MEMORANDUM

TO: Supreme Court Advisory Committee

FROM: Judge David Peeples

RE: The legal effect of letter rulings by judges

DATE: March 23, 2011

In response to questions raised by Chief Justice Tom Gray, Justice Hecht has asked the committee to study the legal effect of letter rulings by judges. The question is: To what extent should letter rulings from judges have the legal effect of formal orders? (The issue seems not to have arisen with e-mail rulings, which have no ink signature.)

Letter rulings are used primarily in two situations. First, after an oral hearing judges occasionally take matters under advisement and later announce their rulings by letter. Second, when a matter is decided by submission without an oral hearing, judges will often notify litigants of the ruling by letter. These letter rulings can raise several questions:

1. **Finality and appealability.** Is the letter ruling itself a final and appealable order (assuming it disposes of all parties and issues or is a subject for interlocutory appeal)? That is, does the letter *start* the timetables?

2. **Effectiveness.** Is it effective to grant a new trial or to set aside an earlier final order on which the timetables have begun to run? That is, does the letter *stop* the time-tables that would otherwise keep running?

3. **Enforceability.** Is the letter ruling enforceable as an order of the court (e.g., orders compelling discovery for purposes of Rule 215, temporary orders in a family law case)? Letter rulings would seem to be at least as enforceable as oral rulings from the bench.

4. **Preservation of error.** Is it a sufficient ruling of the court to preserve error?

In our discussion of this matter, I suggest that we keep several thoughts in mind.

1. **Ain't broke, don't fix?** Are there enough recurring problems with letter rulings to justify a rule?

2. **Draft for the most common situation.** If we draft a rule, we should draft for the most common and usual situations. I submit that in most instances judges do not

intend that letter rulings will *be* the final and appealable order. Even when judges intend to grant complete/final relief in a letter, they almost always envision that there will eventually be a formal, signed judgment or order.

3. **Interlocutory letter rulings are common.** Many letter rulings are interlocutory anyway, and issues of finality and appealability will not arise. And frequently there is no intent to write up a formal order ever; all the parties need is the judge's decision, and there will never be a formal typewritten order in the form of a pleading. Discovery is probably the most common example of this.

4. **Clarity and ease of application.** Every rule of procedure should aim for clarity and ease of application. This means we should avoid inquiries into the judge's subjective intent. The appellate cases usually focus on such language as, *I will grant the motion, I am denying the motion, The motion for new trial is granted, I ask Attorney Jones to prepare and circulate an order,* etc.

5. **Easy to create finality.** Remember that when judges really intend finality, they can simply put clear finality language in their letters. The *Lehmann* language comes to mind.

6. **E-mail.** As time goes by will letter rulings gradually vanish, as e-mail displaces all these hard-copy letters? Does e-mail's superiority to hard copy (quicker and easier) explain the dwindling number of these cases?

Several cases on this subject are collected in *Perdue v. Patten Corp.*, 142 S.W.3d 596, 600-603 (Tex. App.—Austin 2004, no pet.). Excerpts from *Perdue* are attached.

notice of the "drop docket" to Patten's attorney and Kuehr—but not to Wilson or Bosworth; the cases were to be dismissed if no party appeared on August 31, 1998. When the Perdues failed to appear, the court signed an order dismissing their causes. The Perdues did not find out about the dismissal until the spring of 1999. In July 1999, Wilson filed a petition for bill of review on behalf of the Perdues. About a year later, Bosworth became the Perdues' attorney of record in place of Wilson.[2]

In July 2002, Patten filed a motion for summary judgment, asserting that there was no evidence to support three of the necessary elements of a bill of review that (1) the plaintiffs were prevented from making their claim by some fraud on behalf of the opposing party or an official mistake by the court, (2) the plaintiffs' own negligence did not contribute to the dismissal of their claims, and (3) the plaintiffs exercised due diligence in pursuing other legal remedies against the judgment.[3] *See Narvaez v. Maldonado*, 127 S.W.3d 313, 319, 321 (Tex.App.-Austin 2004, no pet.). The court granted a no-evidence summary judgment on April 12, 2003. The Perdues filed a motion for new trial, which the court announced it was granting in a letter to counsel dated July 22, 2003; the formal order granting a new trial was entered on July 31, 2003.

DISCUSSION

Jurisdiction

[1] As a preliminary matter, this Court raised the issue of subject-matter jurisdiction to determine whether the summary judgment is properly before us on appeal. In response, the Perdues assert that we do not have jurisdiction over this cause because the trial court granted their motion for new trial, vacating the summary judgment.[4] Patten insists that the summary judgment is properly before us because the order granting new trial was ineffectual and null as it was entered three days after the court's plenary power over the case had expired. *See* Tex. R Civ. P. 329b(c), (e). The court's letter announcing the granting of a new trial was timely; its order was not.

The trial court's plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment is limited to 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. *Id.* (e). If a motion for new trial "is not determined by written order signed within seventy-five days after the

2. Although Wilson and Bosworth were both substituted as counsel for Kuehr in 1996, it appears that only Wilson handled the cases until 1999. Until that time, Wilson and Bosworth appear to have been practicing together or at least sharing office space, as they shared the same address and phone number. By the time Bosworth took over the cases from Wilson, he appears to have moved to a separate office.

3. Patten has not challenged the other element of a bill of review: that the Perdues must have a meritorious claim. *See Jones v. Texas Dep't of Protective & Regulatory Servs.*, 85 S.W.3d 483, 487 (Tex.App.-Austin 2002, pet. denied).

4. The Perdues alternatively argue that the summary-judgment order failed to dispose of all parties and claims and was therefore not final. They claim that the summary-judgment motion "merely requests certain evidentiary findings." We disagree. Patten's no-evidence summary-judgment motion sufficiently notifies the court of its argument that there is no evidence to support the second and third elements of a bill of review. The trial court's grant of this motion foreclosed all of the Perdues' claims, as they could challenge the trial court's dismissal of their claims only by proving the bill-of-review elements.

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judgment was signed, it shall be considered overruled by operation of law on expiration of that period." *Id.* (c). After the court's plenary power has expired, it may not set aside a judgment except by bill of review. *Id.* (f).

Here, the trial court signed the order granting summary judgment on April 12, 2003.[5] The Perdues filed a motion for new trial on May 12. On June 26, seventy-five days after the judgment was signed, the motion was overruled by operation of law. However, the trial court retained plenary power to set aside the judgment for thirty days, until July 28.[6] The court held a hearing on the motion for new trial on July 11 and on July 22 sent a letter to the parties stating, "Accordingly, it is the order of the Court that the Motion for New Trial filed by Plaintiffs, Matthew Perdue and Thelma Cade–Perdue, be ***GRANTED*** in all things." The letter continued, "Mr. Bosworth [the Perdues' counsel] is directed to prepare the appropriate Order for my signature and forward the same to me at my office.... I shall attend to the filing of the Order after signature." The Perdues argue that this letter serves as a valid order granting their motion for new trial within the period of the court's plenary jurisdiction. The trial court signed the order granting a new trial on July 31, three days after its plenary power had expired.

Two rules of civil procedure govern our decision. Rule 329b governs the timing for taking action on motions for new trials. *See* Tex.R. Civ. P. 329b. Rule 5, in turn, clearly states, "The court may not enlarge the period for taking any action under the rules relating to new trial except as stated in these rules." *Id.* 5.

In *Reese v. Piperi*, 534 S.W.2d 329 (Tex. 1976), the supreme court addressed a similar issue, whether a trial court's oral rendition of a motion for new trial fell within the period of its plenary jurisdiction to amend or modify a judgment. The oral pronouncement came while the court still had plenary jurisdiction, but the signed written order came more than thirty days after the motion for new trial was overruled by operation of law. Because the trial court had lost its plenary jurisdiction, the judgment could only be set aside by bill of review. *See id.* at 330–31. The movants argued that the formal written order was a nunc pro tunc reflection of the oral judgment. The supreme court found that the judge's oral pronouncement represented an intention to grant the motion in the future if the parties did not work things out. *Id.* The court acknowledged that even though the trial court could have made an oral pronouncement that might serve as a present rendition of judgment, "[t]he opportunities for error and confusion may be minimized if judgments will be rendered only in writing and signed by the trial judge after careful examination." *Id.* at 330.

The opinion then noted a "further problem" posed by rule 5:

> order granting a new trial would not be timely.

5. The Perdues assert that the actual date the order was signed was likely April 21, 2003, evidenced by the fact that April 12 was a Saturday and that the order was filed on April 21. Calculating the dates from April 21, the formal order purporting to grant the motion for new trial would be timely. However, there is no evidence in the record to support this speculation, and indeed the docket sheet reflects that the order was entered on April 15; if this were the actual date, the formal

6. Because the thirty-day period expired on Saturday, July 26, 2003, the court's plenary jurisdiction extended until Monday, July 28. *See* Tex.R. Civ. P. 4; *McClelland v. Partida*, 818 S.W.2d 453, 455 n. 2 (Tex.App.-Corpus Christi 1991, writ dism'd w.o.j.).

> If an oral pronouncement by the court were to satisfy the requirements of Rule 329b(4) and if this rendition could be entered months later in the form of a nunc pro tunc order, the trial judge could extend the time for final disposition of the motion for new trial far beyond the period prescribed by Rule 329b—despite the express language of Rule 5 that the court "may not enlarge the period for taking any action under the rules relating to new trials ... except as stated in the rules relating thereto."

Id. at 331.[7] The supreme court held that rule 329b, like rule 306a establishing appellate timetables, contemplated a written and signed order granting a motion for new trial that must be rendered within the period of the trial court's plenary jurisdiction. *See id.* at 331.

In *McCormack v. Guillot*, the supreme court found ineffective a docket sheet notation granting a motion for new trial and, relying on *Reese*, held that the formal written order—signed after the court had lost plenary power under rule 329b—was a nullity. 597 S.W.2d 345, 346 (Tex.1980). The *McCormack* court also cited with approval two appellate-court cases holding that absent a formal order signed by the judge, the motion for new trial is overruled by operation of law, and the trial court loses its plenary jurisdiction thirty days after that. *See id.; Atkinson v. Culver*, 589 S.W.2d 164, 165–66 (Tex.Civ.App.-El Paso 1979, no writ); *Teran v. Fryer*, 586 S.W.2d 699, 700 (Tex.Civ.App.-Corpus Christi 1979, writ ref'd).

The *McCormack* opinion also noted that there should be no distinction between the procedural requisites for the overruling of a motion for new trial, triggering appellate timetables, and the granting of a motion for new trial, vacating a prior judgment in the exercise of plenary power. *See* 597 S.W.2d at 346. In each instance, the court's order must be in writing and signed. *See id.* (citing *Reese*, 534 S.W.2d at 330–31). The court held that the necessity of a "written order that is express and specific" applies equally to measuring time for appellate steps and for determining a motion for new trial during the period of the court's plenary jurisdiction.[8] *See id.* (quoting *Poston Feed Mill Co. v. Leyva*, 438 S.W.2d 366, 368 (Tex.Civ.App.-Hous-

7. The text of former rule 329b(5) referred to the court's "taking action" on a motion for new trial. *See* Tex.R. Civ. P. 329b(5) (West 1977, repealed 1981) ("The failure of a party to file a motion for new trial within the ten (10) day period ... shall not deprive the district court of jurisdiction to set aside a judgment rendered by it, provided such action be taken within thirty (30) days after the judgment is rendered."). Although the current rule 329b does not use this phrase, rule 5 maintains this concept by stating that the trial court may not enlarge the period for "taking action" under rule 329b. *See* Tex.R. Civ. P. 5.

8. Furthermore, the Texas Supreme Court has determined that generally letters to counsel are not the kind of documents that constitute a judgment, decision, or order from which an appeal may be taken: "The time from which one counts days for the appellate steps is that day on which the judge reduces to writing the judgment, decision or order that is the official, formal and authentic adjudication of the court upon the respective rights and claims of the parties." *Goff v. Tuchscherer*, 627 S.W.2d 397, 398–99 (Tex.1982). The *Goff* court concluded that a trial court's letter to counsel stating that it had overruled a plea of privilege, which also called upon counsel to prepare and present an appropriate order reflecting that ruling, did not start the clock running on the appellant's twenty-day deadline for perfecting his appeal. *Id.* Rather, the court's formal order overruling the plea of privilege signed a couple weeks later was the final judgment. *Id.* By analogy, the letter in this case manifested the trial judge's understanding that the letter was not the final, official order granting a new trial because it called on counsel to draft and submit such an order.

ton [14th Dist.] 1969, writ dism'd w.o.j.)); *see also Faulkner v. Culver*, 851 S.W.2d 187, 188 (Tex.1993) (order granting new trial must be written and signed; oral pronouncement and docket entry not sufficient).

The facts of this case are distinguishable from those in more recent appellate-court cases such as *In re Fuentes* and *Schaeffer*. *See In re Fuentes*, 960 S.W.2d 261, 264–65 (Tex.App.-Corpus Christi 1997, no writ); *Schaeffer Homes, Inc. v. Esterak*, 792 S.W.2d 567, 569 (Tex.App.-El Paso 1990, no writ). In those cases, the courts noted that present-tense language in a letter to counsel, without any directive for counsel to prepare an order, could be construed as an order if the letter was filed or otherwise appeared in the court's record. *See Fuentes*, 960 S.W.2d at 264–65; *Schaeffer*, 792 S.W.2d at 569; *see also In re Helena Chem. Co.*, 134 S.W.3d 378, 380 (Tex.App.-Waco 2003, no pet. h.) (court is to look to entire record to determine judge's intent when construing order entered within period of court's plenary power). Here, although the July 22 letter to counsel purported to grant the motion for new trial and was filed with the court clerk, it also directed counsel to prepare an order and thus indicated the court's intent that it not be the operative order. But even if the letter unequivocally attempted to serve as a final order, the letter does not constitute the formal, signed order contemplated by *Atkinson* and *Teran*. *See Atkinson*, 589 S.W.2d at 166; *Teran*, 586 S.W.2d at 700.

More importantly, both *McCormack* and *Reese* also rest their decision on the language of rule 5 that prohibits a trial court from "enlarg[ing] the period for taking any action under the rules relating to new trials." Tex.R. Civ. P. 5; *see McCormack*, 597 S.W.2d at 346; *Reese*, 534 S.W.2d at 330–31. Rule 5 prevents the trial court from expanding its jurisdiction to grant a new trial by entering a signed written order reflecting the earlier letter after its plenary jurisdiction had expired.

We agree with Patten that the trial court's July 22 letter to counsel was not an "order" for purposes of rule 329b. The formal order signed on July 31 is the controlling order. It is null because it was signed more than thirty days after the motion for new trial was overruled by operation of law. Therefore, the summary judgment was not vacated and was a final, appealable order.[9]

No-evidence motion for summary judgment

[2–5] A no-evidence summary judgment is essentially a directed verdict granted before trial, to which we apply a legal-sufficiency standard of review. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750–51 (Tex.2003); *Jackson v. Fiesta Mart, Inc.*, 979 S.W.2d 68, 70 (Tex.App.-Austin 1998, no pet.). In general, a party seeking a no-evidence summary judgment must assert that no evidence exists as to one or more of the essential elements of the nonmovant's claims on which it would have the burden of proof at trial. *Holmstrom v. Lee*, 26 S.W.3d 526, 530 (Tex. App.-Austin 2000, no pet.). Once the movant specifies the elements on which there is no evidence, the burden shifts to the nonmovant to raise a fact issue on the challenged elements. Tex.R. Civ. P. 166a(i). A no-evidence summary judgment will be sustained when (1) there is a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or of

9. Although they believed the summary judgment had been vacated by the trial court's letter, the Perdues filed a notice of appeal to preserve their right to appeal. "A party who is uncertain whether a judgment is final must err on the side of appealing or risk losing the right to appeal." *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 196 (Tex.2001).

CITATION BY PUBLICATION USING THE INTERNET

by

Richard R. Orsinger, Chair
Rule 16-165a Subcommittee
Supreme Court Advisory Committee

March 24, 2011

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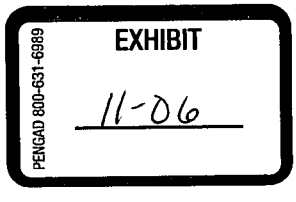


I. CITATION BY PUBLICATION VIA THE INTERNET. The assignment is to consider whether notice of citation by publication, required under Tex. R. Civ. P. 116 to be published in a "newspaper," should be altered to permit or require publication on the Internet, in addition to or in lieu of publication in a newspaper of the county in question.

II. CURRENT TEX. R. CIV. P. 116.

Here is the language of current TRCP 116:

> Rule 116. Service of Citation by Publication
>
> The citation, when issued, shall be served by the sheriff or any constable of any county of the State of Texas or by the clerk of the court in which the case is pending, by having the same published once each week for four (4) consecutive weeks, the first publication to be at least twenty-eight (28) days before the return day of the citation. In all suits which do not involve the title to land or the partition of real estate, such publication shall be made in the county where the suit is pending, if there be a newspaper published in said county, but if not, then in an adjoining county where a newspaper is published. In all suits which involve the title to land or partition of real estate, such publication shall be made in the county where the land, or a portion thereof, is situated, if there be a newspaper in such county, but if not, then in an adjoining county to the county where the land or a part thereof is situated, where a newspaper is published.

III. ISSUES TO CONSIDER. Issues to be considered include:

(1) As used in the current TRCP 116, does the term "published" mean only that the notice must be printed in a paper newspaper, as the Rule implies? Or can publication be accomplished by posting the notice at a web site? If the latter, then at whose web site, the newspaper's or the government's?

(2) As used in the current TRCP 116, does the term "newspaper" mean just the paper copy that is distributed by hand delivery, at newsstands or news racks, by street vendors, and by US Mail, or does it require that the notice be included in the electronic version of the

newspaper that is published on the newspaper's web site or distributed to subscribers by email?

(3) How does the Term "published once a week" apply to the posting of an electronic notice that is continuously available 24-hours a day?

(4) Is a web site more likely to give actual notice to the absent party, or to persons who might communicate the notice to the absent party, than publication in a newspaper in the county where the suit is filed, or where the land is located? Is there a way to insure that such notices will be picked up by popular Internet search engines such as Google, Yahoo, etc. so that when people search for their own names or names of persons they know the notices will be listed high up in the search results?

(5) If we recognize Internet-based publication of notice, do we merely (i) suggest publication through both the paper and the electronic version of the newspaper, or (ii) do we *require* such dual publication, or (iii) do we permit the plaintiff or sheriff to choose whether to publish notice through either a newspaper or an internet posting at a government-maintained web site in lieu of newspaper publishing, or (iv) do we require that notice be published at a government-maintained web site instead of through a newspaper?

(6) If a government-maintained web site is to be involved, should each county operate their own, or should citations by publication be published at a central site maintained by the State of Texas, through the Secretary of State or other government office?

(7) How does cost figure in the decision?

(8) What does the litigant do when there is no paper newspaper in the county or an adjoining county?

IV. HOUSTON CHRONICLE AGAINST GOVERNMENT WEB SITE NOTICES.

— Houston Chronicle. March 12, 2011

Hear ye, hear ye: Public notices regarding public money need to be where we'll see them — in newspapers

Timely access to information: Nothing is more crucial to the smooth functioning of the institutions of our democracy. And nothing is more fundamental to that access than the traditional published public notice in the newspaper. It spreads the word about meeting agendas, bidding processes for contracts and other nuts and bolts of the operation of agencies large and small financed with public dollars.

Published notices in newspapers are the time-honored successors to the town criers of old. They get the word out so that voters — taxpayers — can be in the know. They do so

efficiently, economically and impartially. Importantly in this Internet age, they also do so electronically, via newspaper websites, as well as a statewide newspaper industry website that aggregates all public notices from Texas papers in one place, independently operated and not run by the government (http://www.txhead/ lines.com/index.php/public_notices).

That venerable method of informing the public is being put at risk in Texas by a movement in the Legislature to amend the public notice process for our 1,000-plus school boards and 254 county governments, as well as our municipal governments.

Spearheading this ill-advised effort is HB 507, by Rep. Angie Chen Button, (R-Richardson), that would allow school districts, municipalities and counties to move some public notices on bids to the Internet.

We acknowledge, up front, our self-interest. Publishing public notices creates a revenue stream for newspapers, albeit a relatively small one in many cases. By law, Texas newspapers must charge their lowest classified rate for public notices.

To do the same job newspapers already do, governments would have to spend thousands of additional taxpayer dollars for secure servers, programming, posting and auditing. So much for the cost-benefit argument for changing over.

The prospect of posting competitive bidding notices on the websites of the public entities — school districts, cities and counties — without some independent oversight is particularly alarming. These are your tax dollars. Competitive bidding notices should be published in a newspaper, where they can be seen by all taxpayers.

Newspapers are watchdogs. We routinely monitor and report the acts of government. This is a benefit that no government entity can possibly provide in this important area.

We hope state lawmakers will bring discernment and judgment to their review of this issue and continue the requirement that public notices be published in newspapers.

A majority of Texans rely on their local newspaper as the primary source of information in their community.

This is where such vital information concerning taxpayer dollars should be placed.

V. PENDING LEGISLATION. The following bills have been introduced in the current session of the Texas Legislature.

H.B. No. 1082

A BILL TO BE ENTITLED AN ACT relating to authority for certain school districts to provide public notice by posting the notice on the district 's Internet website.

Sec. 11.177. AUTHORITY FOR CERTAIN DISTRICTS TO PUBLISH NOTICE ON DISTRICT WEBSITE.

(a) This section applies to a school district only if:

(1) there is not a daily, weekly, or biweekly newspaper published in the district; and

(2) the population of the district constitutes less than 10 percent of the total population of the county in which the district 's central administrative office is located.

(b) If a school district, the district 's board of trustees, or an officer of the board is required under state law to publish notice concerning the district in a newspaper, the district, board, or officer may instead post the notice on the district 's Internet website.

(c) Notice posted on an Internet website under Subsection (b) must meet any content or deadline or other date requirements established by law or rule for publishing that notice in a newspaper and must meet or exceed any duration or frequency requirements established by law or rule for publishing that notice in a newspaper. The notice or a link to the notice must be posted in a prominent place on the homepage of the website.

(d) Notice posted on an Internet website under Subsection (b) is not required to meet any page or type-size requirements established by law or rule for publishing that notice in a newspaper.

H.B. No. 1094

A BILL TO BE ENTITLED AN ACT relating to the availability on the Internet of reports of political expenditures and contributions filed in connection with certain county and municipal offices.

SECTION 1. The heading to Section 254.0401, Election Code, is amended to read as follows:

Sec. 254.0401. AVAILABILITY OF [ELECTRONIC] REPORTS ON INTERNET.

SECTION 2. Section 254.0401, Election Code, is amended by adding Subsections (a-1) and (c) and amending Subsection (f) to read as follows:

(a-1) Each county clerk shall make a report filed with the clerk under this subchapter in connection with a county office or the office of county commissioner available to the public on the county 's Internet website not later than the second business day after the date the report is filed.

(c) The clerk of a municipality with a population of 500,000 or more shall make a report filed with the clerk under this subchapter in connection with the office of mayor or member of the municipality 's governing body available to the public on the municipality 's Internet website not later than the second business day after the date the report is filed.

H.B. No. 1153

A BILL TO BE ENTITLED AN ACT relating to public access to financial and tax rate information of political subdivisions.

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

SECTION 1. Subchapter B, Chapter 403, Government Code, is amended by adding Section 403.0241 to read as follows:

Sec. 403.0241. INTERNET PORTAL TO LOCAL GOVERNMENT FINANCES.

(b) The comptroller shall establish an Internet portal to allow a member of the public to access without charge financial and tax information for political subdivisions of this state. The portal must include a search feature that retrieves the information specified by this section in response to a user 's entry of the address of a location in this state.

(c) The Internet portal must be accessible by members of the public and must be designed to retrieve, with respect to any address of a location in this state that a user enters into the search feature, the following information for each political subdivision within the boundaries or extraterritorial jurisdiction of which the address is located, organized by political subdivision:

(1) the name of the political subdivision; and

(2) the political subdivision 's Internet website address or, if the political subdivision does not operate an Internet website, contact information to enable a member of the public to obtain from the political subdivision financial and tax information.

(d) Subject to Subsection (e), for each political subdivision identified as required by Subsection (c), the Internet portal must be designed to enable the user to access the following financial information on the political subdivision 's Internet website:

(1) budget for the political subdivision 's current fiscal year;

(2) each proposed budget for the following fiscal year that currently is under consideration by the political subdivision 's governing body;

(3) the most recent annual financial report published by the political subdivision 's governing body;

etc.

H.B. No. 2816

Sec. 11.177. AUTHORITY TO PUBLISH NOTICE ON DISTRICT WEBSITE.

(a) If a school district, the district's board of trustees, or an officer of the board is required under state law to publish notice concerning the district in a newspaper, the district, board, or officer may instead post the notice on the district's Internet website.

(b) Notice posted on an Internet website under Subsection (a) must meet any content or deadline or other date requirements established by law or rule for publishing that notice in a newspaper and must meet or exceed any duration or frequency requirements established by law or rule for publishing that notice in a newspaper. The notice or a link to the notice must be posted in a prominent place on the home page of the website.

(c) Notice posted on an Internet website under Subsection (a) is not required to meet any page or type-size requirements established by law or rule for publishing that notice in a newspaper.

H.B. No. 3364

SECTION 1. Section 51.002, Property Code, is amended by adding Subsection (b-2) to read as follows:

(b-2) If a county maintains an Internet website, the county must post a notice of sale filed with the county clerk under Subsection (b)(2) on the website on a page that is publicly available for viewing without charge or registration.

S.B. No. 690

A BILL TO BE ENTITLED AN ACT relating to the enforcement of a self-service storage facility lien . . . .

(d) The notice required by this section may be given by publishing the notice once in a print or electronic version of a newspaper of general circulation in the county in which the motor vehicle, motorboat, vessel, or outboard motor is stored if:

(1) the lessor submits a written request by verified mail to the governmental entity with which the motor vehicle, motorboat, vessel, or outboard motor is registered or titled requesting information relating to the identity of the last known owner of record and any lienholder of record; . . . .

VI. LEGAL ENCYCLOPEDIAS.

6C Nichols Cyc. Legal Forms § 138:1

Nichols Cyclopedia of Legal Forms Annotated
Database updated November 2010

Chapter 138. Newspapers and Magazines

I. Suggestions

§ 138:1. Newspapers and magazines, in general

West's Key Number Digest, Constitutional Law 90(1) to (3), 90.1 to 90.3, 274.1
West's Key Number Digest, Newspapers 1 to 6, 6.1, 6.5

A.L.R. Library

What constitutes newspaper of "general circulation" within meaning of state statutes requiring publication of official notices and the like in such newspaper, 24 A.L.R.4th 822

Legal Encyclopedias

C.J.S. Constitutional Law §§ 848 to 852
C.J.S. Newspapers §§ 1 to 2, 24 to 26

There are several characteristics that newspapers have in common: they are published periodically, usually at short, regular intervals not exceeding a week; they are meant to appeal to a wide spectrum of the general public; they usually contain advertisements, and; their purpose is to convey news or advocate opinions.[FN1] Newspapers may also be defined in state law to identify the types of publications in which legal notices may be published.[FN2] Other statutes that may contain definitions regarding newspapers include those relating to taxation and licensing, libel, antitrust, regulation of news racks, postal rates, and regulation of pornography.[FN3]

Publications with narrower appeal, such as a daily sports sheet or a publication devoted to radical social and political commentary, may qualify as newspapers, magazines, or periodicals.[FN4]

Practice Note: Due to the Internet, the very nature of what may be considered a "newspaper" is changing, requiring that practitioners review the effect of other laws. That the online edition of a newspaper is in fact an "edition" of the "newspaper" has been accepted by many courts.[FN5]

One issue the online version of a newspaper presents for users that is different—yet the same—as that presented by the print version is copyright infringement. Since the Internet allows users to browse and "assemble" the equivalent of their own newspaper by pulling news content from the servers of various publishers according to their needs and interests, many users may erroneously believe—despite online access agreements, website copyright notices, and disclaimers—the content is not copyright protected or in the public domain.[FN6]

Magazines are commonly understood to be synonymous with the term "periodical." Each issue of a periodical contains a variety of original articles by different authors. The largest class of periodicals would be magazines, which are pamphlets published periodically, containing miscellaneous papers, compositions, articles, stories, or poems, which are often illustrated.[FN7] To be treated as second class matter under the postal regulations, a periodical must be a printed paper or publication, issued in pamphlet or book form, at stated or regular intervals of more than one day between each issue. It contains either general, class, trade, technical, scientific, serial articles, or other reading matter, and advertising.[FN8] To qualify for periodical-class mail, a magazine must be regularly issued at stated intervals at least four times a year. It must bear a date of issue and be numbered consecutively. Periodical-class mail must have a known office of publication, and it must be formed of printed sheets and not reproduced by means of the stencil, mimeograph, or hectograph processes, or reproduced in imitation of typewriting. Reproduction by any other printing process is permissible. Any style of type may be used.[FN9]

[FN1] Am. Jur. 2d, Newspapers, Periodicals, and Press Associations § 1.

[FN2] See, e.g., Ind. Code Ann. § 5-3-1-0.4 (defining a "newspaper" a publication that: (1) is a daily, weekly, semiweekly, or triweekly newspaper of general circulation; (2) has been published for at least three (3) consecutive years in the same city or town; (3) has been entered, authorized, and accepted by the United States Postal Service for at least three (3) consecutive years as mailable matter of the periodicals class; and (4) has at least 50% of all copies circulated paid for by subscribers or other purchasers at a rate that is not nominal).

[FN3] See Am. Jur. 2d, Newspapers, Periodicals, and Press Associations § 2.

[FN4] For additional discussion of the definition of newspapers, magazines, and other periodicals, see What constitutes newspapers, magazines, periodicals, or the like, under sales or use tax law exemption, 25 A.L.R.4th 750.

[FN5] See, e.g., Pogliani v. U.S. Army Corps of Engineers, 166 F. Supp. 2d 673 (N.D. N.Y. 2001), judgment aff'd, 306 F.3d 1235 (2d Cir. 2002) and aff'd in part, remanded in part, 49 Fed. Appx. 327 (2d Cir. 2002); Lockheed Martin Corp. v. Network Solutions, Inc., 985 F. Supp. 949, 152 A.L.R. Fed. 793 (C.D. Cal. 1997), judgment aff'd, 194 F.3d 980, 44 Fed. R.

Serv. 3d 1207 (9th Cir. 1999); American Libraries Ass'n v. Pataki, 969 F. Supp. 160 (S.D. N.Y. 1997); American Civil Liberties Union v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996), judgment aff'd, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997).

[FN6] For additional discussion of this issue and a sample online access agreement and website notices and disclaimers, see §§ 2.3242 to 2.3244.40 of this publication.

[FN7] See Am. Jur. 2d, Newspapers, Periodicals, and Press Associations § 5.

[FN8] See Am. Jur. 2d, Newspapers, Periodicals, and Press Associations § 6.

[FN9] See 39 C.F.R. pt. 3001, subpt. C, App. A. There are numerous additional requirements imposed by the postal regulations.

VII. CASE LAW IS IN ITS INFANCY. There is precious little case law on the question of internet-based notice as distinguished from paper newspaper notice.

A. VIRGIN ISLANDS. The issue was considered in *Hernandez v. Alcorta*, 2003 WL 22391311 (Terr. V.I. 2003). A copy of the Opinion is attached. The Judge in the case wrote:

> Incorporating by reference an affidavit by the publisher of the Source, Plaintiff contends that not only is an internet newspaper not a deficient method for disseminating notices to the public, it is in fact superior to printed versions in many ways. The stated reasons for this superiority are (1) that internet newspapers reach a greater number of people because they are free and available 24 hours per day, (2) that an internet newspaper's audience potentially extends far beyond the confines of its original location, (3) that persons reading an internet newspaper can easily forward information contained therein to others, and (4) that legal notices published in internet newspapers are not relegated to a section in the back pages, but are immediately accessible through the home page.
>
> The Court finds all these arguments persuasive.

Id. at *3.

B. WASHINGTON STATE. In *Central Puget Sound Regional Transit Authority v. Miller*, 156 Wash.2d 403, 128 P.3d 588, 596 (Wash. 2006), a majority of the Washington Supreme Court held that a condemning authority's giving public notice of its meeting through the internet was sufficient notice to comply with the governing Washington statute. The Court's majority Opinion said:

> There is very little case law on the subject of the sufficiency of web posting for notice requirements. Courts in several cases have rejected web posting as a method to apprise class members of a class action suit. See, e.g., Reab v. Elec. Arts, Inc., 214 F.R.D. 623, 631 (D.Colo.2002). However, in such instances the posting was not an

exercise of legislative authority. Additionally, the California Court of Appeals held last year that statements on a web site "hardly could be more public." Wilbanks v. Wolk, 121 Cal.App.4th 883, 885, 17 Cal.Rptr.3d 497, 503 (2004); see also Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) ("[The Web] provides relatively unlimited, low-cost capacity for communications of all kinds.").

Miller's argument that posting on a web site does not necessarily "furnish" notice to anyone is unfounded. Just as it is impossible to assure that anyone will look at a particular web site, it is equally impossible to assure that anyone will purchase, much less read, a newspaper. In addition, there is no way to assure that a newspaper will even publish a notice furnished by an agency because agencies are not required to buy advertising space. More important, however, is the fact that RCW 35.22.288 does not require an agency to use one of the listed methods, much less prohibit the use of the internet. The statute explicitly states that the methods "may include, but not be limited to" those specifically listed. RCW 35.22.288. Clearly, any other method that provides comparable notice to those listed would meet the statutory requirement. Miller has not shown that publication on the Sound Transit web site failed in any way to meet the standard set forth in the statute. While precedent on this subject is sparse, posting on a public web site is at least as likely to provide the community with notice as the specifically approved notice given to a newspaper, and this was the method Sound Transit had used for years.

C. A SEVENTH CIRCUIT CLASS ACTION CASE. In a class action case, *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 786 (7th Cir. 2004), after reversing on other grounds, the Seventh Circuit said this about class action notice using the Internet:

> When individual notice is infeasible, notice by publication in a newspaper of national circulation (here USA Weekend, a magazine that is included in hundreds of Sunday newspapers) is an acceptable substitute. Fed.R.Civ.P. 23(c)(2); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317, 70 S.Ct. 652, 94 L.Ed. 865 (1950); In re Agent Orange Product Liability Litigation, 818 F.2d 145, 167-69 (2d Cir.1987); Montelongo v. Meese, 803 F.2d 1341, 1351-52 (5th Cir.1986). Something is better than nothing. But in this age of electronic communications, newspaper notice alone is not always an adequate alternative to individual notice. (See Brian Walters, " 'Best Notice Practicable' in the Twenty-First Century," 2003 UCLA J.L. & Tech. 4, discussing N.D. Cal. Civ. L.R. 23-2, which requires that notice of securities class actions be posted to an online clearinghouse maintained by Stanford Law School.) The World Wide Web is an increasingly important method of communication, and, of particular pertinence here, an increasingly important substitute for newspapers. Although Fleet did not post a notice on its own website, a firm that was hired to administer the settlement maintained a website with details of the case, and so far as appears that was an acceptable substitute.

D. OTHER CLASS ACTION CASES. Other courts have ruled that a combination of internet notice and other more conventional forms of notice constituted the best notice practicable under the circumstances. There are a number of cases where internet posting, coupled with mailings or newspaper publications, were found to be *Fidel v. Farley*, 534 F.3d 508 (6th Cir. 2008); *Turner v. Murphy Oil USA, Inc.*, 472 F.Supp.2d 830 (E.D. La. 2007); *Grunewald v. Kasperbauer*, 235 F.R.D. 599 (E.D. Pa. 2006); *Nilsen v. York County*, 382 F.Supp.2d 206 (D.Me. 2005); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liability Litigation*, 226 F.R.D. 498 (E.D.Pa. 2005); *In re Global Crossing Securities and ERISA Litigation*, 225 F.R.D. 436 (S.D.N.Y. 2004); *Mangone v. First USA Bank*, 206 F.R.D. 222 (SS.D.Ill. 2001); *Fry v. Hayt, Hayt & Landau*, 198 F.R.D. 461 (E.D. Pa. 2000). None of the foregoing cases evaluated Internet notice alone.

VIII. THE LAW REVIEWS.

A. WILLIAM MITCHELL LAW REVIEW. Jessica Klander, in Student Note, *Civil Procedure: Facebook Friend or Foe?: the Impact of Modern Communication on Historical Standards for Service of Process–Shamrock Development v. Smith*, 36 Wm. Mitchell L. Rev. 241, 252 (2009), wrote:

> Yet, while the constitutional standard may limit divergence, it can also be a catalyst for change when rules become outdated and antiquated. [FN85] The constitutional standard of due process requires a plaintiff to use a method reasonably calculated to reach the defendant, which implies that courts must provide the methods appropriate for doing so. When the methods available are no longer reasonably calculated to reach the defendant, the courts must, in turn, make the changes necessary to comply with the standard. [FN86] Because of the influence of modern technology on communication patterns, electronic service may be a significantly better means for reaching a defendant, making the exclusion of electronic service suspect. [FN87] Due process requires that the method employed reflect an actual desire to inform the defendant, and when the defendant is best informed through electronic service, the exclusion of this method is in conflict with this underlying principle. [FN88] Because the constitutional sufficiency for affording notice is factually specific, the plaintiff is required to conform to the actual behavior of the defendant. [FN89] But when the methods for providing notice do not conform to actual behavior, due process becomes a loophole, rather than a safeguard, for defendants to evade service. [FN90]

The student author went on to state:

> Despite the lack of electronic service in the United States, it cannot be long before such case law will begin to surface, because as noted by the court in Rio Properties, "[t]o be sure, the Constitution does not require any particular means of service of process, only that the method selected be reasonably calculated to provide notice and an opportunity to respond." [FN144] As the internet fast becomes a necessity, and not a choice, statutory reform to include electronic service has become an imminent issue beckoning immediate attention. [FN145] Allowing electronic service has begun

> to become more prevalent in other countries. [FN146] For example, in a groundbreaking service-of-process case, an Australian defendant suffered a default judgment obtained through the exercise of service by publication via Facebook. [FN147] However unique, the Australian case denotes positive signs that the judiciary worldwide is beginning to recognize and incorporate electronic methods of communication into the processes of civil procedure. [FN148]
>
> Although the United States has not yet incorporated electronic service into service of process, there are signs that the trend is moving in that direction. [FN149] Recent changes to the Federal Rules of Civil Procedure suggest that there is a general trend toward allowing electronic service. [FN150] There have been parallel developments in the service of documents electronically in the federal and state judiciary system. [FN151] In 1996, the Federal Rules of Civil Procedure were amended to make "clear the equality of filing by electronic means with written filings." [FN152] Similarly, rules 5(a) and 5(b)(2)(E) work together to allow the electronic delivery of all pleadings and papers as long as the parties consent to it in writing. [FN153] Furthermore, under the rules of discovery, parties are required to provide any electronically stored documents unless unduly burdensome. [FN154] But perhaps the closest analogous change is in the use of electronic postings for class action lawsuits. "Even absent judicial decree, parties to class actions are employing internet technologies, usually websites, to help meet notice requirements." [FN155] These changes underscore the importance of electronic communication in modern litigation. Because notice forms the foundation for litigation, electronic service ought to be allowed.

Id. at 262-63.

B. HOFSTRA LAW REVIEW. Law student Lauren A. Rieders, in *Old Principles, New Technology, and the Future of Notice in Newspapers*, 38 Hofstra L. Rev. 1009, 1043 (2010). She began her article:

> The American newspaper industry is dying. [FN1] Nearly two hundred newspapers have turned their last pages in recent years [FN2] due to declining advertising and subscription revenue, and the propagation of free information on the Internet. [FN3] In 2008, the 100-year-old Christian Science Monitor announced that it would cease printing daily and instead, publish its content online. [FN4] In 2009, the 146-year-old Seattle Post-Intelligencer became an online-only publication. [FN5] Recently, Arthur J. Sulzberger, Jr., the chairman and publisher of The New York Times, revealed that the company will stop printing the newspaper "'sometime in the future, date TBD.'" [FN6] The demise of the newspaper institution is unsettling, not only because newspapers have played a paramount role throughout American history, but also because their decline may compromise citizens' statutory and constitutional rights. [FN7]

Id. at 1009-1010.

The student author concludes her article with an appeal to the use of internet versions of newspapers:

> The propriety of notice by publication is implicated by the troubled state of the newspaper industry. [FN249] If the purpose of notice by publication is to ensure that a notice is given the widest publicity practicable, and to make sure that the rights of all concerned are safeguarded, [FN250] online newspapers should be used to achieve these ends. [FN251] Statutes and procedural rules should no longer embrace only print newspapers as the default vehicle for providing constructive notice. [FN252] Especially in the context of initiating court proceedings, in the future, print newspapers may no longer be "reasonably calculated" to apprise a defendant that he may be deprived of his life, liberty or property rights. [FN253]
>
> In every state where legal notices are required to be published in a newspaper, the state should instead require that notices be published in online newspapers. [FN254] Citizens no longer need to "thumb through the printed pages . . . [or] look at all the current notices" [FN255] to find out whether their interests are implicated. Rather, they can search databases of legal notices, or even have notices delivered to their personal e-mail addresses. [FN256] Furthermore, publishing notices in online newspapers will reduce the amount of litigation concerning whether notice published in a certain newspaper afforded due process protections to an interested party. [FN257] In sum, the transition from paper-based notice to Internet notice published in online newspapers will preserve the source of revenue for newspapers, and it will improve the chance that citizens are actually apprised of the content contained therein. [FN258]

Id. at 1042-1043.

C. UNIVERSITY OF CHICAGO LAW REVIEW. Another student work, by Jordan S. Ginsberg, Comment, *Class Action Notice: The Internet's Time Has Come*, 2003 U. Chi. Legal F. 739, 772 (2003), addressed electronic notice in class action proceedings. The author concludes:

> The class action mechanism has changed markedly through amendments and alterations. [FN194] The same holds true for the notice requirement of the class action rule. At the dawn of the twenty-first century, courts and litigants should reassess their base assumptions about communication and information transmission. While courts have held that newspapers were the standard for providing notice of pending class actions, [FN195] the advent of the internet should force them to reevaluate this belief. National newspapers may be an appropriate means of transmitting notice in certain, select instances. However, in cases where class members are truly diverse and unknown, courts rely on the fictions of accessibility and prominence of national newspapers to sustain their effectiveness. [FN196] At the very least, the legal community should recognize the breadth and scope of the

internet; courts should recognize it as an exclusive and affordable means of providing adequate notice to unidentifiable parties. Internet notice can be as narrowly tailored to a targeted group or as widely cast as necessary. As the popularity of the internet continues to grow, the legal community will one day have to face the realization that the internet generally provides a better, more comprehensive, more accessible form of notice to a greater number of potential class members than the national newspapers do. The legal community must not be afraid to find that exclusive publication in national newspapers is an inefficient relic of the past, and a scheme of internet notice is necessary to provide the "best practicable" notice.

D. UNIVERSITY OF PITTSBURGH LAW REVIEW. A law professor and two practicing lawyers, Robert H. Klonoff, Mark Herrmann, and Bradley W. Harrison, published an article, *Making Class Actions Work: the Untapped Potential of the Internet*, 69 U. Pitt. L. Rev. 727 (2008), regarding giving notices in class action cases via the Internet. The authors reached this conclusion:

> The power of the Internet to allow class members to participate in class action litigation cannot be ignored. No longer can efficiency or logistical concerns prevent courts and practitioners from engaging those unnamed class members who have been historically cast aside.
>
> The current uses of the Internet in class action litigation alleviate some of the plight of the absent class member. At the very least, the Internet has begun to take steps aimed at empowering these individuals by enhancing their ability to gather information about pending or potential litigation. But the transition to actual and meaningful participation has just begun.

E. OTHER PUBLICATIONS. The following list of articles on electronic service is taken from Nancy Levit, *Electronic Evidence Annotated Bibliography*, 23 J. Am. Acad. Matrim. Law. 217, 244-45 (2010):

•Jeremy A. Colby, E-SOP's Fables: Recent Developments in Electronic Service of Process, 9 J. Internet L. 3 (June 2006) (addressing electronic service of process cases regarding parties residing inside and outside the United States).

•Kevin W. Lewis, Comment, E-Service: Ensuring the Integrity of International E-Mail Service of Process, 13 Roger Williams U. L. Rev. 285 (2008) (focusing on the two federal cases, Rio Properties, Inc. v. Rio International Interlink (from the Ninth Circuit Court of Appeals) and Broadfoot v. Diaz (from the Northern District of Georgia Bankruptcy Court), that started the email service of process idea).

•Matthew R. Schreck, Preventing "You've Got Mail" ™ From Meaning "You've Been Served": How Service of Process by E-Mail Does Not Meet Constitutional Procedural Due Process Requirements, 38 J. Marshall L. Rev. 1121 (2005) (arguing that service by email should be a method of last resort used only when other methods fail).

•Andriana L. Shultz, Comment, Superpoked and Served: Service of Process Via Social Networking Sites, 43 U. Rich. L. Rev. 1497 (2009) (discussing an Australian case authorizing service of the notice of a default judgment on Facebook).

•Aaron R. Chacker, Note, E-ffectuating Notice: Rio Properties v. Rio International Interlink, 48 Vill. L. Rev. 597 (2003).

•Jessica Klander, Note, Civil Procedure: Facebook Friend or Foe? The Impact of Modern Communication on Historical Standards for Service of Process-- Shamrock Development v. Smith, 36 Wm. Mitchell L. Rev. 241 (2009) (Minnesota).

• John M. Murphy III, Note, From Snail Mail to E-Mail: The Steady Evolution of Service of Process, 19 St. John's J. Legal Comment. 73 (2004) (Rio Properties, Inc. v. Rio International Interlink).

•David P. Stewart & Anna Conley, E-Mail Service on Foreign Defendants: Time for an International Approach?, 38 Geo. J. Int'l L. 755 (2007).

•Maria N. Vernace, Comment, E-Mailing Service of Process: It's a Shoe-In!, 36 UWLA L. Rev. 274 (2005) (9th Cir.).

IX. POSSIBLE REVISIONS TO TEX. R. CIV. P. 116.

[Amended] Rule 116. Service of Citation by Publication

The citation, when issued, shall be served by the sheriff or any constable of any county of the State of Texas or by the clerk of the court in which the case is pending, by having the same published once each week for four (4) consecutive weeks, the first publication to be at least twenty-eight (28) days before the return day of the citation. In all suits which do not involve the title to land or the partition of real estate, such publication shall be made in the county where the suit is pending, if there be a newspaper published in said county, but if not, then in an adjoining county where a newspaper is published. In all suits which involve the title to land or partition of real estate, such publication shall be made in the county where the land, or a portion thereof, is situated, if there be a newspaper in such county, but if not, then in an adjoining county to the county where the land or a part thereof is situated, where a newspaper is published. [Version A] The publication requirement *may* also be met by publishing citation at such a newspaper's internet site for a period of four (4) continuous weeks, beginning at least twenty-eight (28) days before the return day of the citation, provided that the citation may be accessed by using a search capability built into the internet site.

or

[Version B] The citation *shall* also be published at the newspaper's internet site for a period of four (4) continuous weeks, beginning at least twenty-eight (28) days

before the return day of the citation, provided that the citation may be accessed by using a search capability built into the internet site.

or

[Version C] The publication requirement *may* also be met by publishing citation at an internet site maintained by the county [or "State of Texas"] for a period of four (4) continuous weeks, beginning at least twenty-eight (28) days before the return day of the citation, provided that the citation may be accessed by using a search capability built into the internet site.

or

[Version D] The publication requirement *shall* also be met by publishing citation at an internet site maintained by the county [or "State of Texas"] for a period of four (4) continuous weeks, beginning at least twenty-eight (28) days before the return day of the citation, provided that the citation may be accessed by using a search capability built into the internet site.

or

The citation, when issued, shall be served by the sheriff or any constable of any county of the State of Texas or by the clerk of the court in which the case is pending, by having the same published at an internet site maintained by the county [or "State of Texas"] for the purpose of publishing legal notices, for a period of four (4) continuous weeks, beginning at least twenty-eight (28) days before the return day of the citation, provided that the citation may be accessed by using a search capability built into the internet site. ~~In all suits which do not involve the title to land or the partition of real estate, such publication shall be made in the county where the suit is pending, if there be a newspaper published in said county, but if not, then in an adjoining county where a newspaper is published. In all suits which involve the title to land or partition of real estate, such publication shall be made in the county where the land, or a portion thereof, is situated, if there be a newspaper in such county, but if not, then in an adjoining county to the county where the land or a part thereof is situated, where a newspaper is published.~~

IN THE SUPREME COURT OF TEXAS

Misc. Docket Nos. 08-9010 and 08-9046

FINAL REPORT OF THE ANCILLARY PROCEEDINGS TASK FORCE

Submitted to the Supreme Court of Texas on January 24, 2011

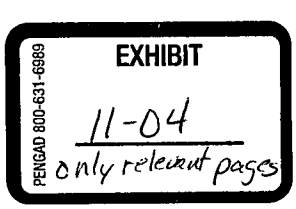
TO THE HONORABLE SUPREME COURT:

I. INTRODUCTION

The task force was established by the Texas Supreme Court pursuant to Misc. Docket No. 08-9010 and No. 08-9046. The task force was charged with the responsibility of reviewing and making recommendation of necessary revisions to ancillary proceeding rules contained in Part VI of the Texas Rules of Civil Procedure to clarify the procedures, modernize the language of the rules, resolves conflicts with other civil procedure rules, and reflect developments in the law.

The following persons served on the Task Force:

Professor Elaine Carlson, Chair-South Texas College of Law, Houston
Bruce A. Atkins, Law Offices of Bruce Atkins, Houston
Frederick J. Barrow, Littler Mendelson P.C., Dallas
Michael S. Bernstein, Michael S. Bernstein, P.C., Garland
Mark P. Blenden, The Blenden Law Firm, Dallas
Donna Brown, Donna Brown, P.C., Austin
Professor William V. Dorsaneo III, Southern Methodist Univ. School of Law, Dallas



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John T. Huffaker, Sprouse Shrader Smith P.C., Amarillo
Woody Hughes, Titus County Sheriff's Office, Mount Pleasant
The Honorable Tom Lawrence, Harris County JP Precinct 4-2, Humble
Clyde Lemon, Harris County District Clerk's Office
Chief Deputy Carlos Lopez, Travis County Constable Precinct Five, Austin
Raul Noriega, Texas RioGrande Legal Aid, San Antonio
Ronald Rodriguez, Law Offices of Ronald Rodriguez, Laredo
Stuart R. Schwartz, Scott, Hulse, Marshall, Feuille, Finger, & Thurmond P.C., El Paso
Carl Weeks, Chair, Process Server Review Board, Austin
The Honorable Randy Wilson, 157th Civil District Court, Houston
Dulcie Wink, The Wink Law Firm, Houston
Bonnie Wolbrueck, former Williamson County District Clerk (retired)
Christopher K. Wrampelmeier, Underwood Wilson, Berry, Stein, & Johnson, P.C., Amarillo
The Honorable Stephen Yelenosky, 345th Civil District Court, Austin
Staff Attorney: **Kennon Peterson,** Rules Attorney, Texas Supreme Court

II. PROCESS OF REVIEW

The task force began meeting in April 2008. Ten full task force meetings were held in Houston at South Texas College of Law and in Austin at the law offices of Haynes & Boone. In addition, the various subcommittees held numerous meetings across the state to prepare recommendations for the full committee's consideration. Thereafter, an editing subcommittee comprised of Professor Elaine Carlson, Dulcie Wink, David Fritsche, Pat Dyer, Judge Tom Lawrence and Kennon Peterson undertook the task of modernizing the language of the rules, organizing the rules in a logical sequence and harmonizing the full committee draft proposals. The edited final proposals were sent back to subcommittees for any proposed suggestions and for approval.

III. RECOMMENDATIONS

Attached are the Task Force recommended changes to the Ancillary Proceeding Rules of Procedure, currently contained in Rules 592-734, affecting attachment, garnishment, sequestration, distress warrants, injunctions, execution, turnover and receiverships, trial of right of property and mandamus proceedings. The Committee was constrained by governing statutes pertaining to ancillary proceedings. For that reason, the proposed rules are presented together with companion statutory provisions, as both must be considered in tandem to comprehend the applicable procedures.

IV. CONCLUSION

The Task Force proposed amendments to the rules of civil procedure pertaining to Ancillary Proceedings are submitted for consideration of the Supreme Court. We appreciate the opportunity to participate in this collaborative process.

Table of Contents

Texas Rules of Civil Procedure Part V: Rules Relating To Ancillary Proceedings

PART VI. Rules Relating To Ancillary Proceedings

SECTION 1. INJUNCTIONS

Rule INJ 1 (592). Temporary Restraining Orders[1]

(a) *Application.* A temporary restraining order may be sought by a motion or application[2] that must:

(1) contain a plain and intelligible statement of the grounds for injunctive relief;

(2) state why immediate and irreparable injury, loss, or damage will result if the temporary restraining order is not granted;

(3) state why the applicant has no adequate remedy at law;

(4) state why the applicant has a probable right to recover on a cause of action; and

(5) if sought without notice to the adverse party or its attorney, demonstrate through specific facts, supported by verification or affidavit, that:

(A) notice was not possible or practicable; or

(B) the applicant will sustain substantial damage before notice can be served and a hearing held.

(b) *Verification.* All facts supporting the application must be verified or supported by affidavit by one or more persons having personal knowledge of relevant facts that are admissible in evidence. Pleading on information and belief is insufficient to support the granting of the application.[3]

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[1] This rule has been rewritten completely and contains information from existing Rules 680 through 683.

[2] Throughout the injunction rules, the term "application" refers to an application or a motion.

[3] This draft requires each element of the application to be supported by sworn allegations. The existing Texas Rules of Civil Procedure only expressly require sworn averments for TROs that are issued *without notice*. *In re Texas Natural Resource Conservation Commission* cites *Millwrights Local Union No. 2484 v. Rust Engineering Company* for the proposition that a TRO may issue on merely a sworn petition, whereas a temporary injunction requires evidence. *See In re Tex. Natural Resource Conservation Comm'n*, 85 S.W.3d 201, 204 (Tex. 2002) (orig. proceeding); *Millwrights Local Union No. 2484 v. Rust Eng'g Co.*, 433 S.W.2d 683, 685-87 (Tex. 1968). Neither case addresses the issue of whether a TRO may be granted without sworn allegations of the elements so long as the opposing party is given notice of the TRO hearing. No Texas case addresses this issue directly, most likely because TROs are not usually appealable. However, existing Rule 682 provides that *no* writ of injunction may be granted without a pleading verified by affidavit. Because a TRO is a writ of injunction, the sworn pleading rule should apply.

(c) *Time for Hearing.* The court may conduct a hearing on the application at such time and upon such notice, if any, as directed by the court.

(d) *Order.* A court may grant the application with or without written or oral notice to the adverse party or its attorney. Unless provided otherwise by the Texas Family Code or other statute, every order granting an application for a temporary restraining order must:

(1) state the date and hour of issuance;

(2) state why immediate and irreparable injury, loss, or damage will result if the temporary restraining order is not granted;

(3) state why the applicant has no adequate remedy at law;

(4) state why the applicant has a probable right to recover on a cause of action;

(5) describe in reasonable detail, and not by reference to the petition or other document, the act or acts sought to be mandated or restrained;

(6) set a specific date and time for hearing on the application for the temporary or permanent injunction sought;

(7) state the amount and terms of the applicant's bond, if a bond is required;

(8) if granted without notice to the adverse party or its attorney:

(A) state why it was granted without notice; and

(B) set a hearing of the application for a temporary injunction that is at the earliest possible date, taking precedence over all matters except older matters of the same character;

(9) state the duration of the order;

(10) state that the order is binding on the parties to the action, their officers, agents, servants, employees, and attorneys, and on those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise; and

(11) be filed promptly in the clerk's office.

(e) *Duration and Extension.*

(1) The duration of a temporary restraining order may not exceed fourteen days from the date of issuance.

(2) The court may extend the duration of a temporary restraining order for a like period not to exceed fourteen days. The reasons for the extension must be stated in the order.

(3) The parties may agree to extend the duration beyond the above-referenced time periods.

(f) *Applicant's Bond.* No temporary restraining order may be issued unless the applicant first posts a bond or other security pursuant to Rule **INJ 4 (595)**.

(g) *Motion to Dissolve or Modify.*[4] On two days' notice to the party who obtained the temporary restraining order, or shorter if the court directs, a party may move for dissolution or modification of the temporary restraining order. The court must hear and determine the motion as expeditiously as practicable. If the grounds for the motion to dissolve or modify are based on an issue of fact, the motion must be supported by specific facts shown by affidavit, verified denial, testimony, or other evidence.

(h) *Conflict.* If there is a conflict between a provision of this rule and the Texas Family Code, the Texas Family Code shall prevail.

PROPOSED COMMENTS TO RULE **INJ 1 (592(a))**: Throughout the injunction rules, the term "application" refers to an application or a motion.

A party seeking a temporary restraining order should include a request for a temporary or permanent injunction in its live pleadings. The application for a temporary restraining order may be included in the party's petition or in a separate pleading.

Rule INJ 2 (593). Temporary Injunctions[5]

(a) *Application.* A temporary injunction may be sought by a motion or application that must:

(1) contain a plain and intelligible statement of the grounds for injunctive relief;

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[4] The existing rules also contain a "Bond on Dissolution" provision. The Injunctive Rule Subcommittee recommends deleting that rule completely. *See* July 2, 2008 Memorandum from Dulcie Green Wink to the Ancillary Task Force, Injunctive Rule Subcommittee (hereinafter referred to as "Attachment A").

[5] This draft rule incorporates information from existing Rules 681 and 682, and is prepared to be relatively parallel to pleading requirements for a TRO.

(2) state why immediate and irreparable injury, loss, or damage will result if the temporary injunction is not granted;

(3) state why the applicant has no adequate remedy at law; and

(4) state why the applicant has a probable right to recover on a cause of action.

(b) *Verification.* All facts supporting the application must be verified or supported by affidavit by one or more persons having personal knowledge of relevant facts that are admissible in evidence; however, facts may be stated based on information and belief if the grounds for belief are specifically stated.

(c) *Notice and Hearing.* The application cannot be granted without notice to the adverse party and an evidentiary hearing. The court must conduct the hearing at such time and upon such reasonable notice as the court may direct. An application for temporary injunction cannot be granted without evidence of each element in the hearing.

(d) *Order.* Every order granting an application for a temporary injunction must:

(1) state the date and hour of issuance;

(2) state why immediate and irreparable injury, loss, or damage will result if the temporary injunction is not granted;

(3) state why the applicant has no adequate remedy at law;

(4) state why the applicant has a probable right to recover on a cause of action;

(5) describe in reasonable detail, and not by reference to the petition or other document, the act or acts sought to be mandated or restrained;

(6) state that the temporary injunction shall apply until trial on the merits with respect to the ultimate relief sought;

(7) set the cause for trial on the merits with respect to the ultimate relief sought;

(8) state the amount and terms of the applicant's bond, if a bond is required; and

(9) be filed promptly in the clerk's office.

(e) *Effect of Appeal.* Unless ordered otherwise, the appeal of a temporary injunction may not delay the trial.

(f) *Applicant's Bond.* No temporary injunction may be issued unless the applicant first posts a bond or other security pursuant to Rule **INJ 4 (595)**.

(g) *Motion to Dissolve or Modify.*[6] On reasonable notice to the party who obtained the temporary injunction, which may be less than three days, a party may move for dissolution or modification of the temporary injunction. The court must hear and determine the motion as expeditiously as practicable. If the grounds for the motion to dissolve or modify are based on an issue of fact, the motion must be supported by specific facts shown by affidavit, verified denial, testimony, or other evidence.

(h) *Conflict.* If there is a conflict between a provision of this rule and the Texas Family Code, the Texas Family Code shall prevail.

PROPOSED COMMENTS TO RULE **INJ 2 (593(a))**: Throughout the injunction rules, the term "application" refers to an application or a motion.

A party seeking a temporary injunction should include a request for a temporary and/or permanent injunction in its live pleadings. The application for the temporary injunction, itself, may be included in the party's petition or in a separate pleading.

The parties may agree to expedited discovery in preparation for the injunction hearing. On a motion by a party, the court has the discretion to order expedited discovery to facilitate the parties' preparation for the injunction hearing. The expedited discovery can, but is not required to, be limited to the injunctive issues. In determining whether and to what extent the discovery should be limited to the injunctive issues, the court should consider the facts and circumstances of the case, the ability to sever the injunctive issues from the other issues in the case, judicial economy, the costs to the parties and the potential harassment that can arise in injunctive cases. An order granting expedited discovery should specify whether and to what extent the discovery is limited to injunctive issues.

Rule INJ 3 (594). Permanent Injunctions

(a) *Pleading.* To be awarded a permanent injunction, a party's pleading must:

(1) contain a plain and intelligible statement of the grounds for injunctive relief;

[6] The existing rules also contain a "Bond on Dissolution" provision. The Injunctive Rule Subcommittee recommends deleting that rule completely. *See* Attachment A.

(2) state why immediate and irreparable injury, loss, or damage will result if the permanent injunction is not granted; and

(3) state why the applicant has no adequate remedy at law.

(b) *Verification.* All facts supporting the plea for a permanent injunction must be verified or supported by affidavit by one or more persons having personal knowledge of relevant facts that are admissible in evidence; however, facts may be stated based on information and belief if the grounds for belief are specifically stated. A permanent injunction cannot be granted without evidence of each element in the trial.

(c) *Conflict.* If there is a conflict between a provision of this rule and the Texas Family Code, the Texas Family Code shall prevail.

Rule INJ 4 (595). Applicant's Bond or Other Security[7]

(a) *Requirement of Bond.* Unless otherwise provided by statute,[8] a writ of injunction may not be issued unless the applicant has filed with the clerk a bond:

(1) payable to the respondent in the amount set by the court's order;

(2) with sufficient surety or sureties to be approved by the clerk; and

(3) conditioned that the applicant will abide the decision which may be made in the cause, and that the applicant will pay all sums of money and costs that may be adjudged against the applicant if the temporary restraining order or temporary injunction shall be dissolved in whole or in part.

(b) *Other Security.* In lieu of a bond, the applicant may deposit cash or other security in compliance with Rule 14c.

(c) *Bond in Family Code Case.* To the extent permitted by the Texas Family Code, the court in its discretion may dispense with the necessity of a bond in connection with an ancillary injunction.[9]

[7] This draft rule is derived from existing Rule 684.

[8] The Injunctive Rule Subcommittee recommends that the Supreme Court of Texas include a comment to the draft rule containing language such as: This rule recognizes that there are some statutes that dispense with the necessity of a bond under certain circumstances. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. §§ 65.041-65.043.

[9] This language comes from existing Rule 693a.

(d) *Restraining Governmental Entities.* Where the temporary restraining order or temporary injunction is against the State, a municipality, a State agency, or a subdivision of the State in its governmental capacity, and the State, municipality, State agency, or subdivision of the State in its governmental capacity has no pecuniary interest in the suit and no monetary damages can be shown, the bond shall be allowed in the sum set by the court, and the liability of the applicant will be for its face amount if the temporary restraining order or temporary injunction shall be dissolved in whole or in part. The court rendering judgment on the bond may allow recovery for less than its full face amount under equitable circumstances and for good cause shown by affidavit or otherwise.

(e) *Review of Applicant's Bond.* On reasonable notice, which may be less than three days, any party shall have the right to prompt judicial review of the applicant's bond. Any party may move to increase or reduce the amount of the bond, or question the sufficiency of the surety or sureties. The court's determination may be made on the basis of uncontroverted affidavits setting forth facts as would be admissible in evidence; otherwise, the parties must submit evidence. After a hearing, the court must issue a written order on the motion.

PROPOSED COMMENT TO RULE **INJ 4 (595)**: This rule recognizes that there are some statutes that dispense with the necessity of a bond under certain circumstances. *See, e.g.* TEX. CIV. PRAC. & REM. CODE ANN. §§ 65.041-65.043.

Rule INJ 5 (596). Contents of Writ of Injunction[10]

(a) *General Requirements.* Unless provided otherwise by statute, every writ of injunction, whether it be a temporary restraining order, temporary injunction, or permanent injunction must:

(1) be styled "The State of Texas";

(2) be dated and signed by the clerk officially;

(3) bear the seal of the court;

(4) state the names of the parties to the proceedings, the name of the applicant, the nature of the application, and the court's action on the application;

(5) be directed to the person or persons enjoined; and

(6) have a copy of the order granting the application for the writ attached.

[10] This draft rule is derived from existing Rules 683 and 687. The Injunctive Rule Subcommittee has provided a proposed form for writs of injunction.

(b) *Command of Writ.* The writ must command the person or persons to whom it is directed to, until the time specified:

(1) cease and refrain from performing the acts enjoined in the court's issuing order or judgment, a copy of which must be attached to the writ; and

(2) to the extent the injunction is mandatory in nature, obey and execute the terms of the issuing order or judgment, a copy of which must be attached to the writ.

(c) *Setting of Hearing or Trial.* If the writ is a temporary restraining order, it must state the date and time for the temporary injunction hearing. If the writ is a temporary injunction, it must state the date and time for trial on the merits.

(d) *Return of Writ.* The writ must be made returnable to the court that ordered the issuance of the writ in the same manner as a citation.

(e) *Form of Writ.*

(1) If the writ is a temporary restraining order, it shall be substantially in the following form:

"The State of Texas.

"To _____, [Respondent]:

"Whereas, in the _____ Court of _____ County, in a certain cause wherein _____ is plaintiff and _____ is defendant, as shown by a true copy of the attached Petition;

"And whereas _____ [Applicant] applied for a temporary restraining order against _____ [Respondent] as shown by true copy of the attached application;

"And whereas the Honorable Judge of said court, upon presentment of the application, entered an order granting the application for temporary restraining order, a true copy of which is attached.

"THEREFORE YOU ARE COMMANDED TO OBEY ALL OF THE TERMS OF SAID ORDER, and that you cease and refrain from performing all of the acts said Order restrains you from performing, [*and/or, to the extent the injunction is mandatory in nature*: "and that you obey and execute the terms of the said Order,"] until hearing on an application for temporary injunction to be held before the Judge of said Court, on the _____ day of _____, 2____ at _____

o'clock _____ M, in the courtroom for the _____ Court in _____ County, in _____, Texas, and when and where you will appear and show cause why a temporary injunction should not be issued as prayed for in the application, and why the other relief prayed for therein should not be granted.

"ISSUED AND GIVEN UNDER MY HAND and seal of said Court at my office in _____ [City], _____ County, Texas, this the _____ day of _____, 2____."

(2) If the writ is a temporary injunction, it shall be substantially in the following form:

"The State of Texas.

"To _____, [Respondent]:

"Whereas, in the _____ Court of _____ County, in a certain cause wherein _____ is plaintiff and _____ is defendant, as shown by a true copy of the attached Petition;

"And whereas _____ [Applicant] applied for a temporary injunction against _____ [Respondent] as shown by true copy of the attached application;

"And whereas the Honorable Judge of said court, upon presentment of the application, granted a temporary injunction and entered an Order, a true copy of which is attached;

"THEREFORE YOU ARE COMMANDED TO OBEY ALL OF THE TERMS OF THE ATTACHED ORDER, and that you cease and refrain from performing all of the acts said Order restrains you from performing, [*and/or, to the extent the injunction is mandatory in nature*: "and that you obey and execute the terms of the said Order,"] until trial on the merits with respect to the ultimate relief sought, which shall be conducted on the _____ day of _____, 2____ at _____ o'clock _____ M, in the courtroom for the _____ Court in _____ County, in _____, Texas, or such other date and time as said Court shall order.

"ISSUED AND GIVEN UNDER MY HAND and seal of said Court at my office in _____ [City], _____ County, Texas, this the _____ day of _____, 2____."

(3) If the writ is a permanent injunction, it shall be substantially in the following form:

"The State of Texas.

"To _____, [Respondent]:

"Whereas, in the _____ Court of _____ County, in a certain cause wherein _____ is plaintiff and _____ is defendant;

"And whereas _____ [Applicant] applied for a permanent injunction against _____ [Respondent];

"And whereas the Honorable Judge of said court, upon presentment of the application in trial granted a permanent injunction against _____ [Respondent] and entered a Judgment, a true copy of which is attached;

"THEREFORE YOU ARE COMMANDED TO OBEY ALL OF THE TERMS OF THE ATTACHED JUDGMENT, and that you permanently cease and refrain from performing all of the acts said Judgment restrains you from performing [*and/or, to the extent the injunction is mandatory in nature*: "and that you permanently obey and execute the terms of the said Order"].

"ISSUED AND GIVEN UNDER MY HAND and seal of said Court at my office in _____ [City], _____ County, Texas, this the ____ day of _____, 2____."

(f) *Conflict.* If there is a conflict between a provision of this rule and the Texas Family Code, the Texas Family Code shall prevail.

Rule INJ 6 (597). Delivery, Service, and Return of Writ[11]

(a) *Delivery of Writ.*

(1) The clerk issuing a writ of injunction must deliver the writ to the sheriff, constable, or other person authorized by Rule 103, or the applicant, who must then deliver the writ to the sheriff, constable, or other person authorized by Rule 103.

(2) If several persons are enjoined, residing in different counties, the clerk must issue additional copies of the writ as requested by the applicant.

(b) *Service of Writ.*

[11] This draft rule is derived from existing Rule 689.

(1) A temporary restraining order or other writ of injunction is not effective until served upon the person(s) to be enjoined. The writ may be served by any person authorized by Rule 103 of the Texas Rules of Civil Procedure. Only a sheriff or constable may serve a temporary restraining order or other writ of injunction that requires the actual taking of possession of a person, property, or thing, or a writ requiring that an enforcement action be physically enforced by the person delivering the writ.

(2) The person authorized to serve the writ, upon receipt, must:

(A) endorse the writ with the date of receipt; and

(B) as soon as practicable, serve the writ on the party enjoined.

(c) *Return of Writ.*

(1) The return must be in writing and signed by the sheriff, constable, or other person authorized by Rule 103 executing the writ. The return must be filed with the issuing clerk within the time stated in the writ.

(2) The action of the sheriff, constable, or other person authorized by Rule 103 must be endorsed on or attached to the writ, showing how and when the writ was executed.

Rule INJ 7 (598). Scope of the Writ of Injunction[12]

Every writ of injunction, whether temporary or permanent in nature, is binding only on the parties to the action, their officers, agents, servants, employees, and attorneys, and on those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Rule INJ 8 (599). Orders that are Issued Before the Petition is Filed[13]

A temporary restraining order or an order setting a time for hearing upon an application for temporary injunction may be issued prior to suit being filed. If so, the following must occur:

[12] This draft rule is derived from existing Rule 683.

[13] This draft rule contains the substance of existing Rules 685 and 686, both of which seem to apply only when the applicant seeks a TRO or a date for an injunction hearing *before* filing the original petition. Thus, the two rules have been combined here for clarity.

(a) *Filing and Docketing.* The party for whom the order is granted must file the order and the petition as soon as practicable with the clerk of the proper court.

(b) *Issuance of Citation.* The clerk must then docket the case to the court to which the case is permanently assigned. The clerk must also issue a citation to the defendant as in other civil cases, which will be served and returned in like manner as ordinary citations. When a true copy of the petition is attached to the temporary restraining order or the order setting a time for the temporary injunction hearing, it is not necessary to attach a separate copy of the petition to the citation; instead, it is sufficient for the citation to refer to plaintiff's petition.[14]

Rule INJ 9 (600). The Answer[15]

The defendant to a cause involving an application for a temporary restraining order, a temporary injunction, or a permanent injunction may answer as in other civil actions. No injunction shall be dissolved before final hearing because of the denial of the material allegations of the application, unless the answer denying the allegations is supported by a verification or affidavit.

Rule INJ 10 (601). Disobedience[16]

The court may punish disobedience of a temporary restraining order, a temporary injunction, or a permanent injunction as contempt. The complainant may file in the court in which the injunction is pending an affidavit stating what person is guilty of disobedience and describing the acts constituting the disobedience. The court may then issue a writ of attachment for the disobedient person, directed to the sheriff or any constable of any county, and requiring that officer to arrest the person therein named if found within any county and have the person brought before the court at the time and place named in the writ. Alternatively, the court may issue a show cause order requiring the person to appear on a designated date and show cause why the person should not be adjudged in contempt of court. On return of the writ of attachment or show cause order, the court must proceed to hear proof. If satisfied that the person has disobeyed the injunction, either directly or indirectly, the court may commit the person to jail without bail until the person is purged of the contempt in the manner and form as the court may direct.

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[14] Existing Rule 685(b) has been incorporated here. The last sentence of existing Rule 685(b) has been moved to Rules **INJ 1(c) (592(c))** and **INJ 2(a) (593(a))**.

[15] This draft rule is modeled after existing Rule 690.

[16] This draft rule is modeled after existing Rule 692.

Rule INJ 11 (602). Principles of Equity Applicable[17]

The principles, practice, and procedure governing courts of equity govern proceedings in injunctions when not in conflict with these rules or the provisions of the statutes.

Rule INJ 12 (603). Bond on Dissolution[18]

[NO RULE CONTENT RECOMMENDED]

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[17] This draft rule is modeled after existing Rule 693.

[18] The Injunctive Rule Subcommittee recommends deleting existing Rule 691. *See* Attachment A. Rule 691 reads:

> Upon the dissolution of an injunction restraining the collection of money, by an interlocutory order of the court or judge, made in term time or vacation, if the petition be continued over for trial, the court or judge shall require of the defendant in such injunction proceedings a bond, with two or more good and sufficient sureties, to be approved by the clerk of the court, payable to the complainant in double the amount of the sum enjoined, and conditioned to refund to the complainant the amount of money, interest and costs which may be collected of him in the suit or proceeding enjoined if such injunction is made perpetual on final hearing. If such injunction is so perpetuated, the court, on motion of the complainant, may enter judgment against the principal and sureties in such bond for such amount as may be shown to have been collected from such defendant.

A number is retained for the rule in case the Supreme Court Advisory Committee disagrees with the recommendation.

Injunction Statutes
Texas Civil Practice & Remedies Code

§ 65.011. Grounds Generally

A writ of injunction may be granted if:

(1) the applicant is entitled to the relief demanded and all or part of the relief requires the restraint of some act prejudicial to the applicant;

(2) a party performs or is about to perform or is procuring or allowing the performance of an act relating to the subject of pending litigation, in violation of the rights of the applicant, and the act would tend to render the judgment in that litigation ineffectual;

(3) the applicant is entitled to a writ of injunction under the principles of equity and the statutes of this state relating to injunctions;

(4) a cloud would be placed on the title of real property being sold under an execution against a party having no interest in the real property subject to execution at the time of sale, irrespective of any remedy at law; or

(5) irreparable injury to real or personal property is threatened, irrespective of any remedy at law.

§ 65.012. Operation of Well or Mine

(a) A court may issue an injunction or temporary restraining order prohibiting subsurface drilling or mining operations only if an adjacent landowner filing an application claims that a wrongful act caused injury to his surface or improvements or loss of or injury to his minerals and if the party against whom the injunction is sought is unable to respond in damages for the resulting injuries.

(b) To secure the payment of any injuries that may be sustained by the complainant as a result of subsurface drilling or mining operations, the party against whom an injunction is sought under this section shall enter into a good and sufficient bond in an amount fixed by the court hearing the application.

(c) The court may appoint a trustee or receiver instead of requiring a bond if the court considers it necessary to protect the interests involved in litigation concerning an injunction under this section. The trustee or receiver has the powers prescribed by the court and shall take charge of and hold the minerals produced from the drilling or mining operation or the proceeds from the disposition of those minerals, subject to the final disposition of the litigation.

§ 65.013. Stay of Judgment or Proceeding

An injunction may not be granted to stay a judgment or proceeding at law except to stay as much of the recovery or cause of action as the complainant in his petition shows himself equitably entitled to be relieved against and as much as will cover the costs.

§ 65.014. Limitations on Stay of Execution of Judgment

(a) Except as provided by Subsection (b), an injunction to stay execution of a valid judgment may not be granted more than one year after the date on which the judgment was rendered unless:

(1) the application for the injunction has been delayed because of fraud or false promises of the plaintiff in the judgment practiced or made at the time of or after

rendition of the judgment; or

(2) an equitable matter or defense arises after the rendition of the judgment.

(b) If the applicant for an injunction to stay execution of a judgment was absent from the state when the judgment was rendered and was unable to apply for the writ within one year after the date of rendition, the injunction may be granted at any time within two years after that date.

§ 65.015. Closing of Streets

An injunction may not be granted to stay or prevent the governing body of an incorporated city from vacating, abandoning, or closing a street or alley except on the suit of a person:

(1) who is the owner or lessee of real property abutting the part of the street or alley vacated, abandoned, or closed; and

(2) whose damages have neither been ascertained and paid in a condemnation suit by the city nor released.

§ 65.016. Violation of Revenue Law

At the instance of the county or district attorney or the attorney general, a court by injunction may prevent, prohibit, or restrain the violation of any revenue law of this state.

§ 65.017. Cigarette Seller, Distribution, or Manufacturer

In addition to any other remedy provided by law, a person may bring an action in good faith for appropriate injunctive relief if the person sells, distributes, or manufactures cigarettes and sustains a direct economic or commercial injury as a result of a violation of:

(1) Section 48.015, Penal Code; or

(2) Section 154.0415, Tax Code.

§ 65.018. to 65.020 [Reserved for expansion]

§ 65.021. Jurisdiction of Proceeding

(a) The judge of a district or county court in term or vacation shall hear and determine applications for writs of injunction.

(b) This section does not limit injunction jurisdiction granted by law to other courts.

§ 65.022. Return of Writ; Hearing by Nonresident Judge

(a) Except as provided by this section, a writ of injunction is returnable only to the court granting the writ.

(b) A district judge may grant a writ returnable to a court other than his own if the resident judge refuses to act or cannot hear and act on the application because of his absence, sickness, inability, inaccessibility, or disqualification. Those facts must be fully set out in the application or in an affidavit accompanying the application. A judge who refuses to act shall note that refusal and the reasons for refusal on the writ. A district judge may not grant the writ if the application has been acted on by another district judge.

(c) A district judge may grant a writ returnable to a court other than his own to stay execution or restrain foreclosure, sale under a deed of trust, trespass, removal of property,

or an act injurious to or impairing riparian or easement rights if satisfactory proof is made to the nonresident judge that it is impracticable for the applicant to reach the resident judge and procure the action of the resident judge in time to put into effect the purposes of the application.
(d) A district judge may grant a writ returnable to a court other than his own if the resident judge cannot be reached by the ordinary and available means of travel and communication in sufficient time to put into effect the purpose of the writ sought. In seeking a writ under this subsection, the applicant or attorney for the applicant shall attach to the application an affidavit that fully states the facts of the inaccessibility and the efforts made to reach and communicate with the resident judge. The judge to whom application is made shall refuse to hear the application unless he determines that the applicant made fair and reasonable efforts to reach and communicate with the resident judge. The injunction may be dissolved on a showing that the applicant did not first make reasonable efforts to procure a hearing on the application before the resident judge.

§ 65.023. Place for Trial
(a) Except as provided by Subsection (b), a writ of injunction against a party who is a resident of this state shall be tried in a district or county court in the county in which the party is domiciled. If the writ is granted against more than one party, it may be tried in the proper court of the county in which either party is domiciled.
(b) A writ of injunction granted to stay proceedings in a suit or execution on a judgment must be tried in the court in which the suit is pending or the judgment was rendered.

§ 65.024. to 65.030 [Reserved for expansion]

§ 65.031. Dissolution; Award of Damages
If on final hearing a court dissolves in whole or in part an injunction enjoining the collection of money and the injunction was obtained only for delay, the court may assess damages in an amount equal to 10 percent of the amount released by dissolution of the injunction, exclusive of costs.

§ 65.032. to 65.040 [Reserved for expansion]

§ 65.041. Bond Not Required for Issuance of Temporary Restraining Order for Certain Indigent Applicants
A court may not require an applicant for a temporary restraining order to execute a bond to the adverse party before the order may issue if:
(1) the applicant submits an affidavit that meets the requirements of Section 65.043 to the court; and
(2) the court finds that the order is intended to restrain the adverse party from foreclosing on the applicant's residential homestead.

§ 65.042. Bond Not Required for Issuance of Temporary Injunction for Certain Indigent Applicants (a) A court may not require an applicant for a temporary injunction to execute a bond to the adverse party before the injunction may issue if:
(1) the applicant submits an affidavit that meets the requirements of Section 65.043 to

the court; and

(2) the court finds that the injunction is intended to enjoin the adverse party from foreclosing on the applicant's residential homestead.

(b) If the affidavit submitted under Subsection (a)(1) is contested under Section 65.044, the court may not issue a temporary injunction unless the court finds that the applicant is financially unable to execute the bond.

§ 65.043. Affidavit

(a) The affidavit must contain complete information relating to each and every person liable for the indebtedness secured by or with an ownership interest in the residential homestead concerning the following matters:

(1) identity;

(2) income, including income from employment, dividends, interest, and any other source other than from a government entitlement;

(3) spouse's income, if known to the applicant;

(4) description and estimated value of real and personal property, other than the applicant's homestead;

(5) cash and checking account;

(6) debts and monthly expenses;

(7) dependents; and

(8) any transfer to any person of money or other property with a value in excess of $ 1,000 made within one year of the affidavit without fair consideration.

(b) The affidavit must state: "I am not financially able to post a bond to cover any judgment against me in this case. All financial information that I provided to the lender was true and complete and contained no false statements or material omissions at the time it was provided to the lender. Upon oath and under penalty of perjury, the statements made in this affidavit are true."

(c) In the event the applicant is married, both spouses must execute the affidavit.

(d) The affidavit must be verified.

§ 65.044. Contest of Affidavit

(a) A party may not contest an affidavit filed by an applicant for a temporary restraining order as provided by Section 65.041.

(b) A party may contest an affidavit filed by an applicant for a temporary injunction as provided by Section 65.042:

(1) after service of a temporary restraining order in the case; or

(2) if a temporary restraining order was not applied for or issued, after service of notice of the hearing on the application for the temporary injunction.

(c) A party contests an affidavit by filing a written motion and giving notice to all parties of the motion in accordance with Rule 21a of the Texas Rules of Civil Procedure.

(d) The court shall hear the contest at the hearing on the application for a temporary injunction and determine whether the applicant is financially able to execute a bond against the adverse party as required by the Texas Rules of Civil Procedure. In making its determination, the court may not consider:

(1) any income from a government entitlement that the applicant receives; or

(2) the value of the applicant's residential homestead.

(e) The court may order the applicant to post and file with the clerk a bond as required by the Texas Rules of Civil Procedure only if the court determines that the applicant is financially able to execute the bond.
(f) An attorney who represents an applicant and who provides legal services without charge to the applicant and without a contractual agreement for payment contingent on any event may file an affidavit with the court describing the financial nature of the representation.

§ 65.045. Conflict with Texas Rules of Civil Procedure
(a) To the extent that this subchapter conflicts with the Texas Rules of Civil Procedure, this subchapter controls.
(b) Notwithstanding Section 22.004, Government Code, the supreme court may not amend or adopt rules in conflict with this subchapter.
(c) The district courts and statutory county courts in a county may not adopt local rules in conflict with this subchapter.

SECTION 2. ATTACHMENT

Rule ATT 1 (604). Application for Writ of Attachment and Order

(a) *Pending Suit Required for Issuance of Writ.* An application for a writ of attachment may be filed at the initiation of a suit or at any time during the progress of a suit.

(b) *Application.* An application for a writ of attachment must:

(1) state the nature of the applicant's underlying claim;

(2) state the statutory grounds for issuance of the writ as provided in Chapter 61 of the Civil Practice and Remedies Code and the specific facts justifying attachment; and

(3) state the dollar amount sought to be satisfied by attachment.

(c) *Verification.* The application must be verified or supported by affidavit by one or more persons having personal knowledge of relevant facts that are admissible in evidence; however, facts may be stated based on information and belief if the grounds for the belief are specifically stated.

(d) *Order.*

(1) *Issuance Without Notice.* No writ shall issue before a final judgment except on written order of the court after a hearing, which may be ex parte.

(2) *Effect of Pleading.* The application shall not be quashed because two or more grounds are stated conjunctively or disjunctively.

(3) *Return.* The order must provide that the writ is returnable to the court that issued the writ.

(4) *Findings of Fact.* The order must include specific findings of fact supporting the statutory grounds for issuance of the writ.

(5) *Amount of Property to be Attached.* The order must state the dollar amount to be satisfied by attachment.

(6) *Levy and Safekeeping.* The order must command the sheriff and any constable of any county to levy on the property found in the officer's county and keep the property safe and preserved subject to further order of the court.

(7) *Applicant's Bond.* The order must state the amount of the bond required from the applicant. The bond must be in an amount which, in the court's opinion, will adequately compensate the respondent in the event the applicant fails to prosecute the suit to effect and pay all damages and costs as may be adjudged against the applicant for wrongful attachment.

(8) *Respondent's Replevy Bond.* The order must set the amount of the respondent's replevy bond equal to the lesser of the value of the property or the amount of the applicant's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court.

(e) *Multiple Writs.* Multiple writs may issue at the same time, or in succession, without requiring the return of the prior writ or writs. Writs may be sent to different counties for service by the sheriffs or constables. In the event multiple writs are issued, the applicant must inform the officers to whom the writs are delivered that multiple writs are outstanding.

Rule ATT 2 (605). Applicant's Bond or Other Security

(a) *Requirement of Bond.* A writ of attachment may not be issued unless the applicant has filed with the clerk or justice of the peace a bond:

(1) payable to the respondent in the amount set by the court's order;

(2) with sufficient surety or sureties as approved by the clerk or justice of the peace; and

(3) conditioned on the applicant prosecuting the applicant's suit to effect and paying all damages and costs as may be adjudged against the applicant for wrongful attachment.

(b) *Other Security.* In lieu of a bond, the applicant may deposit cash or other security in compliance with Rule 14c.

(c) *Review of Applicant's Bond.* On reasonable notice, which may be less than three days, any party shall have the right to prompt judicial review of the applicant's bond. Any party may move to increase or reduce the amount of the bond, or question the sufficiency of the surety or sureties. The court's determination may be made on the basis of uncontroverted affidavits setting forth facts as would be admissible in evidence; otherwise, the parties must submit evidence. After a hearing, the court must issue a written order on the motion.

Rule ATT 3 (606). Contents of Writ

(a) *General Requirements.* A writ of attachment must be dated and signed by the district or county clerk or the justice of the peace, must bear the seal of the court, and must be directed to the sheriff or any constable of any county within the State of Texas.

(b) *Command of Writ.* The writ must command the sheriff or constable to levy on so much of the respondent's property as may be found within the county and that approximates the amount set by the court order, and to keep the property safe and preserved subject to further order of the court.

(c) *Return of Writ.* The writ must be made returnable to the court that ordered the issuance of the writ within thirty, sixty, or ninety days from the date of issuance, as directed by the applicant.

(d) *Notice to Respondent.* The face of the writ must display, in not less than 12-point type and in a manner calculated to advise a reasonably attentive person, the following notice:

"To _____, Respondent:

"YOU ARE HEREBY NOTIFIED THAT PROPERTY ALLEGED TO BE OWNED BY YOU HAS BEEN ATTACHED. IF YOU CLAIM ANY RIGHTS IN THE PROPERTY, YOU ARE ADVISED:

"YOUR FUNDS OR OTHER PROPERTY MAY BE EXEMPT UNDER FEDERAL OR STATE LAW.

"YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE OR MODIFY THIS WRIT."

(e) *Form of Writ.* The following form of writ may be issued, but any form used must contain the Notice to Respondent:

"The State of Texas.

"To the Sheriff or any Constable of any County of the State of Texas, greetings:

"We command that you promptly attach so much of the property of [Respondent], if it be found in your county, as shall be of sufficient value to make the sum of _____ dollars, and the probable costs of suit, to satisfy the demand of [Applicant], and that you keep the attached property safe and preserved, unless replevied, that the same may be liable to further proceedings before the court in

_____ County, Texas. You will return this writ on or before [30, 60, 90] days from the date of issuance of the writ showing how you have executed the same."

Rule ATT 4 (607). Delivery, Levy, and Return of Writ

(a) *Delivery of Writ.* The clerk or justice of the peace issuing a writ of attachment must deliver the writ to:

(1) the sheriff or constable; or

(2) the applicant, who must then deliver the writ to the sheriff or constable.

(b) *Timing and Extent of Levy.* The sheriff or constable who receives the writ of attachment must:

(1) endorse the writ with the date of receipt;

(2) as soon as practicable proceed to levy on property subject to the writ and found within the sheriff's or constable's county; and

(3) levy on property in an amount that the sheriff or constable determines to be sufficient to satisfy the writ.

(c) *Method of Levy.*

(1) *Real Property.* Levy on real property is made by the sheriff or constable describing the property on the return and immediately filing for record a copy of the writ and return with the county clerk of each county in which the property is located.

(2) *Personal Property.* The sheriff or constable may levy on personal property by:

(A) seizing the property and holding it in a location under the control of the sheriff or constable;

(B) seizing the property in place, in which case the sheriff or constable must affix a notice of the seizure to or near the property; or

(C) seizing the property and holding it in a bonded warehouse, or other secure location in which case the applicant may be held responsible for the costs. In the event the property is released to the respondent by the court, the respondent must pay all expenses

associated with storage of the property. Storage fees may be taxed as costs against the non-prevailing party.

(d) *Return of Writ.*

(1) The sheriff's or constable's return must be in writing and must be signed by the sheriff or constable. The writ must be returned to the clerk or justice of the peace from which it issued within the time stated in the writ.

(2) The sheriff's or constable's action must be endorsed on or attached to the writ. In the return, the sheriff or constable must state what action the sheriff or constable took in levying, describe the property attached with sufficient certainty to identify it and distinguish it from property of like kind, and state when the property was seized and where the property is being held. When property has been replevied, the sheriff or constable must deliver the replevy bond to the clerk or justice of the peace to be filed with the papers of the suit.

Rule ATT 5 (608). Service of Writ on Respondent After Levy

As soon as practicable following levy, the applicant must serve the respondent with a copy of the writ of attachment, the application, accompanying affidavits, and orders of the court. Service may be in any manner prescribed for service of citation or as provided in Rule 21a.

Rule ATT 6 (609). Respondent's Replevy Rights

(a) *Where Filed.* At any time before judgment, if the attached property has not been previously claimed or sold, the respondent may replevy some or all of the property, or the proceeds from the sale of the property if it has been sold under order of the court, by filing a replevy bond with the court or the sheriff or constable and serving the applicant with a copy of the bond. All motions regarding the attached property must be filed with the court having jurisdiction of the suit.

(b) *Amount and Form of the Respondent's Replevy Bond.* The respondent's replevy bond must be made payable to the applicant in the amount set by the court's order with sufficient surety or sureties, as provided by law, to be approved by the court or by the sheriff or constable who has possession of the property. The bond must be conditioned on the respondent satisfying to the extent of the penal amount of the bond any judgment that may be rendered against the respondent in the suit.

(c) *Other Security.* In lieu of a bond, the respondent may deposit cash or other security in compliance with Rule 14c.

(d) *Review of Respondent's Replevy Bond.* On reasonable notice, which may be less than three days, any party shall have the right to prompt judicial review of the respondent's replevy bond. Any party may move to increase or reduce the amount of the bond, or question the sufficiency of the surety or sureties. The court's determination may be made on the basis of uncontroverted affidavits setting forth facts as would be admissible in evidence; otherwise, the parties must submit evidence. After a hearing, the court must issue a written order on the motion.

(e) *Respondent's Right to Possession.* If the respondent files a proper replevy bond, and the replevy bond is not successfully challenged by the applicant, the sheriff or constable in possession of the attached property must release the property to the respondent within a reasonable time after a copy of the bond is delivered to the sheriff or constable. Before the property is released to the respondent, the respondent must pay all expenses associated with storage of the property.

(f) *Substitution of Property.* On reasonable notice, which may be less than three days, the respondent shall have the right to move the court for a substitution of property of equal value or greater value as the property attached. Unless the court orders otherwise, no property on which a lien exists may be substituted.

(1) *Court Must Make Findings.* If sufficient property has been attached to satisfy the writ, the court may by written order authorize substitution of one or more items of respondent's property for all or part of the property attached. The court must include in the order findings as to the value of the property to be substituted.

(2) *Method of Substitution.* No personal property under levy of attachment shall be deemed released until the property to be substituted is delivered to the location named in the order; no real property under levy of attachment shall be deemed released until the order authorizing substitution is filed of record with the county clerk of each county in which the property is located. The original property under levy of attachment may not be released until the respondent pays all costs associated with the substitution of the property, including all expenses associated with storage of the property.

(3) *Status of Lien.* Upon substitution, the attachment lien on the released property is deemed released, and a new lien attaches to the substituted property. The new lien is deemed to have been perfected as of the date of levy on the original property.

Rule ATT 7 (610). Applicant's Replevy Rights

(a) *Motion.* If the respondent does not replevy attached personal property within ten days after service of the writ on the respondent, and if the attached property has not been previously claimed or sold, at any time before judgment the applicant may move the court to replevy some or all of the property.

(b) *Notice and Hearing.* The court may in its discretion, after notice and a hearing, grant the applicant's motion to replevy and set the applicant's replevy bond.

(c) *Order.* The order must set the amount of the applicant's replevy bond equal to the lesser of the value of the property or the amount of the applicant's claim, one year's accrual of interest if allowed by law on the claim, and the estimated costs of court. The bond must be made payable to the respondent in the amount set by the court's order, with sufficient surety or sureties as approved by the clerk or the justice of the peace. The order must also include the conditions of the applicant's replevy bond as provided in this rule.

(d) *Conditions of Applicant's Replevy Bond.* The applicant's replevy bond must be conditioned on the applicant satisfying to the extent of the penal amount of the bond any judgment which may be rendered against the applicant in the action. The bond must also contain the conditions that the applicant will:

(1) not remove the personal property from the county;

(2) not waste, ill-treat, injure, destroy, or dispose of the property;

(3) maintain the property, in the same condition as when it is replevied, together with the value of the fruits, hire or revenue derived from the property;

(4) return the property, along with all fruits, hire, or revenue derived therefrom, to the respondent in the same condition if the underlying suit is decided against the applicant; and

(5) to the extent that the:

(A) property is not returned, pay the value of the property, along with the fruits, hire, or revenue derived therefrom; and

(B) returned, but not in the same condition, pay the difference between the value of the property as of the date of replevy and the date of judgment, regardless of the cause of the difference in value, along with the value of the fruits, hire, or revenue derived therefrom.

(e) *Other Security.* In lieu of a bond, the applicant may deposit cash or other security in compliance with Rule 14c.

(f) *Service on Respondent.* The applicant must serve the respondent with a copy of the court's order and the applicant's replevy bond. Service may be in any manner prescribed for service of citation or as provided in Rule 21a.

(g) *Applicant's Right to Possession.* If the court grants the applicant's motion to replevy, a copy of the court's order and applicant's replevy bond must be delivered to the sheriff or constable in possession of the attached personal property. The sheriff or constable must then release the property to the applicant within a reasonable time. Before the property is released to the applicant, the applicant must pay all expenses associated with storage of the property.

Rule ATT 8 (611). Dissolution or Modification of Order or Writ

(a) *Motion.* Any party, or any person who claims an interest in the property under levy of attachment, may move the court to dissolve or modify the order or writ, for any ground or cause, extrinsic or intrinsic. The motion must be verified and must admit or deny each finding set forth in the order directing the issuance of the writ. If the movant is unable to admit or deny the finding, the movant must set forth the reasons why the movant cannot do so.

(b) *Time for Hearing.* Unless the parties agree to an extension of time, the motion must be heard promptly, after reasonable notice to all parties, which may be less than three days, and the motion must be determined not later than ten days after it is filed.

(c) *Stay of Proceedings.* The filing of the motion stays any further proceedings under the writ, except for any orders concerning the care, preservation, or sale of any perishable property, until a hearing is held, and the motion is determined.

(d) *Conduct of Hearing; Burden of Proof.*

(1) *Burden of Applicant.* The applicant has the burden to prove the statutory grounds relied on for issuance of the writ of attachment. If the applicant fails to carry its burden, the writ must be dissolved and the underlying order set aside.

(2) *Burden of Movant.* If the applicant carries its burden, the movant has the burden to prove the grounds alleged to dissolve or modify the order or writ. If the movant seeks to modify the order or writ based upon the value of the property, the movant has the burden to prove that the reasonable value of the property attached exceeds the amount necessary to secure the claim, interest for one year, and probable costs.

(3) *Hearing.* The court's determination may be made after a hearing involving all parties, or upon the basis of affidavits setting forth facts as would be admissible in evidence. Additional evidence, if tendered by any party, may be received and considered.

(e) *Orders Permitted.* The court may order the dissolution or modification of the order or writ, and may make orders allowing for the care, preservation, disposition, or substitution of the property (or the proceeds if the same has been sold), as justice may require. If the court modifies its order granting attachment, it must make further orders with respect to the bond that are consistent with the modification of the order. If the movant has given a replevy bond, an order to dissolve the writ must release the replevy bond and discharge the sureties thereon. If the writ is dissolved, the order must be set aside, the attached property must be released, and all expenses associated with storage of the property may be taxed as costs to the applicant.

(f) *Third-Party Claimant.* If any person other than the applicant or respondent in the original suit claims all or part of the attached property, the court, on motion and hearing, may order the release of the property to that third-party claimaint. The court may require a bond payable to the applicant or respondent, as ordered by the court, in an amount set by the court with sufficient surety or sureties and conditioned that the third-party claimant will pay, up to the amount of the bond, all damages and costs adjudged against the third-party claimant for wrongfully seeking the release of the property. If the court does not order the release of the property to the third-party claimant, the third-party claimant may follow the procedure for the trial of right of property.

(g) *Wrongful Attachment; Attorney's Fees.* A writ of attachment must be dissolved before a respondent may bring a claim for wrongful attachment. In addition to damages for wrongful attachment, the respondent may recover reasonable attorney's fees incurred in obtaining dissolution or modification of the order or writ.

Rule ATT 9 (612). Judgment

(a) *Judgments on Replevy Bond.*

(1) *Judgment Against Respondent on Replevy Bond.* If the underlying suit is decided against a respondent who replevied the attached property, final judgment must be rendered against all of the obligors on the respondent's replevy bond, jointly and severally, for the amount of the judgment plus interest and costs, or for an amount equal to the value of the property replevied as of the date of the execution of the respondent's replevy bond,

and the value of the fruits, hire, revenue, or rent derived from the property.[19]

(2) *Judgment Against Applicant on Replevy Bond.* If the underlying suit is decided against an applicant who replevied the attached property, final judgment must be rendered against all of the obligors on the applicant's replevy bond, jointly and severally, for the value of the property replevied as of the date of the execution of the applicant's replevy bond, and the value of the fruits, hire, revenue, or rent derived from the property.

(b) *All Judgments.* In any judgment, all expenses associated with storage of the property may be taxed as costs against the non-prevailing party.

PROPOSED COMMENT TO RULE **ATT 9 (612)**: See Sections 61.062 and 61.063 of the Texas Civil Practice and Remedies Code.

Rule ATT 10 (613). Perishable Property

(a) *Definition of Perishable Property.* Property may be found to be perishable when it is in danger of serious and immediate waste or decay, or if the keeping of the property until the trial will necessarily be attended with expense or deterioration in value that will greatly lessen the amount likely to be realized therefrom. For the purposes of this rule, the word "property" refers to personal property under levy of attachment pursuant to court order.

(b) *Trial Court Discretion.* The judge or justice of the peace may make any orders necessary for the property's preservation or use.

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[19] **Comment to the Court**: Rule **ATT 9(a) (612(a))** is based on Section 61.063 of the Texas Civil Practice and Remedies Code and existing Rule 709. Section 61.063 provides: "A judgment against a defendant who has replevied attached personal property shall be against the defendant and his sureties on the replevy bond for the amount of the judgment plus interest and costs or for an amount equal to the value of the replevied property, plus interest, according to the terms of the replevy bond." Existing Rule 709, which applies to sequestration, provides: "[I]n case the suit is decided against the plaintiff, final judgment shall be entered against all the obligors in [the plaintiff's replevy bond], jointly and severally for the value of the property replevied as of the date of the execution of the replevy bond, and the value of the fruits, hire, revenue or rent thereof as the case may be. The same rules which govern the discharge or enforcement of a judgment against the obligors in the defendant's replevy bond shall be applicable to and govern in case of a judgment against the obligors in the plaintiff's replevy bond." The Task Force incorporated components of existing Rule 709 into Rule **ATT 9(a) (612(a))** in an attempt to harmonize the attachment and sequestration rules. But to be consistent with Section 61.063 of the Civil Practice and Remedies Code, the Task Force included the language requiring the final judgment to "be rendered against all of the obligors . . . for the amount of the judgment plus interests and costs." The Task Force is perplexed by a statutory requirement that obligors be responsible for an amount that could be greater than the penal amount of the bond and recommends that the Court seek a statutory amendment to enable a rule limiting the liability of the obligors to the penal amount of the bond, consistent with other rules, such as existing Rule 709, limiting the liability of similar obligors.

(c) *Motion and Affidavit for Sale of Perishable Property.* If the respondent has not replevied property after the levy of a writ of attachment, the applicant, or other party claiming an interest in the property may file a motion with the court clerk or justice of the peace, supported by affidavit, stating specific facts to support a finding that the property or any portion of the property is perishable. A copy of the motion and affidavit must be delivered to the person who is in possession of the property and served on all other parties in any manner prescribed for service of citation or as provided in Rule 21a.

(d) *Hearing.* The judge or justice of the peace must hear the motion, with or without notice to the parties, as the urgency of the case may require. The judge or justice of the peace may, based on affidavits or oral testimony, order the sale of the perishable property and must set the amount of the movant's bond, if required.

(e) *Movant's Bond.* If the motion for an order of sale is filed by the applicant or respondent, no bond is required; the applicant or respondent may replevy the property at any time before the sale. If the motion for an order of sale is filed by any person or party other than the respondent whose property is under levy of attachment, the court shall not grant the order, unless the movant files with the court a bond payable to the applicant or respondent as ordered by the court, with one or more good and sufficient sureties to be approved by said court, conditioned that the movant will be responsible to the applicant or respondent as ordered by the court for any damages, up to the amount of the bond, sustained upon a finding that the motion or sale was wrongful.

(f) *Order.* An order to sell perishable property must be in writing, specifically describe the property to be sold, be directed to a sheriff or constable, and command the sheriff or constable to sell the property. If the property is being held by a person other than a sheriff or constable, then the sheriff or constable conducting the sale must deliver a copy of the order of sale to the person in possession of the property.

(g) *Procedure for Sale of Perishable Property.* The sale of perishable property must be conducted in the same manner as sales of personal property under execution, provided that the judge or justice of the peace may set the time of advertising and sale at a time earlier than ten days, according to the exigency of the case, and in that event notice must be given in the manner directed by the order.

(h) *Return of Order of Sale.* The sheriff or constable conducting the sale of perishable property must promptly remit the proceeds of the sale to the clerk or to the justice of the peace. The sheriff or constable must sign and file with the papers of the case a written return of the order of sale, stating the time and place of the sale, the name of the purchaser, and the amount of money received, with an itemized account of the expenses attending the sale.

Rule ATT 11 (614). Report of Disposition of Property

When attached property is claimed, replevied, or sold, or otherwise disposed of after the writ has been returned, the sheriff or constable who had custody of the property must immediately complete and sign a report describing the disposition of the property. If the property was replevied, the report must also describe the condition of the property on the date and time of replevy. The report must be filed with the clerk or justice of the peace.

Rule ATT 12 (615). Amendment of Errors

(a) *Before Order.* Before the court issues an order on an application for writ of attachment, the application and any supporting affidavits may be amended to correct any errors. Those amendments do not require leave of court or notice to the respondent, but must be filed with the clerk at a time that will not operate as a surprise to the respondent.

(b) *After Order, Before Levy of the Writ.* After the court issues an order on an application for writ of attachment but before the writ of attachment is levied, the application, any supporting affidavits, and the bond may be amended to correct any clerical errors. Those amendments do not require leave of court or notice to the respondent, but must be filed with the clerk or justice of the peace at a time that will not operate as a surprise to the respondent. Clerical errors in the court's order for issuance of the writ and the writ of attachment may also be corrected by the court, without notice.

(c) *After Order and Levy of the Writ.* After levy of the writ of attachment, on motion, notice, and hearing, the court in which the suit is filed may grant leave to amend clerical errors in the application, any supporting affidavits, the bond, the writ of attachment, or the sheriff or constable's return, for good cause, provided the amendment does not change or add to the grounds of attachment stated in the original application.

Attachment Statutes
Texas Civil Practice & Remedies Code

§ 61.001. General Grounds

A writ of original attachment is available to a plaintiff in a suit if:

(1) the defendant is justly indebted to the plaintiff;

(2) the attachment is not sought for the purpose of injuring or harassing the defendant;

(3) the plaintiff will probably lose his debt unless the writ of attachment is issued; and

(4) specific grounds for the writ exist under Section 61.002.

§ 61.002. Specific Grounds

Attachment is available if:

(1) the defendant is not a resident of this state or is a foreign corporation or is acting as such;

(2) the defendant is about to move from this state permanently and has refused to pay or secure the debt due the plaintiff;

(3) the defendant is in hiding so that ordinary process of law cannot be served on him;

(4) the defendant has hidden or is about to hide his property for the purpose of defrauding his creditors;

(5) the defendant is about to remove his property from this state without leaving an amount sufficient to pay his debts;

(6) the defendant is about to remove all or part of his property from the county in which the suit is brought with the intent to defraud his creditors;

(7) the defendant has disposed of or is about to dispose of all or part of his property with the intent to defraud his creditors;

(8) the defendant is about to convert all or part of his property into money for the purpose of placing it beyond the reach of his creditors; or

(9) the defendant owes the plaintiff for property obtained by the defendant under false pretenses.

§ 61.0021. Grounds for Attachment in Suit for Sexual Assault

(a) Notwithstanding any other provision of this code, attachment is available to a plaintiff who:

(1) has general grounds for issuance under Sections 61.001(2) and (3); and

(2) institutes a suit for personal injury arising as a result of conduct that violates:

(A) Section 22.011(a)(2), Penal Code (sexual assault of a child);

(B) Section 22.021(a)(1)(B), Penal Code (aggravated sexual assault of a child);

(C) Section 21.02, Penal Code (continuous sexual abuse of young child or children); or

(D) Section 21.11, Penal Code (indecency with a child).

(b) A court may issue a writ of attachment in a suit described by Subsection (a) in an amount the court determines to be appropriate to provide for the counseling and medical needs of the plaintiff.