there does not seem to be a problem under Texas law now, we should seriously consider whether any unintended signal would be sent by any reform of the rules. That is, since the law seems to permit something close to (if not exactly) self authentication by virtue of the existing TGAA requirements (see above), it is possible some courts might interpret any reform to add the proposed authentication language as a sign that arbitration awards are to be given an even greater presumption of validity. This would be especially problematic if such a signal were read to suggestion a greater presumption of substantive validity. Perhaps this is a farfetched reading, but we ought not to rule out the possibility that some might argue—and some courts might agree—that this unnecessary change could be read in this fashion to give it some purpose. At a minimum, it would spawn wasteful and unnecessary litigation until this issue was resolved.

The Proposal, and Some Alternatives

The proponents have offered a rule amendment whereby a "simplified affidavit", as they put it, by the arbitrator or an officer of the arbitration body conducting the arbitration would be sufficient. They would add a section to Rule 902 of the TRE to accomplish this.

If the Court were inclined to see a need for an authentication mechanism, one alternative might be to treat private arbitration awards like domestic public documents not under seal. That is, like 902(2). This section provides:

> 2) Domestic Public Documents Not Under Seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

Or, perhaps the somewhat more cumbersome process under 902(3) for foreign public records would be more appropriate. The additional steps presumably provide some greater procedural protections, given that courts are going to be less familiar with and, thus, perhaps appropriately more cautious before accepting, a foreign public record. That, arguably, more closely fits the model of private arbitration awards. This section provides:

> 3) Foreign Public Documents. A document purporting to be executed or attested in an official capacity by a person, authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification. The final certification shall be dispensed with whenever both the United States and the foreign country in which the official record is located are parties to a treaty or convention that abolishes or displaces such requirement, in which case the record and the attestation shall be certified by the means provided in the treaty or convention.

So, a new rule about private arbitration awards that sought to track 902(3) might look something like this:

> **11) Private Arbitration Awards.** A document purporting to be executed or attested in an official capacity of a private arbitrator, and accompanied by a certification as to the genuineness of the signature and official position (A) of the arbitrator, or (B) of any official of the arbitration body conducting the arbitration whose certificate of genuineness of signature and official position relates to the execution or attestation. All parties must be given reasonable opportunity to investigate the authenticity and accuracy of the private arbitration award.

Conclusion

Having put together some alternative formulations, I say again in conclusion that my initial research suggests that no amendment is needed and that a change to allow for self-authentication may not be appropriate, given the fundamental differences that exist between private arbitration awards and public judicial records.

To: SCAC
From: Alex Albright
Date: October 11, 2007
Re: PJC Admonitory Instructions Plain Language Rewrite

As promised, here is a list of issues for consideration when we address Rule 226a admonitory instructions. The report on the testing of plain language vs. existing PJC charge on mock jurors has been posted on the SCAC website.

A Word document with the proposed plain language rewrite has been posted. The proposed revisions to Rule 226a and other rules are first, followed by revisions to PJC sections that are not part of the Rules. A side by side version was posted in August (to the extent it is possible to create a version that compares the old and new language side by side). If you want to submit changes for consideration, please be sure that you send a redline version to me showing where you are making the changes. Also send proposed additional language for other issues you would like included.

Email your comments to me before the meeting at aalbright@law.utexas.edu. Or you can fax to me at 512-471-6988.

Particular issues for discussion at the October 19 meeting:

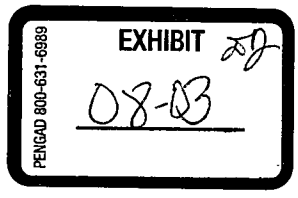
1. Describing "bias and prejudice." Rule 226a(I)
2. Contempt instruction. Rule 226a(I), (III)
3. Cell phones and electronic devices. Rule 226a(II)
4. "Preponderance of the evidence" no change recommended. Rule 226a(III)
5. Presiding juror instructions. Rule 226a(III) (including that presiding juror reads the charge vs. each getting a copy of written charge)
6. "Unanimous" explanation. Rule 226a(III)(exemplary damages)
7. Certificates when mixed unanimous/non-unanimous questions.
8. Proposed instruction on juror notetaking. Rule 226a(III)
9. Proposed instruction on language interpreters. Rule 226a(III)
10. Proposed Rule 226 & 236 on juror oaths

Admonitory Instruction Subcommittee
PJC Oversight Committee

Report to Supreme Court Advisory Committee
On Plain Language Rewrite of Admonitory Instructions

Draft of June 28, 2007

For discussion at SCAC at October 18, 2007 meeting



Proposed Texas Rule of Civil Procedure 226a(I) (PJC 100.1)
Instructions to the panel before jury selection

Members of the Jury Panel [*or* Ladies and Gentlemen]: We are about to begin selecting a jury. Right now, you are members of what we call a panel. After the lawyers ask you some questions, 12 of you will be chosen for the jury. But before we start asking questions and choosing jurors, I will give you some information and then go over the instructions.

First of all, we thank you for being here. Even if you are not chosen for the jury, you are performing a valuable service that is your right and duty as a citizen of a free country.

Now I will give you some background about this case. This is a civil trial, which means it is a lawsuit that is not a criminal case. The parties are as follows: The plaintiff is _____, and the defendant is _____.

[description of the current case]

Jurors sometimes ask what it means when I say we want jurors who do not have any bias or prejudice. The word "prejudice" comes from "pre-judge" or judging something before you have all the information. We want jurors who will not pre-judge the case and who will decide the case based only on the evidence presented in court and the law that I explain.

If you are chosen for the jury, you will listen to the evidence and decide the facts of the case. I, as the judge, will manage the process and make sure the law is applied correctly. I assure you we will handle this case as fast as we can, but we cannot rush things. We have to do it fairly and we have to follow the law.

Every juror must obey the instructions that I am about to give you. If you do not follow these instructions, I may have to order a new trial and start this process over again. That would be a waste of time and money. It is also possible that you may be held in contempt or punished in some other way, so please listen carefully to these instructions.

These are the instructions:

1. Remember that you took an oath that you will tell the truth, so be honest when the lawyers ask you questions, and always give complete answers. Sometimes a lawyer will ask a question of the whole panel instead of just one person. If the question applies to you, raise your hand and keep it raised until you are called on.

2. Do not mingle or talk with the lawyers, the witnesses, the parties, or anyone involved in the case. You can exchange casual greetings like "hello" and "good morning." Other than that, do not talk with them at all. They have to follow these instructions too, so they will not be offended. Also, do not accept any favors from the lawyers, the witnesses, the parties, or anyone involved in the case, and do not

do any favors for them. This includes favors such as giving rides and food. We ask you not to mingle or accept favors to avoid looking like you are friendly with one side of the case.

3. Do not discuss this case with anyone, even your spouse or friend. Do not allow anyone to discuss the case with you or in front of you. If anyone tries to discuss the case with you, tell me. We ask you not to discuss the case with others because we do not want you to be influenced by something other than the evidence presented in court.

Do you understand these instructions? If you do not, please tell me now.

The lawyers will now begin asking questions.

Proposed Texas Rule of Civil Procedure 226a(II) (PJC 100.2)
Instructions for the jury after it has been selected

Members of the Jury [*or* Ladies and Gentlemen]: You have now been chosen to serve on this jury. Because of the oath you have taken and your selection for the jury, you become officials of this court and active participants in our justice system.

[hand out the written instructions]

What you are receiving is a set of written instructions, and I am going to discuss them with you now. Some of them you have heard before, and some are new.

1. It is your duty to listen to and consider the evidence and to determine fact issues later submitted to you.

2. Please turn off all cell phones and electronic devices. Do not record or photograph any part of these court proceedings.

3. Please remember what I said about not mingling with those involved in this case, not accepting favors from those involved with this case, and not discussing the case with anyone. We ask you not to mingle or accept favors to avoid looking like you are friendly with one side of the case. We ask you not to discuss the case with others because we do not want you to be influenced by something other than the evidence presented in court.

4. Please discuss this case only with other jurors and only after I have given you the final instructions and sent you to the jury room to reach a verdict. This will be after you have heard all the evidence, all my instructions, and all the lawyers' arguments. We ask you not to discuss the case with your fellow jurors until the end of the case so that you do not form opinions about the case before you have heard everything.

5. Do not investigate this case on your own. Do not inspect places or items from this case unless they are presented as evidence in court. Do not let anyone do those things for you. This rule is very important because we cannot have a trial based on evidence not presented in open court. Your conclusions about this case must be based only on what you see and hear in this courtroom. All the evidence must be presented in open court so the parties and their lawyers can test it and object to it. For example:

    - Do not try to get information about the case from outside this courtroom.
    - Do not go to places mentioned in the case to inspect the places for yourself.

- Do not look things up in law books, dictionaries, public records, or on the Internet.

These rules are very important. If a juror does any of these, tell that person to stop and report it to me immediately.

6. Do not tell other jurors your own experiences or other people's experiences. For example, you may have special knowledge of something in the case, such as business, technical, or professional information. You may even have expert knowledge or opinions, or you may know what happened in this case or another case. But keep it to yourself. Telling other jurors about it is wrong because it means the jury will be considering things that were not presented in court.

7. Do not consider attorneys' fees unless I tell you to. Do not guess about attorneys' fees.

8. Do not consider insurance or who might be covered by insurance unless I tell you to. Do not guess about who might or might not be covered by insurance.

Do you understand these instructions? If you do not, please tell me now.

After you have heard all the evidence, I will give you instructions to follow as you make your decision. The instructions also will have questions for you to answer. You will not be asked which side should win, so do not be concerned about that. Instead, you will need to answer the specific questions I give you.

As I have said before, if you do not follow these instructions, I may have to order a new trial and start this process over again.

Keep these instructions and review them as we go through this case. If anyone does not follow these instructions, tell me.

Proposed Texas Rule of Civil Procedure 226a(III) (PJC 100.3)
General Instructions to the jury before answering the questions and reaching a verdict

Members of the Jury [*or* Ladies & Gentlemen]: You are about to go to the jury room to reach a verdict. This means you will apply the law and answer the questions I will give you.

Remember: You are to make up your own minds about the facts. You are the only judges of the credibility of the witnesses and the weight to give their testimony. But on matters of the law, you must follow the instructions I have given you before and those I will give you now. Please remember what I said about not discussing the case until you are in the jury room.

In just a moment I will be giving you a set of questions. Here are the instructions for answering the questions:

1. Do not let bias, prejudice, or sympathy play any part in your decision.

2. Base your answers only on what was presented in court and on the law I explain to you. Please remember what I have said about not sharing your own special knowledge or experiences. This case must be decided only on the facts presented in court and on the law I give you.

3. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition.

4. All the questions and answers are important. No one should say that any question or answer is not important.

5. A yes answer must be based on a preponderance of the evidence unless you are told otherwise.

    - The term "preponderance of the evidence" is a legal phrase that means the greater weight and degree of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a yes answer, then answer no.

    Note: *Testing revealed a lack of comprehension of this term, but the Committee recommends no change.*

    - Whenever a question requires an answer other than yes or no, your answer must be based on a preponderance of the evidence unless you are told otherwise.

6. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win.

7. Do not answer questions by drawing straws or by any method of chance.

8. Some questions might ask you for a dollar amount. Do not decide on a dollar amount by adding up each juror's amount and then figuring the average.

9. Do not trade your answers. For example, do not say "I will answer this question your way if you answer another question my way."

10. The answers to the questions must be based on the decision of at least 10 of the 12 jurors unless otherwise instructed. The same 10 jurors must agree on all the answers and then to the entire verdict. Specifically—

    - Do not agree to be bound by a vote of anything less than 10 jurors, even if it would be a majority.

    - If all 12 jurors agree, the presiding juror, or the elected foreperson, signs the verdict certificate for the entire jury.

    - If all 12 jurors do not agree, the 10 or more jurors who agree each sign the verdict certificate.

As I have said before, if you do not follow these instructions, I may have to order a new trial and start this process over again. That would be a waste of time and money. It is also possible that you may be held in contempt or punished in some other way. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

[Definitions, questions and special instructions given to the jury will be transcribed here.]

When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.

The presiding juror has these duties:

- The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

*[**Note**: The Committee felt that this instruction was not necessary if each juror receives a copy of the charge.]*

- To preside over your deliberations. This means the presiding juror will take the lead in discussions, write down the answers that 10 or more of you agree on, and see that you follow the instructions.

- To give written questions or comments to the judge. The presiding juror should give them to the bailiff, who will give them to me.

- To vote on the answers to questions, just as all jurors do.

- To sign the verdict if all 12 jurors agree or to get the signatures of all those who agree if the verdict is not by all 12.

Do you understand the duties of the presiding juror? If you do not, please tell me now.

Once you have reached a verdict, the presiding juror must notify the bailiff. Do not notify the bailiff that you have reached a verdict until—

1. you have answered all the questions,

2. the presiding juror has written down the answers, and

3. the presiding juror has signed the verdict certificate if all 12 jurors agree, or had all those who agree sign the verdict certificate if it is not signed by all 12.

Proposed Texas Rule of Civil Procedure 226a(III)/Proposed New PJC 100.3A
Exemplary Damages

If exemplary damages are sought against a defendant, the jury must unanimously find, with respect to that defendant, (i) liability on at least one claim for actual damages that will support an award of exemplary damages, (ii) any additional conduct, such as malice or gross negligence, required for an award of exemplary damages, and (iii) the amount of exemplary damages to be awarded. The jury's answers to questions regarding (ii) and (iii) must be conditioned on a unanimous finding regarding (i), except in an extraordinary circumstance when the conditioning instruction would be erroneous. The jury need not be unanimous in finding the amount of actual damages. Thus, if questions regarding (ii) and (iii) are submitted to the jury for defendants D1 and D2, instructions in substantially the following form must immediately precede such questions:

Preceding question (ii):

Answer Question (ii) for D1 only if all of you answered "Yes" to Question[s] (i) regarding D1. Otherwise, do not answer Question (ii) for D1. [Repeat for D2.]

You are instructed that in order to answer "Yes" to [any part of] Question (ii), you must unanimously agree (all of you) to your answer. You may answer "No" to [any part of] Question (ii) only upon a vote of 10 or more jurors. Otherwise, you must not answer [that part of] Question (ii).

Preceding question (iii):

Answer Question (iii) for D1 only if you answered "Yes" to Question (ii) of D1. Otherwise, do not answer Question (iii) for D1. [Repeat for D2.]

You are instructed that you must unanimously agree (all of you) on the amount of any award of exemplary damages.

These examples are given by way of illustration.]

Proposed Texas Rule of Civil Procedure 226a(III)/PJC 100.3B Certificates

Certificate: Regular Verdict

We, the jury, have answered the questions as indicated and now submit them as our verdict.

If all jurors agree, the presiding juror signs here:

_____ _____

Presiding Juror Printed name

If all jurors do not agree, those ten who do agree on all the answers and to the entire verdict, sign here:

	Signature	Printed name
1.	_____	_____
2.	_____	_____
3.	_____	_____
4.	_____	_____
5.	_____	_____
6.	_____	_____
7.	_____	_____
8.	_____	_____
9.	_____	_____
10.	_____	_____
11.	_____	_____

[Or]

Certificate: Mixed Unanimous and non-unanimous Verdict

[If some of the jury's answers must be unanimous and others need not be, the court should prepare the required certificate in a clear and simple manner, which will depend on the nature of the charge. The court may consider using the following certificate at the end of the charge:]

We, the jury, have answered the questions as indicated and now submit them as our verdict.

The presiding juror fills out the next section:

I certify that all jurors agreed on the these questions (Answer "All" or list the answers):

_____

_____ _____

Presiding Juror Printed name

If all of you did not agree on the answers to some questions, the jurors who did agree to those answers must certify as follows:

We agree to the answers to the following questions:

List the questions: _____

Signature Printed name

[Insert the appropriate number of lines—11 or 5—for signatures and for printed names.]

[The court may also decide that a clearer way of obtaining the required certificate is to segregate the questions to which the jury's answers must be unanimous and request a certificate for each part of the charge.]

[Or]

Certificate: Second Part of Two-Part Trial with Unanimous Verdict

We, the jury, have answered the questions as indicated and now submit them as our verdict.

The presiding juror fills out the next section:

I certify that all jurors agreed on the these questions (Answer "All" or list the answers):

_____

_____ _____

Presiding Juror Printed name

Proposed Texas Rule of Civil Procedure 226a(IV) (PJC 100.5)
Instructions after a verdict

Thank you for your verdict.

I now release you from jury duty. I have told you that the only time you can discuss the case is with the other jurors in the jury room. Now you can discuss the case with anyone. But you can choose not to discuss the case; that is your right.

After you are released from jury duty, the lawyers and others can ask you questions to see if the jury followed the instructions, and they can ask you to give a sworn statement. You are free to discuss the case with them and to give a sworn statement if you want. But you may choose not to discuss the case and not to give a sworn statement; that is your right.

Proposed New 226a(V) /PJC 100.11
Optional Instructions on Jurors' Note-Taking

During the trial, if taking notes will help focus your attention on the evidence, you may take notes. If taking notes will distract your attention from the evidence, you should not take notes. Any notes you take are for your own personal use and may be taken back into the jury room and consulted during deliberations. Do not take your notes out of the courtroom. Do not share your notes with other jurors. Do not rely on another juror's notes.

Proposed New 226a(VI)/PJC 100.13 Instruction
Instructions to the jury on language interpreters

Note: *The Committee decided not to include an instruction that requires a juror to inform the judge if the juror disagrees with the official interpretation.*

During this trial, one or more witnesses or documents may be introduced in another language and interpreted into English. The interpreter has been certified by the State of Texas and has sworn to truly and wholly interpret into English the evidence given in this case.

You may have special knowledge of the language being interpreted. But do not rely on your special knowledge and do not tell any other jurors any of your special knowledge.

The official testimony of the witness or document is the English interpretation, and you must rely on the official interpretation personally and in your discussions with other jurors. Do not tell any of the other jurors if your own interpretation differs from the official interpretation.

Proposed Rule 226
Jury panel's oath

Before the parties or their lawyers begin asking questions of those on the jury panel, the judge, or someone acting under the judge's direction, must swear in the panel members in substance as follows:

> Do you swear or affirm that you will truthfully answer all questions asked of you concerning your qualifications as a juror, so help you God?

Proposed Texas Rule of Civil Procedure 236
Juror's oath

The judge, or someone acting under the judge's direction, must swear in the jurors in substance as follows:

> Do you swear or affirm that you will render a true verdict, according to the law and the evidence, so help you God?

Proposed PJC 100.4
Additional instruction for a two-part trial

Members of the Jury [*or* Ladies and Gentlemen]:

In addition to these instructions, you must continue to follow all the other instructions I have given you.

[Additional definitions, questions, and special instructions given to the jury will be transcribed here.]

_____
JUDGE PRESIDING

Proposed PJC 100.6
Instructions if permitted to separate

During this trial, you will be allowed to separate from each other in the evening.

I remind you of the rule I explained before: Do not discuss this case with anyone, even your spouse or friend. Do not allow anyone to discuss the case with you or in front of you. If anyone tries to discuss the case with you, tell me.

Proposed PJC 100.7
Instructions if jurors disagree about testimony

You have asked to hear testimony from the trial.

If you disagree about the testimony of a witness, please write down the exact point you disagree about, and I will have the court reporter search the record and read you the testimony of the witness. It will take some time for the court reporter to find this testimony and prepare to read it to you, so please be patient.

Proposed PJC 100.8
Direct and indirect evidence

During this trial, you may have heard two kinds of evidence. They are direct evidence and indirect evidence.

Direct evidence means a fact was proved by a document, by an item, or by testimony from a witness who heard or saw the fact directly.

Indirect evidence means the circumstances reasonably suggest the fact. Indirect evidence means that based on the evidence, you can conclude the fact is true. Indirect evidence is also called "circumstantial evidence."

For example, suppose a witness was outside and saw that it was raining. The witness could testify that it was raining, and this would be direct evidence. Now suppose the witness was inside a building and the witness testified that people walked into the building with wet umbrellas. This could prove by indirect evidence that it was raining outside.

A fact may be proved by direct evidence or by indirect evidence or by both.

Proposed PJC 100.10
Instructions for a jury that cannot reach a verdict

You have told me you cannot reach a verdict.

If, in the interest of justice, you can end this case by reaching a verdict, you should.

But none of you should give in on what you believe is right or what you believe is the truth unless you are convinced to change your mind.

Continue to discuss the case carefully, listen to each other, and try your best to reach a verdict. Keep your minds open to every reasonable argument the other jurors present. Perhaps you will change your mind. That way, you can reach a verdict that is fair, and you can feel good about it because you did not give in on what you believe.

Do not assume your opinion is the only right one. You should be willing to consider other opinions. Do not be hasty in forming and expressing your opinions. But as I said, none of you should give in on what you believe is right or what you believe is the truth unless you are convinced to change your mind.

If you cannot reach a verdict, I may have to order a new trial. That means we would have to do this over again and our time and money spent on this trial would be a waste. So please do your best to reach a verdict.

Please return to the jury room and continue your discussions.

Proposed PJC 100.12
Instructions if someone exercises a privilege other than 5th Amendment privilege

You cannot assume anything from [*name of party*]'s claim of [*privilege asserted*] privilege.

TRACY CHRISTOPHER
JUDGE, 295TH DISTRICT COURT
201 CAROLINE, 14TH FLOOR
HOUSTON, TEXAS 77002
(713) 368-6450

April 1, 2008

Memo to the SCAC

Re: Plain language revisions to Rule 226a and other rules

To summarize what we have done, the PJC Oversight Committee tested juror comprehension of one set of pattern jury charges and found that our instructions need some work. Oversight started with Rule 226a and attempted to make those instructions more understandable. In addition we polled the district judges via email to see if they thought the instructions needed to be plainer and found a lot of support for that. We presented a draft of the rule to the SCAC on 10/19/07. There was some resistance to any change at all and I asked Justice Hecht if this was something that the Supreme Court wanted us to continue working on, in light of the opposition. He indicated that the Supreme Court wanted us to continue working on the issue.

On 10/19/07, we discussed only the items that were new or that we considered a significant change rather than going line by line.

The following is a summary of what took place at the last meeting:

1. SCAC recommended that we rework the section on bias or prejudice-our committee is still working on this.
2. SCAC recommended that we delete contempt at the first part of the instructions but keep it in the second half-Florida's instruction attached for reconsideration, p. 7.
3. SCAC recommended a rewrite and emphasis on cell phone and internet usage-new draft attached, p. 8-12

4. SCAC recommended a change to preponderance of the evidence to include the more likely than not standard-new draft attached, p. 13.
5. SCAC agrees that the signature page is still confusing-our committee is still working on this.

The following are new items that we did not discuss last time that I would like to discuss this time and then go back to the new drafts. I have attached the previous drafts of the new items.

1. Juror note taking, p.3.
2. Interpreter instruction, p.4.
3. Jury panel oath and juror oath, p.5
4. Direct and indirect evidence, p.6

Once we have discussed all of the new concepts, we will return with a final plain language draft for review.

Proposed New 226a(V) /PJC 100.11
Optional Instructions on Jurors' Note-Taking

During the trial, if taking notes will help focus your attention on the evidence, you may take notes. If taking notes will distract your attention from the evidence, you should not take notes. Any notes you take are for your own personal use and may be taken back into the jury room and consulted during deliberations. Do not take your notes out of the courtroom. Do not share your notes with other jurors. Do not rely on another juror's notes.

Proposed New 226a(VI)/PJC 100.13 Instruction
Instructions to the jury on language interpreters

Note: *The Committee decided not to include an instruction that requires a juror to inform the judge if the juror disagrees with the official interpretation.*

During this trial, one or more witnesses or documents may be introduced in another language and interpreted into English. The interpreter has been certified by the State of Texas and has sworn to truly and wholly interpret into English the evidence given in this case. You may have special knowledge of the language being interpreted. But do not rely on your special knowledge and do not tell any other jurors any of your special knowledge. The official testimony of the witness or document is the English interpretation, and you must rely on the official interpretation personally and in your discussions with other jurors. Do not tell any of the other jurors if your own interpretation differs from the official interpretation.

Proposed Texas Rule of Civil Procedure 226
Jury panel's oath

Before the parties or their lawyers begin asking questions of those on the jury panel, the judge, or someone acting under the judge's direction, must swear in the panel members in substance as follows:

Do you swear or affirm that you will truthfully answer all questions asked of you concerning your qualifications as a juror, so help you God?

Current version of the oath:

You, and each of you, do solemnly swear that you will true answers give to all questions propounded to you concerning your qualifications as a juror, so help you God?

Proposed Texas Rule of Civil Procedure 236
Juror's oath

The judge, or someone acting under the judge's direction, must swear in the jurors in substance as follows:

Do you swear or affirm that you will render a true verdict, according to the law and the evidence, so help you God?

Current version of the oath:

You, and each of you, do solemnly swear that in all cases between parties which shall be to you submitted, you will a true verdict render, according to the law, as it may be given you in the charge by the court, and to the evidence submitted to you under the rulings of the court. So help you God.

Current version of circumstantial evidence:

A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

Proposed PJC 100.8
Direct and indirect evidence

During this trial, you may have heard two kinds of evidence. They are direct evidence and indirect evidence.

Direct evidence means a fact was proved by a document, by an item, or by testimony from a witness who heard or saw the fact directly.

Indirect evidence means the circumstances reasonably suggest the fact. Indirect evidence means that based on the evidence, you can conclude the fact is true. Indirect evidence is also called "circumstantial evidence."

For example, suppose a witness was outside and saw that it was raining. The witness could testify that it was raining, and this would be direct evidence. Now suppose the witness was inside a building and the witness testified that people walked into the building with wet umbrellas. This could prove by indirect evidence that it was raining outside.

A fact may be proved by direct evidence or by indirect evidence or by both.

April 1, 2008 Draft to review for reconsideration of Criminal penalties

Florida 1.0 PRELIMINARY VOIR DIRE INSTRUCTION

The attorneys and I will now ask you questions to help us select jurors for this case. We want to know if some personal experience or special knowledge might influence your decision. We also want to know if your personal opinions might affect your decision. Please understand that these questions are not meant to embarrass you or to pry into your personal affairs. People often have strong feelings that they may be reluctant to disclose, but you have sworn in this case to answer all questions truthfully and completely and you must do so. If you do not understand a question, raise your hand or ask for an explanation. Remaining silent when you have information to disclose is as much a violation of your oath as making a false statement. A violation of your oath to tell the whole truth would be very serious and could result in civil and criminal penalties against you.

Admonitory Instruction Subcommittee
PJC Oversight Committee

Report to Supreme Court Advisory Committee
On Plain Language Rewrite of Admonitory Instructions

Draft of March 2, 2008

On use of cell phones, electronic communication, investigation

Proposed Texas Rule of Civil Procedure 226a(II) (PJC 100.2)
Instructions for the jury after it has been selected

Members of the Jury [*or* Ladies and Gentlemen]: You have been chosen to serve on this jury. Because of the oath you have taken and your selection for the jury, you become active participants in our justice system.

Comment [AWA1]: Jane Bland comment ????

[hand out the written instructions]

You have received a set of written instructions. I am going to read them with you now. Some of them you have heard before, and some are new.

1. It is your duty to listen to and consider the evidence and to determine fact issues that I will submit to you at the end of trial.

2. Turn off all mobile phones and electronic devices, and keep them turned off during all court proceedings and jury deliberations. Do not communicate with anyone electronically during court proceedings and jury deliberations. I will give you a telephone number where others may contact you in case of an emergency. Do not record or photograph any part of these court proceedings, as it is prohibited by law.

Comment [AWA2]: Discussed at length SCAC 10/18/07

3. Please remember what I said about not mingling with those involved in this case, not accepting favors from those involved with this case, and not discussing the case with anyone. We ask you not to mingle or accept favors to avoid looking like you are friendly with one side of the case. We ask you not to discuss the case with others because we do not want you to be influenced by something other than the evidence presented in court.

4. Please do not talk about the case with anyone during the trial. You will discuss this case with other jurors only after I have given you the final instructions and sent you to the jury room to reach a verdict. This will be after you have heard all the evidence, all my instructions, and all the lawyers' arguments. We ask you not to discuss the case with your fellow jurors until the end of the case so that you do not form opinions about the case before you have heard everything.

5. Please do not investigate or research this case on your own. Do not use the Internet to learn about any aspect of this case. Do not inspect places or items from this case unless they are presented as evidence in court. Do not let anyone do those things for you. This rule is very important because we cannot have a trial based on evidence not presented in open court. Your conclusions about this case must be based only on what you see and hear in this courtroom. All the evidence must be presented in open court so the parties and their lawyers can test it and object to it. For example:

    - Do not try to get information about the case from outside this courtroom.
    - Do not go to places mentioned in the case to inspect the places for yourself.
    - Do not look things up on the Internet, in law books, dictionaries, or public records.

    These rules are very important. If a juror does any of these things, tell that person to stop and report it to me immediately.

6. Do not tell other jurors your own experiences or other people's experiences. For example, you may have special knowledge of something in the case, such as business, technical, or professional information. You may even have expert knowledge or opinions, or you may know what happened in this case or another similar case. But keep it to yourself. Telling other jurors about it is wrong because it means the jury will be considering things that are not presented in court.

7. Do not consider attorneys' fees unless I tell you to. Do not guess about attorneys' fees.

8. Do not consider insurance or who might be covered by insurance unless I tell you to. Do not guess about who might or might not be covered by insurance.

Do you understand these instructions? If you do not, please tell me now.

After you have heard all the evidence, I will give you instructions to follow as you make your decision. The instructions also will have questions for you to answer. You will not be asked which side should win, so do not be concerned about that. Instead, you will need to answer the specific questions I give you.

As I have said before, if you do not follow these instructions, I may have to order a new trial and start this process over again.

Please keep these instructions and review them as we go through this case. If anyone does not follow these instructions, tell me.

Proposed Texas Rule of Civil Procedure 226a(III) (PJC 100.3)
General Instructions to the jury before answering the questions and reaching a verdict

Members of the Jury [*or* Ladies & Gentlemen]: You are about to go to the jury room to reach a verdict. This means you will answer the questions I will give you.

Remember: You are to make up your own minds about the facts. You are the only judges of the credibility of the witnesses and the weight to give their testimony. But on matters of the law, you must follow the instructions I have given you before and those I will give you now. Please remember what I said about not discussing the case until you are in the jury room.

In just a moment I will be giving you a set of questions. Here are the instructions for answering the questions:

1. Do not let bias, prejudice, or sympathy play any part in your decision.

2. Base your answers only on what was presented in court and on the law I explain to you. Please remember what I have said about not sharing your own special knowledge or experiences. This case must be decided only on the facts presented in court and on the law I give you.

3. Please remember to turn off your mobile phones and other electronic devices during deliberations. Although you may use them during breaks in deliberations, do not ever use them to research the facts of this case or look up something that you do not understand in my instructions to you. Remember that you have promised not to investigate or research this case on your own at any time during these proceedings.

4. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition.

5. If you have a question about the instructions, you may write down your question and give it to the bailiff, who will give it to me.

6. All the questions and answers are important. No one should say that any question or answer is not important.

7. .....

Proposed PJC 100.6
Instructions if permitted to separate

During this trial, you will be allowed to separate from each other in the evening.

I remind you of the rules I explained before: Do not discuss this case with anyone, even your spouse or friend. Do not allow anyone to discuss the case with you or in front of you. If anyone tries to discuss the case with you, tell me. Also remember that you have promised not to investigate or research this case on your own, on the Internet or otherwise, at any time during these proceedings.

Oversight Subcommittee draft on Preponderance
Draft of March 24, 2008

The following is the definition of preponderance of the evidence that we discussed. I have put the definition in the current boilerplate language of the charge to show the context. I have bracketed the sentence that we agree merits further discussion.

Answer "Yes" or "No" to all questions unless otherwise indicated. A "Yes" answer must be based on a preponderance of the evidence unless you are otherwise instructed. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term "preponderance of the evidence" means the greater weight of the credible evidence admitted in this case. [A greater number of witnesses testifying to a fact on one side or a greater quantity of evidence introduced on one side does not necessarily constitute a preponderance of the evidence.] For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true. Whenever a question requires an answer other than "Yes" or "No," your answer must be based on a preponderance of the evidence unless you are otherwise instructed.

Note Taking Background

In connection with the proposed rule on note taking, I enclose the current instruction in PJC 100.11, an excerpt from a Court of Criminal Appeals case, and a 1P97 draft from the Court Rules Committee

Current instruction in PJC 100.11

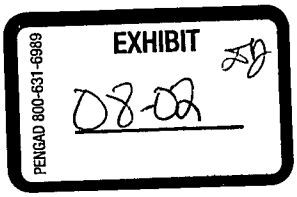
During trial, if taking notes will help focus your attention on the evidence, you may take notes. If taking notes will distract your attention from the evidence, you should not take notes. Any notes you take are for your own personal use, and you may not share them with other jurors. Your personal recollection of the evidence takes precedence over any notes you have taken. A juror may not rely on the notes of another juror.

PRICE V. STATE, 887 S.W. 2D 949 (TEX. CRIM. APP. 1994)
PERMITTING JUROR NOTE-TAKING

[1] [2] [3] While we recognize the concerns expressed in *Cheek* and *Ledet* and the states that still prohibit juror note-taking, we believe the time has come to allow the trial judges of this State the discretion to permit juror note-taking. [FN10] We are confident the inherent risks of note-taking can be avoided if the trial judge takes the following steps. *First,* determine if juror note-taking would be beneficial in light of the factual and legal issues to be presented at the trial. *Jumpp,* 619 A.2d at 609. If the trial is to be relatively short and simple, the need for note-taking will be slight. On the other hand, if a long and complex trial is anticipated, note-taking could be extremely beneficial. *Second,* the trial judge should inform the parties, *prior to voir dire,* if the jurors will be permitted to take notes. If note-taking is to be allowed, the parties should be permitted to question the venire as to their ability to read, write or take notes. *Triplett,* 421 S.E.2d at 519-520 (W.Va.1992).

FN10. We note that trial judges who do *not* permit juror note-taking will eliminate review of the matter on appeal and probably save many hours of trial and appellate court time.
Third, the trial judge should admonish the jury, at the time it is impaneled, on note-taking.[FN11] *MacLean,* 578 F.2d at 66; *DiLuca,* 448 N.Y.S.2d at 735. Having reviewed the jury instructions used by many jurisdictions, we believe the following admonition, or one substantially similar, should be given:

FN11. During oral argument, the State argued that comprehensive jury instructions will alleviate many of the risks associated with jury note-taking.
Ladies and Gentlemen of the Jury:



Because of the potential usefulness of taking notes, you may take notes during the presentation of evidence in this case. However, you may not take notes during the arguments of the lawyers, or when the jury charge is read to you.

Moreover, to ensure a completely fair and impartial trial, I will instruct you to observe the following limitations:

1. Note taking is permitted, but not required. Each of you may take notes. However, no one is required to take notes.

2. Take notes sparingly. Do not try to summarize all of the testimony. Notes are for the purpose of refreshing memory. They are particularly helpful when dealing with measurements, times, distances, identities, and relationships.

*955 3. Be brief. Overindulgence in note taking may be distracting. You, the jurors, must pass on the credibility of witnesses; hence, you must observe the demeanor and appearance of each person on the witness stand to assist you in passing on his or her credibility. Note taking must not distract you from that task. If you wish to make a note, you need not sacrifice the opportunity to make important observations. You may make your note after having made the observation itself. Keep in mind that when you ultimately make a decision in a case you will rely principally upon your eyes, your ears, and your mind, not upon your fingers.

4. Do not take your notes away from court. At the end of each day, please place your notes in the envelope which has been provided to you. A court officer will be directed to take the envelopes to a safe place and return them at the beginning of the next session on this case, unopened.

5. Your notes are for your own private use only. It is improper for you to share your notes with any other juror during any phase of the trial other than jury deliberations. You may, however, discuss the contents of your notes during your deliberations.

See generally, Litigation Management Manual, Exhibit B (Federal Judicial Center 1992).

Fourth, the trial judge should provide the following instruction, or one substantially similar, in the jury charge at each phase of the trial:

You have been permitted to take notes during the testimony in this case. In the event any of you took notes, you may rely on your notes during your deliberations. However, you may not share your notes with the other jurors and you should not permit the other jurors to share their notes with you. You may, however, discuss the contents of your notes with the other jurors. You shall not use your notes as authority to persuade your fellow jurors. In your deliberations, give no more and no less weight to the views of a fellow juror just because that juror did or did not take notes. Your notes are not official transcripts. They are personal memory aids, just like the notes of the judge and the notes of the lawyers. Notes are valuable as a stimulant to your memory. On the other hand, you might make an error in observing or you might make a mistake in recording what you have seen or heard. Therefore, you are not to use your notes as authority to persuade fellow jurors of what the evidence was during the trial.

Occasionally, during jury deliberations, a dispute arises as to the testimony presented. If this should occur in this case, you shall inform the Court and request that the Court read the portion of disputed testimony to you from the official transcript. You shall not rely on your notes to resolve the dispute because those notes, if any, are not official transcripts. The dispute must be settled by the official transcript, for it is the official transcript, rather than any juror's notes, upon which you must base your determination of the facts and, ultimately, your verdict in this case.

See generally, MacLean, 578 F.2d at 67; *DiLuca,* 448 N.Y.S.2d at 735; *and,* Tex.Code Crim.Proc.Ann. art. 36.28.

We believe that by complying with these four cautionary steps, Texas juries will be able to obtain the benefits of note-taking while avoiding the inherent risks.

This is from a proposal sent to the Supreme Court in 1997 from the Court Rules Committee:

II. Exact wording of proposed Rule (the proposed new wording has been underlined):

Rule 226a. ADMONITORY INSTRUCTIONS TO JURY PANEL AND JURY

Preamble - Unchanged.

I. - Unchanged.

II. - Unchanged through paragraph 9 under "Written Instructions".

. . .

10. Do not seek information contained in law books, dictionaries, public or private records or elsewhere, which is not admitted in evidence.

(The court may, in its discretion, allow the jurors to take notes during the trial for the purpose of refreshing their memories during their deliberations. The court shall see that suitable materials are provided for this purpose, shall retain custody and ensure confidentiality of the notes during the trial and shall collect and destroy the notes after the jurors render their verdict. If the court allows the jury to take notes, it shall read the following instructions to the jury:)

11. You will be allowed to take notes during the trial and, after the arguments of counsel, take them into the jury room for the purpose of refreshing your memories during your deliberations. You must, however, follow these instructions:

a. The notes are not considered evidence.

b. The notes should not be considered any more accurate than the memory of a juror not making notes.

c. Your note taking should not interfere with your ability to pay attention to the evidence.

d. You have been provided materials to use in taking notes. Do not remove the notes from the courtroom at any time during the trial or from the jury room during your deliberations. During any morning and afternoon breaks, you may leave your notes on your chairs. At the noon break and at the end of the day, please hand your notes to the bailiff for safekeeping. No one will look at your notes during the breaks. At the end of the trial, leave your notes with the bailiff and they will be destroyed.

. . . the remainder of paragraph II is unchanged.

III.

That the following written and oral instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jury as part of the charge:

Written Instructions

Ladies and Gentlemen of the Jury:

This case is submitted to you . . . (remainder of the rule down through the form for the jury to sign is unchanged).

Oral Instructions

(If the court allowed the jury to take notes during the trial, after the final arguments of counsel and before the jury retires to deliberate, the following instructions shall be given by the court to the jury:)

You may take your notes to the jury room but remember to follow the instructions I gave you before, including the following:

a. The notes are not considered evidence.

b. The notes should not be considered any more accurate than the memory of a juror not making notes.

IV. - Unchanged.

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

The purpose of the proposed rule is allow jury note-taking during the trial, and to allow the juror notes in the jury room during deliberations.

August 27

- ~~**RJA 13**~~ 14306-394
- TRCP 223 14395-417
- ~~**TRCP 145/148**~~ 14417-30
- **TRE 514** HIPAA 14430-40

August 26

- **TRAP 28** 13995-14069; vote for 20 days, 26-1 at 14035; 12-7 against provision requiring serving petition on TC; note- need amendment to TRAP 12, see 14117
- cross-appeals in overlapping jdns 14070-115; 27-1 back to subcom for more study
- **TRAP 8.1** eliminate subsection (e) entirely; no opposition 14118-20
- **TRAP 52-53** eliminate reference to unpublished ops in PFR 14121-26 unopposed
- **TRAP 29** address amendments to CPRC 51.014(b) 14126-31 unopposed
- **TRAP 10.1 & 49.11** MFR conference certificate; 14131-32
- **precedent in transfers of appeals** 14133-192 15-11 for law of transferor 14192
- ~~RJA 13~~ 14193-14301

May 7

- exhibits and the appellate record 13877-933; no rec, back to Orsinger/Jackson
- TRAP 28 permissive appeals 13933-84; vote 15-3 for alternative one, at 13971
- TRCP 10 withdrawal 13984-86; unanimous to add phone # for pro se @ 13985

May 6

- TRAP 9.5/TRCP 21a cert of service 13547-80 votes to reject amending 13577, 80
- TRCP 21a (rejected-13580)
- **TRAP 10.1 & 49.11** (MFR conference certificate) 13548-49
- **transferred appeals** 13582-665 votes at 13644, 657 for law of transferor court
- **TRCP 11, 21** (various e-filing) 13666-732; 795-872
- **TRCP 223** 13755- unanimous vote to allow computerized shuffle; 13791- slim majority vote to keep shuffle in rule

April 1-2 **RJA 14/15** (E-Access)

March 5 ~~protective order task force~~

March 4

- RJA 14/15 (E-Access) 12596-12863
- TRAP 28 accelerated appeals 12863-65
- transferred appeals 12865-912; consensus that law of transferor ct should apply

(continued next page)

2005 (cont'd)

January 8

- TRAP 10.1 MFR conf certificate 12457-69; 12468- vote to amend, back to subcom
- TRAP 12.1/25/28 permissive appeals 12470-540 on agenda for next time
- TRAP 9.5 harmonizing TRCP and TRAP certificates of service 12540-55
- precedent in transferred appeals 12555-86

January 7

- RJA 14/15 (E-Access) 12199-238
- E-filing issues 12238-372
- retention/disposal of exhibits 12372-450; 12449 vote 21-2 to amend S. Ct. orders

2004

November 12

- report on recusal rule (TRCP 18a-b) 11992-94
- permissive appeals 12020-22 to be presented at next SCAC meeting
- retention/disposal of exhibits 12033, 12132-36
- RJA 14 12035-12132
- ~~TRCP 103~~ 12136-60
- TRCP 223 jury shuffle 12160-80 (vote on 12177, 27-0 to allow electronic shuffle)
- e-filing 12180-89 (summary 12181-2)

August 13

- ~~TRCP 103/PSRB~~ (11847-96)
- ~~TRCP 226a~~ jury instruction on exemplary damages 11738-92
- ~~TRCP 292~~ (11734-38)
- TRAP 28 (permissive appeals) 11899-959 (vote 11943)
- TRAP 28 defining accelerated appeals 11960-80
- TRE 514 HIPAA (11793-835) back to subcommittee/SBOT AREC
- **TRE 407(b) (11835-36)** recommend defining "purchaser" of defective product
- **TRE 705(d)** (11836-37) recommendation to conform to FRE 703 amendments
- JP jury charge issues re: exemplary damages 11841-2 on agenda for next time

May 14

- TRCP 202 (to perpetuate tmy) /206 (to investigate claims) 11506-652; 11560 13-9 against replacing "must" in 202.4(a) with "may"; 11560 13-11 favor keeping "substantial" before "need" in draft of 206.4(a)(2); consensus to delete (a)(1); 11590 16-8 for more limits than in subcom draft; 11601 12-4 to add sentence instead of remanding to subcom; 11607 20-0 to add new 2nd sentence to 206.4(b); 11617 17-0 to omit 1st sentence of 206.5; 11628 16-0 to make 50-hour time limit of R. 190 apply; 11652 back to subcom.
- ~~TRCP 226, 292~~ PJC 11653-99
- TRE 514 HIPAA 11711-24

March 5

- update on Code of Judicial Conduct committee 11199-200
- structure of fed rules committee 11202-03
- E-filing report: Vogel, Griffith, Unger 11203-57
- ~~TRCP 226a~~ PJC/unanimity on exemplary damages 11257-60
- ~~TRCP 42~~ class action: inchoate claims, opt-in 11260-63 no recommendation
- TRCP 76a 11264-83 no recommendation
- TRCP 202 11284- 384 (vote 11332, no rec; 11354 19-2 against removing "adverse" from 202.(f) and 202.3(a); 11358 12-5 against adding statement to 202.1(g) why depos can't wait until suit filed; 11361 15-4 **for** subcom to look at interplay between "must" and "may" in 202.4(a), (a)(1); 11370 18-2 against adding "for any purpose" after "use" in 202.5; 11374 18-3 **for** including 202 depos in 6-hour per side default limits).

(continued next page)

2004 (cont'd)

January 16

- ~~TRCP 42~~ class actions 10902-73
- TRCP 202 11169-92 (no recommendation)
- ~~TRCP 194.2~~ designation of PR3Ps 11054-56
- ~~TRCP 173 ad litem~~ 10974-11050; 11056-153
- TRE 514 HIPAA 11154-68
- TRE 407(b) 11168 (no recommendation)

2003

October 25
- **TRE 904** counter-affidavits per CPRC 18.001 10774-848; vote 10848 13-9 favor
- TRE 514 HIPAA 10852-82
- TRCP 76a 10882-91 (no proposal; no change since 1990)

October 24
- ~~TRCP 42~~ effective date, opt-in, inchoate claims 10482-572
- ~~TRCP 173~~ ad litem 10572-716
- **TRE 103** 10716-39 (vote 10730 25-0 for amendment)
- **TRE 904** counter-affidavits per CPRC 18.001 10739-67

August 23
- ~~TRCP 8a~~ 10341-436; suspended by Misc. Docket # 03-9207; DR 1.04 adopted Misc. Docket # 05-9013
- ~~TRCP 173~~ ad litem 10436-67

August 22
- ~~TRCP 42~~ (Vol. 1 +10187-208)
- ~~TRCP 8a~~ referral fees 10208-337 (suspended by Misc. Docket 03-9207)

August 21
- ~~TRCP 167~~ Offer of Settlement 9747-9938
- ~~TRAP 24~~ 9938-57
- ~~TRCP 42~~ 9957-10033

July 19 ~~RJA 13~~
July 18 ~~RJA 13~~
July 17 ~~RJA 13~~

June 21
- ~~TRCP 167~~ Offer of Settlement 8846-74; 8909-87
- ~~RJA 13~~ MDL 8874-8909

June 20 ~~TRCP 167~~ Offer of Settlement Vols. 1-2

April 12
- TRCP 7-8 attorneys, referral fees 8403-86
- ~~TRCP 42~~ class actions 8487-8537

April 11 ~~TRCP 167~~ Offer of Settlement 8072-8190; 8201-8399

2002

Nov. 8
- TRCP 18c media 7710-7801
- TRCP 202 subcom still considering whether any change needed 7805-08
- proposed RJA 13 Visiting judge review 7808-68 vote 7827, 58; back to subcom
- **TRE 409** offers to pay expenses 7874-78; vote 22-0 to revise 7878
- TRE 103 7879-92 tabled b/c controversial and not on agenda
- TRE 904 7893-97 tabled b/c controversial and not on agenda
- TRE 509 (leading up to proposal on new TRE 514) 7899-7960
- E-filing pilot project 7960-8051

September 21
- TRCP 102? MNT 7576-7600 vote 7600 14-2 retain status quo
- cy pres & class action 7608-39 vote 7638 cmt instead of rule
- TRCP 21 and discovery 7640-45; removed from agenda, no interest
- TRE 514 HIPAA 7646-53 referred to evidence subcom
- proposed RJA 13 Visiting judge peer review 7653-97; back to subcom
- TRCP 202 7697-7703 no action

September 20
- update on revision to Judicial Conduct Code 7278
- TRCP 167 offer of settlement 7280-7335 will revisit later
- TRCP 18c 7335-90; 7394-7536; returned to subcommittee
- **FED** TRCP 739, 740, 741, 743, 748, 749, 754, 755 7536-72; votes 7547, 60

June 15 FED rules 7095-7270

June 14
- ~~TRAP 11~~ amicus 6714-5; 6727-32
- **TRCP 329b** MNT 6732-74 vote @ 6773 13-2 for 105 days; back to Dorsaneo
- TRCP 167 offer of settlement (later became) 6774-6851
- FED rules 6854-7087

May 18 FED rules

May 17
- offer of settlement (later became) 6230-6368
- FED rules 6374-6558
- TRCP 329b 6559-71 time limit on TC's power to "ungrant" MNT

(continued next page)

2002 (cont'd)

March 9

- **306a** 6082-6142 vote 12-0 at 6142 recommendation specifying procedures for motion and hearing on late notice; text to be sent to Court by Babcock

- TRCP 18c media 6144-6218

March 8

- parental notification rules 57507-5853
- TRAP 11 amicus 5855-93
- TRAP 27.1 overlapping courts of appeals 5893-5918; tabled until another mtg
- TRCP 329b MNT 5918-5955; vote 17-3 for proposal; back to subcom for text
- TRCP 167 offer of settlement (later became) 5957-6038
- TRCP SOP 6039-6076 vote 6076 12-1 defeat mtn to allow lawyers to serve process by registered or certified mail

Feb. 26

- ~~TRAP 52.7~~ 3-17
- ~~TRAP 33.1(d)~~ 17-21
- proposed TRAP 38.10 alignment of parties 21-29 no change needed
- ~~TRAP 19.1~~ en banc motion extends COA's plenary power 30-33
- ~~TRAP 11~~ amicus 33-46
- TRAP 27.1 overlapping courts of appeals 47-55

January 26

- ~~TRCP 103/536~~ 5579-5648 SOP no recommendation
- FED rules 5648-99 no recommendation

January 25

- ~~parental notification~~ 5268-5359
- ~~TRAP 4.5~~ 5361-63
- ~~TRAP 9.5~~ serving mandamus record 5363-86 back to subcom for drafting
- ~~TRAP 9.7~~ 5386-89
- **TRAP 10.1** conference cert on MFR 5389-94; vote 5394 26-0 to adopt change
- ~~TRAP 12.6~~ 5395
- ~~TRAP 13.1~~ 5399-5428
- ~~TRAP 18.1~~ 5428
- TRAP 26.1 5428-5453 vote 5442, 5453 recommend concept; no text yet
- TRAP 29.5 5453-6
- ~~TRAP 33.1~~ 5456-92 vote @ 5473 20-0 for Court to reconsider prior proposal
- ~~TRAP 34.6~~ 5492-3
- ~~TRAP 38~~ 5494-5508
- TRAP 41.2 composition of en banc panel 5509-10; no recommendation
- ~~TRAP 42.1~~ dismissal to implement settlement 5510-16 42.1
- ~~TRAP 46.5~~ 5516 voluntary remittitur

bold = SCAC recommendation on that date; ~~strikeout~~ = Supreme Court later made related rule change

- ~~TRAP 47~~ publication of opinion 5517-67
- TRAP 49.1 MFR 5567-73 Baron's suggestion re pg limits; no recommendation
- ~~TRAP 56.3~~ 5573-4

bold = SCAC recommendation on that date; ~~strikeout~~ = Supreme Court later made related rule change

2001

November 2

- TRAP 9.2(b)(2)(D) add delivery confirmation; 4911-16; rejected 4911
- TRCP 6 service on Sunday 4916-21 on agenda for January meeting
- FED rules 4922-5069
- **TRAP 41** en banc court 5073-5124; 11-4 vote to return to pre-1997 rule at 5107
- **final judgments** 5124-35; unanimous recommendation 5135 Duncan/Peeples
- TRCP 306a late notice 5136-5214
- TRCP 329b ungranting MNT 5215-44
- ~~TRCP 103/536~~ 5244-60

September 28

- NLH update: Dorsaneo asked to look at sealing records in appellate cts 4588
- FED rules 4596-4761; 4799
- ~~PN rules~~ 4764-98
- TRCP 306a 4799-4852
- TRAP 41 composition of en banc court 4853-4884
- ~~TRCP 103/536~~ 4885-89

June 16

- finality of judgments 4446-4514; 4523 committee reassignment
- **TRAP 20** affidavit of indigence 4514-23 approved unanimously 4523
- **TRCP 742** 4525-28 approved unanimously 4527-28
- **TRCP 742a** 4528-35 approved unanimously 4535
- **TRCP 738** 4535-4550 approved unanimously 4550
- **TRCP 739** 4550 approved unanimously
- TRCP 740 4550-81 needs further study
- TRCP 741 4581
- TRCP 743-747 4582-84 unclear if changes formally approved

June 15

- ~~TRAP 47~~ publication of opinions 4124-4203; 4224-57; 4263-4337
- ~~TRCP 103/536~~ 4203-24
- **TRCP 3a** 4260-63 recommendation to add any authorized JP courts 4263
- TRAP 9.2(b)(2)(D) add delivery confirmation 4337-47 needs further study
- TRAP 20 affidavit of indigence 4348-57 needs further drafting
- TRCP 306a finality of judgments 4357-4441; 4440 16-3 recommend amendment

March 30

- *Lehman* /final judgment 3789-3889; back to subcom
- TRAP 18 recusal 3893-3958; Vote 3927, unanimous in favor of changes
- ~~TRAP 46.5~~ voluntary remittitur 3959-78; approved 3978
- TRCP 194 family law disclosures 3981-4025
- **TRE 702** 4026-4116 votes 4041 (702), 4082, 4115-16 (on cmts)

(continued next page)

2001 (cont'd)

January 13

- ~~TRAP 9.7~~ 3615-30 vote 27-0 adopt recommendation at 3630
- ~~TRAP 34.6~~ inaccuracies in reporter's record 3630-58; vote 3656-7 unanimous
- ~~TRAP 46.5~~ voluntary remittitur 3658-91 to be voted on next meeting
- ~~TRAP 42~~ dismissal settlement 3691-3721 vote @ 3720 26-1 in favor
- TRCP 3a proposal to post local rules on website 3721-40
- final judgments 3742-70

January 12

- NLH status report on 166a(i), TRAP 47, voir dire proposal 3293-7
- recusal rule 3299-3409; 3413-3595
- TRCP 3a proposal to require clerk to make local rules available 3409-13
- ~~TRAP 9.7~~ adoption of briefs 3601-08 vote 19-0 in favor of proposal at 3608

2000

November 18

- TRCP 3a 3156-3207 approved 25-12 @ 3207
- TRE 103 comment approved unanimously 3207-08
- TRE 409 admissibility of paid expenses 3209-19 back to subcommittee
- TRE 701 lay opinion testimony 3219-45 approved 20-0 @ 3226; comment approved as revised 21-2 @ 3246
- TRE 702 Daubert/Robinson 3246-88 approved 13-8 @ 3255

November 17

- NLH update 2828-30
- TRAP 47 unpublished opinions 2830-37
- TRCP 528 2839-43 vote 21-12 to limit parties to one transfer as of right
- TRCP 647 notice of sale of real estate 2843-44; conform to statute approved 24-0
- recusal 2845-46
- TRAP 9.5 2847-51 minor additional changes approved
- TRAP 33.1 preserving error 2851-57; recommendation approved 26-0 @ 2857
- TRAP 34.6(e)-(f) 2857-72
- TRAP 38 adoption of parties' briefs 2873-75
- TRAP 35.3 contempt for untimely filing of appellate record 2876-77; proposal rejected
- TRAP 38.6 2877-78 no action
- TRAP 43.2 vacating COA judgment pursuant to settlement 2878-79 back to subcom
- 46.5 remittitur 2880-86
- TRAP 49.10, 64.6 motion for rehearing page limits approved unanimously 2886-88
- TRAP 52.7 serving copy of mandamus record 2888-89 rec not to amend rule approved
- ~~TRAP 55.2 should say "brief must state" not "petition" 2889 approved unanimously~~
- TRAP 47 unpublished opinions 2890-2902
- final judgments 2902-2986; 2990-3131
- TRCP 194.2 disclosures 3131-52

October 21

- voir dire 2687-2708; vote 2708
- TRCP 176.3 subpoenas 2710-16
- TRCP 194 disclosure 2716-2733 back to subcom
- final judgments 2733-2815 vote 2815
- recusal 2816-23

October 20

- NLH report 2359-61
- recusal 2362-2494
- TRAP 49 unpublished opinions 2494
- TRAP 52 original proceeding record 2653-57
- certificate of conference for motion for rehearing 2657

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2000 (continued)

October 20 (continued)
- TRAP 13.1(a) court reporter 2658-68
- TRAP 18 mandate 2669-70
- TRAP 25.1 no change recommended
- TRAP 26.1 2672-79
- TRAP 29.5 interlocutory appeal 2680-81

August 26
- recusal 2209-2242
- summary judgment 2242-2340
- subcom assignments 2340-2354

August 25
- NLH report 1850
- recusal 1850-1937
- voir dire 1937-1999; 2003-2204

May 20
- recusal 1658-1845

May 19
- parental notification 1295-1404; summary of recommendations 1392-3
- recusal 1404-65; 1479-1654
- TRCP 199.5(f) 1459-72
- filing discovery 1473-79

B. Specific Changes to the District/County Court E-Filing Template

Rule 1.1: The Task Force recommended moving the provisions in template rule 3.1 ("Scope") to rule 1.1, and changed the title of the rule accordingly.

Rule 1.2(b): The Task Force recommended changes to clarify that the court may order parties to electronically file documents independent of electronic service; however, the SCAC subsequently recommended deleting the provision allowing JP courts to order parties to electronically file or serve, and recommended relocating all provisions regarding electronic service to Rule 5..

Rule 1.3: The Task Force added provisions to explain the mechanics of individual JP court participation and notice to the county clerk, who is required to maintain and post a list of JP courts in the county that participate in e-filing. The SCAC further recommended requiring notice to the county commissioners' court when individual JP courts begin or cease participating in electronic filing, at the request of SCAC member Andy Harwell, the McLennan County Clerk. The SCAC also recommended requiring advance notice to the public and registered parties to avoid the situation where parties find e-filing unexpectedly unavailable, perhaps after it is too late to file a paper copy.

Rule 2.1: The Task Force added new terms to define JP courts and explain participation in e-filing. The SCAC added a definition of "digital signature" and a cross-reference to Rule 4.2, redefined "parties," and renamed "traditional" filing as "paper" filing.

Rule 2.2: The SCAC recommended replacing "pro se" with "self-represented" and including a cross-reference to the statute allowing corporations to represent themselves in small claims court.

Rule 3.1: The Task Force deleted provisions not applicable to JP courts, which do not have jurisdiction in probate matters or in applications for judicial bypass of parental notification and

consent requirements.

Rule 3.2(d): The Task Force deleted the template rule 3.4(d)'s reference to "third" parties, such that the JP rule now authorizes parties—not third parties—to ask the court to allow inspection of a filer's original document. The SCAC added new rule 3.2(e), which requires an e-filer of scanned signed document to retain the original, and requires the court to allow examination of original by other parties upon request.

Rule 4.1: The Task Force's changes more accurately states the respective roles of TexasOnline and the Department of Information Resources (DIR), and reflect DIR's statutory authority to set a maximum fee a court may charge for e-filing through TexasOnline. *See* Tex. Gov't Code 2054.111. The SCAC changed the description of DIR from a state "entity" to a state "agency."

Rule 4.3(e): Because not all JP courts employ clerks and staffing varies considerably, many Task Force members—particularly JP members—were concerned about the potential ramifications of the rules requiring a court to "accept" any filing that it did not affirmatively reject within one day. To balance this concern with the desire on the part of parties and attorneys to be assured that e-filed documents have been filed with the court, the Task Force eliminated the first sentence, which required the court to decide whether to accept or reject a filing within one business day. The revised version simply provides that any filing not affirmatively rejected within that period is deemed filed. The SCAC debated the validity of "acceptance" by the clerk but ultimately voted to keep the provision, including the Task Force's recommended changes.

Rule 4.4: The Task Force believed that language originally included in the template to make filers feel more comfortable about e-filing is no longer necessary. No substantive change is intended.

Rule 5.1: The Task Force changed several provisions to clarify the circumstances under which documents can be e-served. The Task Force recommended requiring e-filing parties to register with TexasOnline, thereby making a party's registered address accessible to other registered users; however, it recommended providing that documents may be e-served either through TexasOnline or directly from party to party via e-mail. The SCAC agreed with these changes but recommended deleting the provision authorizing courts to order parties to receive service electronically.

Rule 5.2(a): The SCAC recommended clarifying that "mailbox rule" concept applies to e-service and incorporating TRCP 21a's provision allowing parties to prove non-receipt of e-served documents.

Rule 5.3: The Task Force recognized that the provision in TRCP 21a adding 3 days following service by fax is carried over into Rule 5.3 of the district/county court e-filing template, but it concluded that this provision serves no valid purpose in the e-filing context and should be eliminated in the JP e-filing rules, if not in the district/county court e-filing template as well. The Task Force also recommends several changes to the certificate of service required for electronically served

documents, including mandatory inclusion of the filer's e-mail address and revisions to the descriptive statement regarding service. The SCAC deleted language in 5.3(b)(iv) regarding e-service transmissions that are "reported as complete," in light of its recommended changes to Rule 5 clarifying the operation of a "mailbox rule" concept.

(COUNTY NAME) COUNTY

LOCAL RULES OF THE DISTRICT COURTS

concerning the

ELECTRONIC FILING OF COURT DOCUMENTS

PART 1. GENERAL PROVISIONS

Rule 1.1 Purpose

These rules govern the electronic filing and service of court documents, by any method other than fax filing, in (County name) County. These rules are adopted pursuant to Rule 3a of the Texas Rules of Civil Procedure and may be known as the "(County name) County Local Rules of the District Courts Concerning the Electronic Filing of Court Documents."

Rule 1.2 Effect on Existing Local Rules

These rules are adopted in addition to any other local rules of the district courts in (County name) County. These rules do not supersede or replace any previously adopted local rules. These rules are in addition to current local rules for electronic court documents (fax filing).

Rule 1.3 Electronic Filing Optional Unless Ordered by Court

(a) Except as provided by subsection (b) below, the electronic filing and serving of court documents is wholly optional.

(b) Upon the motion of a party and for good cause shown, a district court may order the parties in a particular case to electronically file and serve court documents that are permitted to be electronically filed under Rule 3.3.

PART 2. DEFINITIONS

Rule 2.1 Specific Terms

The following definitions apply to these rules:

(a) "Convenience fee" is a fee charged in connection with electronic filing that is in addition to regular filing fees. A Convenience Fee charged by the District Clerk will be considered as a court cost.

(b) "District clerk" means the (County name) County District Clerk.

(c) "Digitized signature" means a graphic image of a handwritten signature.

(d) "Document" means a pleading, plea, motion, application, request, exhibit, brief, memorandum of law, paper, or other instrument in paper form or electronic form. The term does not include court orders.

(e) "Electronic filing" is a process by which a filer files a court document with the district clerk's office by means of an online computer transmission of the document in electronic form. For purposes of these rules, the process does not include the filing of faxed documents which is described as the "electronic filing of documents" in Section 51.801, Government Code.

(f) "Electronic filing service provider (EFSP)" is a business entity that provides electronic filing services and support to its customers (filers). An attorney or law firm may act as an EFSP.

(g) "Electronic order" means a computerized, non-paper court order that a judge signs by applying his or her digitized signature to the order. A digitized signature is a graphic image of the judge's handwritten signature.

(h) "Electronic service" is a method of serving a document upon a party in a case by electronically transmitting the document to that party's e-mail address.

(i) "Electronically file" means to file a document by means of electronic filing.

(j) "Electronically serve" means to serve a document by means of electronic service.

(k) "Filer" means a person who files a document, including an attorney.

(l) "Party" means a person appearing in any case or proceeding, whether represented or appearing pro se, or an attorney of record for a party in any case or proceeding.

(m) "Regular filing fees" are those filing fees charged in connection with traditional filing.

(n) "Rules" are the (County name) County Local Rules of the District Courts concerning the Electronic Filing of Documents.

(o) "Traditional court order" means a court order that is on paper.

(p) "Traditional filing" is a process by which a filer files a paper document with a clerk or a judge.

Rule 2.2 Application to Pro Se Litigants

The term "counsel" shall apply to an individual litigant in the event a party appears pro se.

PART 3. APPLICABILITY

Rule 3.1 Scope

(a) These rules apply to the filing of documents in all non-juvenile civil cases, including cases that are appeals from lower courts, before the various district courts with jurisdiction in (County name) County.

(b) These rules apply to the filing of documents in cases before the various district courts referred to in paragraph (a) above that are subsequently assigned to associate judges or any other similar judicial authorities.

Rule 3.2 Clerks

These rules apply only to the filing of documents with the district clerk. These rules do not apply to the filing of documents directly with a judge as contemplated by TEX. R. CIV. P. 74.

Rule 3.3 Documents That May Be Electronically Filed

(a) A document that can be filed in a traditional manner with the district clerk may be electronically filed with the exception of the following documents:

i) citations or writs bearing the seal of the court;

ii) returns of citation;

iii) bonds;

iv) subpoenas;

v) proof of service of subpoenas;

vi) documents to be presented to a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents;

vii) documents sealed pursuant to TEX. R. CIV. P. 76a; and

viii) documents to which access is otherwise restricted by law or court order, including a document filed in a proceeding under Chapter 33, Family Code.

(b) A motion to have a document sealed, as well as any response to such a motion, may be electronically filed.

Rule 3.4. Documents Containing Signatures

(a) A document that is required to be verified, notarized, acknowledged, sworn to, or made under oath may be electronically filed only as a scanned image.

(b) A document that requires the signatures of opposing parties (such as a Rule 11 agreement) may be electronically filed only as a scanned image.

(c) Any affidavit or other paper described in Rule 3.4(a) or (b) that is to be attached to an electronically–filed document may be scanned and electronically filed along with the underlying document.

(d) Where a filer has electronically filed a scanned image under this rule, a court may require the filer to properly file the document in a traditional manner with the district clerk. A third party may request the court in which the matter is pending to allow inspection of a document maintained by the filer.

PART 4. FILING MECHANICS

Rule 4.1 TexasOnline

(a) Texas Online is a project of the Texas Department of Information Resources, a state entity charged with establishing a common electronic infrastructure through which state agencies and local governments may electronically send and receive documents and required payments.

(b) To become registered to electronically file documents, filers must follow registration procedures outlined by TexasOnline. The procedure can be accessed from TexasOnline's website at "www.texasonline.com."

(c) Filers do not electronically file documents directly with the district clerk. Rather, filers indirectly file a document with the district clerk by electronically transmitting the document to an electronic filing service provider (EFSP) which then electronically transmits the document to TexasOnline which then electronically transmits the document to the district clerk. A filer filing or serving a document must have a valid account with an EFSP and with TexasOnline

(d) Consistent with standards promulgated by the Judicial Committee on Information Technology (JCIT), TexasOnline will specify the permissible formats for documents that will be electronically filed and electronically served.

(e) Filers who electronically file documents will pay regular filing fees to the district clerk indirectly through TexasOnline by a method set forth by TexasOnline.

(f) An EFSP may charge filers a convenience fee to electronically file documents. This fee will be in addition to regular filing fees.

(g) TexasOnline will charge filers a convenience fee to electronically file documents. This fee will be in addition to regular filing fees and will be in an amount not to exceed the amount approved by the Texas Department of Information Resources.

(h) The district clerk may charge filers a convenience fee to electronically file documents. This fee will be in addition to regular filing fees, credit card fees, or other fees.

Rule 4.2 Signatures

(a) Upon completion of the initial registration procedures, each filer will be issued a confidential and unique electronic identifier. Each filer must use his or her identifier in order to electronically file documents. Use of the identifier to electronically file documents constitutes a "digital signature" on the particular document.

(b) The attachment of a digital signature on an electronically-filed document is deemed to constitute a signature on the document for purposes of signature requirements imposed by the Texas Rules of Civil Procedure or any other law. The person whose name appears first in the signature block of an initial pleading is deemed to be the attorney in charge for the purposes of Texas Rules of Civil Procedure 8, unless otherwise designated. The digital signature on any document filed is deemed to be the signature of the attorney whose name appears first in the signature block of the document for the purpose of Texas Rules of Civil Procedure 13 and 57.

(c) A digital signature on an electronically-filed document is deemed to constitute a signature by the filer for the purpose of authorizing the payment of document filing fees.

Rule 4.3 Time Document is Filed

(a) A filer may electronically transmit a document through an EFSP to TexasOnline 24 hours per day each and every day of the year, except during brief periods of state-approved scheduled maintenance which will usually occur in the early hours of Sunday morning.

(b) Upon sending an electronically-transmitted document to a filer's EFSP, the filer is deemed to have delivered the document to the clerk and, subject to Rule 4.3(h), the document is deemed to be filed. If a document is electronically transmitted to the filer's

EFSP and is electronically transmitted on or before the last day for filing the same, the document, if received by the clerk not more than ten days tardily, shall be filed by the clerk and deemed filed in time. A transmission report by the filer to the filer's EFSP shall be prima facie evidence of date and time of transmission.

(c) On receipt of a filer's document, the filer's EFSP must send the document to Texas Online in the required electronic file format along with an indication of the time the filer sent the document to the EFSP and the filer's payment information. TexasOnline will electronically transmit to the filer an "acknowledgment" that the document has been received by TexasOnline. The acknowledgment will note the date and time that the electronically-transmitted document was received by TexasOnline.

(d) Upon receiving a document from a filer's EFSP, TexasOnline shall electronically transmit the document to the district clerk. If the document was not properly formatted, Texas Online will transmit a warning to the filer's EFSP.

(e) Not later than the first business day after receiving a document from TexasOnline, the district clerk shall decide whether the document will be accepted for filing. The district clerk shall accept the document for filing provided that the document is not misdirected and complies with all filing requirements. The district clerk shall handle electronically-transmitted documents that are filed in connection with an affidavit of inability to afford court costs in the manner required by TEX. R. CIV. P. 145. If the clerk fails to accept or reject a document within the time period, the document is deemed to have been accepted and filed.

(f) If the document is accepted for filing, the district clerk shall note the date and time of filing which, with the exception of subsection (h) below, shall be the date and time that the filer transmitted the document to the filer's EFSP. The district clerk shall inform TexasOnline of its action the same day action is taken. TexasOnline shall, on that same day, electronically transmit to the filer's EFSP a "confirmation" that the document has been accepted for filing by the district clerk. The EFSP will electronically transmit the confirmation to the filer. This confirmation will include an electronically "file-marked" copy of the front page of the document showing the date and time the district clerk considers the document to have been filed.

(g) If the document is not accepted for filing, the district clerk shall inform TexasOnline of its action, and the reason for such action, the same day action is taken. TexasOnline shall, on that same day, electronically transmit to the filer's EFSP an "alert" that the document was not accepted along with the reason the document was not accepted. The EFSP will electronically transmit the alert to the filer.

(h) Except in cases of injunction, attachment, garnishment, sequestration, or distress proceedings, documents that serve to commence a civil suit will not be deemed to have been filed on Sunday when the document is electronically transmitted to the filer's EFSP, TexasOnline, or the Clerk on Sunday. Such documents will be deemed to have been filed on the succeeding Monday.

Rule 4.4 Filing Deadlines Not Altered

The electronic filing of a document does not alter any filing deadlines.

Rule 4.5 Multiple Documents

(a) Except as provided by subsection (b) below, a filer may include only one document in an electronic transmission to TexasOnline.

(b) A filer may electronically transmit a document to TexasOnline that includes another document as an attachment (e.g., a motion to which is attached a brief in support of the motion).

Rule 4.6 Official Document

(a) The district clerk's file for a particular case may contain a combination of electronically-filed documents and traditionally-filed documents.

(b) The district clerk may maintain and make available electronically-filed documents in any manner allowed by law.

Rule 4.7 E-mail Address Required

In addition to the information required on a pleading by TEX. R. CIV. P. 57, a filer must include an e-mail address on any electronically-filed document.

Rule 4.8 Document Format

(a) Electronically-filed documents must be computer-formatted as specified by TexasOnline. Electronically-filed documents must also be formatted for printing on 8 ½-inch by 11-inch paper.

(b) An electronically-filed pleading is deemed to comply with TEX. R. CIV. P. 45.

PART 5. SERVICE OF DOCUMENTS OTHER THAN CITATION

Rule 5.1 Electronic Service of Documents Permissible

(a) In addition to the methods of serving documents (other than the citation to be served upon the filing of a cause of action) set forth in TEX. R. CIV. P. 21a, a filer may serve documents upon another party in the case by electronically transmitting the document to that party at the party's email address. Service in such a manner is known as 'Electronic service," and is permissible in the circumstances set out in paragraph (b) below.

(b) Documents may be electronically served upon a party only where that party has agreed to receive electronic service or where the court has ordered the parties to electronically serve documents.

(c) By virtue of electronically filing a document or serving a document or by agreeing to accept service, a filer additionally agrees to provide information regarding any change in his or her e-mail address to TexasOnline, the district clerk, and all parties in the case.

(d) A party who electronically files a document is not required to electronically serve documents upon other parties unless the court has ordered the parties to electronically serve documents.

(e) A filer may electronically serve a document in instances where the document is traditionally filed as well as in instances where the document is electronically filed.

Rule 5.2 Completion of Service and Date of Service

(a) Electronic service shall be complete upon transmission of the document by the filer to the party at the party's e-mail address.

(b) Except as provided by subsection (c) below, the date of service shall be the date the electronic service is complete.

(c) When electronic service is complete after 5:00 p.m. (recipient's time), then the date of service shall be deemed to be the next day that is not a Saturday, Sunday or legal holiday.

Rule 5.3 Time for Action After Service

Whenever a party has the right or is required to do some act within a prescribed period of time after service of a document upon the party and that document is electronically served, then three days shall be added to the prescribed period of time.

Rule 5.4 Certification of Service

(a) Documents to be electronically served upon another party shall be served before the time or at the same time that the document is filed.

(b) A filer who electronically serves a document upon another party shall make a written certification of such service that shall accompany the document when that document is filed. The written certification shall include, in addition to any other requirements imposed by the Texas Rules of Civil Procedure, the following:

(i) the filer's e-mail address or telecopier (facsimile machine) number;

(ii) the recipient's e-mail address;

(iii) the date and time of electronic service; and

(iv) a statement that the document was electronically served and that the electronic transmission was reported as complete.

PART 6. ELECTRONIC ORDERS AND VIEWING OF ELECTRONICALLY-FILED DOCUMENTS

Rule 6.1 Courts Authorized to Make Electronic Orders

(a) A judge may electronically sign an order by applying his or her digitized signature to the order. Judges are not required to electronically sign orders.

(b) Upon electronically signing an order, the judge shall electronically forward the order to the district clerk who may treat the electronic order as the official copy of the order. Alternatively, the district clerk may print the electronic order and treat the printed order as the official copy of the order.

(c) The district clerk may electronically scan a traditional court order. The scanned court order may then serve as the official copy of the court order. The district clerk is not required to electronically scan traditional court orders in order to create official electronic court orders. Electronic scanning of traditional court orders is at the option of the district clerk.

Rule 6.2 Viewing of Electronically-filed Documents

(a) The district clerk shall ensure that all the records of the court, except those made confidential or privileged by law or statute, may be viewed in some format by all persons for free.

(b) Independent of the TexasOnline system and the requirement of viewing access described in subsection (a), the district clerk may choose to provide for both filers and the general public to electronically view documents or court orders that have been electronically filed or scanned. Where such provision has been made, persons may electronically view documents or court orders that have been electronically filed or scanned.

(c) Nothing in this rule allows for the viewing of documents or court orders, in any form, that are legally confidential (e.g., papers in mental health proceedings) or otherwise restricted by judicial rule or order.

PART 7. MISCELLANEOUS PROVISIONS

Rule 7.1 Assigned Court to Resolve Disputes

In the event a dispute should arise involving the application of these rules or various electronic filing issues, the court assigned to the case in which the dispute arises shall decide any dispute.

Rule 7.2. Rule Guiding Interpretation.

These rules shall be liberally construed so as to avoid undue prejudice to any person on account of using the electronic filing system or sending or receiving electronic service in good faith.

ADOPTION OF RULES

The foregoing "(County name) County Local Rules of the District Courts concerning the Electronic Filing of Documents" are hereby adopted by the undersigned district judges in (County name) County on this the _____ day of _____, 2004 and submitted to the Supreme Court of Texas for approval.

These rules shall become effective upon their approval by the Supreme Court of Texas.

_____ _____

Judge, XXth Judicial District Court Judge, XXth Judicial District Court

2007

November 30- CANCELLED

October 19

- Justice Hecht update 16577-579
- update on Court Administration Task Force 16580-82
- TRAP 9.8 minors' initials 16583-605
- Uniform Format Manual 16.16 16607-51; assigned to TRAP subcom for next mtg 16648
- TRCP 301/329b JNOV 16651-661 further study by Duncan subcom
- TRAP 4.3 modification of COA judgments 16662-75 no change recommended
- TRCP 226a plain-language jury charge 16675-838

August 25

- **TRAP 9.8 minors' initials** 16458-84; votes at 16481, 483
- **garnishment rules** 16484-529; see NLH comment at 16526, 28 re task force
- TRCP 226a plain-language jury charge update16529-73

August 24

- Justice Hecht update 16160
- ~~**JP e-filing rules**~~ 16161-16317; 16339-16366; 16372-16434
- CLB and NLH report on complex case study 16317-16339
- home equity reverse mortgage task force 16367-72; Court to reconstitute original task force to make recommendations for SCAC, 16371-72;
- **automatic substitution of public officials in trial rules** 16435-16454; 23-0 for Orsinger recommendation at 16454

June 8

- Justice Hecht update 15983-990
- **TRAP 24** supersedeas 15991-16023; 16077-16095; vote at 16095 16-6 for proposal
- TRAP 9.8 minors' initials 16024-045
- **TRAP 20.1** indigence 16046-051; approved as amended 16051
- **TRAP 41** 16052-054; approved as amended 16054
- **TRAP 52.6** mandamus reply brief in COA 25 pages 16054-58 approved 16058
- TRCP 657-679 garnishment 16058-77; 16095-155 vote 20-5 at 16152 private servers can serve writs of garnishment; back to J. Lawrence subcommittee to draft

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2007 (cont'd)

April 27

- Justice Hecht update 15685-86
- rocket docket 15687-798; CLB to meet with NLH, WBJ, etc. to clarify purpose
- TRAP 20.1 15799-803 implicit approval of proposal, but not which of 2 alternatives
- TRAP 24 15803-12 tabled until next meeting
- **TRAP 38.1(e)** statement re oral argument 15812-47; 15839 12-8 for proposal
- **TRAP 39.1** right to oral argument 15847-881, 22-4 for proposal 15880; JDH to redraft to address CJ Gray's concern about en banc arguments and consolidate into 1 paragraph.
- TRAP 41 15881-89 implicit approval of proposal, but not which of 2 alternatives
- **TRAP 49** 15890-92 proposal approved by lack of objection 15892
- TRAP 53.2(d)(9) implicitly approved as part of TRAP 49 proposal 15894
- minors' initials in appellate briefs 15894-901 moved to next time
- TRCP 657-679 garnishment 15903-930
- TRCP 226a 15931-40, 13-2 against proposal in concept, 13-1 for shorter version if forced to choose between longer and shorter versions.
- TRE 904 15941-79 13-0 against proposal.

February 16

- TRAP 20.1 15440-87 subcom to revise language and revisit next meeting 15487
- **TRAP 24** 15488-15575; 15514 15-9 against concept of motion to strike insufficient affidavit; 15528 back to subcom; subsection (d) substituting "appropriate" for "potential" 22-2, at 15574; address at next meeting whether judgment is superseded if debtor fails to obtain finding in line with net worth affidavit, 15575.
- court recorder rules 15576-81 David Jackson's comments on proposed TRAP changes
- **TRAP 41** 15582-604; Dorsaneo to look at assignments aspects of rule, at 15600.
- **TRAP 52.3** mandamus verification 15604-626 18-4 vote for J. Duncan proposal, but 11-8 vote to keep rule as it is (15625-6).
- **oral argument statement** 15626-62; 15662 25-1 for J. Bland's proposal in concept; Bland/Dorsaneo to consider for next meeting language tweaks and TRAP location.
- TRCP 226a David Beck jury instruction proposal 15663-79 15679 15-7 against proposal in concept. Dawson to meet with proponents and suggest revised language next meeting.

December 8

- rocket docket 15211-272, 15321-331; no recommendation, back to subcom
- proposed TRE 904 affidavits 15272-321 presentation by Bruce Williams; back to subcom
- **TRCP 296** FOF/COL 15332-423
  - vote to leave first sentence of 296 as is, 13-10 at 15373.
  - **Add amendment:** "If findings are properly requested, the judge shall state findings on each issue raised by the pleadings and evidence. Unless otherwise required by law, the trial court's findings of fact may be in broad form." **19-10**, at 15392, 14-6 to substitute "issue" for original proposal "ground of recovery or defense" at 15409.
  - **Also add:** "The trial court's findings should include only as much of the evidentiary facts as is necessary to disclose the basis for the court's decision." 14-2, at 15412.
  - **Add comment:** "Unnecessary or voluminous evidentiary findings are not to be included in the court's findings of fact and conclusions of law." 18-6, at 15414.
  - proposed amendment to TRCP 297 to allow trial court to make oral FOF/COL: rejected 15-7 at 15421.
  - Slight majority favors some change to TRCP 296: 15-14, at 15423.

- TRCP 226a David Beck jury instructions 15423-429; rejected 12-7 at 15427.

October 21

- **TRAP 49.8** extension of time to file en banc mtns; 15094-95, 14-0 for subcom proposal
- **TRAP 49.9** MFR not prerequisite to filing en banc; 15095-96 18-0 for subcom proposal
- **TRAP 53.7** en banc mtn counts as MFR for 45 days to file PFR; 15096-97 18-0 in favor
- **TRAP 19.1** court of appeals's plenary power 15097-101 20-0 for subcom proposal
- **TRAP 52.3** mandamus verification; 15101-132, 13-7 for proposal; see also 15197-98
- proposed TRAP version of 76a 15133-150; subcom will work on drafting proposal
- proposed TRE 904 affidavits on services provided 15151-187; back to subcom
- TRE 606 15187-95; 15195 17-0 for subcom rec not to adopt SBOT AREC proposal
- TRE 609 15195-96 15-0 for subcom rec not to adopt SBOT AREC proposal

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2006 (cont'd)

October 20

- TRCP 199.2 14830-51; 17-8 for subcom rec not to adopt SBOT proposal
- TRCP 245 14852-76; 28-0 vote not to change 45 to 75 days, at 14864; 23-3 vote that rule needs no clarification regarding later-added parties' rights to 45-day notice, at 14876.
- TRCP 296 14877-921; 14918-19: subcom to reconsider 296, SBOT proposal + other issues
- TRCP 226a David Beck jury instructions; 14921-40; 14938: 12-10 subcom to reconsider
- **TRCP 306a** conform to TRAP 4.2 14941-46; 14946 23-1 to conform
- **TRAP 13** court recorders 14947-99; vote 16-7 for subcom rec, at 14977; vote 14-4 for Gaultney modification, at 14992; 11-5 to remove para 4 of S.Ct order, at 14999.
- **TRAP 34.6, 35.3, 38.5** court recorders accompanying modifications approved 14985
- **TRAP 20.1** indigence certificate 14999-15035, vote 15022 26-1 for proposal
- TRAP 41.1 15035-45; needs further subcom study 15045
- **TRAP 49.7** en banc reconsideration 15045-15090; 15090 24-0 vote for subcom proposal

June 2

- **TRCP 21** 14721-821; 14818-14820 solid majority vote to substitute "ten days" for "three days" in existing paragraph 2; slight majority favors some [unspecified] accommodation for family law practice

April 14

- **parental consent/notification** 14463-99 votes: 31-2 recommend no change to PN rules in wake of consent law; 27-6 vote to add reference to consent law in cmt to PN rules; 14498-99
- **PSRB matters** 14499-628 most matters tabled indefinitely; 27-1 vote to recommend eliminating Harris County exception re TPSA process server course at 14627
- TRCP 21 3-day notice requirement 14629-715, on next agenda for further consideration