THE HISTORY OF TEXAS CIVIL PROCEDURE

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I. INTRODUCTION

The promulgation of rules of court by the Texas Supreme Court has been the principal mechanism for the regulation of proceedings in Texas courts. This article provides a historical overview of the development of these rules, the rule-making process, the impact of procedural rule-making on the administration of justice in Texas courts, and the continuing need for revision and reorganization of the Texas Rules of Civil Procedure. This article also acknowledges the enormous debt that is owed to the Texas judges, lawyers, and professors who have participated in the rule-making process, mostly without plaudits or even public recognition. In a small way, this paper attempts to pay that debt.

"The Constitution of the Republic of Texas and the Constitutions of the State of Texas for 1845, 1861, 1866, and 1869, make no provision for rules of court, other than to say that trials shall be conducted according to 'rules

and regulations prescribed by law.'"[1] But the Texas Constitution of 1876 explicitly empowered the Texas Supreme Court to "make rules and regulations for the government of said court, and the other courts of the State, to regulate proceedings and expedite the dispatch of business therein."[2] As a result, under the leadership of Chief Justice Oran M. Roberts[3] the Texas Supreme Court promulgated a complete set of rules in 1877 for all Texas courts from the filing of suit in the trial court to the rendition of judgment in the Texas Supreme Court.[4] In 1891, the provision was amended to allow rulemaking "not inconsistent with the laws of the State."[5]

With the passage of the Rules of Practice Act in 1939, the Texas Supreme Court was given the authority to promulgate procedural rules for use in Texas courts and, importantly, to repeal procedural statutes.[6] With the aid of the original Texas Supreme Court Advisory Committee, the Texas Supreme Court promulgated the Texas Rules of Civil Procedure in 1940.[7] These rules superseded procedural statutes and predecessor court

[1] W.M. HARRIS, RULES OF THE COURTS 7 (L. K. Smoot ed., 2d ed. 1921).

[2] Tex. Const. art. V, § 25 (amended 1891).

[3] Chief Justice Roberts was first elected to the Texas Supreme Court in 1856. Ford Dixon, *Roberts, Oran Milo, Handbook of Texas Online*, STATE HISTORICAL SOCIETY (Aug. 28, 2013, 10:30 PM), https//www.tshaonline.org/handbook/online/articles/fro18. After leading the passage of the ordinance removing Texas from the Union in 1861 and a short military career, Roberts returned to Austin as chief justice of the Texas Supreme Court in 1864. *Id.* He held that position until 1865, when he was removed along with other state incumbents. *Id.* In 1874, Roberts was appointed and then elected to the Texas Supreme Court. *Id.* He served as chief justice for four years. *Id.* In 1878, he was elected Governor of Texas, serving two terms. *Id.* After his retirement, he was appointed professor of law at the University of Texas, which had opened in 1883. *Id.* He held that position for ten years. *Id.* He wrote THE ELEMENTS OF PLEADING as a text for law students in 1890. *Id.*

[4] As explained by Chief Justice Roberts, "The members of the [Constitutional] Convention, in giving the Supreme Court 'the power to make rules and regulations,' for the express purpose of regulating the proceedings and expediting the business in the courts, must have designed more than the making of a few short rules of court, such as have formerly been made and practiced under." Tex. Land Co. v. Williams, 48 Tex. 602, 603 (1878).

[5] Tex. Const. art. V, § 25 (repealed 1985); *See also* Roy W. McDonald, *The Background of the Texas Procedural Rules*, 19 TEX. L. REV. 229, 239 (1941) ("[W]ith the amendment of the Constitution of 1891 . . . the earlier [rule-making] spirit seems to have waned . . . .").

[6] *See* Acts of May 15, 1939, 46th Leg., R.S., ch. 25, 1939 Tex. Gen. Laws 201, 201–03, *repealed by* Act of June 12, 1985, 69th Leg., ch. 480, § 26(1), 1985 Tex. Gen. Laws 1720, 2048 (current version at TEX. GOV'T CODE ANN. § 22.004 (West Supp. 2012)).

[7] Jack Pope & Steve McConnico, *Texas Civil Procedure Rule Making*, 30 BAYLOR L. REV. 5, 11–12 (1978).

rules, but designedly did not make nonessential changes in Texas procedure.[8]

During the next four decades, the Texas Supreme Court promulgated a number of additional civil procedural rules and amended many others. By 1980 and during the 1980s and 1990s, continuing dissatisfaction with the Texas rulebook caused the rule-making process to greatly accelerate. But by the end of the twentieth century, the process of revision of the Texas Rules of Civil Procedure stalled before recodification of the rules could be completed. With the full recognition that rule-making is a never-ending process, this article explains what needs to be done to "finish" the job.

My participation in the rule-making process began in the late 1970s, when I became a member of the State Bar of Texas Administration of Justice Committee. By 1982, I also became a member of the Advisory Committee to the Texas Supreme Court. I have served as a member of the Advisory Committee as a result of consecutive reappointments since my original appointment. Along the way, I served as one of the principal reporters to the Combined Committee that drafted the Texas Rules of Appellate Procedure, which were promulgated by the Texas Supreme Court and the Court of Criminal Appeals in 1984.[9] In 1991, I was appointed by the Texas Supreme Court as the Chair of the Task Force on Revision of the Texas Rules of Civil Procedure, which developed a Recodification Draft of the Texas Rules of Civil Procedure and submitted the draft to the Advisory Committee in 1993.[10] Thereafter, the Advisory Committee met every other month until it substantially completed a new Recodification Draft in late

[8] *See* Pope, *supra* note 7, at 10–11. Many rules, procedural statutes, and court decisions interpreting them have historical roots traceable to the Republic of Texas, Mexico and Spain. Joseph McKnight, *The Spanish Influence on the Texas Law of Civil Procedure*, 38 TEX. L. REV. 24, 26–34, 37–40 (1957) ("[T]he Law of Spain [concerning pleadings and joinder of claims and parties] as laid down in *Las Siete Partides* became a permanent part of the law of Texas."); *see generally* Peter L. Reich, *Siete Partidas in My Saddlebags: The Transmission of Hispanic Law from Antebellum Louisiana to Texas and California*, 22 TUL. EUR. & CIV. L.F. 79 (2007). Many others were clearly influenced by English principles of equity jurisprudence and by English practice in the common law courts.

[9] WILLIAM V. DORSANEO III, http://www.law.smu.edu/getmedia/47ebc3e1-a665-4105-9905-713c3eadb018/Biography (last visited Sept. 29, 2013).

[10] Appointment of Task Forces to Consider Changes in the Rules of Procedure in Texas Courts at 2, Misc. Docket No. 91-0048 (Tex. June 19, 1991) *available at* http://www.supreme.courts.state.tx.us/miscdocket/91/91-0048.pdf.

1997.[11] In short, the Texas Rules of Civil and Appellate Procedure have been a major part of my professional life for the last four decades.

II. PROCEDURAL DEVELOPMENTS BEFORE THE ADOPTION OF THE TEXAS RULES OF CIVIL PROCEDURE

A. The Texas Pleading System

Almost a decade before David Dudley Field's Code was adopted in New York, the Fourth Congress of the Republic of Texas adopted the common law of England[12] but rejected the English common law system of issue-pleading, and its forms of action.[13] Following the pattern established by the Spanish influenced civil law before independence was declared, the common law system of pleadings was never used in Texas courts.[14] Instead, "fact pleading" was the approach adopted in Texas.[15]

Early legislation enacted by the First Congress of the Republic in 1836[16] makes it clear that simple pleadings following the earlier Spanish model

[11] Memorandum from William V. Dorsaneo, III, Chairman, Task Force of the Recodification of the Texas Rules of Civil Procedure, to Justice Nathan L. Hecht, Supreme Court of Texas, Charles L. Babcock, Supreme Court Advisory Committee, and Supreme Court Advisory Committee Members (March 2, 2000) (http://faculty.smu.edu/wdorsane/PDF_Files/recod_all_sec.pdf).

[12] *See* Act approved Jan. 20, 1840, 4th Cong., R.S., § 1, 1840 Repub. Tex. Laws 3, 3–4, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 177, 177–78 (Austin, Gammel Book Co. 1898). *See also*, Joseph C. Hutcheson, Jr., Assoc. Justice of the Circuit Court of Appeals, New Orleans, La., The Spirit of the New Federal Rules, Address Before the Bar Association of Dallas (Nov. 12, 1938) *in* 3 DALL. B. SPEAKS 209, 215 (1938) (explaining that neither the common law system of pleading nor the separation of law and equity was adopted).

[13] *See* Act approved Feb. 5, 1840, 4th Cong., R.S., § 1, 12, 1840 Repub. Tex. Laws 88, 88–89, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 262, 262–263 (Austin, Gammel Book Co. 1898).

[14] "The laws of Coahuila and Texas regarding pleadings . . . [limited the parties to two writings:] a petition by the plaintiff, a contestation by the defendant, a replica by the plaintiff, and a duplica by the defendant. In these pleadings, the parties were respectively allowed and required to set forth, in a plain and intelligible manner, the facts upon which they respectively relied to sustain their positions before the court; in short, to state to the court the real truth of the matter in controversy, so far as they might be able." JNO. C. TOWNES, PLEADING IN THE DISTRICT AND COUNTY COURTS OF TEXAS, 84 (2d ed. 1913).

[15] *See* 2 ROY W. MCDONALD, TEXAS CIVIL PRACTICE § 5.02.1 (1982).

[16] "It shall be the duty of the plaintiff or his attorney, in taking out a writ or process, to file his petition, with a full and clear statement of the names of the parties, whether plaintiff or defendant, with the cause of action, and the nature of relief, which he requests of the court . . . ." Act

"by petition and answer," as distinguished from common law pleading practice, were required by Texas procedural law from the beginning.[17] The Supreme Court of the Republic was proud of that fact, and in 1844 the Court expressed the opinion that the Texas system (as it existed at that time) was far superior to other systems.[18]

In 1846, the Texas Supreme Court stated that a petition should contain a statement "of the facts which constitute the plaintiff's cause of action or the defendant's ground of defense."[19] One year later, the Court reasoned that

approved Dec. 22, 1836, 1st Cong., R.S., § 8, 1836–37 Repub. Tex. Laws 198, 201, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1258, 1261 (Austin, Gammel Book Co. 1898). Subsequently, in 1840, legislation enacted by the Fourth Congress provided "[t]hat the adoption of the common law shall not be construed to adopt the common law system of pleading, [B]ut the proceedings in all civil suits shall, as heretofore, be conducted by petition and answer . . . . In every civil suit in which sufficient matter of substance may appear upon the petition, to enable the court to proceed upon the merits of the cause, the suit shall not abate for want of form . . . ." Act approved Feb. 5, 1840, 4th Cong., R.S., § 1, 12, 1840 Repub. Tex. Laws 88, 88–89, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 262, 262–263 (Austin, Gammel Book Co. 1898).

[17] *See* Coles v. Kelsey, 2 Tex. 541, 552–53 (1847) ("[O]ur system of bringing suits by petition bears no analogy to the common law practice. But there is a most striking similarity in our forms to the English bill and answer in chancery, so much so as to leave no doubt of their kindred origin. They are both derived from the Roman law, out of which grew up the civil law. . . . [O]urs came to us through the laws of Spain."); *see generally* McKnight, *supra*, note 8, at 26–31.

[18] Hamilton v. Black, Dallam 586, 586–87 (Tex. 1844) ("The object of our statutes on the subject of pleading is to simplify as much as possible that branch of the proceedings in courts, which by the ingenuity and learning of both common and civil lawyers and judges had become so refined in its subtleties as to substitute in many instances the shadow for the substance."); *see also* Fowler v. Poor, Dallam 401, 402–03 (Tex. 1841) ("Our system of proceedings in civil suits differs from that known in England and adopted in most of the States of the United States. . . . The mode of conducting proceedings in civil suits by petition and answer is so highly appreciated by the legislative power of the republic, that . . . it was expressly enacted, 'that the adoption of the common law shall not be construed to adopt the common law system of pleading; but the proceedings in all civil suits shall as heretofore be conducted by *petition and answer*.'") (emphasis in original).

[19] *See, e.g.*, Mims v. Mitchell, 1 Tex. 443, 446–47 (1846). ("The pleadings are extremely defective in respect to certainty, perspicuity and accuracy in setting forth the facts which constitute the cause of action and grounds of defense. Facts are not stated directly with the time, place and circumstances attending and giving character to them; but indirectly and by reference and conclusions drawn from assumed facts are stated, rather than the *facts* upon which the conclusions arise. . . . [W]ith us, neither the distinctions of the *forms* of action nor the *general issues* exist; but our pleadings really are or are intended to be, what the English pleadings are defined to be; *the statement in a legal and logical manner of the facts which constitute the plaintiff's cause of action, or the defendant's ground of defense, or the written statement of those*

"the technical distinctions and artificial boundaries of the common law actions constitute no element and have no place; [the] only requisites [of a petition] are, that it shall disclose a *right*, an *injury* and a *remedy*, the *facts* which constitute the plaintiff's right, the injury committed by the defendants, and a specification of the relief sought."[20]

Chief Justice Oran M. Roberts explained that the pleading rules contained in the Rules for the District and County Courts were adopted in 1877 because he and the other members of the Texas Supreme Court believed that it "was necessary to establish some system of . . . practice in the courts"[21] because "[i]t was generally understood, and acted on, that there was no such thing as a system of pleading in Texas."[22] Accordingly, Roberts' pleading rules were designed "to make it necessary for attorneys, who assumed to manage cases, to understand the facts and law pertaining to them, so that they could and would shape their pleadings . . . in a manner to exhibit distinctly the material issues of law and facts, involved in them."[23] Significantly, Texas Rule 2 provided that "[p]leadings, with the exception of those presenting issues of law, must be a statement of facts in contradistinction to a statement of evidence, of legal conclusions, and of arguments."[24]

facts, intended to be relied on, as the support or defense of the party in evidence.") (emphasis in original); *see also* Love v. Keowne, 58 Tex. 191, 195 (1882) ("Pleadings must be certain. General allegations, independent of time, place, persons or other circumstances of identity or certainty, are insufficient . . . .).

[20] Carter v. Wallace, 2 Tex. 206, 209–10 (1847).

[21] *See* O. M. ROBERTS, THE ELEMENTS OF TEXAS PLEADING, 13–16 (1890) (also explaining procedure for exchange of amended and supplemental pleadings under 1877 Texas rules).

[22] *Id.* at 12–13.

[23] *Id.* at 16.

[24] RULES FOR THE DISTRICT COURT AND COUNTY COURTS, Rule 2, 47 Tex. 615, 615–616 (1877) ("Facts are adequately represented by terms and modes of expression, wrought out by long judicial experience, perpetuated in books of form, in law and equity, which, though not authoritatively requisite, may generally be adopted as safe guides in pleading. In case of a violation of this rule, to such an extent as to produce confusion, uncertainty, and unnecessary length in pleading, the court may require the matter set up to be repleaded, so as to exclude the superfluous parts of it from the record."); W.M. HARRIS, RULES OF THE COURTS 138 (L.K. Smoot ed., 2d ed. 1921). These rules also provided for the pleading of a "general exception" as it was called in Texas (the general demurrer), *see* RULES FOR THE DISTRICT COURT AND COUNTY COURTS, Rule 17, 47 Tex. 615, 619 (1877), and a common law requirement that there be a due order of pleading by a defendant as required by statute. *See* Rule 7, *id*. at 617; TEX. REV. CIV. STAT. art. 2012 (1925) ("Pleas shall be filed in due order of pleading, and shall be heard and determined in such order under the direction of the court.").

Shortly thereafter, the Revised Civil Statutes of 1879, relying on the 1877 rules, required that "[t]he pleadings shall consist of a statement, in logical and legal form, of the facts constituting the plaintiff's cause of action or the defendant's ground of defense."[25] Accordingly, by 1879 Texas pleading practice for the statement of claims and defenses resembled Code pleading principles, which had themselves required an ever-increasing degree of technical proficiency to state the "facts" constituting the plaintiff's cause of action or the defendant's grounds of defense.[26] By 1925, one commentator stated that Texas judicial decisions had also unfortunately developed a mass of procedural technicalities that confounded practitioners,[27] despite Texas's earlier Spanish-influenced simplified civil law pleading norms.

Another serious flaw in the system concerned the concept of waiver of pleading defects and the absence of the procedural concept of trial by consent; pleading defects could be raised for the first time after trial and judgment in a new trial motion.[28] Indeed, a complaint about the pleadings could be made for the first time on appeal because of a strict attitude about the importance of pleadings.[29]

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[25] Act approved Feb. 21, 1879, 16th Leg., R.S., TEX. REV. CIV. STAT., Ch. 2, Art. 1187 (1879).

[26] *See* CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 7, at 21–23 (2d ed. 1947).

[27] *See* Thos. H. Franklin, *Simplicity in Procedure*, 4 TEX. L. REV. 83, 84 (1925) ("[T]he practicing lawyer of today dares not file any pleading without consulting a number of court decisions for the purpose of determining whether he has made a plain statement of his cause of action or defense. . . . The pleadings in a case having thus been made intricate by court decisions, is it any wonder that our court reports are filled with decisions on procedure, the final adjudication of cases delayed, and the real justice of the cause submerged in a sea of technical rulings?").

[28] *See, e.g.*, Gulf, C. & S. F. Ry. Co. v. Vieno, 26 S.W. 230, 231 (Tex. Civ. App.—Austin 1894, no writ); *cf.* Sw. Life Ins. Co. v. Powers, 122 S.W.2d 1056, 1057 (Tex. 1939) (insufficiency of answer could not be raised for first time on appeal).

[29] *See* Jack Ritchie, *Appeal and Error—Issues not Raised by Pleadings—Construction of New Rule 67*, 23 TEX. L. REV. 396, 397 (1945) ("Complaint could be made for the first time on appeal, even though appellant admitted the truth of the evidence received without support in the pleading." (citing San Antonio & A.P. Ry. v. Flato, 35 S.W. 859 (Tex. Civ. App.—Galveston 1896, no writ)); *see also Gulf, C. & S.F. Ry. Co.*, 26 S.W. at 231 ("Many decisions may be found coming from the supreme court of this state announcing and applying the principle that facts not alleged, though proven, cannot form the basis of a judgment. . . . The verdict and the judgment would not cure this defect in the petition, nor was it waived because a demurrer was not addressed to it [when] [t]he fact omitted was a matter of substance."). *But see* Tex. Emp'rs Ins. Ass'n v. Marsden, 114 S.W.2d 858 (Tex. 1938) (applying trial by implied consent theory); Coleman Nat.

As Dean, later Judge, Charles E. Clark, the principal architect of the Federal Rules of Civil Procedure, explained in an influential article in the Iowa Law Review, the promulgation of sensible pleading rules is an important prerequisite to procedural reform and the development of modern procedural devices designed to facilitate dispute resolution on the merits.[30] By the late 1920s and 1930s, these problems with Texas pleading practice were well recognized, and the movement for procedural change manifested in 1938 by the promulgation of the Federal Rules of Civil Procedure influenced, but did not control, the development of the Texas Rules of Civil Procedure[31] whose drafters regarded wholesale adoption of the federal rules as too radical a change for Texas lawyers.[32]

B. Forum Selection; Venue and Jurisdiction

The first Act of the Republic of Texas Congress also contained relatively detailed provisions concerning venue.[33] The Spanish Code, Las Siete Partidas, after which the Texas venue scheme was modeled, placed venue at the defendant's domicile, subject to several exceptions.[34] In 1846, in the earliest days of Texas statehood, the First Legislature adopted an act (An Act to Regulate Proceedings in the District Courts, 1846) delineating

Bank v. McDonald, 286 S.W. 487, 489 (Tex. Civ. App.—Austin 1926, writ dism'd w.o.j.) (affirming judgment based on unpleaded account actually litigated by parties without objection).

[30] *See* Charles E. Clark, *Simplified Pleading*, 27 IOWA L. REV. 272 (1942) ("Simplified pleading is basic to any program of civil procedural reform. With it, the modern remedies of discovery, pre-trial, and summary judgment acquire meaning and value. Without it, they can accomplish comparatively little . . . [because] they are geared to the prompt disclosure of all facts and matters in dispute and likewise prompt adjudication wherever possible.").

[31] *See* Charles E. Clark, *The Texas and Federal Rules of Civil Procedure*, 20 TEX. L. REV. 4, 5 (1941); Robert W. Stayton, *The Scope and Function of Pleading Under the New Federal and Texas Rules: A Comparison*, 20 TEX. L. REV. 16, 16 (1941). *See also* J. M. Daniel, *Governor Dan Moody and Judicial Reform in Texas During the Late 1920s*, TEX. SUP. CT. HIST. J., Winter 2012, at 1–9.

[32] *See* Clarence A. Guittard, *The Rule-Making Process: A Review of Court-Managed Procedural Reform in Texas*, 60 TEX. B.J. 404, 404 (1997).

[33] *See* Act approved Dec. 22, 1836, 1st Cong., R.S., § 5, 1836–37 Repub. Tex. Laws 198, 200, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1258, 1260–61 (Austin, Gammel Book Co. 1898).

[34] Charles T. Frazier, Jr., *Venue Procedure in Texas: An Analysis of the 1983 Amendments to the Rules of Civil Procedure Governing Venue Practice Under the New Venue Statute*, 36 BAYLOR L. REV. 241, 242 (1984).

the procedures that were to govern proceedings in the district courts.[35] The very first section of the 1846 statute, basically recodifying its 1836 predecessor, contained provisions regarding venue and its framework: a general rule followed by a listing of 11 exceptions.[36] This section set the approach that would be taken to venue for more than a century. In 1879, as Professor Townes explains, "the codifiers took up the whole subject, revised and combined all the acts, materially changed the language of a number of the sections, and added eleven other exceptions."[37] In subsequent years, the basic statute was revised, amended, and several new subdivisions were added.[38] Although the number of exceptions increased to at least 34 in the venue statute itself (plus myriad other exceptions in particular cognate statutes), the basic approach to venue questions remained substantially the same until the adoption of Senate Bill No. 898 by the 68th Legislature during its closing days in May 1983.[39]

Under this venue scheme, the basic principle was that, in the absence of an exception, venue was fixed in the county of the defendant's "domicile."[40] The manner in which a defendant challenged the plaintiff's choice of forum by a sworn plea in abatement was substantially revised.[41] Subsequent legislation, enacted in 1907, simplified the former practice and provided for a sworn plea of privilege, which sought transfer of improper venue to a proper county, rather than dismissal of the action, which had required the

[35] *See generally* Act approved May 13, 1846, 1st Cong., R.S., 1836–37 Repub. Tex. Laws 363, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822 –1897, at 1669 (Austin, Gammel Book Co. 1898).

[36] *Id.* § 1.

[37] TOWNES, *supra* note 14, at 299; *see also* Act approved Dec. 10, 1863, 10th Leg., R.S., ch. 17, § 1, 1863 Tex. Gen. Laws 10, 10–11, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 664, 664–65 (Austin, Gammel Book Co 1898).

[38] *See* TEX. REV. CIV. STAT. art. 1194 (1895); *See also* TEX. REV. CIV. STAT. art. 1830 (1911).

[39] *See* Act of June 17, 1983, 68th Leg., R.S., ch. 385, §§ 1–4, 1983 Tex. Gen. Laws 2119, 2119–25.

[40] As noted by Professor Joseph W. McKnight in *The Spanish Influence on the Texas Law of Civil Procedure*, 38 TEXAS L. REV. 24, 36–37 (1959), "Spanish law greatly insisted on fixing venue at the defendant's domicile. Texas, in turn, drew its venue statute from the Spanish model and has always adhered to the basic Spanish principle, though statutory exceptions are ever-increasing."

[41] *See* Shell Petroleum Corp. v. Grays, 62 S.W.2d 113, 115 (Tex. 1933).

plaintiff to refile and to contend with the defense of limitations.[42] Ordinarily, the "privilege" asserted was the basic privilege of being sued in the county where the defendant resided. The plea was also allowed (and required) to contain a general allegation that "no exception to exclusive venue in the county of one's residence provided by law exists in said cause."[43]

To maintain venue of the action in the county of suit, the plaintiff was required to controvert the Plea of Privilege by filing a Controverting Plea, under oath, setting out specifically the grounds relied on to confer venue of the cause on the court where the action was pending.[44] When the Plea of Privilege was controverted, the venue issues were determined by a trial of the venue facts, with the general rule being that the plaintiff had to establish, by a preponderance of the evidence, the application of one or more exceptions.[45] It was frequently necessary for the plaintiff to prove a cause of action as one of the venue facts.[46] At the venue hearing, live testimony was required to establish the venue facts. Affidavits were not a permissible substitute.[47]

In 1846, the First Legislature also enacted a procedural statute recognizing a plea to the jurisdiction.[48] Another procedural statute enacted that year provided that "[n]o judgment shall in any case be rendered against any defendant unless upon service, or acceptance, or waiver of process, or upon an appearance by the defendant, as prescribed in this chapter, except where otherwise expressly provided by law."[49] Under these provisions,

[42] *See* Act of April 18, 1907, 30th Leg., R.S., ch. 133, 1907 Tex. Gen. Laws 248, 248–49, *amended by* Act of May 15, 1939, 46th Leg., R.S., § 1, 1936 Tex. Gen. Laws 204.

[43] TEX. R. CIV. P. 86, 25 TEX. B.J. 371, 371–72 (1962, amended 1983).

[44] *Id.*

[45] TEX. R. CIV. P. 86, 25 TEX. B.J. 371, 371 (1962, amended 1971).

[46] *See* Emp'rs Cas. Co. v. Clark, 491 S.W.2d 661, 662 (Tex. 1973) ("A cause of action does not accrue or arise unless there is a cause of action. To prove that a cause of action has arisen in his favor a plaintiff must prove that he in fact has a cause of action." (quoting Victoria Bank & Trust Co. v. Monteith, 158 S.W.2d 63, 67 (Tex. 1941))).

[47] *See* Compton v. Elliott, 88 S.W.2d 91, 95–96 (Tex. 1935).

[48] It provided in part: "That no plea in abatement, except a plea to the jurisdiction of the court . . . shall be received . . . unless the party pleading the same . . . shall make affidavit to the truth thereof." Act approved May 13, 1846, 1st Leg., § 31, 1846 Tex. Gen. Laws 363, 373 *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1670, 1677 (Austin, Gammel Book Co 1898).

[49] Act of May 11, 1846, 1st Leg., § 18 (1846). This statute was carried forward into the rules of procedure as TEX. R. CIV. P. 124.

Texas courts allowed nonresidents to appear specially to challenge the exercise of in personam jurisdiction.[50]

After the Civil War, the legal landscape was changed radically by the inclusion of "general appearance" provisions in the Revised Statutes of 1879.[51] First, Article 1242 stated: "The filing of an answer shall constitute an appearance of the defendant so as to dispense with the necessity for the issuance or service of citation upon him."[52] Second, Article 1243 provided that if service were quashed on motion, the defendant was deemed to have entered his appearance at the next term of court.[53] Third, Article 1244 added that if the judgment was reversed on appeal for want of service or defects in service, the defendant was deemed to have entered his appearance to the term of the trial court where he filed the mandate.[54]

In 1889, the Texas Supreme Court interpreted these statutory provisions to mean that every appearance, even one made especially by a nonresident to challenge the exercise of jurisdiction, constituted a general appearance. In *York v. State*, the State of Texas brought suit against York, a resident of the State of Missouri, to recover on a lease contract.[55] York was served in Missouri, appeared in the Texas court, and made what he thought was a "special appearance" for the purpose of contesting personal jurisdiction.[56] The court overruled his plea.[57] When the case came to trial, York appeared, waived his demand for a jury, and relied solely on his plea to the jurisdiction for his defense.[58] Judgment was rendered against York.[59] On appeal, the Supreme Court of Texas held that articles 1242, 1243, and 1244 had abolished the special appearance.[60] The court further held that every

[50] *See, e.g.*, De Witt v. Monroe, 20 Tex. 289, 293 (1857). ("An appearance for the purpose of objecting to defective process or want of process, has often been held by this court to be permissible, and that it does not bind the party to a full appearance in the cause.").

[51] These statutes did not appear in Paschal's original codification and were added by the codifiers in the 1879 statutes. *See Report of Commissioners to Revise Laws of Texas Appointed Under Act of July 28, 1876*, *reprinted in* 6 TEX. L. REV. 327, 336–37 (1927).

[52] TEX. REV. CIV. STAT. art. 1242 (1879).

[53] *Id.* art. 1243.

[54] *Id.* art. 1244.

[55] 11 S.W. 869, 869 (Tex. 1889).

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* at 871.

[60] *See id.* at 870–71.

defense pleading was part of the answer, and by statute the answer was a general appearance that dispensed with the necessity of valid service on the defendant.[61] Hence, as a result of York's appearance, the Texas trial court had jurisdiction and the judgment was affirmed.[62]

York appealed to the Supreme Court of the United States, contending that the denial of a special appearance was a denial of due process under the Constitution's Fourteenth Amendment.[63] The Supreme Court affirmed, holding that "[t]he State has full power over remedies and procedure in its own courts, and can make any order it pleases in respect thereto, provided that substance of right is secured without unreasonable burden to parties and litigants."[64] As Professor E. Wayne Thode has explained, in many quarters, the Texas Supreme Court's decision was considered "the ultimate in jurisdictional provincialism" until it was eliminated in 1962.[65]

C. Joinder of Claims and Parties

Prior to the adoption of the Texas Rules of Civil Procedure in 1940, no procedural rule provided standards for the joinder of claims and parties in Texas District and County Courts.[66] Similarly, the Revised Civil Statutes of 1925 contained only three procedural statutes dealing with the joinder of claims and parties.[67] Instead, these subjects were governed by case law, which embraced the idea that:

> It is the general policy of our law (administered in a blended legal and equitable jurisdiction) to have all controversies relating to the same subject-matter settled in

[61] *Id*. at 871.

[62] *Id.*

[63] York v. Texas, 137 U.S. 15, 20 (1890).

[64] *Id.*

[65] E. Wayne Thode, *In Personam Jurisdiction; Article 2031B, the Texas 'Long Arm' Jurisdiction Statute; and the Appearance to Challenge Jurisdiction in Texas and Elsewhere*, 42 TEX. L. REV. 279, 279–80 (1964).

[66] *See generally* W.M. HARRIS, RULES OF THE COURTS: RULES FOR DISTRICT AND COUNTY COURTS 138–210 (L.K. Smoot ed., 2d ed. 1921).

[67] *See* former TEX. REV. CIV. STAT. art. 1992 (1925) (Additional parties) (now TEX. R. CIV. P. 37); *see also* former TEX. REV. CIV. STAT. art 1998 (Of intervenor) (now TEX. R. CIV. P. 61); Act approved Feb. 5, 1840, 4th Cong., R.S., §§ 1–6, 1840 Repub. Tex. Laws 62, 62–64, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 236–38 (Austin, Gammel Book Co. 1898) (superseded by TEX. R. CIV. P. 97(1941)). *See also* former TEX. REV. CIV. STAT. art. 2015 (Pleas of Counterclaim) (superseded by TEX. R. CIV. P. 97).

> one suit so far as that may be done without unduly prejudicing the rights of some of those interested . . . to effectuate the great purpose of avoiding multiplicity of litigation and sequent expense to parties and the public, vexation and turmoil . . . ."[68]

At this same time, Texas courts were influenced by equity pleading practice, which recognized a competing concept of "multifariousness," which could be a basis for claims of misjoinder, "as for example the uniting in one bill of several matters perfectly distinct and unconnected against one defendant, or the demand[s] of . . . several defendants in the same bill."[69] One influential commentator explains that:

> The rule against multiplicity of suits is said to be, within reasonable limits, the cardinal principle as to the joinder of parties and causes of action; but it is said that each case must be governed by its own circumstances, and whether it be multifarious or not must be left to the sound discretion of the court.[70]

Under this analysis, multifariousness in a petition was seldom a good ground of objection under the Texas system of practice.[71] But the doctrine did establish a foothold in one area involving the joinder of tort actions with contract claims,[72] unless both claims arose from the same transaction.[73]

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[68] Barton v. Farmers' State Bank, 276 S.W.177, 180–81 (Tex. Comm'n App. 1925); *see also* Thomas v. Hill, 3 Tex. 270, 272 (1848) ("The object of the law is to avoid a multiplicity of suits."); Hudmon v. Foster, 231 S.W. 346, 348 (Tex. Comm'n App. 1921) ("A leading principle of our law and system of procedure is to avoid a multiplicity of suits, and to settle in one action the respective claims of parties when they are of such a nature as to admit of adjustment in that mode." (citing Fitzhugh v. Orton, 12 Tex. 4, 6 (1854))).

[69] *Hudmon*, 231 S.W. at 347 (quoting Nat'l Bank of Jefferson v. Tex. Inv. Co., 12 S.W. 101, 102 (Tex. 1889) (reconciling competing doctrines).

[70] *See* JOHN SAYLES, TEXAS CIVIL PROCEDURE, § 359 (3d ed. 1896) (citing Clegg v. Varnell, 18 Tex. 294, 303 (1857)).

[71] *See id.* at 260 ("The rules of chancery practice will be regarded only when they may be deemed reasonable, and harmonize with our system of practice.").

[72] *See* W. F. Stewart & Co. v. Gordon, 65 Tex. 344, 347 (1886) ("The causes of action which may be joined, must be such as the plaintiff may enforce against each of the defendants.").

[73] *See* Hooks v. Fitzenrieter, 13 S.W. 230, 230 (Tex. 1890) ("In our State, however, the right to sue for a breach of contract and for a tort, where both grow out of the same transaction, and can be properly litigated together, is recognized.").

Common law principles of substantive law and general principles of equity jurisprudence also influenced the joinder of parties and particularly the distinctions between proper parties and necessary parties.[74] Prior to the adoption of the Texas Rules of Civil Procedure in 1940, Texas court decisions involving common law claims based principles of joinder on the nature of the parties' substantive rights and liabilities as being joint, several or joint and several as to both plaintiffs and defendants.[75] In contrast, distinctions between proper and so-called "necessary" parties in equitable actions were based on whether the party in question was "necessary" in the strictest sense such that no decree could be rendered in the party's absence or whether the party was not "necessary" in the strictest sense, but only in the sense that the party's joinder was proper and necessary to determine that party's rights and liabilities, but not to settle all questions in the controversy or to conclude the rights of all persons who have an interest in the subject matter of the litigation.[76] This entire subject was and remained a most difficult one for the bench and bar even after the adoption of the Texas Rules of Civil Procedure.[77]

Third party practice (impleader) and interpleader and class action practice were also recognized prior to 1940. Impleader was permitted of joint tortfeasors under the 1917 Contribution Statute[78] and more generally under former Article 1992 of the Revised Civil Statutes of 1925.[79]

Interpleader was also recognized by judicial decisions that adopted equity practice[80] as a remedial joinder of parties procedure designed to

[74] *See* TOWNES, *supra* note 14, at 258–260, 264–287.

[75] TOWNES, *supra* note 14, at 263 ("[I]f the right involved were joint all those jointly interested were required to join as plaintiffs, and if the liability were contractual and joint, all must be sued as defendants; if it grew out of a joint tort, the tort feasors could be sued jointly or singly or in such grouping as the plaintiff might elect.").

[76] *See* TOWNES, *supra* note 14, at 258.

[77] *See* William V. Dorsaneo, III, *Compulsory Joinder of Parties in Texas*, 14 HOUS. L. REV. 345 (1977).

[78] *See* former TEX. REV. CIV. STAT. art. 2212 (1925), (current version at TEX. CIV. PRAC. & REM. CODE, ch. 32 (West 2008)); *see also* Lottman v. Cuilla, 288 S.W. 123, 126 (Tex. Comm'n App. 1926, judgm't adopted).

[79] Former TEX. REV. CIV. STAT. art 1992 ("Before a case is called for trial, additional parties, necessary or proper parties to the suit, may be brought in, either by the plaintiff or the defendant upon such terms as the court may prescribe; but not at a time nor in a manner so as to unreasonably delay the trial of the case.").

[80] *See* Nixon v. Malone, 98 S.W. 380, 385 (Tex. 1906) *amended by* 99 S.W. 403 (Tex. 1907), *overruled on other grounds*, Glen v. McCarty, 110 S.W.2d 1148, 1151 (Tex. 1937).

protect stakeholders from multiple liability or double vexation.[81] Similarly, Texas courts recognized representative suits under equitable principles before such actions were recognized by any rules or statutes.[82]

Finally, intervention was also favored by court decisions prior to the adoption of the Texas Rules of Civil Procedure both by reference to the nature of the intervenor's interest in the action[83] and the procedure for intervention prescribed by statute.[84]

D. Discovery and Pretrial Practice

During the Republican period of Texas history, statutes were enacted authorizing the taking of written depositions of witnesses absent from or who resided outside the Republic of Texas or who were aged, infirm, about to leave the country, or who otherwise were unable to attend court.[85] Perhaps more significantly, these depositions were not discovery depositions, but were used to reduce testimony to a tangible form, for later use at trial.[86] The modern concept of discovery relevance as distinguished from trial relevance did not exist.[87] In 1846, the State's first Practice Act promulgated by the First Legislature contained an "Evidence" section that maintained similar procedures for written depositions or depositions on written questions.[88] By 1907, the oral deposition became a part of Texas

[81] *See* Clayton v. Mony Life Ins. Co. of Am., 284 S.W.3d 398, 402 (Tex. App.—Beaumont 2009, no pet.).

[82] *See, e.g*, Miller v. Foster, 13 S.W. 529, 531–32 (Tex. Comm'n App. 1889) ("[T]here are cases in which certain parties before the court are entitled to be deemed the full representative of all other persons . . . .").

[83] *See* Pool v. Sanford, 52 Tex. 621, 633–34 (1880).

[84] Former TEX. REV. CIV. STAT. art. 1998 ("Any party may intervene in vacation, subject to be stricken out by the court for sufficient cause at the next term on the motion of the opposite party; and such intervenor shall, within five days from the filing of same, notify the opposite party or his attorney of the filing of such pleadings. When court is in session such pleadings shall be filed under the rules governing amendments to pleadings.").

[85] Act approved Dec. 22, 1836, 1st Cong., R.S., § 27–29, 1836–37 Repub. Tex. Laws 198, 206–07 , *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1258, 1266–67 (Austin, Gammel Book Co. 1898).

[86] *See id.*

[87] *See* FED. R. CIV. P. 26.

[88] The 1st Texas Legislature designated the conditions under which a deposition could be taken as:

> Depositions of witnesses in civil suits, residing in the State, may be taken in the following cases: first, where the witness is about to leave the State, or the county where

practice, but when it did, its scope was confined in the same way as the scope of discovery had been confined for written depositions.[89]

In summary, before the adoption of the 1940 Texas Rules of Civil Procedure, there was no concept of discovery in the modern sense. There were no interrogatories to parties of the type provided for under the predecessor federal rules or of the type we have now.[90] There were no workable provisions to compel the production of documentary evidence before trial,[91] no provisions to compel a party to submit to a mental or physical examination even if the party's condition was in controversy,[92] and no requests for admission.[93] Basically the only type of discovery in Texas practice for 100 years was deposition discovery designed to perpetuate admissible testimony, which was not pretrial discovery in the modern sense at all.

Before 1941, pre-trial practice was extremely limited in all other respects. There was no pre-trial conference rule[94] of pre-trial conference practice, which was of a recognized and regularized character from county to county, and, of course, there was no summary judgment practice at all.[95] Professor Stayton has described Texas lawyers' attitude about summary judgment in 1941 as being one by which the lawyers thought summary

> the suit is to be tried; second, where a witness by reason of age, sickness or official [duty] shall be unable to attend the court; third, where the witness resides without the county in which the suit is pending; fourth, where the witness is female . . . .

Act approved May 13, 1840, 1st Cong., R.S., § 67, 1840 Repub. Tex. Laws 363, 379 *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1669, 1685 (Austin, Gammel Book Co. 1898).

[89] In 1907, the 30th Texas Legislature enacted a statute providing that the testimony of "any witness" could be taken by oral deposition, that is, by oral questions propounded by the parties at the deposition proceeding to which oral answers were given. Acts of April 12, 1907, 30th Leg., R.S., ch. 91, § 2, 1907 Tex. Gen. Laws 186, 187.

[90] *See* FED. R. CIV. P. 33; *see also* TEX. R. CIV. P. 197.1. *See generally* Julius Franki, *Discovery*, 13 TEX. B.J. 447 (1950).

[91] *See* Franki, *supra* note 90, at 448 (discussing prior case law including *Sayles v. Bradley & Metcalf Co.*,49 S.W. 209 (1899)); *see also* Tex. Co. v. Honaker, 282 S.W. 879, 882–83 (Tex. Civ. App.—Fort Worth 1926, writ ref'd).

[92] *See* FED. R. CIV. P. 35; TEX. R. CIV. P. 204.1.

[93] *See* FED. R. CIV. P. 36; TEX. R. CIV. P. 198.1.

[94] *See* TEX. R. CIV. P. 166, 3 TEX. B.J. 525, 548 (1940, amended 2003).

[95] *See* TEX. R. CIV. P. 166a, 12 TEX. B.J. 529, 531–32 (1949, amended 1971).

judgment amounted to some sort of "snap" judgment, rather than a reasoned process.[96]

E. The Trial Process

Although formal discovery and pretrial practice was largely undeveloped before the adoption of the Texas Rules of Civil Procedure in 1941, Texas trial practice and particularly the way in which the jury was charged by the trial judge had already undergone a substantial developmental process before 1940.

Originally, the use of the general charge was predominant.[97] But the earliest Texas practice also recognized the use of a special verdict in the form of narrative findings by the jury, similar to the findings of fact made in bench trials.[98] As early as 1876,[99] and probably earlier,[100] Texas trial courts made use of questions framed by the trial court to be answered by the jury under the court's instructions. By contrast, in the general charge, the judge stated the applicable law and it was "the province and duty of the jury to apply the facts, permitted to go before them under the rulings of the court, to the law as given them in the charge . . . and directly and concretely

[96] Robert W. Stayton, *The Plastic Code*, 29 TEX. L. REV. 764, 787 (1951).

[97] 3 ROY W. MCDONALD, *supra* note 15, § 12.02 (1983).

[98] *See* Claiborne v. Tanner, 18 Tex. 68, 71–72 (1856). For further discussion of the Texas jury charge practice prior to the 1973 amendments, *see* GUS M. HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS (1959); Richard L. Collier, *Submission of Special Issues in Slip and Fall Cases*, 5 BAYLOR L. REV. 161 (1953); J. B. Dooley, *Special Issues Under the New Rules*, 20 TEX. L. REV. 32 (1941); William V. Dorsaneo, III, *Broad-Form Submission of Jury Questions and the Standard of Review*, 46 S.M.U. L. REV. 601 (1993); Coleman Gay, *"Blindfolding" the Jury: Another View*, 34 TEX. L. REV. 368 (1956); J.A. Gooch, *Submission to the Jury*, 18 TEX. B.J. 155 (1955); Leon Green, *Blindfolding the Jury*, 33 TEX. L. REV. 273 (1955); Leon Green, *Special Issues*, 14 TEX. B.J. 521 (1951); Albert P. Jones, *Special Issue Submission*, 16 TEX. B.J. 285 (1953); W. Page Keeton, *Personal Injuries Resulting from Open and Obvious Conditions — Special Issue Submission in Texas*, 33 TEX. L. REV. 1 (1954); William D. Masterson, Jr., *Preparation and Submission of Special Issues in Texas*, 6 SW. L.J. 163 (1952); William O. Neal & William A. Paddock, *Submission of Issues in Uncontrolled-Intersection Collision Cases in Texas*, 44 TEX. L. REV. 1 (1965); A.R. Stout, *Our Special Issue System*, 36 TEX. L. REV. 44 (1958); Tom Suggs, *Jury Submission Under the New Rules*, 6 DALL B. SPEAKS 229 (1941).

[99] J.B. Dooley, *The Use of Special Issues Under the New State and Federal Rules*, 20 TEX. L. REV. 32, 32–33 (1941); *see, e.g.*, Yeary v. Smith, 45 Tex. 56 (1876).

[100] Act of May 13, 1846, I Paschal's Digest, Art. 1469 (4th ed. 1874) ("In civil suits the jury may find and return a special verdict in writing, in issues made up under the direction of the court, declaring the facts proved to them; any verdict so found shall be conclusive between the parties as to the facts found."), *cited in* MCDONALD, *supra* note 15, § 12.02 n.8.

decide by their verdict who shall prevail in the suit."[101] For example, one important case held that if any theory in a general charge was insupportable factually, legally, or procedurally, the entire case must be reversed, even though the evidence would support one or more of the properly submitted theories.[102]

By the end of the nineteenth century, due to legislative enactments and court interpretation, submission of cases by special issues (interrogatories) became more acceptable.[103] One of the principal early obstacles to the use of special issues was the rule that a verdict had to encompass all of the elements of the claim.[104] Even undisputed facts had to be found by the jury because the trial court was statutorily precluded from rendering judgment if all facts raised by the pleadings were not found, even if none of the evidence presented raised a fact issue.[105] In 1897, in *Silliman v. Gano*, the Texas Supreme Court described this aspect of special verdict practice as a "dangerous practice."[106] Chief Justice Gaines urged the Texas Legislature to eliminate the strict requirement that the special verdict include all findings necessary to support a judgment.[107] In answer to this criticism in 1897, the Texas Legislature promptly passed legislation mandating that "an issue not submitted and not requested by a party . . . shall be deemed as found by the court in such manner as to support the judgment."[108] The 1897 legislation made special issue submission a more workable method.[109]

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[101] McFaddin v. Hebert, 15 S.W.2d 213, 216 (Tex. 1929).

[102] Lancaster v. Fitch, 246 S.W. 1015, 1016 (Tex. 1923); *see also* Tisdale v. Panhandle & S.F. Ry. Co., 228 S.W. 133, 137 (Tex. Comm'n App. 1921, judgm't adopted). As explained below, special issue practice is subject to many of the same problems. *See infra* Part IV.

[103] *See* Galveston, H. & S.A. Ry. Co. v. Jackson, 50 S.W. 1012, 1013 (Tex. 1899).

[104] *See, e.g.*, Paschal v. Cushman & Co., 26 Tex. 74, 75 (1861) ("This verdict is not sufficient to sustain the decree, inasmuch as the fact is omitted that appellants had recovered a judgment, etc., as alleged in the petition.").

[105] *See, e.g.*, Cole v. Crawford, 5 S.W. 646, 647 (Tex. 1887) ("It is well settled in this court that, when a case is given to a jury upon special issues, all the issues of fact made by the pleadings must be submitted and determined, or the verdict will be set aside.").

[106] 39 S.W. 559, 561–62 (Tex. 1897).

[107] *Id.*

[108] Act approved June 18, 1897, 25th Leg., S.S., ch. 7 § 1, 1897 Tex. Gen. Laws 15, 15, *reprinted in* 10 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1455, 1455 (Austin, Gammel Book Co. 1898). As the full text states:

> The special verdict must find the facts established by the evidence and not the evidence by which they are established; and it shall be the duty of the court when it submits a case to the jury upon special issues to submit all the issues made by the pleading. But

By 1913, the Texas Legislature enacted the Special Issues Act,[110] the predecessor of what is presently Rule 277 of the Texas Rules of Civil Procedure.[111] It is commonly accepted that the legislation was enacted to provide an escape from a general charge practice that had become unmanageable because of "a gradual accumulation of instructions considered helpful to juries."[112] The new procedures mandated by the Special Issues Act required the use of special issues.[113] The statute included language requiring that "special issues shall be submitted distinctly and separately, and without being intermingled with each other, so that each issue may be answered by the jury separately."[114] This "distinctly and separately" requirement introduced a "system of fractionization of special issues far beyond that employed in any other jurisdiction in the common-law world."[115]

In *Fox v. Dallas Hotel Co.*, the Texas Supreme Court applied the mandate for the submission of each issue "distinctly and separately, avoiding all intermingling" in negligence cases.[116] Alexander Fox died as a result of injuries he sustained while trying to operate a defective elevator.[117] Although many specific acts of negligence had been alleged, the trial court

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> the failure to submit any issue shall not be deemed a ground for reversal of the judgment upon appeal or a writ of error unless its submission has been requested in writing by the party complaining of the judgment. Upon appeal or writ of error, an issue not submitted and not requested by a party to the cause shall be deemed as found by the court in such manner as to support the judgment; provided, there be evidence to sustain such a finding. *Id.*

[109] *See* Dooley, *supra* note 99, at 33. This Texas innovation was subsequently adopted in Wisconsin and Michigan and was incorporated into Federal Rule 49(a). *See* ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 62 (1952). For a detailed discussion of this practice, *see* Leon Green, *A New Development in Jury Trial*, 13 A.B.A. J. 715, 717 (1927), *reprinted in* JUDGE AND JURY 350, 359 (1930).

[110] Act of March 29, 1913, 33rd Leg., R.S., ch. 59, § 1, 1913 Tex. Gen. Laws 113, 113, *repealed by* Act of May 15, 1939, 46th Leg., R.S., ch. 25, § 1, 1939 Tex. Gen. Laws 201, 201.

[111] *See* TEX. R. CIV. P. 277.

[112] Lemos v. Montez, 680 S.W.2d 798, 801 (Tex. 1984).

[113] Act of March 29, 1913, 33rd Leg., R.S., ch. 59, § 1, 1913 Tex. Gen. Laws 113, 113 (repealed 1939).

[114] *Id.*

[115] Jack Pope & William G. Lowerre, *Revised Rule 277—A Better Special Verdict System for Texas*, 27 SW. L.J. 577, 579 (1973).

[116] 240 S.W. 517, 521–22 (1922), *overruled by* Burk Royalty Co. v. Walls, 616 S.W.2d 911, 925 (Tex. 1981).

[117] *Id.* at 517.

submitted the following single question concerning the decedent's contributory negligence:

> Do you find from preponderance of the evidence that Alexander Fox was "guilty of contributory negligence in his conduct in, around, or about the elevator, or the shaft thereof, prior to or at the time he was injured?"[118]

The Texas Supreme Court rejected the trial court's submission of contributory negligence in broad-form, construing former Article 1984a as requiring that each separate factual theory be the subject of a separate question having a separate answer.[119] After *Fox*, the courts strictly enforced the requirement that issues be submitted "separately and distinctly" in negligence cases, but not in other cases.[120]

The Special Issues Act, enacted in 1913, also permitted "such explanations and definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such issues."[121] This principle of necessity was applied rigorously in an apparent effort to avoid complex jury charges.[122] Accordingly, after the adoption of the Special Issues Act, hostility to the general charge historically meant a limited role for definitions and instructions.[123] Indeed, before the adoption of the Texas Rules of Civil Procedure, the use of instructions, as distinguished from definitions of legal terms, was prohibited.[124] The most that could be done was to define legal and technical terms used in the charge.[125]

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[118] *Id.* at 522.

[119] *See id.* at 521–22.

[120] *See* Roosth & Genecov Prod. Co. v. White, 262 S.W.2d 99, 104 (Tex. 1953), *overruled by Burk Royalty Co.*, 616 S.W.2d at 925.

[121] Act of Mar. 29, 1913, 33rd Leg., R.S., ch. 59, § 1, 1913 Tex. Gen. Laws 113, 113 (repealed 1939).

[122] *See* Tex. & N.O. Ry. Co. v. Martin, 32 S.W.2d 363, 367 (Tex. Civ. App.—Beaumont 1930, writ ref'd); *see also* J.M. Radford Grocery Co. v. Andrews, 15 S.W.2d 218, 219 (Tex. Comm'n App. 1929, holding approved) (in automobile collision case, instruction as to duties of drivers approaching and passing other vehicles on public streets was a general charge and not an explanation and definition of the legal term "negligence").

[123] *See* Green, *Blindfolding the Jury*, *supra* note 98, at 278–79.

[124] Green, *Blindfolding the Jury*, *supra* note 98, at 279 (citing the holding in *J.M. Radford Grocery Co.*, 15 S.W.2d 218).

[125] *See* Tex. & N.O. Ry. Co., 32 S.W.2d at 367 ("This assignment does not in the least complain of the court's refusing or failing to define any term used in [the] charge.").

Another aspect of Texas special issue practice that caused problems in the trial of cases to juries involved the submission of inferential rebuttal defenses in question form.[126] The submission of these defenses in question form tended to confuse jurors and to create conflicts in jury findings because plaintiffs were required not only to obtain favorable jury findings on each element of the plaintiff's claim but also to obtain a separate affirmative answer to another question negating the defense and on which the plaintiff had the burden of persuasion, *e.g.* "Do you find from a preponderance of the evidence that the occurrence in question was not the result of an unavoidable accident?"[127]

III. RULES OF PRACTICE ACT

In 1939, the 46th Legislature passed the Rules of Practice Act, relinquishing to the Supreme Court of Texas "full rulemaking power in the practice and procedure in civil actions."[128] Under the Rules of Practice Act, neither Court-made rules nor their amendments require advance legislative

[126] *See, e.g.*, Wheeler v. Glazer, 153 S.W.2d 449, 452 (Tex. 1941); *see also* Green, *Blindfolding the Jury*, *supra* note 98, at 277–78.

[127] *See* Yarborough v. Berner, 467 S.W.2d 188, 192 (Tex. 1971) ("It has become an instrument, and one of right, to raise conflicts in jury issues which defeat a verdict and a trial. Professor Green has condemned the issue as one which creates the right to set a trap for the jury." (citing Green, *Blindfolding the Jury*, *supra* note 98)).

[128] On May 12, 1939, the legislature passed House Bill 108, which is usually referred to as the Rules of Practice Act. Act of May 15, 1939, 46th Leg., R.S., ch. 25, § 2, 1939 Tex. Gen. Laws 201, 201, *repealed by* Act of June 12, 1985, 69th Leg., ch. 480, § 26(1), 1985 Tex. Gen. Laws 1720, 2048 (current version at Tex. Gov't Code Ann. § 22.004 (West Supp. 2012)). Through express provision of the Act, full authority to make rules governing civil case was relinquished to the supreme court by the legislature, subject to the limitation that the rules not "abridge, enlarge or modify the substantive rights of a litigant." *Id.* The court was ordered to promulgate rules and file them with the secretary of state within a specified time frame such that the rules would become effective on September 1, 1941. *Id. See* James W. Wilson, *The Texas Rules of Civil Procedure*, 29 TEX. L. REV. 766, 766–67 (1951). Perhaps indicative that the Texas Legislature would not be content to leave court rules to the courts, the Legislature passed in the same session ten additional bills containing sometimes minute adjustments in practice and procedure. *See, e.g.*, Act of June 7, 1939, 46th Leg., R.S., ch 28, 1939 Tex. Gen Laws 205, 205–13. Even after the Texas Supreme Court had filed the first edition of the civil procedure rules with the Texas Secretary of State, the Legislature in 1941 enacted a bill to authorize the Court to amend these initial rules and to reserve the Legislature's right to alter or repeal them. *See* Act of Mar. 6, 1941, 47th Leg., R. S., ch. 53, 1941 Tex. Gen. Laws 66, 66–67.

approval.[129] The Practice Act also provides broadly that the Texas Supreme Court may list, as "repealed or modified," "conflicting laws and parts of laws governing practice and procedure in civil actions."[130] The rules and amendments to rules remain in effect until disapproved by the legislature.[131]

On January 10, 1940, the Court appointed a 21-member advisory committee to assist the Court in carrying out its rule making responsibilities.[132] As explained by one of the committee members, the

[129] TEX. GOV'T CODE ANN. § 22.004(b) (West Supp. 2012). The Texas Supreme Court is required to file the rules or amendments promulgated by the Court and must mail a copy of the rules or amendments to each member of the State Bar of Texas not later than the 60th day before the date on which they become effective. *Id.* Unlike the federal Rules Enabling Act, which requires the U.S. Supreme Court to transmit a proposed rule to Congress by May 1 of the year in which the rule is to take effect (*see* 28 U.S.C. § 2074(a) (2000)), the Texas Rules of Practice Act, as amended in 2011, provides only that on written request from a member of the legislature, the secretary of state must provide the member with electronic notification when the supreme court has promulgated rules or amendments. *Id.* Prior to the 2011 amendment, the statute required the secretary of state to report the rules or amendments to the next regular session of the legislature by mailing them to each elected member of the legislature on or before December 1 immediately preceding the session. *See* Act of May 15, 1939, 46th Leg., R.S., ch. 25, § 2, 1939 Tex. Gen. Laws 201, 201 (amended 2011) (current version at TEX. GOV'T CODE ANN. § 22.004(b) (West Supp. 2012)). But because there has never been a statutory requirement for the Texas Supreme Court to transmit a proposed rule or amendment to the legislature before their effective date, the statutory process is not designed to facilitate collaboration between the Texas Legislature and the Texas Supreme Court. In fact, the opposite is true.

[130] TEX. GOV'T CODE ANN. § 22.004(c) (West Supp. 2012) ("The list has the same weight and effect as a decision of the court.").

[131] TEX. GOV'T CODE ANN. § 22.004(b) (West Supp. 2012).

[132] *See* Order Appointing Supreme Court Rules Advisory Committee, Misc. Docket No.99-9167, 3 TEX. B.J. 520 (Tex. Jan. 10, 1940); Order Appointing Supreme Court Rules Advisory Committee, Misc. Docket No.99-9167, 4 TEX. B.J. 617 (Tex. Jan. 10, 1940); Order Appointing Supreme Court Rules Advisory Committee, Misc. Docket No.99-9167, 6 TEX. B.J. 462 (Tex. Jan. 10, 1940). The membership of the original advisory committee included the following judges and lawyers: Angus Wynne, Chairman, retired Supreme Court Associate Justice, F.A. Williams, retired Supreme Court Associate Justice, Thomas B. Greenwood, M.N. Chrestman, Third Court of Appeals Chief Justice James W. McClendon, Tenth Court of Appeals Associate Justice James P. Alexander, Professor Robert W. Stayton, Professor Roy W. McDonald, W.R. Chapman, Olin R. VanZandt, William A. Vinson, Judge Alan Montgomery, Winbourne Pearce, Randolph L. Carter, Allen Clark, Judge R.B. Levy, J. B. Dooley, Richard F. Burges, W.E. Orgain, former House Speaker Robert W. Calvert, and Dallas Scarborough. *Id.*

The four most influential members of the committee were Justices McClendon and Alexander, Professor Stayton, a former member of the Commission of Appeals and Professor of Practice and Procedure at the University of Texas School of Law, and Professor McDonald, Professor of Practice and Procedure at Southern Methodist University Law School. Justice Alexander also

committee did not attempt "to overhaul the structure of [the] procedural rules from beginning to end" but only decided:

> (1) to examine all rules of procedure then in use in the courts of Texas, whether they had come into existence and use through legislative enactment, promulgation by the Supreme Court of Texas, or promulgation by the Supreme Court of the United States for the use in federal courts . . . (3) to select out those rules regarded by the committee and the legal profession generally as trouble-makers and to improve them, if possible . . . .[133]

Accordingly, under the leadership of Angus Wynne, Chairman of the Advisory Committee and President of the Texas Bar Association, Justice James P. Alexander of the Waco Court of Appeals, Justice James W. McClendon of the Austin Court of Appeals, Professor Roy W. McDonald of Southern Methodist University, and Professor Robert W. Stayton of the University of Texas, the original Supreme Court Advisory Committee ("SCAC"), devised the original Texas Rules of Civil Procedure.[134]

served as Professor of Practice and Procedure at Baylor University Law School. *Id.* He was elected chief justice of the Texas Supreme Court in 1940 and was sworn in on January 1, 1941. Alexander, James P., *Supreme Court Chief Justices*, Texas Politics, http://www.laits.utexas.edu/txp_media/html/just/justices/10.html (last visited Oct. 6, 2013). Chief Justice Alexander became the Court's first "Rules Member" and continued his interest in rule making for the Court until his death on January 1, 1948. *See* Pope, *supra* note 7, at 12 n.44. Subsequent rules members include Justice James P. Hart, Justice Robert W. Calvert, who served from September 1949 until he became the Court's chief justice in January 1961, Justice Ruel Walker who served as the rules member from 1961 until Justice Jack Pope was appointed in May 1975 on Justice Walker's retirement. *Id.* Justice Pope's tenure as Rules Member itself lasted until September 1982, when he became the Court's chief justice. Justice James P. Wallace succeeded Justice Pope as the rules member. After Justice Wallace's retirement in August 1988, Justice William W. Kilgarlin succeeded Justice Wallace. Justice Kilgarlin was succeeded by Justice Nathan L. Hecht in January 1989.

[133] Robert W. Calvert, Some of the Important Changes Effected by the New Rules of Practice and Procedure in Civil Actions, Address Before the Bar Association of Dallas (June 21, 1941), *in* 6 DALL. B. SPEAKS, 1941, at 170–71.

[134] *See* Letter from the Texas Supreme Court Advisory Committee to the Supreme Court of the State of Texas (Sept. 16, 1940) *in* 3 TEX. B. J. 522, 522–24; *see also* Letter from the Texas Supreme Court Advisory Committee to the Supreme Court of the State of Texas (Sept. 16, 1940), *in* 4 TEX. B. J. 620, 620–22; *see also* Letter from the Texas Supreme Court Advisory Committee to the Supreme Court of the State of Texas (Sept. 16, 1940), *in* 6 TEX. B. J. 465, 465–67.

IV. NEW RULES OF 1941

A. Sources of Texas Rules of Civil Procedure

After conducting a series of meetings during an eight-month period in 1940,[135] the committee proposed adoption of 822 rules.[136] Most of the rules were based on the procedural provisions of the Revised Civil Statutes of 1925 and the existing Texas District and County Court Rules.[137] Others were based on a slightly modified version of the 1938 federal rules, including the federal rules dealing with permissive and compulsory joinder of claims and parties, interpleader and class actions, consolidation, severance and separate trials,[138] written discovery, sanctions for failure to obey an order to produce documents and pretrial practice.[139] Parts of federal rules concerning pleading of claims and defenses, as provided in Federal Rule 8, and concerning amendments to pleadings, as provided in Federal Rule 15, were also adopted, among others.[140]

B. The Organization of the New Rules

The Texas Supreme Court's initial Order Adopting Rules was entered on October 29, 1940, with an effective date of September 1, 1941.[141] After the Court made some significant modifications,[142] particularly with respect to the trial court's charge to the jury,[143] and motion for new trial practice,[144] the new Rules of Civil Procedure went into effect September 1, 1941.[145] As

[135] For a general discussion of this activity *see* Wilson, *supra* note 128, at 770–80.

[136] *See generally* former TEX. R. CIV. P. 1–822, 4 TEX. B.J. 487, 487–608 (1941).

[137] *See* Guittard, *supra* note 32, at 404.

[138] Guittard, *supra* note 32, at 404; *See* former TEX. R. CIV. P. 38–43, 51, 97, 166, 174, 4 TEX. B.J. at 493–96, 503, 512, 514 (1941).

[139] *See* former TEX. R. CIV. P. 166–170, 4 TEX. B.J. at 512–13 (1941).

[140] *See* former TEX. R. CIV. P. 47, 48, 66, 67, 71, 94, 4 TEX. B.J. at 495–96, 498, 502–03 (1941).

[141] *See* Order Adopting Rules, Misc. Docket No.99-9167, 3 TEX. B.J at 522; Order Adopting Rules, Misc. Docket No.99-9167, 4 TEX. B.J at 619; Order Adopting Rules, Misc. Docket No.99-9167, 6 TEX. B.J at 464.

[142] Order Adopting Amendments Sept. 20, 1941, Misc. Docket No.99-9167, 4 TEX. B.J. 624 (Tex. Sept. 20, 1941); Order Adopting Amendments Sept. 20, 1941, Misc. Docket No.99-9167, 6 TEX. B.J. 469 (Tex. Sept. 20, 1941).

[143] *See* former TEX. R. CIV. P. 277–279, 6 TEX. B.J. at 368–70 (1943).

[144] *See* former TEX. R. CIV. P. 324, 6 TEX. B.J. at 375–76 (1943).

[145] *See* sources cited *supra* note 140.

originally promulgated, the Texas Rules of Civil Procedure were divided into eight parts:

> General Rules
>
> II.Rules of Practice in District and County Courts
>
> III.Rules of Procedure for the Courts of Civil Appeals
>
> IV.Rules of Practice for the Supreme Court
>
> V.Rules of Practice in Justice Courts
>
> VI.Rules Relating to Ancillary Proceedings
>
> VII. Rules Relating to Special Proceedings
>
> VIII.Closing Rules[146]

Most of the original Texas Rules of Civil Procedure derived from the Revised Civil Statutes of 1925 and predecessor Texas rules for District and County Courts, which are one-paragraph rules with uninformative headings and no subheadings.[147] This style contrasts with the federal rules of civil procedure and with the Texas rules that were based on the federal rules, which provide complete coverage of the discrete procedural subjects covered in each rule, together with informative headings and subheadings for numbered subdivisions and paragraphs contained in the rules.[148] The original drafters thought it wise not to change the predecessor rules and statutes too much during the drafting process because of a presumed familiarity with them by the bench and bar and a concomitant hostility to change.[149]

Many years later, Chief Justice Clarence Guittard of the Dallas Court of Appeals and a longtime active and influential member of the Advisory Committee to the Texas Supreme Court accurately described the new rules as a mixture of Texas procedural statutes, with some revisions and additions, some federal rules thought necessary to update Texas statutes, and with many former Texas Rules.[150] As Guittard explains, "most of the

[146] *See Rules of Practice and Procedure in Civil Actions: Topical Index*, 4 TEX. B.J.487,487–88 (1941).

[147] *See, e.g.*, former TEX. R. CIV. P. 6-14, 4 TEX. B.J. 489, 490 (1941).

[148] *See, e.g.*, former TEX. R. CIV. P. 38, 39, 40, 42, 4 TEX. B.J. 489, 493–95 (1941).

[149] Dean Clark viewed this piecemeal incorporation as a missed opportunity arguing that "piecemeal reform may often be less desirable than no reform at all." Clark, *supra* note 31, at 14.

[150] Guittard, *supra* note 32, at 404.

rules then adopted, and many still in force, contain obsolete provisions and much of the convoluted language common in 19th century legislation."[151]

C. The Pleading System

Under prior Texas practice, as reflected in Article 1187 of the Revised Civil Statutes of 1879, the pleader was required to plead "facts" constituting a "cause of action."[152] The federal approach, embedded in Federal Rule 8 in the 1937 version of the federal rules, required a concise statement of a claim; the words "facts" and "cause of action" were eliminated because they had spawned a complex set of technical pleading requirements under the predecessor procedural Codes.[153] The federal drafters thought it better to abandon traditional terminology rather than to try to redefine the terms.[154] Professor McDonald advocated that the federal approach should be adopted, not verbatim, but essentially.[155] He recommended that the new Texas pleading rule should be drafted in substantial conformity with Federal Civil Procedure Rule 8.[156]

But at the last meeting of the Advisory Committee in October of 1940, the language used in the first draft was changed so that instead of requiring the pleader to plead a ground of recovery sufficient to give fair notice of the claim, the pleader was still required to plead a cause of action.[157] This backward step, opposed by McDonald and others, was justified in several ways.[158] The primary justification involved a perceived need to preserve the relationship between the issues set forth in the pleadings and the Texas

[151] Guittard, *supra* note 32, at 404. Chief Justice Guittard was appointed to the Advisory Committee in the early 1960s and, with a short hiatus during Chief Justice John Hill's tenure, as chief justice of the Texas Supreme Court, Chief Justice Guittard served on the committee until his death in 1998.

[152] *See* Act approved Feb. 21, 1879, 16th Leg., R.S., Tex. Rev. Civ. Stat., Ch. 2, art. 1187 (1879) TEX. GEN. LAWS 88, 88, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 262, 262 (Austin, Gammel Book Co. 1898); *see also* TEX. REV. CIV. STAT. art. 1997 (Vernon 1925).

[153] *See* CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING §§ 4, 38 (2d ed. 1947).

[154] *See* 3 ROY W. MCDONALD, *supra* note 15, § 6.11.

[155] *See* 3 ROY W. MCDONALD, *supra* note 15, § 6.11 n.5.

[156] *See* 3 ROY W. MCDONALD, *supra* note 15, § 6.11 n.99.

[157] *See* Wilson, *supra* note 128, at 779.

[158] *See* Wilson, *supra* note 128**Error! Bookmark not defined.**, at 778.

"special issue" jury charge.[159] In a law review article on the subject, Professor Robert Stayton suggested that to depart from specific pleading too much would increase the difficulty being encountered in the submission of special issues.[160]

Whatever was intended, the failure to deemphasize the role of pleadings in fact contributed to the perpetuation of complex special issue practice. Professor Hodges' influential text on special issue practice as it existed before the 1973 amendments to the Texas Rules of Civil Procedure points out that pleadings had always been a blueprint for the charge.[161] Technical pleadings made for technical jury charges, and that is the way things remained for quite some time.[162]

More significantly, the Supreme Court Advisory Committee recommended to the Texas Supreme Court that it eliminate the general demurrer, while retaining special exception practice.[163] The original Advisory Committee also developed a waiver of pleading defects rule[164] under the guidance of then Associate Justice James P. Alexander of the Waco Court of Appeals, who shortly thereafter became Chief Justice of the Texas Supreme Court.[165] When this rule was adopted, the traditional problem of errors being raised after verdict and judgment was ameliorated.[166]

D. Joinder of Claims and Parties

The main subjects explicitly adopted from the 1937 federal rules by the Texas Supreme Court as part of the Texas Rules of Civil Procedure in 1940 were the federal rules dealing with the joinder of claims and parties.[167] New

[159] *See id.*; TEX. R. CIV. P. 277, 279.

[160] Stayton, *supra* note 31, at 22.

[161] HODGES, *supra* note 98, at 4.

[162] The 1973 amendments to Tex. R. Civ. P. 277 eliminated the requirement that special issues be submitted separately and distinctly. *See* Dorsaneo, *supra* note **Error! Bookmark not defined.**, at 606–08; *see also* WILLIAM V. DORSANEO III, 8 TEXAS LITIGATION GUIDE § 122.02 [2] (2013).

[163] *See* Roy W. McDonald, *Civil Rules Begin to Take Form*, 3 TEX. B.J. 179, 180 (1940).

[164] TEX. R. CIV. P. 90; *see* Wilson, *supra* note 128, at 773.

[165] *See* Wilson, *supra* note 128, at 769.

[166] *See infra* Part IV.G.

[167] *See* Clark, *supra* note 31, at 7. ("The chief topic explicitly adopted is that of joinder of parties; here the Federal Rules 19–23 are taken over practically in entirety in local rules 39–43, though the local rule on intervention (Rule 60) is continued in place of the Federal Rule 24."). *See generally* Louis R. Frumer, *Multiple Parties and Claims in Texas*, 6 SW. L.J. 135 (1952).

Civil Procedure Rule 51(a) adopted in 1940, essentially a verbatim copy of the original version of Federal Rule 18(a) provides in its first sentence that: "The plaintiff in his petition or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party."[168] By the adoption of this standard, Texas law was simplified by the elimination of the "multifariousness" exception to the joinder of claims in cases involving one plaintiff and one defendant.[169] The second[170] and third[171] sentences of Texas Rules 51(a) were also copied from the original version of Federal Rule 18(a).[172]

Texas Rule 51(b) was also modeled on Federal Rule 18(b), allowing permissive joinder of a principal and contingent claim to be litigated in the same action, but a sentence was added by amendment on September 20, 1941, effective December 31, 1941,[173] to Texas Rule 51(b) disallowing its application "in tort cases so as to permit the joinder of a liability or indemnity insurance company, unless such company is by law or contract directly liable to the person injured or damaged."[174] The original version of Texas Rule 39 (Necessary Joinder of Parties) adopted in 1940 was also taken largely verbatim from the 1937 version of Federal Rule 19.[175]

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[168] TEX. R. CIV. P. 51(a); s*ee* TEX. R. CIV. P. 51(a), 4 TEX. B.J. 496 (1941, amended 1961); *cf.* FED. R. CIV. P. 18(a).

[169] *See* text *supra* notes 69–73, above. The former general rule against the joinder of tort claims and contract claims in the same lawsuit was also laid to rest. *Cf.* Jameson v. Zuehlke, 218 S.W.2d 326, 328 (Tex. Civ. App.—Waco 1948, writ ref'd n.r.e.) ("Our view [of Rule 51(a)] is that where the parties are the same, there are no restrictions . . . .").

[170] *See* TEX. R. CIV. P. 51(a) ("There may be a like joinder of claims when there are multiple parties if the requirements of Rules 39, 40 and 43 are satisfied.").

[171] *See* TEX. R. CIV. P. 51(a) ("There may be a like joinder of cross claims or third-party claims if the requirements of Rules 38 and 97, respectively, are satisfied.").

[172] Federal Rule 18(a) was rewritten in 1966 to eliminate interpretive problems primarily caused by the last two sentences of the original subdivision. *See* Benjamin Kaplan, *1966 Amendments of the Federal Rules of Civil Procedure* (pt. II), 81 HARV. L. REV. 591, 596–97 (1968); Fed. Hous. Adm'r v. Christianson, 26 F. Supp. 419, 419 (D. Conn. 1939).

[173] Order Adopting Amendments Sept. 20, 1941, *supra* note 142.

[174] *See* TEX. R. CIV. P. 51(b), 4 TEX. B.J. 489, 496 (1941, amended 1961); *see also* TEX. R. CIV. P. 38(c).

[175] *Compare* former TEX. R. CIV. P. 39, 4 TEX. B.J. 489, 494 (1941, amended 1970), *with* former FED. R. CIV. P. 19, 28 U.S.C. § 4, at 2622 (1940, amended 1966). But in adopting Federal Rule 19(b), the words "who are not indispensable, but" were omitted from the first sentence in Texas Rule 39(b). Former TEX. R. CIV. P. 39, 4 TEX. B.J. 489, 494 (1941, amended 1970).

As explained above,[176] prior to the adoption of the Texas Rules of Civil Procedure, Texas courts used the term "necessary" to mean a party whose nonjoinder would deprive the court of jurisdiction to litigate any part of the case, i.e. the terms "necessary" and "indispensable" were synonymous.[177] In contrast, under federal practice and former Federal Rule 19(a), the term "necessary" was not synonymous with the term "indispensable."[178] It meant "conditionally necessary" (with the conditions being that the nonjoined person had to be subject to the trial court's jurisdiction and the party's absence had to be raised in the trial court before joinder was required), not jurisdictionally "indispensable."[179] Accordingly,[180] because the original version of Texas Rule 39's terminology did not match the terminology in the Texas case law, the new procedural rule caused considerable confusion for a number of years,[181] until the Texas Supreme Court's 1966 decision in the *Petroleum Anchor* case reconciled the conflict.[182]

[176] *See* text *supra* notes 74–76.

[177] *See* Frumer, *supra* note 167, at 142 n.17.

[178] *See* Frumer, *supra* note 167, at 142 n.17.

[179] *See* Frumer, *supra* note 167, at 142 n.17.

[180] *See* 28 U.S.C. § 4 at 2622 (1940) ("***Necessary joinder***. [Except as otherwise provided in these rules,] persons having a joint interest shall be made parties and be joined . . . as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.").

[181] Petroleum Anchor Equip., Inc. v. Tyra, 406 S.W.2d 891, 893 (Tex. 1966); *see* Brown v. Meyers, 163 S.W.2d 886, 889 (Tex. Civ. App.—Galveston 1942, writ ref'd w.o.m.) (recognizing distinction between indispensable and conditionally necessary parties); *see also* Hicks v. Sw. Settlement & Dev. Corp., 188 S.W.2d 915, 925–26 (Tex. Civ. App.—Beaumont 1945, writ ref'd w.o.m.) (*contra*); Frumer, *supra* note 167, at 142 n.17 ("There is going to be confusion on this score in the Texas cases until the courts more clearly define the terminology which they are using."). *See generally* Jack Ritchie, *Necessary Parties–Combined Action of Trespass to Try to Land and for Damages–Rule 39*, 24 TEX. L. REV. 511. Professor Stayton attempted to cabin this confusion by coining the word "insistible" to refer to parties who are "necessary", but not "indispensable." *See* Frumer, *supra* note 167, at 142 n.17; *see also Petroleum Anchor*, 406 S.W.2d at 893.

[182] *Petroleum Anchor*, 406 S.W.2d at 893 ("It is at once apparent that the 'necessary' parties of which the rule speaks fall into two categories: (1) those who under paragraph (a) '*shall* be made parties,' and (2) those who under paragraph (b) 'ought to be parties if complete relief is to be accorded between those already parties.' It is also at once apparent that 'persons having a joint interest' within the meaning of paragraph (a), properly interpreted, are *indispensable* parties, but that those who simply ought to be joined if complete relief is to be accorded between those already parties are not *indispensable*.") (emphasis in original); *see also* Robert W. Stayton, *Important Developments Since 1940 in the Law Relating to Parties and Actions*, *quoted in Petroleum Anchor* 406 S.W.2d at 893.

The 1940 Texas Rules 38 (Third Party Practice),[183] 40 (Permissive Joinder of Parties),[184] 41 (Misjoinder and Nonjoinder of Parties),[185] 42 (Class Actions),[186] 43 (Interpleader)[187] and 97 (Counterclaim and Cross-Claim)[188] were also based on companion federal rules, supplanting prior Texas law dealing with the subjects covered in the new rule book. For the most part, the adoption of these rules improved the Texas Rules of Civil Procedure.[189] Even the one most criticized addition made by the Texas Supreme Court to Civil Procedure Rule 97[190] caused no particular difficulty. In contrast, the failure to replace the Texas law generally prescribing the basis and the procedure for intervention with a rule based on Federal Rule 24[191] and the recodification of Article 1992 as Civil Procedure Rule 37,[192] as well as the problems noted above with the original version of Civil Procedure Rule 39,[193] show that the Texas drafters did not fully understand the new federal framework for joinder of claims and parties that was incorporated in the 1940 Texas Rules.[194]

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[183] TEX. R. CIV. P. 38, 4 TEX. B.J. 489, 493–94 (1940, amended 1983).

[184] TEX. R. CIV. P. 40, 4 TEX. B.J. 489, 494 (1940).

[185] TEX. R. CIV. P. 41, 4 TEX. B.J. 489, 494 (1940, amended 1941).

[186] TEX. R. CIV. P. 42, 4 TEX. B.J.489, 494–95 (1940, amended 1941).

[187] TEX. R. CIV. P. 43, 4 TEX. B.J. 489, 495 (1940).

[188] *See* Act approved Feb. 5, 1840, 4th Cong., R.S., §§ 1–6, 1840 Repub. Tex. Laws 62, 62–64, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 236–38 (Austin, Gammel Book Co. 1898) (superseded by TEX. R. CIV. P. 97(1941)). ("Pleas of counterclaim.—"Whenever any suit is brought for the recovery of any debt due by judgment, bond, bill or otherwise, the defendant shall be permitted to plead therein any counter claim he may have against the plaintiff, subject to such limitations as may be prescribed by law . . . ."). Unlike new Texas Rule 97(a), such counterclaims were permissive only. *See* Norton v. Wochler, 72 S.W. 1025, 1026 (Galveston 1903, no writ) ("The statute authorizing a defendant to plead in any suit brought against him for debt any counterclaim he may have against the plaintiff is merely permissive, and not mandatory, and his failure to plead his counterclaim does not defeat his right to recover thereon in a separate suit . . . .").

[189] Wilson, *supra* note **Error! Bookmark not defined.**, at 789.

[190] *See* TEX. R. CIV. P. 97(g) ("Tort shall not be the subject of set-off or counterclaim against a contractual demand nor a contractual demand against tort unless it arises out of or is incident to or is connected with same."). Dean Clark regarded this innovation as contrary to the spirit of the new joinder rules. *See* Clark, *supra* note 31, at 8–9.

[191] *See* FED. R. CIV. P. 24.

[192] *See* former Tex. Rev. Civ. Stat. art. 1992 (1925) (Additional parties) (now TEX. R. CIV. P. 37); *see also* TEX. R. CIV. P. 37, 4 TEX. B.J. 489, 493 (1940).

[193] *See* sources cited *supra* note 181.

[194] *See* sources cited *supra* note 181.

E. Discovery and Pretrial Practice

Several federal rules concerning pretrial discovery were adopted by the Texas Supreme Court. The federal rules concerning production of documents and requests for admission were adopted.[195] A controversial physical and mental examination rule was repealed before it ever went into effect, and did not find its way into the Texas rulebook until much later, in the early 1970s.[196] The provisions of Federal Rule 37 involving sanctions were used to a certain extent to draft a Texas sanctions rule,[197] but the old deposition practice was retained.[198]

The main problem with the 1941 discovery rules, as with the pleading rules, is that they moved too timidly toward modern concepts of pretrial practice.[199] The scope of discovery was still essentially restricted to the issues made by the pleadings, as under the prior Texas deposition practice.[200] Moreover, prior experience with the Texas deposition practice made it difficult for Texas lawyers to understand the broader scope of Federal Rule 34.[201]

With respect to the balance of pretrial procedure, a pre-trial rule like Federal Rule 16[202] was adopted in 1940, but it was left to the discretion of the local judges as to whether they would conduct pre-trial conferences.[203] For many years thereafter, pre-trial conferences were not usually conducted in most counties, except perhaps for the purpose of ruling on special

[195] *See* Alex H. McGlinchey, *Sanctions Available to Parties in Texas Discovery Procedures*, 19 SW. L.J. 740, 744 (1965). *Compare* FED. R. CIV. P. 34 *and* FED. R. CIV. P. 36, *with* TEX. R. CIV. P. 167, 20 TEX. B.J. 187, 187 (1957, repealed 1998). The motion to produce, as originally adopted, was derived directly from Federal Rule 34, except that Texas expressly prohibited pre-trial discovery of communications or reports incident to handling the case and entry upon land for inspection. *See* TEX. R. CIV. P. 167, 20 TEX. B.J. 187, 187 (1957, repealed 1998).

[196] TEX. R. CIV. P. 170(a), 4 TEX. B.J. 489, 513 (1940, repealed 1983). *See* McGlinchey, *supra* note 195, at 745 n.26.

[197] TEX. R. CIV. P. 170, 4 TEX. B.J. 489, 513 (1940, repealed 1983).

[198] TEX. R. CIV. P. 186–215, 4 TEX. B.J. 489, 516–20 (1940).

[199] *See* Franki, *supra* note 90, at 479.

[200] *See* Franki, *supra* note 90, at 479.

[201] FED. R. CIV. P. 34; *see* Franki, *supra* note 90, at 477.

[202] FED. R. CIV. P. 16.

[203] TEX. R. CIV. P. 166.

exceptions and pending motions before trial.[204] Not surprisingly, a summary judgment (snap judgment) rule was not adopted in 1940.[205]

F. The Jury Charge

The Supreme Court Advisory Committee also recommended a substantial revision of the procedural rules concerning the court's charge to the jury.[206] A review of the memoranda exchanged by the members of the Advisory Committee when the original meetings occurred in 1940 indicates that "probably no subject was more thoroughly studied, considered or debated by the Committee as a whole and the Sub-committee drafting this portion of the report [concerning the jury charge rules], than the charge to the jury."[207] In fact, during 1940 and 1941, the principal jury charge rules, Rules 277, 278, and 279 were drafted, revised in part, and repealed in part before they became effective. These documents and the rules recommended to the Court for adoption, as well as the rules actually promulgated, demonstrate dissatisfaction with the requirement of separate and distinct submission of factual theories and the separate submission of rebuttal defenses, such as unavoidable accident and sole proximate cause, in question form.[208] In particular, dissatisfaction with the submission of inferential rebuttal defenses led the Advisory Committee membership to recommend the non-submission of inferential rebuttal defenses in question form in the court's charge to the jury.[209] But, as originally enacted by order

[204] *See* WILLIAM V. DORSANEO III, 9 TEXAS LITIGATION GUIDE § 110.01 (2013); *see generally* John F. Sutton, *Trial Judges Look at Pretrial Procedures*, 26 TEX. B.J. 195, 196 (1963).

[205] *See* Roy W. McDonald, *Summary Judgments*, 30 TEX. L. REV. 285, 285 (1952).

[206] *See* Wilson, *supra* note 128, at 772.

[207] Memorandum from Justice James W. McClendon, Chief Justice of the Austin Court of Appeals, to the Texas Supreme Court , at 1 (Oct. 15, 1940) (on file in Box 13 of the Stayton Collection, Tarlton Law Library, University of Texas School of Law).

[208] *Id.* (objectives of rule changes were "1) Reducing the number of questions required to be submitted to the jury; 2) Obviating conflicting findings; 3) Avoiding the double negative in placing the burden of proof"); *see also* Memorandum from Randolph L. Carter of San Antonio, Texas to Members of the Rules Committee (Oct. 15, 1940) (on file in Box 13 of the Stayton Collection, Tarlton Law Library, University of Texas School of Law).

[209] Memorandum from Justice James W. McClendon, Chief Justice of the Austin Court of Appeals to the Texas Supreme Court, at 1–2 (Oct. 15, 1940) (on file in Box 13 of the Stayton Collection, Tarlton Law Library, University of Texas School of Law) (The "FINAL (SEPTEMBER) DRAFT of proposed Rule 279's first paragraph stated: 'When the court submits a case upon special issues . . . it shall not be necessary to submit any defensive issue unless raised

of October 29, 1940, and as amended slightly in September, 1941,[210] the pertinent provision was changed to allow the continuance of submission of inferential rebuttal defenses, including unavoidable accident in question form, as long as such a defense was supported by "an affirmative [i.e. specific] written pleading."[211]

As originally promulgated, Rule 277 also contained the following sentences authorizing a substantial departure from separate and distinct submission:

> [T]he court may submit several issues disjunctively in the same question where an affirmative finding on either of such issues would be sufficient as an element for a basis of recovery or of defense. For example, the court may inquire in one question whether the defendant has committed any one of several alleged acts of negligence. Alleged acts of contributory negligence may likewise be grouped.[212]

In addition, before its repeal by the Court's order of March 31, 1941, original Rule 278, (Failure to Submit Separately), read as follows:

> The fact that an issue is multifarious or duplicitous shall not constitute ground for reversal except where it affirmatively appears from the record that the complaining party was prejudiced thereby.[213]

These provisions were deleted by order of March 31, 1941, before the original rules became effective.[214] Consequently, despite the substantial

by the pleading under which the burden of establishing such defensive issue is upon the pleader.'").

[210] *See* Letter from the Texas Supreme Court to the Secretary of State and Members of the 47th Legislature of Texas (Oct. 29, 1940), 3 TEX. B.J. 517 (1940); Order Adopting Amendments Mar. 31, 1941, 6 Tex. B.J. 468 (1943).

[211] The historical record supports the conclusion that Associate Justice James P. Alexander, of the Waco Court of Appeals, soon to be elected as Chief Justice of the Texas Supreme Court in November, 1940, was the principal proponent of the continuation of former practice, which lasted until its abolition by amendment to Rule 277 effective September 1, 1973. Memorandum from James P. Alexander to the Texas Supreme Court (Sept. 30, 1940) (on file in Box 13 of the Stayton Collection, Tarlton Law Library, University of Texas School of Law).

[212] TEX. R. CIV. P. 277, 3 TEX. B.J. 525, 566 (1940).

[213] TEX. R. CIV. P. 278, 3 TEX. B.J. 525, 566 (1940).

[214] Former TEX. R. CIV. P. 277, 4 TEX. B. J. 169–78 (1941) (as amended by Mar. 1941 order); Order Adopting Amendments Mar. 31, 1941, 4 TEX. B. J. 623 (1941).

work of the Advisory Committee, the "distinct and separate" submission of factual theories mandated by the Special Issues Act of 1913 and the Texas Supreme Court's decision in *Fox* survived the adoption of the Texas Rules of Civil Procedure and controlled Texas charge practice in negligence cases until September 1, 1973.[215]

As originally promulgated, Rule 277 also was intended to liberalize the use of instructions by permitting "such explanatory instructions and such definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such issues . . . ."[216] At that time, language was also added to provide that an explanatory instruction or definition did not constitute a general charge.[217] As explained in the following excerpt from an unpublished memorandum prepared by Justice James McClendon, dated October 15, 1940, these changes were intended to allow trial judges more discretion in the use of instructions:

> I am sure every member of the Committee recognized the inherent right of every litigant to have his theory of the case (where properly in issue factually) fairly presented to the jury in some proper and adequate manner. In the respect in question this was amply taken care of by the provision in Rule 277 . . . requiring the judge to give "explanatory instructions."

It reads:

> In submitting special issues, the court shall submit such explanatory instructions . . . as shall be necessary to enable the jury to properly pass upon and render a verdict on such issues.This change from "explanations" in Art. 2189 to "explanatory instructions" was intended to reach this objective. "Explanatory instructions" is also carried into Rules 273, 274 and 276.
>
> Still another objective is attained by this requirement of "Explanatory instructions." It combines the special issue and general charge methods so as to preserve the

[215] Former TEX. R. CIV. P. 277, 36 TEX. B. J. 495, 495–96 (1973) (amended effective Sept. 1, 1973).

[216] Former TEX. R. CIV. P. 277, 3 TEX. B.J. 522 (1940) (as originally promulgated in October 1940).

[217] Former TEX. R. CIV. P. 277, 3 TEX. B.J. 567 (1940).

> advantages of both. On the one hand it obviates subdividing the ultimate, controlling elements of grounds of recovery or defense into numerous component issues, thereby: 1) simplifying the questions required to be submitted; 2) avoiding confusion; and 3) obviating conflicting findings and double negatives. On the other hand, it enables the court to charge the jury understandingly in regard to the findings they are called upon to make; and at the same time the value of the special issue method in requiring specific findings upon the ultimate, controlling, controverted factual issues in the case is preserved. The special issue method, when properly administered, is generally conceded to be the best adapted to obtaining actual fact findings by the jury and to confining the jury to its real proper function – that of a fact-finding instrumentality only. . . . [T]he requirement for "explanatory instructions" will, if it is submitted, greatly improve the administration of the special issue method in this State, preserving, at the same time, every right of the litigant to a fair submission of the case.[218]

Nevertheless, continuing hostility to the "general charge" remained a formidable obstacle to the achievement of these goals.[219] Although Justice McClendon viewed the change from "explanations" to "explanatory instructions" as a way to avoid the confusing complexity then existing in the fragmented Texas "special issue" system, by combining a broader form of special issue as authorized in the original versions of Rules 277 and 278 with useful explanatory instructions, this view was not shared by all of his contemporaries.[220] Ultimately, the change had no significant impact on the practice. Despite the substitution of the words "explanatory instructions"

[218] Memorandum from Justice James W. McClendon, Chief Justice of the Austin Court of Appeals to the Texas Supreme Court, at 1 (Oct. 15, 1940) (on file in Box 13 of the Stayton Collection, Tarlton Law Library, University of Texas School of Law). *See* William V. Dorsaneo III & David Crump, TEXAS CIVIL PROCEDURE: TRIAL AND APPELLATE PRACTICE, at 4-64 to 4-65 (1981).

[219] *See* Boaz v. White's Auto Stores, 172 S.W.2d 481, 484 (Tex. 1943).

[220] *See* J.B. Dooley, *The Use of Special Issues Under the New State and Federal Rules*, 20 TEX. L. REV. 32, 36–37 (1941).

for "explanations," the 1941 version of Rule 277 permitted them only when they were "necessary to enable the jury to render a verdict."[221]

G. Appellate Review; Preservation of Complaints

Before the adoption of the rules in 1940, article 1837 of the Revised Civil Statutes of 1925 authorized review of a complaint on appeal to the courts of appeals "upon an error in law either assigned [in a motion for new trial] or apparent upon the face of the record."[222] Similarly, former Texas Rule 71a exempted "fundamental error" from the requirement of a motion for new trial as a prerequisite to appeal.[223] With the adoption of the rules of procedure in 1940, former article 1837 was listed as repealed and not included in a rule of civil procedure.[224] Instead new Civil Procedure Rule 324 abolished the fundamental error exception and required the assignment of error in a motion for new trial as a prerequisite to appellate complaint in most jury cases.[225]

Another equally important change to the process of appellate review that must be mentioned is the adoption of former Civil Procedure Rules 434[226] and 503[227] in 1940. Both of these rules replaced the traditional rule of presumed harm[228] with the modern harmless error rule.[229] An earlier rule of

[221] TEX. R. CIV. P. 277, 3 TEX. B.J. 525, 566–67 (1940) (as originally promulgated in October 1940).

[222] TEX. REV. CIV. STAT. art..1837 (1925).

[223] *See* former Texas Rule 71a, *reprinted in* 99–100 S.W.2d xxviii, RULES FOR DISTRICT AND COUNTY COURTS (1937); *see also* Ramsey v. Dunlop, 205 S.W.2d 979, 981–982 (1947).

[224] *See Ramsey*, 205 S.W.2d at 981.

[225] Clarence A. Guittard, *Other Significant Changes in the Appellate Rules*, 12 ST. MARY'S L.J. 667, 673–74 (1981).

[226] *See* TEX. R. CIV. P. 434, 3 TEX. B.J. 519, 593–94 (1940, repealed 1986) ("[N]o judgment shall be reversed on appeal . . . on the ground that the trial court has committed an error of law . . . . unless the . . . error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case . . . .)

[227] *See* TEX. R. CIV. P. 503, 3 TEX. B.J. 519, 604 (1940, repealed 1986) (same standard applicable to Texas Supreme Court).

[228] Under the principle of presumed harm, the burden rested on the party seeking affirmance of the trial court's judgment to show from the record that no harm resulted from the error. *See* Golden v. Odiorne, 249 S.W. 822, 823 (Tex. 1923). For a discussion of these developments see Robert W. Calvert, *The Development of the Doctrine of Harmless Error in Texas*, 31 TEX. L. REV. 1, 4–15 (1952).

[229] *See* TEX. R. APP. P. 44.1, 61.1.

court adopted by the Texas Supreme Court in 1912[230], which had embraced a harmless error rule in the same language as the current rules of appellate procedure, was disregarded by the Court[231] as "inconsistent with the laws of this state, for the government of said court and all other courts of the state . . . ."[232] This result was obtained because the Court approved an opinion of the Commission of Appeals[233] which reasoned that Rule 62a could not be interpreted as placing the burden to show harm on a defendant, whose general demurrer had been overruled erroneously, even though the plaintiff proved his case and was entitled to recover judgment on the merits of the case on the trial of the action.[234]

H. The "End" Product

With the adoption of the "new rules," Texas lawyers and judges were provided with a reorganized, semi-modernized rulebook that was largely based on procedural provisions of the Revised Civil Statutes of 1925 together with Chief Justice Roberts' Rules of Court, as amended over time, with some federal influence.[235] In truth, with the exceptions of Chief Justice Alexander's waiver of pleading defect rule abolishing the general demurrer, the abolition of the fundamental error exception in new trial practice, the adoption of harmless error rules for appellate review, the few changes in jury charge practice that survived and became effective in 1941, and the adoption of federal rules concerning joinder of claims and parties, the procedural amendments were very modest. Still, the rule-making task had been given to the Supreme Court of Texas — and it was hoped that this grant of authority to the Court would provide the Texas bench and bar with the opportunity to make additional amendments in succeeding years.[236] But

[230] *See* former Texas Rule 62a, *reprinted in* 149 S.W. x, AMENDMENTS TO RULES: TEXAS COURTS OF CIVIL APPEALS (1912).

[231] *See Golden*, 249 S.W. at 823–25.

[232] TEX. CONST. art. V, § 25 (repealed Nov. 5, 1985); *see also* Tex. Rev. Civ. Stat. art. 1524 (1892).

[233] *Golden*, 249 S.W. at 825.

[234] *Id.* at 823–24; *see also* Scott v. Townsend, 166 S.W.1138, 1146–47 (Tex. 1914).

[235] *See supra* text at notes 3–8 and 141–149.

[236] Robert W. Stayton, *Foreword*, VERNON'S TEXAS RULES OF CIVIL PROCEDURE, pp. v-vi, by Julius F. Franki (Vernon 1942).

it remained to be seen whether the Texas Supreme Court would be able to retain its rule-making power[237] or the freedom to exercise it in the future.

V. AMENDMENTS OF 1941 RULES

After the promulgation of the Texas Rules of Civil Procedure, then Chief Justice James P. Alexander wrote the members of the original Rules Advisory Committee and the members of the State Bar Committee on the Administration of Justice asking them to consider needed amendments.[238] Thereafter, from 1943 to 1949, the Texas Supreme Court followed the practice of calling the members of the Advisory Committee and the State Bar Administration of Justice committee to advise the Court on contemplated amendments.[239] In 1949, a new advisory committee was appointed consisting of most of the members of the original rules Advisory Committee and some new appointments.[240] For the most part, after the appointment of the "new" rules Advisory Committee, the Court has maintained an Advisory Committee to consider and to recommend or to reject proposed new rules and changes in existing rules.[241]

Angus Wynne served as the chairman of the Advisory Committee from 1940, until his resignation in 1971.[242] During Angus Wynne's lengthy chairmanship, the Advisory Committee revisited consideration of several federal rules of civil procedure that had been rejected in 1940. As a result, in 1950 the Advisory Committee recommended, and the Texas Supreme Court finally adopted a summary judgment rule,[243] amendments in the Texas discovery rules in 1957 concerning the scope of discovery[244] and

[237] *See* Wilson, *supra* note 128, at 785 (describing failed efforts to diminish or eliminate Court's rule-making power); *see also* Pope, *supra* note 7, at 8, 16 ("The entanglement of procedure and substance demands that the legislature and the courts reach a practical accommodation in making rules of procedure"; "An absolutist attitude by either the court or the legislature will produce little procedural improvement.").

[238] Wilson, *supra* note 128, at 785.

[239] Wilson, *supra* note 128, at 787.

[240] *See* Pope, *supra* note 7, at 12.

[241] *See* Pope, *supra* note 7, at 12.

[242] *See* Pope, *supra* note 7, at 19.

[243] *See* TEX. R. CIV. P. 166a.

[244] *See* TEX. R. CIV. P. 186a, 20 TEX. B.J. 187, 189 (1957, repealed 1983); TEX. R. CIV. P. 186b, 20 TEX. B.J. 187, 189 (1957, repealed 1983).

discovery sanctions,[245] and in 1962, a new rule providing for written discovery by interrogatories to parties.[246] In addition, in 1962 the Committee recommended and the Court adopted an important rule allowing nonresidents to make a special appearance to challenge jurisdiction.[247] During Wynne's chairmanship, significant changes were also made in civil procedure rules concerning new trial motions[248] and appellate practice and procedure.[249] George McCleskey served as chairman for the next decade until the end of 1982.[250] During his chairmanship the same rule-making activities continued resulting in the adoption of civil procedure rules and rule amendments concerning written discovery,[251] mental and physical examinations,[252] the scope of discovery,[253] deposition practice,[254] an important change in Civil Procedure Rule 277 concerning the submission of cases to juries,[255] and significant rule amendments in the rules governing post-verdict motion practice[256] and appellate practice and procedure[257]

[245] *See* TEX. R. CIV. P. 215a, 20 TEX. B.J. 187, 191–92 (1957, repealed 1983); TEX. R. CIV. P. 215b, 35 TEX. B.J. 1037, 1045 (1973, repealed 1983).

[246] *See* TEX. R. CIV. P. 168, 25 TEX. B.J. 371, 372, 424 (1962, repealed 1998).

[247] *See* TEX. R. CIV. P. 120a, 25 TEX. B.J. 372 (1962) (effective Sept. 1, 1962).

[248] *See* TEX. R. CIV. P. 324 and TEX. R. CIV. P 329(b).

[249] *See, e.g.*, TEX. R. CIV. P. 332, 25 TEX. B.J. 371, 430 (1962, repealed 1975); TEX. R. CIV. P. 333, 25 TEX. B.J. 371, 430 (1962, repealed 1975); TEX. R. CIV. P. 334, 25 TEX. B.J. 371, 430–31 (1962, repealed 1975); TEX. R. CIV. P. 335, 25 TEX. B.J. 371, 431 (1962, repealed 1975); TEX. R. CIV. P. 336, 25 TEX. B.J. 371, 431–32 (1962, repealed 1975); TEX. R. CIV. P. 337, 25 TEX. B.J. 371, 432 (1962, repealed 1975); TEX. R. CIV. P. 338, 25 TEX. B.J. 371, 432 (1962, repealed 1975); TEX. R. CIV. P. 339, 25 TEX. B.J. 371, 432 (1962, repealed 1975) (Review by District Courts of County Court Rulings); TEX. R. CIV. P. 354, 43 TEX. B.J. 767, 780 (1980, repealed 1986); TEX. R. CIV. P. 355, 43 TEX. B.J. 767, 780–81 (1980, repealed 1986); TEX. R. CIV. P. 356, 43 TEX. B.J. 767, 781 (1980, repealed 1986); TEX. R. CIV. P. 389a, 43 TEX. B.J. 767, 789 (1980, repealed 1986).

[250] *See* Pope *supra* note 7, at 19.

[251] *See* TEX. R. CIV. P. 167, 35 TEX. B.J. 1037, 1038–39 (1972, repealed 1998); TEX. R. CIV. P. 168, 35 TEX. B.J. 1037, 1040 (1972, repealed 1998); TEX. R. CIV. P.169, 35 TEX. B.J. 1037, 1041 (1972, repealed 1998).

[252] *See* TEX. R. CIV. P. 167a, 35 TEX. B.J. 1037, 1039 (1972, repealed 1998).

[253] Former TEX. R. CIV. P. 167, 33 TEX. B.J. 703, 708–10 (1971); Former TEX. R. CIV. P. 167, 35 TEX. B.J. 1037, 1038–42 (1972); TEX. R. CIV. P. 186a, 33 TEX. B.J. 703, 708–10 (1971); TEX. R. CIV. P. 168a, 35 TEX. B.J. 1037, 1042 (1972).

[254] *See* TEX. R. CIV. P. 200, 35 TEX. B.J. 1037, 1044 (1972, repealed 1998); TEX. R. CIV. P. 201, 35 TEX. B.J. 1037, 1044–45.

[255] *See* TEX. R. CIV. P. 277.

[256] *See* TEX. R. CIV. P. 320, 324, 329b.

McCleskey was succeeded by Luther H. Soules III, who was appointed by order of the Texas Supreme Court in 1983.

Until Luke Soules' appointment, the normal practice of the advisory committee was to meet in Austin for one or two days in the spring of odd-numbered years when the Texas Legislature was in session.[258] During this same time period, the Texas Supreme Court also sought advice from the Committee on the Administration of Justice (COAJ) of the State Bar of Texas, which met at least four times each year in Austin, normally for two day sessions to study and evaluate recommendations for rule changes received by the Court and forwarded to the COAJ.[259] In fact, in 1978, Justice Jack Pope, the Rules Member of the Texas Supreme Court explained that the Committee on the Administration of Justice "has, perhaps, developed more improvements in the rules than any other study group."[260] The Advisory Committee then considered these proposals, as well as other proposals from the Texas Legislature, the Texas Judicial Council, the judiciary, individual lawyers, and other sources.[261]

By the time of Luke Soules' appointment as chairman of the Advisory Committee in 1983, the Texas Supreme Court had recently made or planned to make a very large number of rule changes based on recommendations made by the Advisory Committee, the COAJ, and others.[262] These many rule changes included a major revision of the Texas discovery rules,[263] extensive changes in many aspects of trial and appellate practice,[264] and curative amendments designed to eliminate obsolescent rules and

[257] *See* Order Adopting Amendments to Rules of Civil Procedure, 43 TEX. B.J. 767, 775–794 (June 10, 1980).

[258] *See* Pope, *supra* note 7, at 12.

[259] *See* Pope, *supra* note 7, at 13, 17–18.

[260] *See* Pope, *supra* note 7, at 18.

[261] *See* Pope, *supra* note 7, at 13.

[262] Luther H. Soules III served as Chairman of the Committee on Administration of Justice in 1982. *See* Memorandum from Jack Pope, Rules Member, Supreme Court of Texas, to Supreme Court Advisory Committee (Nov. 12, 1982) (on file with Texas Bar Center) ("As Chairman, he pressed to get the heavy docket to a conclusion.").

[263] *See id.* ("Professor William Dorsaneo, III served as reporter for the Discovery and Deposition rules, and he put those rules with the comments in final form.").

[264] *See id.* For the most part, these proposed rules were adopted by the Texas Supreme Court, effective April 1, 1984; Order Adopting Rules of Civil Procedure December 5, 1983, 47 TEX. B.J. Pull-Out Section, 3 (1984).

inconsistencies.[265] By one count, between January 1, 1981, and April 1, 1984, more than three hundred rules had been amended or adopted.[266] This led some commentators to point out that the bench and bar "need time to learn how to effectively use the recent changes before they are confronted with new changes."[267]

Despite all of this activity, the rules of civil procedure continued to be substantially verbatim renditions of predecessor court rules and the parts of the Revised Civil Statutes of 1925 that were deemed procedural and, therefore, appropriate for inclusion in rules of civil procedure by the Texas Supreme Court.[268] In addition, many of the 1937 federal rules incorporated in the original Texas rules were amended by the Supreme Court to correct mistakes made in them as originally promulgated in 1938 or for other reasons. For the most part, the same corrections were not often made or even considered by the Texas Supreme Court or its Advisory Committee.[269]

Because the Advisory Committee had not met to consider additional rule changes since the winter of 1982, when Luke Soules became the Chairman of the Advisory Committee in 1983, there was a large backlog of proposals for additional rule changes that the Texas Supreme Court had received from the bench and the bar.[270] As a result, the Advisory committee began meeting every other month to work through the backlog and to consider other changes.[271] In fact, during Chairman Soules' service as the Chairman of the Advisory Committee, the rule-making process continued to

[265] *See* Pope, *supra* note 7. ("Judge Tom Phillips, Judge of the 280th District Court, at my request, examined all of the rules to search out obsolescence, inconsistencies, and needed revisions.") Judge Phillips became the Chief Justice of the Texas Supreme Court in 1988 and served with distinction for nearly seventeen years until 2004. *Supreme Court Chief Justices: Phillips, Thomas R.*, TEXAS POLITICS, http://www.laits.utexas.edu/txp_media/html/just/justices/16.html (last visited Oct. 20, 2013).

[266] Steve McConnico & Daniel W. Bishop II, *Practicing Law With the 1984: Rules Texas Rules of Civil Procedure Amendments Effective April 1, 1984*, 36 BAYLOR L. REV. 73, 128 (1984) ("Since January 1, 1981, three hundred and nineteen Texas Rules of Civil Procedure have been amended . . . . Not since the Texas Rules of Civil Procedure were promulgated in 1940 has Texas civil procedure experienced such dramatic change."); *See* Pope, *supra* note 7, at 12 ("since 1941 they have been amended on seventeen occasions.").

[267] *See* McConnico & Bishop, *supra* note 266, at 128.

[268] *See supra* notes 128–129.

[269] *See infra* Part 11.

[270] *See* Pope, *supra* note 7.

[271] *See* Pope, *supra* note 7.

accelerate.[272] During this period, extensive changes were recommended by the Advisory Committee and made by the Court concerning pleading practice,[273] pretrial discovery,[274] discovery sanctions,[275] summary judgment,[276] procedures for findings of fact and conclusions of law in bench trials,[277] the method of submitting cases to the jury[278] and appellate practice and procedure[279] As explained below, many more procedural rule changes were recommended for adoption by the Advisory Committee, based primarily on reports made by Task Forces appointed in 1991 by the Texas Supreme Court but were not adopted by the Texas Supreme Court.[280]

A. Pleadings

After 1941, some technical changes were made in specific pleading rules.[281] More significantly, however, since 1941 the Texas Supreme Court modified the interpretation of the basic pleading rules in a series of cases, ultimately endorsing a type of notice pleading.[282]

Before adoption of the Texas Rules of Civil Procedure, Texas cases generally held that a cause of action at law consists of the existence of a right in the plaintiff and an invasion of that right by some act or omission on the part of the defendant, and, when necessary for recovery according to the substantive law, the consequent damages.[283] Consistent with Code

[272] *See* Pope, *supra* note 7; *see also* McConnico & Bishop *supra* note 266, at 128. Soules was replaced by Charles "Chip" Babcock as the fourth Chairman of the Advisory Committee in 1999.

[273] *See* TEX. R. CIV. P. 13, 63, 185.

[274] *See* TEX. R. CIV. P. 166b, 47 TEX. B.J., Special Pull-Out Section, 8–11 (1984, repealed 1998).

[275] *See* TEX. R. CIV. P. 215, 47 TEX. B.J., Special Pull-Out Section, 19–21 (1984, amended 1998).

[276] *See* TEX. R. CIV. P. 166a(i).

[277] *See* TEX. R. CIV. P. 296–299a.

[278] *See* TEX. R. CIV. P. 277.

[279] *See infra* Part 7.

[280] *See infra* Part 8.

[281] *See, e.g.*, TEX. R. CIV. P. 185 (amended effective April 1, 1984, to reduce technical requirements); TEX. R. CIV. P. 63 (amended effective September 1, 1990 to require that all trial pleadings be on file at least seven days before trial).

[282] *See, e.g.*, Yowell v. Piper Aircraft. Corp., 703 S.W.2d 630, 633 (Tex. 1986); Roark v. Allen, 633 S.W.2d 804, 809–10 (Tex. 1982).

[283] *See* W. Pager Keeton, *Action, Cause of Action, and Theory of the Action in Texas*, 11 TEX. L. REV. 145, 146–48 (1933).

pleading[284] principles, Texas cases also held that the *facts* alleged to establish the existence of the right and its violation *constitute the cause of action*.[285] "[O]n the other hand, it was also said that the cause of action does *not* consist of the allegations of *facts* but of the unlawful *violation of a right* which these facts show."[286] In other words, traditional Texas law required the plaintiff to identify the legal theory or theories on which the plaintiff based its suit, and to allege in a relatively specific way the facts corresponding to each element of the legal claims.

As originally promulgated in 1940 (effective September 1, 1941), the pleading rules eliminated the requirement that the pleader plead the "facts constituting the plaintiff's cause of action or the defendant's ground of defense."[287] This requirement to plead "facts" as distinguished from "evidence" or "legal conclusions" was replaced by a requirement that pleadings "consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's grounds of defense."[288] Although the concept of "fair notice" was added as a pleading requirement for claims,[289] for many years the new Texas pleading rules were interpreted by the courts as if no change had been made.[290]

More recently, however, the traditional Code pleading approach has eroded by the passage of time. In 1987, the First Court of Appeals reinterpreted Rules 45 and 47 by validating a general allegation of negligence in a case involving a car wreck.[291] In *Willock v. Bui*, a majority of the First Court of Appeals approved the following allegations as stating a

[284] Beginning with the New York Code of 1848, there was widespread adoption of pleading and practice codes in the United States. *See* CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING §§ 7–8 at 21–31 (2d ed. 1947).

[285] *See* Keeton, *supra* note 283, at 148.

[286] *See id.*

[287] *See* TEX. REV. CIV. STAT. art. 1997 (1926).

[288] *See* Tex. R. Civ. P. 45.

[289] *See* TEX. R. CIV. P. 47(a) ("An original pleading which sets forth a claim . . . shall contain (a) a short statement of the cause of action sufficient to give fair notice of the claim involved . . . ."). *See also* Tex. R. Civ. P. 45 ("That an allegation be evidentiary or be of legal conclusion shall not be grounds for objection when fair notice to the opponent is given by the allegations as a whole . . . .").

[290] *See, e.g.*, White v. Jackson, 358 S.W.2d 174, 177–78 (Tex. Civ. App.—Waco 1962, writ ref'd n.r.e.) (*citing and following* Mo. Pac. Ry. Co. v. Hennessey, 12 S.W. 608 (Tex. 1889)).

[291] *See* Willock v. Bui, 734 S.W.2d 390, 391–92 (Tex. App.—Houston [1st Dist.] 1987, no writ).

cause of action and giving fair notice of the claim involved against defendant Willock:

> (¶ III)The automobile which Toan Viet Bui was operating was struck from behind during the collision which involved a Pontiac . . . driven by George Michael Willock.
>
> (¶ IV)The collision described in paragraph III above and made the basis of this suit was directly and proximately caused by the negligence of George Michael Willock . . . [who] was guilty of acts of negligence each of which were a proximate cause of the collision made the basis of this suit.[292]

Justice Bud Warren's majority opinion concluded that the allegations gave fair notice of Bui's claim, even though it did not explain Willock's "specific involvement" in the collision.[293] Justice Kenneth Hoyt dissented precisely because the pleading did not apprise Willock "of what his specific involvement was in the collision."[294]

Rather than focusing on the "cause of action" requirement of Civil Procedure Rules 45 and 47, the majority opinion in *Willock v. Bui* emphasizes the requirement that the pleading must "give the opposing party fair notice of the claim involved," as if that part of the pertinent procedural rules constitutes an independent standard, which should not be influenced by the Code pleading practice previously adopted by Texas courts.[295] As a result, the majority opinion in *Willock v. Bui* appears to have approved a form of "notice pleading" similar to the original conception of how pleadings should be drafted under the 1937 federal rules as reflected in the official forms.[296] Ironically, this original approach appears to have been replaced by recent Supreme Court decisions that may signal a revival of Code specificity pleading standards in federal litigation.[297]

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[292] *Id.* at 391.

[293] *Id.* at 391–93.

[294] *Id*. at 393 (Hoyt, J., dissenting).

[295] *Id.* at 392 (majority opinion).

[296] *See* FED. R. CIV. P. Form 11 (formerly Form 9) ("On [Date], at [Place], the defendant negligently drove a motor vehicle against the plaintiff.").

[297] *See* Ashcroft v. Iqbal, 556 U.S. 662, 686–87 (2009).

Even more recently, the Texas Supreme Court[298] and several other courts of appeals have also interpreted Rule 47's "fair notice" requirement as an independent standard.[299] In other words, the standard for the sufficiency of pleading factual claims under the Texas Rules of Civil Procedure has evolved since the adoption of the Texas Rules of Civil Procedure. Nonetheless, the original odd mixture of old and new pleading concepts that is still embodied in Civil Procedure Rules 45 and 47 has never been adequately reconciled, probably because the conflict has not even been generally recognized.

Other important changes occurred in the procedural rules and statutes concerning frivolous pleadings. As originally promulgated in 1941, Civil Procedure Rule 13[300] provided for a contempt sanction against an attorney who "shall make statements in pleading . . . which he knows to be groundless and false, for the purpose of securing a delay of the trial of the cause . . . ."[301] This version of Civil Procedure Rule 13 was not regarded as an effective deterrent against the filing of frivolous lawsuits. Accordingly, in 1987 the Texas Legislature enacted Chapter 9 of the Civil Practice and Remedies Code[302] to deal with frivolous pleadings in cases involving damages for death, personal injury or property damage, on any theory, or for other damages arising from tortious conduct.[303] The Texas Supreme Court reacted to legislative adoption of Chapter 9 by amending Civil

[298] *See* Low v. Henry, 221 S.W.3d 609, 612 (Tex. 2007) ("Texas follows a 'fair notice' standard for pleading, in which courts assess the sufficiency of pleadings by determining whether an opposing party can ascertain from the pleading the nature, basic issues, and the type of evidence that might be relevant to the controversy."); Horizon/CMS Healthcare Corp. v. Auld, 34 S.W.3d 887, 896–97 (Tex. 2000) ("Texas follows a 'fair notice' standard for pleading, which looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant."); *see also* Tex. Dept. of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 230 (Tex. 2004).

[299] *See* Rogers v. Ardella Veigel Inter Vivos Trust No. 2, 162 S.W.3d 281, 289 (Tex. App.—Amarillo 2005, pet. denied) ("While Texas follows the theory of 'notice pleadings' . . . the concept still requires the litigant to provide fair notice of the claims involved . . . . And, to be fair, the allegations must be sufficient to inform a reasonably competent attorney of the nature and basic issues of the controversy and of the potentially relevant evidence."); *see also* Tex. Mut. Ins. Co. v. Ledbetter, 192 S.W.3d 912, 919 (Tex. App.—Eastland 2006), *aff'd in part, rev'd on other grounds in part*, 251 S.W.3d 31 (Tex. 2008).

[300] TEX. R. CIV. P. 13, 4 TEX. B.J. 489, 490 (1941, amended 1990) (Penalty for Fictitious Suits or Pleading).

[301] *Id.*

[302] TEX. CIV. PRAC. & REM. CODE ANN. § 9.001-.014 (West 2002).

[303] *Id.* § 9.002.

Procedure Rule 13 so that it resembled Federal Rule 11,[304] including the federal rule's provision for a 90-day grace period for withdrawal of a pleading filed in violation of applicable pleading standards. At the same time, the Texas Supreme Court added language to its order[305] amending Civil Procedure Rule 13 that repealed Chapter 9 to the extent it conflicted with Rule 13.[306]

This was one of the few times, if not the first time, that the Texas Supreme Court exercised statutory power to repeal a statute without obtaining legislative approval since the adoption of the rules of civil procedure in 1940.[307] Legislative reaction to the Court's repeal of Chapter 9 was extremely hostile and threatened the Court's rule-making power via repeal of the Rules of Practice Act.[308] In 1989, State Senator Kent Caperton sponsored Senate Bill 874, which would have returned exclusive rule-making power to the legislature in response to the Court's repeal of Chapter 9 of the Civil Practice and Remedies Code.[309] Although the bill passed the Legislature, at the request of Chief Justice Tom Phillips, and Justice Nathan Hecht, Governor William P. Clements vetoed it because "[t]he formulation and adoption of new rules or the modification of existing rules governing practice and procedures is a responsibility more appropriately left to the Supreme Court. There is no evidence that the Supreme Court has failed to perform this function responsibly and efficiently."[310] At the same session, Senator Caperton also sponsored a bill directing the Supreme Court of Texas to adopt the rules of civil procedure that conform to the federal rules of civil procedure, but it was withdrawn before being voted out of committee.[311] As a result, Rule 13 was amended again in 1990 to more

[304] *Compare* FED. R. CIV. P. 11, *with* TEX. R. CIV. P. 13.

[305] Order Adopting and Amending Texas Rules of Civil Procedure, 733–34 S.W.2d XXXV, XXXVII–XXXVIII (Tex. July 15, 1987).

[306] *See* TEX. GOV'T CODE ANN. § 22.004(c) (West 2004).

[307] By 1987, Chief Justice Pope had retired and the rule-makers had apparently forgotten his advice about the need to adopt "a cooperative division of labors" to "avoid [constitutional] confrontation." *See* Pope, *supra* note 7, at 16.

[308] *See* Tex. S.B. 874, 71st Leg., R.S. (1989).

[309] *See id.*

[310] Veto Proclamation of Gov. Clements No. 41-2283, Tex. S.B. 874, 71st Leg., R.S. (1989).

[311] *See* Tex. S. Con. Res. 171, 71st Leg., R.S. (1989). This is not the only time the governor has vetoed legislation affecting the Texas Supreme Court's rule-making power. Governor Buford Jester vetoed a bill enacted by the 50th legislature concerning civil process in tax suits. In 1971, Governor Preston Smith vetoed a bill enacted by the 62nd Legislature, which concerned the number of jurors required to render a verdict in civil cases. Also in 1977, Governor Dolph Briscoe

closely resemble the standards and procedures for imposition of sanctions for frivolous pleadings contained in Chapter 9 of the Civil Practice and Remedies Code, including elimination of the 90-day grace period, and the omission of the repealing language in the Court's 1987 amendatory order from the order and from the rulebook.[312]

This entire unfortunate episode ended with the legislature enacting Chapter 10 of the Civil Practice and Remedies Code in 1995,[313] which contains a specific provision prohibiting the Supreme Court from adopting rules "in conflict with this chapter."[314] Thus, the issue of whether the subject of sanctions for frivolous pleadings would be governed under the Texas Supreme Court's rulemaking authority or by legislation was resolved by a compromise that sent a clear message to the Court about the perils of repealing legislation, especially without consulting the relevant legislative stakeholders.

The enactment of statutory provisions prohibiting the Texas Supreme Court from adopting rules of procedure in conflict with legislative enactments has occurred on several occasions after the frivolous pleading conflict.[315] In the last ten years, the Texas Legislature has taken another

vetoed a bill passed by the 65th Legislature, which authorized process by mail in tax suits. *See* Pope, *supra* note 7, at 15 (1978).

[312] Order Adopting and Amending Texas Rules of Civil Procedure, 785–786 S.W.2d XXXI, XXXVI (Tex. April 24, 1990).

[313] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 10.001-.006 (West 2002).

[314] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 10.006 (West 2002) ("Notwithstanding Section 22.004, Government Code, the supreme court may not amend or adopt rules in conflict with this chapter."). As amended in 1999, Chapter 9 of the Civil Practice and Remedies Code was effectively repealed by the 70th Texas Legislature, which amended Section 9.012 to provide that "[t]his section does not apply to any proceeding to which Section 10.004 or Rule 13, Texas Rules of Civil Procedure, applies." *See id.* § 9.012 (West 2002).

[315] *See, e.g.*, Act of June 8, 1995, 74th Leg. R.S., ch. 378, 1995 Tex. Gen. Laws 2921, 2925 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 14.014 (West 2002) ("Notwithstanding Section 22.004, Government Code, this chapter may not be modified or repealed by a rule adopted by the supreme court.")); Act of June 16, 1989, 71st Leg. R.S., ch.1178, 1989 Tex. Gen. Laws 4813, 4814 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 52.005 (West 2008) ("Notwithstanding Section 22.004, Government Code, the supreme court may not adopt rules in conflict with this chapter.")); Act of May 2, 2013, 83rd Leg. R.S., ch. 10 (to be codified at TEX. CIV. PRAC. & REM. CODE ANN. § 134A.007(c)) (West Supp. 2013) ("To the extent that this chapter conflicts with the Texas Rules of Civil Procedure, this chapter controls. Notwithstanding Section 22.004, Government Code, the supreme court may not amend or adopt rules in conflict with this chapter.")); Act of May 18, 1995, 74th Leg. R.S., ch. 138, 1995 Tex. Gen. Laws 978, 981 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 15.066) (West 2002) ("Subject to

approach to the Texas Supreme Court's exercise of its rule-making activities.[316] For example, legislation enacted in 2011 required the Texas Supreme Court to adopt a rule providing for a motion to dismiss "causes of action that have no basis in law or fact on motion and without evidence."[317] As promulgated, new Civil Procedure Rule 91a[318] may again modify the standards for sufficiency of claims under the Texas Rules of Civil Procedure.

B. Venue and Jurisdiction

1. Adoption and Interpretation of Special Appearance Rule

Almost a century after the Civil War, by amendment of the rules of procedure, non-residents again became authorized to make special appearances in strict compliance with Civil Procedure Rule 120a.[319] Before the adoption of Civil Procedure Rule 120a in 1962, a non-resident defendant who appeared in a Texas judicial proceeding for the purpose of challenging the court's jurisdiction was deemed to have consented to its jurisdiction by making an appearance.[320] This result occurred even when the non-resident was not otherwise amenable to process.[321] Although an amicus curiae practice developed before 1962, under which a local attorney exercised the pretense of being a true bystander, by the 1960s even this subterfuge had become unavailable.[322] Professor Wayne Thode has suggested that the defendant appeared in the majority of the cases and contested on the merits rather than suffer a default judgment.[323] Under Thode's analysis, Texas attorneys representing defendants were

Section 22.004, Government Code, to the extent that this chapter conflicts with the Texas Rules of Civil Procedure, this chapter controls.")).

[316] *See infra* Part 10.

[317] *See* Adoption of Rules for Dismissals and Expedited Actions, Misc. Docket No. 12-9191 (Tex. Nov. 13, 2012) *printed in* 75 TEX. B.J. 870, 870–73 (Dec. 2012) (adopting TEX. R. CIV. P. 91a, *Dismissal of Baseless Causes of Action*.); Final Approval of Rules for Dismissals and Expedited Actions, Misc. Docket No. 13-9022 at 4–6 (Tex. Feb. 12, 2013).

[318] *See* TEX. R. CIV. P. 91a.

[319] *See* TEX. R. CIV. P. 120a.

[320] *See* TEX. R. CIV. P. 121–124.

[321] *See* York v. Texas, 137 U.S. 15, 20 (1890).

[322] *See* Nicklas v. Ajax Elec. Co., Inc., 337 S.W.2d 163, 165 (Tex. Civ. App.—Austin 1960, no writ).

[323] Thode, *supra* note 65, at 293.

undoubtedly employed by non-residents to contest more cases on the merits than had been the experience of defendants' attorneys in other states.[324]

As a result of the promulgation of Civil Procedure Rule 120a, the long period of jurisdictional xenophobia that began with the adoption of the general appearance statutes[325] that were included by the revisers, many of whom were former Confederate soldiers who drafted the Revised Civil Statutes of 1879,[326] came to an end.[327] But for several reasons, the adoption of Rule 120a did not eliminate jurisdictional provincialism. First, instead of repealing the "general appearance" provisions, Rule 120a merely makes Texas special appearance practice a specific exception to them.[328] Second, "due order" of pleading[329] and determination[330] rules complicated Texas special appearance practice, as did the requirement that the special appearance had to be made by "sworn motion."[331] Third, as explained by Professor Thode,[332] unlike other jurisdictions, Texas special appearance practice placed the burden on non-residents to prove that the non-resident is not subject to jurisdiction.[333] Finally, and most significantly, the last

[324] *Id.*

[325] The original "general appearance" provisions were recodified in subsequent versions of the Revised Civil Statutes and became part of the Texas Rules of Civil Procedure in 1940 as Rules 121, 122, and 123, with only minor textual changes. *See* Thode, *supra* note 65, at 296; TEX. R. CIV. P. 121, 3 TEX. B.J. 522, 543 (1940); TEX. R. CIV. P. 122, 3 TEX. B.J. 522, 543 (1940); TEX. R. CIV. P. 123, 3 TEX. B.J. 522, 544 (1940).

[326] *See supra* text accompanying note 319; *see also* Thomas W. Cutrer, *Wilson, Samuel A.*, THE TEXAS STATE HISTORICAL ASSOCIATION, http://www.tshaonline.org/handbook/online/articles/fwi47 (last visited Jan. 29, 2013); Doug Johnson, *Clark, George W.*, THE TEXAS STATE HISTORICAL ASSOCIATION, http://www.tshaonline.org/handbook/online/articles/fc105 (last visited Jan. 29, 2013); Roy L. Swift, *West, Charles Shannon*, THE TEXAS STATE HISTORICAL ASSOCIATION, http://www.tshaonline.org/handbook/online%20articles/fwe29 (last visited Jan. 29, 2013).

[327] *See* Thode, *supra* note 65, at 293 (concluding that the fight against this "indefensible unfairness" was "carried to fruition in 1962 by the adoption of Rule 120a").

[328] *See* TEX. R. CIV. P. 120a(1) ("Notwithstanding the provisions of Rules 121, 122 and 123, a special appearance may be made. . . .").

[329] *See id.* ("Such special appearance shall be made by sworn motion filed prior to . . . any other plea . . . ." or "contained in the same instrument.").

[330] *See id.* 120a(2) ("Any motion to challenge the jurisdiction provided for herein shall be heard and determined before . . . any other plea or pleading may be heard.").

[331] *See id.* 120a(1).

[332] *See* Thode, *supra* note 65, at 319.

[333] *See* Siskind v. Villa Found. for Educ., Inc., 642 S.W.2d 434, 438. (Tex. 1982) (non-resident defendant has burden of negating all bases of personal jurisdiction).

sentence of subdivision (1) of Civil Procedure Rule 120a provides that "[e]very appearance, prior to judgment, not in compliance with this rule is a general appearance."[334] These requirements made Texas special appearance practice a treacherous undertaking.

The first significant relaxation of the strict requirements of Texas special appearance practice occurred in 1975, when subdivision (1) of Rule 120a was amended to allow a defective special appearance motion to be amended to cure defects.[335] After this amendment, the courts of appeals ruled that an amendment that adds a verification to an unsworn and, therefore, defective special appearance motion was permissible[336] and that such an amendment could be filed even after the denial of the jurisdictional motion.[337]

Another significant change in special appearance practice was made by an amendment made to Rule 120a in 1990.[338] This amendment allows non-residents and opponents of special appearance motions to use affidavits at special appearance hearings, while retaining the Texas practice of imposing the burden on non-residents to prove lack of amenability to process in Texas courts.[339]

The most dramatic modification of Texas special appearance practice resulted from the Texas Supreme Court's 1998 landmark decision in *Dawson-Austin v. Austin*.[340] In *Dawson-Austin*, the Texas Supreme Court held that a defective special appearance motion did not necessarily constitute a general appearance under the last sentence of subdivision (1) of

[334] TEX. R. CIV. P. 120a(1).

[335] Orders Amending Rule 120a Jan. 1, 1976, 38 TEX. B.J. 823, 824–25 (Tex. Oct. 1975).

[336] *See* Stegall & Stegall v. Cohn, 592 S.W.2d 427, 429 (Tex. Civ. App.—Fort Worth 1979, no writ); Carbonit Hous., Inc. v. Exchange Bank, 628 S.W.2d 826, 828 (Tex. Civ. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.).

[337] *See* Dennett v. First Cont'l Inv. Corp., 559 S.W.2d 384, 385–86 (Tex. Civ. App.—Dallas 1977, no writ) ("[T]he crucial focus is on the *allowance* of amendment, and the *timing* of the amendment is not determinative.") (emphasis in original).

[338] *See* Amendments to the Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, 53 TEX. B.J. 589, 595–96 (1990).

[339] *Id.* at 596 (stating in comment to the amendment: "To provide for proof by affidavit at special appearance hearings . . . [t]hese amendments preserve Texas prior practice to place the burden of proof on the party contesting jurisdiction."). Affidavits must be served at least seven days before the hearing and must be made on personal knowledge and set forth specific facts. As before, oral testimony and the admissible results of discovery may also be admitted at the hearing. *See* TEX. R. CIV. P. 120a(3).

[340] 968 S.W.2d 319 (Tex. 1998).

Rule 120a because it could be cured by amendment "as long as the amendment is filed before there is a general appearance."[341] Moreover, the Court substituted a limited definition of a general appearance, which effectively supersedes the last sentence of the first subdivision of Rule 120a.[342] Quoting the El Paso Court of Appeals opinion in *Moore v. Elektro-Mobil Technik GMBH*, the *Dawson-Austin* opinion states:

> A party enters a general appearance whenever it invokes the judgment of the court on any question other than the court's jurisdiction; if a defendant's act recognizes that an action is properly pending or seeks affirmative action from the court, that is a general appearance.[343]

Under this approach, "[a]n unverified special appearance neither acknowledges the court's jurisdiction nor seeks affirmative action."[344] Accordingly, it is no longer true that "[e]very appearance, prior to judgment, not in compliance with [Rule 120a] is a general appearance."[345]

Subsequent court decisions recognize that Texas special appearance practice has become considerably more user friendly and considerably less provincial than the original rule.[346]

2. Changes in Venue Practice

During the final days of the 68th legislative session in 1983, the Texas Legislature adopted an amended version of Article 1995, Venue[347] (now superseded by Chapter 15 of the Civil Practice and Remedies Code), and

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[341] *Id.* at 322.

[342] *Id.*

[343] *Id.* (quoting Moore v. Elektro-Mobil Technik GMBH, 874 S.W.2d 324, 327 (Tex. Civ. App.—El Paso 1994, writ denied)).

[344] *Id*.

[345] *See* TEX. R. CIV. P. 120a(1) (last sentence).

[346] *See* Kelly v. Gen. Interior Constr., Inc., 301 S.W.3d 653, 658–59 (Tex. 2010) (explaining burdens of pleading and proof in challenges to personal jurisdiction by special appearance); *see also* Exito Elecs. Co. v. Trejo, 142 S.W.3d 302, 306 (Tex. 2004) (defendant does not make general appearance by filing Rule 11 agreement extending time of answer date); BMC Software Belgium, N.V. v. Marchand, 83 S.W.3d 789, 799 (Tex. 2002) (placing burden on plaintiff to prove basis for piercing corporate veil to impute contacts to nonresident).

[347] Act of June 17, 1983, 68th Leg., R.S., ch. 385, 1983 Tex. Gen. Laws 2119, 2119–2124, *repealed by* Act of June 16, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3247–3251 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 15 (West 2002 & Supp. 2008).

repealed another statute (R.C.S. Art. 2008)[348] that granted an interlocutory appeal of venue orders before final judgment. Shortly thereafter, the Texas Supreme Court promulgated new procedural rules for venue practice.[349] These complementary developments marked a major departure from prior Texas venue practice, which had been criticized on numerous occasions by several jurists and commentators.[350]

Virtually all aspects of the pre-September 1, 1983 procedures were modified by the amendment of former Article 1995, which was subsequently recodified in 1985 as Chapter 15 of the Civil Practice and Remedies Code, and the statute's companion procedural rules.[351]

The most significant changes made in the 1983 venue statute are as follows:

- Changing the general rule to allow venue of lawsuits in the county of the defendant's residence[352] or in the county where the cause of action or a part thereof accrued.[353]
- Eliminating many exceptions to the old general rule, such as exceptions for claims of negligence, fraud, and crime or trespass,[354] in favor of the application of the new general rules to such cases.
- Reorganizing the 17 remaining exceptions to the new general rules into separate lists of permissive and mandatory exceptions, incorporated verbatim from the old law or with minor textual changes.[355]

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[348] *Id*. at 2124.

[349] *See* TEX. R. CIV. P. 86–89.

[350] *See, e.g.*, Garey B.Spradley, *Texas Venue:The Pathology of the Law*, 36 SW. L.J. 645, 645 (1982); Clarence Guittard & John Tyler, *Revision of the Texas Venue Statute:A Reform Long Overdue*, 32 BAYLOR L. REV. 561, 563–64 (1980); Joe Greenhill, *State of the Judiciary*, 42 TEX. B.J. 379, 383 (1979).

[351] *See supra* text accompanying note 347.

[352] *See* Snyder v. Pitts, 241 S.W.2d 136, 140 (Tex. 1951) (venue residences have three elements: (1) a fixed place of abode within the possession of the defendant, (2) occupied or intended to be occupied for a substantial period of time, (3) which is permanent rather than temporary).

[353] *See* Act of June 16, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3247 (amended 1995) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 15.002 (West 2002)).

[354] *See* William V. Dorsaneo, III & R. Doak Bishop, *Venue: Analysis of the New Statute and Rules*, 1 TEX. PERS. INJ. LAW REP. 33, 34–36 (1983).

[355] *Id.* at 36–37.

- Eliminating the need under prior law to prove the existence of a cause of action in order to establish that it arose or accrued in a particular county.[356]
- Eliminating the prior practice of trying venue issues in a mini-trial through use of live testimony.[357]
- Replacing the former plea of privilege with a motion to transfer venue[358] and elimination of the need for a plaintiff to file a controverting affidavit or other response to the motion to transfer,[359] except when the plaintiff needs to deny venue facts alleged in the motion to transfer.[360]
- Establishing the basis for transfer (other than on grounds concerning inability to obtain a fair trial)[361] on grounds that venue is not proper in the county of suit and is proper in the county to which transfer is sought (or that venue is mandatory in a particular county).[362]
- Establishing the rule that unless the motion to transfer is based on the inability to obtain an impartial trial or "an established ground of mandatory venue," the plaintiff need only make a showing by prima facie proof in affidavit form (including discovery products attached to affidavits) that the general rule or an exception applies in order to maintain venue in the county of suit.[363]
- Establishing a very broad venue standard for multiple claims joined in the action by plaintiffs.[364]

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[356] TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(a) (West 2002) ("In all venue hearings, no factual proof concerning the merits of the case shall be required to establish venue."); *see also* TEX. R. CIV. P. 87(2)(b).

[357] TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(a) (West 2002) ("The court shall determine venue questions from the pleadings and affidavits."); *see* TEX. R. CIV. P. 87(3)(b), 88.

[358] TEX. CIV. PRAC. & REM. CODE ANN. § 15.063 (West 2002).

[359] TEX. R. CIV. P. 86(4).

[360] *Id.* 87(3)(a).

[361] *Id.* 87(3)(c).

[362] *Id.* 86(3).

[363] *Id.* 87(3).

[364] *See* Act of June 16, 1985, 69th Leg., R.S., ch. 959 § 1, sec. 15.061, 1985 Tex. Gen. Laws 3242, 3249, *repealed by* Act of May 18, 1995, 74th Leg., R.S. ch. 138, § 10 ("When . . . two or more claims or causes of action are properly joined in one action and the court has venue of [a] . . . claim against any one defendant, the court also has venue of all claims . . . against all defendants unless one or more of the claims or causes of action is governed by [a mandatory

- Repealing statutory availability of interlocutory appeals of venue determinations.[365]
- Providing that on an appeal from a trial on the merits, improper venue will not be considered harmless error, but will constitute reversible error.[366] In determining whether venue was or was not proper, an appellate court must consider the entire record, including trial on the merits.[367]

In August 1995, the 74th Texas Legislature again made wholesale revisions in the general venue statute primarily because the 1983 amendments were too favorable to plaintiffs' counsels' ability to engage in questionable forum shopping.[368] The 1995 amendments to Chapter 15 of the Civil Practice and Remedies Code restricted the generous venue choices that were made available to plaintiffs by the 1983 amendments.[369] The amendments changed the general venue rule by limiting venue choices available to claimants in actions against corporations, unincorporated associations, and partnerships to a "principal office" in Texas,[370] by changing the general rule from allowing venue in the counties where the cause of action accrued to the counties in which "all or a substantial part of the events or omissions giving rise to the claim occurred,"[371] and by providing for a venue transfer on the defendant's motion from a county of proper venue to another county for "the convenience of the parties and witnesses and in the interest of justice."[372] The changes also required each plaintiff to establish proper venue, independently of any other plaintiff, or by requiring original plaintiffs or intervening plaintiffs who cannot

venue exception]."); *see* William V. Dorsaneo, III, *The Revised Texas Venue Scheme—Multiple Parties and Multiple Claims*, 18 TEX. TRIAL LAW. F. 7, 7–8 (1983); *see* William D. Underwood, *Reconsidering Derivative-Venue in Cases Involving Multiple Parties and Multiple Claims*, 56 BAYLOR L. REV. 579, 593–94 (2004).

[365] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(a) (West 2002) ("No interlocutory appeal shall lie from the [venue] determination.").

[366] *Id.* § 15.064(b).

[367] *See id.*

[368] *See* Polaris Inv. Mgmt. Corp. v. Abascal, 892 S.W.2d 860, 861–62 (Tex. 1995) (per curiam) (2,700 plaintiffs and plaintiff intervenors joined in securities fraud action against two defendants sued in Maverick County); *see also* Underwood, *supra* note 378, at 599–600.

[369] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.002 (West 2002).

[370] *Id.* § 15.002(a)(3); *see also id.* § 15.001(a) (definition of "principal office" does not include "mere presence of agency or representative").

[371] *Id.* § 15.002(a)(1).

[372] *Id.* § 15.002(b).

independently establish proper venue to meet statutory standards, including that there is an "essential need" to have the persons' claims tried in the county where the suit is pending.[373] Additionally, the amendments make a number of adjustments to the mandatory venue exceptions and to the permissive venue exceptions contained in the general venue statute.[374] As a result of these statutory amendments, it again has become necessary to revise the venue rules contained in the Texas Rules of Civil Procedure.[375]

C. Joinder of Claims and Parties

After 1940, for the most part the Texas rules governing the joinder of claims and parties were not amended after their effective date, September 1, 1941. Thus, Civil Procedure Rules 38 (Third-Party Practice), 40 (Permissive Joinder of Parties), 41 (Misjoinder and Non-Joinder of Parties), 43 (Interpleader) and 60 (Intervenor's Pleadings) have not been amended with minor exceptions.[376]

But in 1970 Civil Procedural Rule 39 was completely rewritten[377] to correspond with amendments made to Federal Rule 19 in 1966.[378] The

[373] *Id.* § 15.003 (West 2002 & Supp. 2012); *see* Surgitek, Bristol-Myers Corp. v. Abel, 997 S.W.2d 598, 604 (Tex. 1999) (plaintiffs who could not independently establish venue in Bexar County also could not satisfy statutory "essential need" in same county as plaintiff who could independently establish venue there).

[374] TEX. CIV. PRAC. & REM. CODE ANN. § 15.003 (West 2002 & Supp. 2012).

[375] These changes were discussed and developed by the Supreme Court Advisory Committee in 1996 and 1997 and are contained in proposed Civil Procedure Rule 25 of the proposed Recodification Draft. *See* Texas Supreme Court Advisory Committee transcript, January 18, 1997, at 7241; *see also* Texas Supreme Court Advisory Committee agenda, January 17–18, 1997 at 11–17.

[376] Effective April 1, 1984, Tex. R. Civ. P. 38(a) was amended to remove the need to get leave of court to commence third-party actions. TEX. R. CIV. P. 38(a), 47 TEX. B. J. 4, Special Pull Out Section (1941, amended 1984).

[377] *See* Order of Texas Supreme Court Amending Civil Procedure Rules, 33 TEX. B.J. 703, 704–05 (Tex. Jan. 1, 1971).

[378] *See* FED R. CIV. P. 19, 28 U.S.C. 2017 (1966, superseded 1987) (former Fed. R. Civ. P. 19, superseded by current Fed. R. Civ. P. 19, amended in 1987 and 2007). Criticism of the original version of Federal Rule 19, from which Texas Rule 19 was taken led to its complete revision in 1966. *See* Howard P. Fink, *Indispensable Parties and the Proposed Amendment to Federal Rule 19*, 74 YALE L.J. 403 (1965); *see also* Benjamin Kaplan, *Continuing Work of the Civil Committee:1966 Amendments of the Federal Rules of Civil Procedure* (I), 81 HARV. L. REV. 356, 366–71 (1967). In 1966, Federal Rule 23 (Class Actions) was also rewritten. *See* Joseph Jaworski & Shelton E. Padgett, *The Class Action in Texas: An Examination and a Proposal*, 12 HOUS. L. REV. 1005, 1006 (1975).

terms "Necessary Joinder" and "joint interest" were removed from both Texas Rule 39(a) and Federal Rule 19(a).[379] The revised rules focus the inquiry on whether the nonjoined person should be joined to protect that person's interest related to the subject of the action or to protect the (other) parties to the action from a "substantial risk of incurring double, multiple, or otherwise inconsistent obligations."[380] But if joinder is not feasible, the trial court is required to determine whether "in equity and good conscience" the case should be litigated in the nonjoined person's absence or whether the person ought to be "regarded as indispensable."[381] As explained by a "young law professor" in 1977,[382] "the major change in the wording of Rule 39 involved the substitution of practical principles for the abstract concept of 'jointness' and supplementation of the 'complete relief' concept with language that directs courts to consider the practical consequences of proceeding in the absence of the nonjoined party."[383] By 1974, the Texas Supreme Court recognized that the compulsory joinder issue should no longer be regarded as a nonwaivable jurisdictional issue.[384] Thus, the longstanding confusion with respect to the subject of the compulsory joinder of parties was eliminated (for the most part) more than three decades after the adoption of the Texas Rules of Civil Procedure.[385]

D. Class Actions

The provisions of Civil Procedure Rule 42 were completely redrafted in 1977 as a reaction to efforts made by proponents of the Uniform Class Action Act to revivify class action practice after a series of judicial

[379] *See* TEX. R. CIV. P. 39(a); *see also* FED. R. CIV. P. 19(a).

[380] *See* TEX. R. CIV. P. 39(a).

[381] *See id.* 39(b).

[382] Brooks v. Northglen Ass'n, 141 S.W.3d 158, 163 (Tex. 2004) (referring to William V. Dorsaneo, III's statement from 1977).

[383] William V. Dorsaneo, III, *Compulsory Joinder of Parties in Texas*, 14 HOUS. L. REV. 345, 360 (1977).

[384] *See* Cooper v. Tex. Gulf Indus. Inc., 513 S.W.2d 200, 204 (Tex. 1974) ("[The] concern is less that of the jurisdiction of a court to proceed and is more a question of whether the court ought to proceed with those who are present."); *cf.* Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 119 (1968) ("To say that a court 'must' dismiss in the absence of an indispensable party and that it 'cannot proceed' without him puts the matter the wrong way around: a court does not know whether a particular person is 'indispensable' until it has examined the situation to determine whether it can proceed without him.").

[385] *See, e.g.*, Cox v. Johnson, 638 S.W.2d 867, 868 (Tex. 1982) (failure to join joint payee of note not "fundamental" jurisdictional error and could not be raised for first time on appeal).

decisions had effectively closed the federal courthouse to class actions in diversity cases.[386] Before the 1977 amendments to Rule 42, class action practice in Texas had been largely restricted to "true" class actions and "hybrid" actions involving disputed ownership interests in specific properties, despite the procedural rules' recognition of common question class actions, which were given the pejorative title "spurious" class actions in the case law and legal literature.[387] In fact, as late as 1972, an opinion written by Justice Tom Reavley suggested that the "spurious" class action had no place in Texas practice and should be eliminated from the original version of Civil Procedure Rule 42.[388]

Despite historical misgivings about class actions premised on the existence of common questions of law and fact, Civil Procedure Rule 42 was amended in 1977 to embrace the then-existing essential procedural incidents of Rule 23 of the Federal Rules of Civil Procedure.[389] But even after the 1977 amendments to Rule 42 to conform it to the federal class action rule,[390] class action litigation played no significant role in Texas practice until the end of the twentieth century.[391] Once class action practice became more common in Texas courts, Civil Procedure Rule 42 was significantly amended by rule amendments promulgated by the Texas Supreme Court in 2003.[392] These amendments were made pursuant to legislation enacted in 2003 requiring the Texas Supreme Court to "adopt rules to provide for the fair and efficient resolution of class actions."[393] The

[386] *See, e.g.*, Zahn v. Int'l Paper Co., 414 U.S. 291, 301–02 (1973). *But see In re* Abbott Laboratories, 51 F.3d 524, 527–29 (5th Cir. 1995).

[387] *See* Frumer, *supra* note 167, at 160; *see also* Jaworski & Padgett, *supra* note 378, at 1009–10.

[388] *See* Commercial Travelers Life Ins. Co. v. Spears, 484 S.W.2d 577, 579 (Tex. 1972) (citing Frumer, *supra* note 167, at 160).

[389] *See* TEX. R .CIV. P. 42, 40 TEX. B.J. 563, 563–64 (1941, amended 1977).

[390] *See* FED. R. CIV. P. 23.

[391] *See* Russell T. Brown, Comment, *Class Dismissed: The Conservative Class Action Revolution of the Texas Supreme Court*, 32 ST. MARY'S L.J. 449, 453 (2001) (noting the pre-2000 judicial tradition of treating class certifications as "simple pre-trial procedural speed bumps," which often forced defendants to settle in the face of potentially large negative judgments).

[392] Amendments to the Texas Rules of Civil Procedure, Misc. Docket No. 03-9160, 66 TEX. B.J. 900, 901–05 (Tex. Oct. 9, 2003).

[393] *See* Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 1.01, 2003 Tex. Gen. Laws 847, 847–48 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 26.001 (West 2008)).

specific concern of the legislature and the Court was the fees to be awarded to class counsel as a result of perceived abuse.[394]

The 2003 legislation required the Texas Supreme Court to promulgate rules mandating use of the lodestar method[395] of calculating the amount of the fee award and requiring that if recovery by the class is in the form of coupons or some non-cash benefit, fees paid to class counsel must be in "cash and non-cash amounts in the same proportion as the recovery for the class."[396]

Effective January 1, 2004, Civil Procedure Rule 42 was further amended in other respects to conform the Texas class action rule to the federal rule.[397] The Texas Supreme Court adopted a new provision requiring class certification orders granting or denying certification of common question class actions under Rule 42(b)(3) to state specific matters so that the trial court's determination can be meaningfully reviewed on appeal.[398] This provision, which does not appear in the federal class action rule, codifies a line of cases decided during the first decade of the twenty-first century requiring a cautious approach to class action certification and rejecting the "certify now and worry later" approach followed previously by several courts of appeals.[399] Under this approach, trial courts must conduct a rigorous analysis of Rule 42's requirements before certifying a class.[400]

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[394] *See, e.g.*, Gen. Motors Corp. v. Bloyed, 916 S.W.2d 949, 953–54 (Tex. 1996).

[395] *See* Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 1.01, 2003 Tex. Gen. Laws 847, 848 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 26.003(a) (West 2008)).

[396] *See id.*; TEX. R. CIV. P. 42(i), (j); Amendments to the Texas Rules of Civil Procedure, Misc. Docket No. 03-9160, 66 Tex. B.J. 900, 905 (Tex. Oct. 9, 2003).

[397] These changes included: (1) deletion of the "specific property claims" as a separate type of class action; (2) change in the timing of the certification from "as soon as practicable after the commencement of the action" to "at an early practicable time"; (3) changes in the notice provisions requiring notice of certification to class members only in (b)(3) (common questions) class actions but permitting appropriate notice in (b)(1) and (b)(2) actions; (4) changes in the settlement, dismissal, or compromise provisions; and (5) addition of the provisions for appointment of class counsel. *See* Amendments to the Texas Rules of Civil Procedure, Misc. Docket No. 03-9160, 66 TEX. B.J. 900, 901–05 (2003).

[398] *See* TEX. R. CIV. P. 42(c)(1)(D), 66 TEX. B.J. 900, 902 (2003).

[399] *See, e.g.*, Nat'l. Gypsum Co. v. Kirbyville Indep. Sch. Dist., 770 S.W.2d 621, 627 (Tex. App.—Beaumont 1989, dism'd w.o.j.). *But see* Sw. Refining Co. v. Bernal, 22 S.W.3d 425, 435 (Tex. 2000) (Court required "'actual, not presumed, conformance with [the Rule]'") (quoting Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 160 (1982)).

[400] *Sw. Refining Co.*, 22 S.W.3d at 435; Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 688 (Tex. 2002).

Accordingly, to facilitate a meaningful review, at the recommendation of the Texas Supreme Court's Advisory Committee,[401] under Rule 42(c)(1)(D) class certification orders must address eight items:

- The elements of each claim or defense.
- Any issues of law or fact common to class members.
- Any issues of law or fact affecting only individual members.
- The issues that will be the object of most of the efforts of the litigants and the court.
- Other available methods of adjudication that exist for the controversy.
- Why the issues common to the members of the class do or do not predominate over individual issues.
- Why a class is or is not superior to other available methods for the fair and efficient adjudication of the controversy.
- If a class is certified, how the class claims and any issues affecting only individual members will be tried in a manageable, time-efficient manner.[402]

After adopting Rule of 42(c)(1)(D), the Texas Supreme Court extended the application of the same type of rigorous analysis to (b)(2) cases.[403] Similarly, the Court made it clear that a trial plan must be included in every certification order, not only when the Rule 42(b)(3)'s predominance and superiority requirements must be satisfied.[404]

[401] The specific recommendation was made by Professor William V. Dorsaneo, III, and Mike A. Hatchell. *See* Meeting of the Texas Supreme Court Advisory Committee, 10148–82 (Aug. 22, 2003).

[402] TEX. R. CIV. P. 42(c)(1)(D).

[403] *See* Compaq Computer Corp. v. Lapray, 135 S.W.3d 657, 671 (Tex. 2004) (cohesiveness of mandatory (b)(2) class must be "rigorously analyze[d]" but if trial court provides (b)(2) class members with notice and opt-out rights, cohesiveness "need not be greater than the predominance and superiority necessary for a class certified under (b)(3).").

[404] *See* State Farm Mut. Auto. Ins. Co. v. Lopez, 156 S.W.3d 550, 556 (Tex. 2004) ("The formulation of a trial plan assures that a trial court has fulfilled its obligation to rigorously analyze all certification prerequisites, and 'understands the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.'" (quoting Sw. Ref. Co., Inc. v. Bernal 22 S.W.3d 425, 435 (Tex. 2000))).

E. Discovery Practice

In the discovery context, there has been continuing controversy and many changes in the rules of civil procedure.[405] The first major changes were made in 1957, during Judge Robert W. Calvert's tenure as the rules member of the Texas Supreme Court. The scope of discovery was changed in 1957 so that, in the language of the 1957 rule, the general scope was extended from the issues made out by the pleadings to matters "relevant to the subject matter" involved in the action.[406] More significantly, as in federal practice, the procedural rules were amended so that it no longer mattered that the information was not admissible at trial, as long as it was "reasonably calculated" to lead to the discovery of admissible information.[407]

But not all of the 1957 amendments were beneficial. As noted above, a broad discovery rule privilege was included in a proviso at the end of the original production of documents rule promulgated in 1940.[408] This proviso was prepared before the Supreme Court's landmark decision in *Hickman v. Taylor* and did not use the term "work product" or the more modern and comprehensive term "trial preparation materials."[409] It exempted from discovery certain post-occurrence party communications involving the

[405] *See generally* William V. Dorsaneo, III, & Elizabeth G. Thornburg, *Time Present, Time Past, Time Future:Understanding the Scope of Discovery in Texas Courts*, 29 HOUS. L. REV. 245 (1992).

[406] TEX. R. CIV. P. 186a, 20 TEX. B.J. 187, 189 (1957, repealed 1983). Former Rule 186a defined the scope of inquiry for a deposition and subpoena *duces tecum* used in conjunction therewith as follows: "Unless otherwise ordered by the court as provided by Rule 186b the deponent may be examined regarding any matter, not privileged, which is relevant to the subject involved in the pending action . . . ." *Id.*

[407] *Id.*

[408] *See supra* note 179 and accompanying text; TEX. R. CIV. P. 167, 4 TEX. B.J. 512, 512 (1941, repealed 1998) ("[P]rovided that the rights herein granted shall not extend to the written communications passing between agents or representatives or the employees of either party to the suit, or communications between any party and his agents, representatives, or their employees, where made subsequent to the occurrence or transaction upon which the suit is based, and made in connection with the prosecution, investigation or defense of such claim or the circumstances out of which same has arisen."). The proviso even protected the names of witnesses and potential parties from discovery. *See Ex Parte* Ladon, 325 S.W.2d 121, 124 (Tex. 1959) (reversing trial court's contempt order against attorney who refused to divulge names of witnesses); *Ex parte* Hanlon, 406 S.W.2d 204, 207–08 (Tex. 1966) (reversing contempt order for failure to disclose name of potential party).

[409] 329 U.S. 495, 511–14 (1947); *see, e.g.*, FED. R. CIV. P. 26(b)(3), (5).

transaction or occurrence that gave rise to litigation. In 1957, when former Rule 186a was adopted to govern the scope of discovery, the older provision was also incorporated in it, but additional troublesome language was added exempting "information obtained in the course of an investigation of a claim or defense by a person employed to make such an investigation."[410]

By virtue of the 1957 amendments, the general scope of discovery was broadened, but the provisos in former Rules 167 and 186a exempted significant communications and information from discovery.[411] In fact, former Rule 186a's revamped proviso may have expanded its coverage so much that it vitiated what the broadened scope of discovery would have provided. These restrictions were much more powerful than the *Hickman* work product doctrine because: (1) the revamped proviso protected all post-occurrence investigations made in connection with the prosecution, investigation, or defense of the claims made in the action (*i.e.*, no "in anticipation of litigation requirement"); (2) the investigative privilege was absolute; and (3) the investigative privilege protected the underlying facts in addition to the investigatory memoranda that memorialized the facts.[412]

In 1971, an exception was added to the proviso to permit discovery of information relating to the identity of any potential party or witness, thereby curing the specific *Ladon* and *Hanlon* problem in former Rules 167 and 186a.[413] This result was accomplished by adding the following language to the text of both rules: "information relating to the identity of any potential party or witness to the occurrence at issue may be obtained from any communication in the possession, custody or control of any party" or "any person having such knowledge."[414]

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[410] TEX. R. CIV. P. 186a, 20 TEX. B.J. 187, 189 (1957, repealed 1983); *see* E. Wayne Thode, *Some Reflections on the 1957 Amendments to the Texas Rules of Civil Procedure Pertaining to Witnesses at Trial, Depositions, and Discovery*, 37 TEX. L. REV. 33, 38 (1958).

[411] *See* Thode, *supra* note 410, at 38–42 (discussing these problems under the new rules).

[412] *Compare* TEX. R. CIV. P. 186a, 20 TEX. B.J. 187, 189 (1957, repealed 1983), *and* Ex parte Ladon, 325 S.W.2d at 124 (holding that original proviso to TEX. R. CIV. P. 167 precluded an injured passenger from obtaining the names of persons on bus from defendant transit company), *and* Ex parte Hanlon, 406 S.W.2d at 207–08 (interpreting TEX. R. CIV. P. 186a to shield identity of potential party defendant because that information was obtained by claim manager and investigator for insurer of another party to the collision), *with Hickman*, 329 U.S. at 511–14.

[413] TEX. R. CIV. P. 167, 33 TEX. B.J. 703, 708–10 (1971, amended 1972); TEX. R. CIV. P. 186a, 33 TEX. B.J. 703, 708–10 (1971, amended 1972).

[414] *See id.*

Major revisions in the discovery rules were made in 1972, effective February 1, 1973, by amending former Rules 167 and 186a.[415] Discovery was broadened to documents and things "reasonably calculated to lead . . . to evidence material to any matter involved in the action" and to allow discovery of the opinions and materials of testifying experts.[416] The discovery rules still contained broad exemptions for "witness statements," "party communications," an undefined exemption for the "work product for an attorney" that was added to the discovery rules for the first time in 1973, an exemption for investigative information that was added in 1957, and an exemption for the mental impressions and opinions of experts used solely for consultation.[417] In a series of decisions in the 1970s, the Supreme Court of Texas dealt with many of these provisions.[418]

By 1980, substantial changes were being discussed and proposed for adoption by the membership of the Committee on the Administration of Justice of the State Bar of Texas to modify the scope of discovery and the discovery rule procedures.[419] At that time, under the leadership of Luther H. Soules, III,[420] who then was the Chairman of the Committee on the

[415] *See* TEX. R. CIV. P. 167, 35 TEX. B.J. 1037, 1038–42 (1972, amended 1980); TEX. R. CIV. P. 186a, 35 TEX. B.J. 1037, 1038–42 (1972, amended 1980).

[416] *See id.*

[417] *See* TEX. R. CIV. P. 186a, 35 TEX. B.J. 1037, 1042 (1972, amended 1980).

[418] *See* Houdaille Indus., Inc. v. Cunningham, 502 S.W.2d 544, 549 (Tex. 1973) (finding that "party communications" means only written communications, not photographs); *see also* Allen v. Humphreys, 559 S.W.2d 798, 802 (Tex. 1977) (recasting party communication privilege narrowly such that privilege could be invoked if: (1) material to be discovered is either (a) a written statement of non-expert witness, (b) a written communication between agents, representatives or employees of any party, or (c) written communications between any party and his agents, representatives, or their employees; (2) made subsequent to the occurrence or transaction on which suit is based; and (3) the statement or communication is made in connection with the prosecution, investigation, or defense of the particular suit or in connection with the investigation of the particular circumstances out of which it arose); *see also* Werner v. Miller, 579 S.W.2d 455, 456 (Tex. 1979) (discussing "at what stage of the proceedings" a party must decide whether consulting expert will be testifying expert).

[419] Some changes in the discovery rules were promulgated by the Texas Supreme Court in 1980, effective January 1, 1981. *See* Rules of Civil Procedure: New Amendments, 43 TEX. B.J. 767, 771 (1980). For a description of these amendments, *see generally* Franklin Spears, *The Rules of Civil Procedure: 1981 Changes in Pre-Trial Discovery*, 12 ST. MARY'S L.J. 633 (1981); *see generally* Jack Pope & Steve McConnico, *Practicing Law With the 1981 Texas Rules*, 32 BAYLOR L. REV. 457 (1980).

[420] Mr. Soules subsequently served as the third Chairman of the Advisory Committee to the Supreme Court of Texas.

Administration of Justice, a discovery revision project was undertaken and completed during the early 1980s.[421] As a result of this project, which culminated in the 1984 amendments to the discovery rules, the rules were reorganized and rewritten.[422]

As a result of the 1984 amendments, the following major revisions were made to the Texas discovery rules.[423]

First, a general rule like Federal Rule 26 was adopted.[424] The new rule included basically all of the scope-of-discovery information, including exemptions, and other generally applicable provisions concerning supplementation of discovery responses, protective orders, and the like.[425]

Second, as a result of the discussion of proposed exemptions from discovery and a vote of the Advisory Committee to eliminate the privilege protecting investigative information from discovery,[426] the former privilege protecting such information from discovery was eliminated.[427]

Third, a discovery abuse and sanctions rule was adopted into which most of the information concerning discovery sanctions was included in a manner similar to the federal model.[428] Under this rule (as promulgated in 1984), it became permissible to impose severe sanctions on parties for

[421] *See* Memorandum from Jack Pope, Rules Member, Supreme Court of Texas, to Supreme Court Advisory Committee (November 12, 1982) ("[W]e especially acknowledge the service by the members of the Committee on Administration of Justice. That Committee has completed its study and revision of all of the Discovery and Deposition Rules after three years of hard research and work."). Agenda of the Texas Supreme Court Advisory Committee, 14 (Nov. 12, 1982).

[422] *See Rules of Civil Procedure*, 47 TEX. B.J. Pull-Out Section (1984). The principal drafter of these rules was Professor William V. Dorsaneo, III, who served as reporter for the Discovery and Deposition Rules. *See also* Agenda of the Texas Supreme Court Advisory Committee, 19–80 (Sept. 1982).

[423] The amendments have been described as "major revisions" that "revolutionized discovery practice in Texas." *See* Steve McConnico & Daniel W. Bishop, II, *Practicing Law With the 1984 Rules: Texas Rules of Civil Procedure Amendments Effective April 1, 1984*, 36 BAYLOR L. REV. 73, 73 (1984); *see also* Ernest E. Figari, Jr., Thomas A. Graves & A. Erin Dwyer, *Texas Civil Procedure*, 39 SW. L.J. 419, 433 (1985).

[424] TEX. R. CIV. P. 166b, 47 TEX. B.J. Pull-Out Section, 8–11 (1984, amended 1987).

[425] *See id.*

[426] *See* Meeting of the Texas Supreme Court Advisory Committee, 40–44 (Nov. 12, 1983). Russell H. "Rusty" McMains's Motion to eliminate the investigative information privilege was approved by a committee vote of 10-8.

[427] *See Rules of Civil Procedure*, 47 TEX. B. J. Pull-Out Section (1984).

[428] TEX. R. CIV. P. 215, 47 TEX. B. J. Pull-Out Section, 19–21 (1984, amended 1987).

partial noncompliance with discovery requests and to impose sanctions on attorneys who advised misconduct.[429]

Fourth, the discovery rules were modernized by expanding the scope of requests for admissions and interrogatories.[430] Under the original versions of these rules, modeled on the 1937 version of the federal rules, a party could only ask another party to state or admit facts rather than to state or admit broader propositions that called for the application of law to the facts.[431] This problem had been corrected at the federal level several years earlier, and finally by 1984, the Texas rules were harmonized with federal discovery practices.[432]

Fifth, the scope of discovery was expanded to include discovery from nontestifying experts who had prepared reports or developed opinions that formed the basis of the opinions of testifying experts,[433] and the investigative information proviso that was added to former Rule 186a in 1957 was finally repealed.[434] As explained below, this seemingly simple modification increased the importance of both the work-product exemption and its companion and predecessor exemption previously included in the original rules, the party-communication exemption.[435]

Sixth, the discovery timetables for written discovery were simplified by adopting a "thirty day rule" for discovery responses.[436]

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[429] *Id*.

[430] TEX. R. CIV. P. 166b(2)(a), 47 TEX. B. J. Pull-Out Section, 8–11 (1984, amended 1987) ("It is . . . not ground for objection that an interrogatory propounded pursuant to Rule 168 involves an opinion or contention that relates to facts the application of law to fact . . . . [I]t is also not ground for objection that a request for admission propounded pursuant to Rule 169 relates to statements or opinions of fact or of the application of law to fact or mixed questions of law and fact or that the documents referred to in a request may not be admissible at trial."). *See* Laycox v. Jaroma, Inc., 709 S.W.2d 2, 4 (Tex. App.—Corpus Christi 1986).

[431] *See id.*

[432] *See* FED. R. CIV. P. 33, 35; TEX. R. CIV. P. 166b(2)(a), 47 TEX. B. J. Pull-Out Section, 9 (1984, repealed 1998).

[433] TEX. R. CIV. P. 166b(2)(e)(1), 47 TEX. B. J. Pull-Out Section, 9 (1984, repealed 1998).

[434] *See* TEX. R. CIV. P. 166b(3), 47 TEX. B. J. Pull-Out Section, 10–11 (1984, repealed 1998); TEX. R. CIV. P. 186a, 20 TEX. B.J. 187, 189 (1957, repealed 1983); *see* William V. Dorsaneo, III, *Work Product & Privilege: How to Protect It, How to Discover It*, ADVOC., Summer 1988, at 27, 27.

[435] TEX. R. CIV. P. 166b(3)(d), 47 TEX. B. J. Pull-Out Section, 10–11 (1984, repealed 1998); *see* Dorsaneo & Thornbug, *supra* note 405, at 264–65.

[436] *See* TEX. R. CIV. P. 167, 47 TEX. B. J. Pull-Out Section, 11 (1984, repealed 1998); TEX. R. CIV. P. 168, 47 TEX. B. J. Pull-Out Section, 11–12 (1984, repealed 1998); TEX. R. CIV. P. 169, 47 TEX. B. J. Pull-Out Section, 12–13 (1984, repealed 1998).

A series of cases decided by the Texas Supreme Court in the mid-1980s construed the party-communication exemption (from which the investigative information problem had been eliminated, effective April 1, 1984) narrowly, such that the post-occurrence communication was not exempted from discovery unless the communication was clearly in anticipation of the particular lawsuit in which the privilege was asserted.[437] The Texas Supreme Court's 1986 opinion in *Turbodyne v. Heard* and in other decisions embraced a "case specific" interpretation, which narrowed the scope of the exemption considerably.[438]

Another significant amendment was made to former Rule 166b(3), effective January 1, 1988, adopting a "substantial need" "undue hardship" exception to the then-existing exemptions for witness statements and party communications, but not to work product, privileged expert information or to matters protected from disclosure by the Rules of Civil Evidence.[439]

In 1987 through 1990, significant amendments also were made to the discovery rules concerning consulting experts and the discovery privilege for party communications. Consulting experts' identities, mental impressions and opinions, as well as any documents or tangible things containing them became discoverable under a new standard, which was intended to broaden discoverability, *i.e.*, "if the consulting expert's opinion or impressions have been reviewed by a testifying expert."[440] Similarly, the party communication privilege[441] was amended to narrow the scope of the

[437] Turbodyne Corp. v. Heard, 720 S.W.2d 802, 804 (Tex 1986) (per curiam) (holding that documents prepared by casualty insurer in connection with settlement of claims with its insured are not protected from discovery in later subrogation suit); Stringer v. Eleventh Court of Appeals, 720 S.W.2d 801, 802 (Tex. 1986) (per curiam) (holding "only information obtained by a party after there is good cause to believe a suit will be filed or after the institution of a lawsuit is privileged"); Robinson v. Harkins & Co., 711 S.W.2d 619, 621 (Tex. 1986) (per curiam) (holding that an investigator's report prepared in connection with a workers' compensation claim was discoverable in a later personal injury action); Terry v. Lawrence, 700 S.W.2d 912, 913–14 (Tex. 1985) (reaffirming holding that photographs are not within "party communications" exemption).

[438] *See Turbodyne Corp.*, 720 S.W.2d at 804.

[439] TEX. R. CIV. P. 166b(3), 50 TEX. B.J. 850, 857 (1987, amended 1990).

[440] Texas Supreme Court Invites Comments on Proposed Amendments to Texas Court Rules, 52 TEX. B.J. 1147, 1154 (1989); Changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, 53 TEX. B.J. 589, 597 (1990). This language replaced language allowing discovery "when the expert's work product forms a basis either in whole or in part of the opinions of an expert who will be called as a witness." *See* TEX. R. CIV. P. 166b(3)(b), 50 TEX. B.J. 850, 857 (1987, amended 1990).

[441] TEX. R. CIV. P. 166b(3)(d), 50 TEX. B.J. 850, 857 (1987, amended 1990).

exemption for post-occurrence party communications by requiring the communication to be "in connection with the prosecution, investigation or defense of the particular suit, or in anticipation of the prosecution or defense of the claims made a part of the pending litigation."[442]

The procedure for presenting objections, which had been added to the discovery rules in 1988[443] to clarify procedural requirements when litigating claims of exemptions or immunity from discovery, was amended in 1990 to expressly provide that an objection or a motion for a protective order containing objections preserves them without further action unless the matter is set for a hearing and determined by the trial court.[444] This amendment also provided that any matter withheld from discovery "shall not be admitted in evidence to the benefit of the withholding party absent timely supplemental production."[445]

Under the influence of the 1990 amendment to the party communication exemption, Texas courts continued to strictly interpret the exemption. For example, in *Flores v. Fourth Court of Appeals*, the Texas Supreme Court interpreted former Rule 166b(3)(d) to require the party claiming the privilege to satisfy a two-pronged test.[446] As explained in *Flores*:

> The first prong requires an objective examination of the facts surrounding the investigation. Consideration should be given to outward manifestations which indicate litigation is imminent. The second prong uses a subjective standard. Did the party opposing discovery have a good faith belief that litigation would ensue? There cannot be good cause to believe a suit will be filed unless elements of both prongs are present. Looking at the totality of the circumstances surrounding the investigation, the trial court

[442] TEX. R. CIV. P. 166b(3)(d), 53 TEX. B.J. 589, 597 (1990). This change substantially conformed the party communication exemption to the companion exemption for witness statements contained in former TEX. R. CIV. P. 166b(3)(c). *Id.* Former Rule 166b(3)(d) also clarified that the party communication "exemption does not include communications prepared by or for experts that are otherwise discoverable." *Id.*

[443] *See* TEX. R. CIV. P. 166b(4), 50 TEX. B. J. 850, 857 (1987, amended 1990).

[444] *See* TEX. R. CIV. P. 166b(4), 53 TEX. B.J. 589, 597–98 (1990, repealed 1998).

[445] *Id.*

[446] 777 S.W.2d 38, 40 (Tex. 1989).

> must then determine if the investigation was done in anticipation of litigation.[447]

Four years later, in *National Tank Co. v. Brotherton*, the Court changed course by modifying the objective prong of *Flores* to eliminate the requirement that litigation must be imminent and by explaining that the objective prong is satisfied "whenever the circumstances surrounding the investigation would have indicated to a reasonable person that there was a substantial chance of litigation."[448] In *National Tank*, the Court also explained that the objective prong did not require proof that the plaintiff had taken some action indicating an intent to sue.[449] Further, the Court explained that the second prong of the *Flores* test required proof that the "circumstances must indicate that the investigation was in fact conducted to prepare for potential litigation."[450] But in the same year, the Court also held that the party-communication privilege did not extend to a communication that was not made in anticipation of the particular lawsuit in which the privilege was asserted because Rule of Civil Procedure 166b(3)(d) specifically required a privileged communication to be made in anticipation of the particular suit.[451]

As a result of the repeal of the investigative information proviso and the adoption of specific language exempting the work product of an attorney from discovery, Texas courts began to examine the undefined scope of the "work product" exemption as a separate exemption. The Texas Supreme Court first referred to notes, lists, and memoranda prepared by an attorney as "work product" in every sense of the term.[452] Subsequent opinions suggested that only "opinion" work product was protected.[453] In 1991, the

[447] *See id.* at 40–41.

[448] 851 S.W.2d 193, 204 (Tex. 1993).

[449] *See id.*

[450] *Id.* at 206 ("If a party routinely investigates accidents because of litigation and nonlitigation reasons, the court should determine the primary motivating purpose underlying the [party's] ordinary business practice.").

[451] Republic Ins. Co. v. Davis, 856 S.W.2d 158, 165 (Tex. 1993) ("Party communications not generated in connection with or in anticipation of the particular suit or in anticipation of the claims made a part of the pending litigation in which the privilege is asserted are not privileged.").

[452] Garcia v. Peeples, 734 S.W.2d 343, 348 (Tex. 1987).

[453] *See, e.g.*, Axelson, Inc. v. McIlhany, 798 S.W.2d 550, 554 (Tex. 1990) (holding that attorney work product privilege protects "only the mental impression, opinions, and conclusions of the lawyer and not the facts"); *see also* Leede Oil & Gas, Inc. v. McCorkle, 789 S.W.2d 686, 687 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding).

Court broadened the privilege by holding that the "work product" privilege is of "continuing duration" and not limited to the duration of the case in which or for which the work was done.[454] But the scope of the work product exemption and its relationship to the other exemptions contained in former Rule 166b remained uncertain.

Despite the fact that many of the interpretive problems spawned by adoption of the 1984 discovery rules had been addressed and resolved by the early 1990's, many problems remained in the Texas rulebook, particularly concerning the scope of discovery rule privileges and their relationship to each other. These problems and the public perception about the abuse of discovery by counsel led the Texas Supreme Court to appoint two discovery task forces in 1991 to make suggestions for additional changes and further improvement.[455]

F. Summary Judgment

In 1950, nine years after the first Supreme Court Advisory Committee decided not to recommend a summary judgment rule, one modeled on the 1983 version of Federal Rule 56 was adopted.[456] Although the procedure was heralded as a means to reduce costs and to improve judicial economy by piercing unmeritious claims and untenable defenses, for many years after its adoption, trial and appellate courts viewed summary judgment practice with hostility. [457] In 1962, the Texas Supreme Court expressed the view that summary judgment is harsh, drastic, extreme, and demands strict application and every indulgence for the non-movant.[458] Thereafter, in a

[454] Owens-Corning Fiberglas Corp. v. Caldwell, 818 S.W.2d 749, 750–51 (Tex. 1991) (disapproving Dewitt & Rearick, Inc. v. Ferguson, 699 S.W.2d 692 (Tex. App.—El Paso 1985, orig. proceeding)).

[455] *See infra* Part 8.

[456] TEX. R. CIV. P. 166a, 12 TEX. B. J. 529, 531 (1949, amended 1951).

[457] Roy W. McDonald, *Summary Judgments*, 30 TEX. L. REV. 285, 286 (1952); Gulbenkian v. Penn., 252 S.W.2d 929, 931 (Tex. 1951).

[458] Gaines v. Hamman, 358 S.W.2d 557, 562 (Tex. 1962). Somewhat interestingly, earlier appellate decisions had treated the procedure more favorably after its adoption in 1950. *See* Rolfe v. Swearingen, 241 S.W.2d 236, 239–240 (Tex. Civ. App.—San Antonio 1951, writ ref'd n.r.e.) (per Pope, J.) (holding that a nonmovant could not raise a disputed issue of fact by remaining silent and announcing ready for trial. "While appellees were shouting their facts, appellants elected to remain mute." To hold otherwise, "will sound the requiem to a rule that has hardly been christened."). *See also* Fowler v. Tex. Emp'rs' Ins. Ass'n, 237 S.W.2d 373, 375 (Tex. Civ. App.—Fort Worth 1951, writ ref'd) (following general rule from Cochran v. Woolgrowers Cent. Storage Co.,166 S.W.2d 904, 908 (1942) ("[W]here the testimony of an interested witness is not

series of opinions, the high Court reversed summary judgments routinely by giving a restrictive interpretation of the basic summary judgment test[459] and by taking a strict view of the sufficiency of the movant's summary judgment evidence.[460] Not surprisingly, trial judges developed a reluctance to grant summary judgments.[461] Consequently, the original version of Rule 166a was largely ineffective for the next three decades.

Civil Procedure Rule 166a was rewritten substantially effective January 1, 1978.[462] The principal amendments concerned both the basic test and the sufficiency of the movant's summary judgment evidence.[463] By virtue of the 1978 amendments, issues not expressly presented to the trial court by written motion, answer, or other response may not be considered on appeal as grounds for reversal.[464] In addition, the amendments authorized summary judgment on the basis of the uncontradicted testimonial evidence of an interested witness or of an expert, when the evidence is probative and could have been readily controverted, but was not.[465] By 1979, as reflected in the Texas Supreme Court's opinion in *City of Houston v. Clear Creek Basin Authority*, the procedural device was recognized as a helpful tool, rather than as an invasion of the trial process or some type of "snap" judgment.[466]

Even more significantly, the Texas Supreme Court amended the summary judgment rule, effective September 1, 1997, to embrace the federal approach to motions that are based on challenges to a ground of recovery or defense on which the nonmovant would have the burden of

contradicted by any other witness, or attendant circumstances, and the same is clear, direct and positive, and free from contradiction, inaccuracies and circumstances tending to cast suspicion thereon, it is taken as true as a matter of law.")).

[459] *See* Gibbs v. Gen. Motors Corp., 450 S.W.2d 827, 828 (Tex. 1970).

[460] *See* Tex. Nat'l Corp. v. United Sys. Int'l, Inc., 493 S.W.2d 738, 739 (Tex. 1973).

[461] A study revealed that during a six-year period, only two percent of civil cases in Texas were handled successfully by summary judgment. Robert L. Pittsford & James W. Russell, III, *Summary Judgment in Texas: A Selective Survey*, 14 HOUS. L. REV. 854, 854 (1977). Another study revealed that seventy percent of the summary judgment cases decided by the Texas Supreme Court from 1968 to 1976 resulted in reversals. Patrick K. Sheehan, *Summary Judgment: Let the Movant Beware*, 8 ST. MARY'S L.J. 253, 254 (1976).

[462] *See* TEX. R. CIV. P. 166a, 40 TEX. B.J. 709, 711–12 (1977, amended 1980).

[463] *See id.*

[464] TEX. R. CIV. P. 166a(c), 40 TEX. B.J. 709, 711–12 (1977, amended 1980).

[465] TEX. R. CIV. P. 166a(c), 40 TEX. B.J. 709, 711–12 (1977, amended 1980).

[466] 589 S.W.2d 671, 676 (Tex. 1979).

proof at trial.[467] Under prior law, in order to be entitled to summary judgment, the defendant was required, by competent proof, to disprove, as a matter of law, at least one of the essential elements of the plaintiff's cause of action or establish one or more affirmative defenses as a matter of law.[468] By the 1997 amendment, the Texas Supreme Court reversed the position that the Court had taken in *Casso v. Brand*,[469] which rejected the approach adopted by the United States Supreme Court in *Celotex Corp. v. Catrett*.[470] In *Celotex*, Chief Justice Rehnquist wrote that "the plain language of [Federal] Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."[471] *In Casso v. Brand*, the Texas Supreme Court had held that "we never shift the burden of proof to the non-movant unless and until the movant has 'establish[ed] his entitlement to a summary judgment on the issues expressly presented to the trial court by conclusively proving all essential elements of his cause of action . . . .'"[472]

As a result of the 1997 amendments, a defendant may obtain a summary judgment without conclusively negating an element of the plaintiff's cause of action.[473] Rather than attempting to negate the claimant's case, the

[467] S*ee* Approval of Revisions to the Texas Rules of Civil Procedure, 60 TEX. B. J. 534, 534 (1997). Final Approval of Revisions to the Texas Rules of Civil Procedure, 60 TEX. B.J. 872, 872–73 (1997). Justices Rose Spector and James Baker dissented from the order adopting the no-evidence motion. Justice Spector disagreed with the basic concept of federal style no-evidence practice. Justice Baker did not disagree with the basic concept, but with the Supreme Court's failure to adopt the recommendations of its Advisory Committee designed to curb potential abuse of the new procedure. *See id.*

[468] Lear Siegler, Inc. v. Perez, 819 S.W.2d 470, 471 (Tex. 1991); Jennings v. Burgess, 917 S.W.2d 790, 793 (Tex. 1996).

[469] Casso v. Brand, 776 S.W.2d 551, 556 (Tex. 1989).

[470] 477 U.S. 317, 322 (1986).

[471] *Id.*

[472] 776 S.W.2d at 556.

[473] Subdivision (i) of amended Civil Procedure Rule 166a provides:

> (i) No Evidence Motion. After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the

movant can assert that there is no evidence to support one or more specific elements of a plaintiff's claim and put the burden on the claimant to present summary judgment evidence to raise an issue of fact.[474]

A comment to the amended rule states that "[t]he motion must be specific in challenging the evidentiary support for an element of a claim or defense; paragraph (i) does not authorize conclusory motions or general no-evidence challenges to an opponent's case."[475] The Court's official comment also states that "[t]o defeat a motion made under paragraph [i.e. subdivision] (i), the respondent is not required to marshal its proof; its response need only point out evidence that raises a fact issue on the challenged elements. The existing rules continue to govern the general requirements of summary judgment practice."[476]

Although proposals for amending Rule 166a to embrace the federal approach had been pending before the Texas Supreme Court for a number of years, the 1997 amendment's adoption was motivated by the filing of House Bill No. 95 "relating to summary judgments in civil actions" by Representative Joe M. Nixon of Houston, Texas. Representative Nixon's bill (which was withdrawn due to the amendment) would have superseded Civil Procedure Rule 166a, if it had become law.[477]

One important aspect of the new provision is the "no evidence" standard.[478] The "no evidence" standard is a familiar part of Texas jurisprudence. It has been applied in instructed verdict cases, cases involving objections to submission of vital fact issues, and in connection

> respondent produces summary judgment evidence raising a genuine issue of material fact.

TEX. R. CIV. P. 166a(i).

[474] *Id.*

[475] TEX. R. CIV. P. 166a(i) cmt. (1997).

[476] *Id.*

[477] Under the bill, which would have become Chapter 40 of the Civil Practice and Remedies Code:

> If a motion by a defendant is based on absence of proof on a claim or issue with respect to which the claimant has the burden of proof, the claimant must respond with evidence sufficient to entitle the claimant to submission of the claim or issue to the jury. If the claimant does not respond as required by this subsection, the court shall grant summary judgment in favor of the defendant.
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> Tex. H.B. 95, 75th Leg., R.S. (1997).

[478] *See* TEX. R. CIV. P. 166a.

with motions under Civil Procedure Rule 301 for judgment notwithstanding the verdict or in disregard of particular jury findings.[479] Regardless of the context, Texas courts have followed the approach that in applying the "no evidence" standard of review, the evidence is to be considered in its most favorable light in support of the nonmovant's position.[480] Thus, a "no evidence" challenge fails if some probative testimonial or documentary evidence is identified, regardless of the number of witnesses or quantity of contrary evidence. But if only some weak circumstantial evidence is found, the focus shifts to showing that the evidence is no more than a "scintilla" and has no probative value.[481]

G. The Jury Charge

The reform proposals that never became effective in 1941 resurfaced in a different form in 1973. After sixty years of separate and distinct submission of jury questions under the 1913 Special Issues Act, it became apparent that the Texas charge practice was overloaded with granulated issues. The "distinctly and separately" requirement had developed into what Justice Jack Pope termed a "system of fractionalization of special issues far

[479] *See* TEX. R. CIV. P. 301. *See generally* Robert W. Calvert, "*No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361 (1960); William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence*," 69 TEX. L. REV. 515 (1991); *see also* William V. Dorsaneo, III, *Judges, Juries and Reviewing Courts*, 53 SMU L. REV. 1497, 1507–1511 (2000).

[480] This originally meant that the reviewing judge or court "must consider only the evidence and inferences tending to support the finding, disregarding all contrary evidence and inferences." *See*, *e.g.*, Wal-Mart Stores, Inc. v. Gonzalez, 968 S.W.2d 934, 936 (Tex. 1998). *See* W. Wendall Hall, *Revisiting Standards of Review on Civil Appeals*, 24 ST. MARY'S L.J. 1045, 1133 (1993) (A different approach was taken in "bad faith" insurance litigation because the elements of the plaintiff's case include "a negative fact," *i.e.*, "the absence of a reasonable basis for denying or delaying payment of the benefits of the policy."); Lyons v. Millers Cas. Ins. Co., 866 S.W.2d 597, 600 (Tex. 1993) (Court devised "[A] particularized application of our traditional no evidence [scope of] review" "under which a review of . . . the legal sufficiency of the evidence supporting a bad faith finding [must] focus . . . on the evidence arguably supporting a bad faith finding." *Id*. In other words, the evidence of the insurer's basis for denial of the claim cannot be disregarded and, if probative and uncontroverted, can be conclusive.); City of Keller v. Wilson, 168 S.W.3d 802, 807, 814, 822 (Tex. 2005) (Texas Supreme Court reformulated the scope of no evidence review as follows: "[A]ppellate courts must view the evidence in the light favorable to the verdict, crediting favorable evidence of reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not." The opinion explains that jurors and reviewing courts "cannot ignore undisputed evidence.").

[481] *See* Kindred v. Con/Chem, Inc., 650 S.W.2d 61, 63 (Tex. 1983).

beyond that employed in any other jurisdiction in the common-law world."[482] Effective September 1, 1973, Civil Procedure Rule 277 was amended to eliminate the former requirement that issues be submitted in separate and distinct form.[483] As a political compromise, however, trial courts were given discretion to submit jury questions in broad-form, combining elements and factual contentions, or to submit separate questions with respect to each element and factual theory.[484] The 1973 amendments also finally eliminated the submission of "inferential rebuttal" defenses in question form and authorized the submission of "proper" explanatory instructions, rather than necessary ones.[485]

Following the 1973 amendments, the Texas Supreme Court made it clear that it preferred the use of broad-form questions.[486] For example, in his last opinion, Chief Justice Pope stated that since the 1973 amendments, broad issues have been repeatedly approved by this court as the correct method for jury submission.[487] In another landmark opinion, the Court instructed that "trial courts are permitted, and even urged, to submit the controlling issues of a case in broad terms so as to simplify the jury's chore."[488] The Court's preference for a simplified charge also extended to the use of definitions and instructions.[489]

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[482] Jack Pope & William G. Lowerre, "*Revised Rule 277—A Better Special Verdict System for Texas*," 27 SW. L.J. 577, 579 (1973).

[483] *See* TEX. R. CIV. P. 277, 36 TEX. B.J. 495, 495–96 (1973).

[484] *See id.*

[485] Former Chief Justice Jack Pope, clearly the most influential figure in the simplification of Texas charge practice in the latter part of the twentieth century, minimized the significance of the change in a law review article by stating that, "[a]lthough the submission of instructions has been expanded to give the trial judge more discretion in his use of instructions, this discretion is not unfettered. Instructions are limited to those that should enable the jury to render its verdict." Jack Pope & William G. Lowerre, *The State of the Special Verdict—1979*, 11 ST. MARY'S L.J. 1, 39 (1979).

[486] *See* Lemos v. Montez, 680 S.W.2d 798, 801 (Tex. 1986); *see also* Burk Royalty Co. v. Walls, 616 S.W.2d 911, 924 (Tex. 1981).

[487] *Lemos*, 680 S.W.2d at 801; *see also Burk Royalty Co.*, 616 S.W.2d at 924 ("This court has repeatedly written that Rule 277 will be applied as written.").

[488] Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass'n, 710 S.W.2d 551, 555 (Tex. 1986).

[489] *Lemos*, 680 S.W.2d at 801 ("This court's approval and adoption of broad issue submission was not a signal to devise new or different instructions and definitions. . . . Judicial history teaches that broad issues and accepted definitions suffice and that a workable jury system demands strict adherence to simplicity in jury charges.").

Rule 277 was amended again, effective January 1, 1988, to provide that "the court shall, whenever feasible [use] broad-form questions" and eliminate trial court discretion to submit separate questions with respect to each element of a case.[490] Shortly after the 1988 amendments, the Texas Supreme Court interpreted the phrase "whenever feasible" to mean, unless extraordinary circumstances exist, a court must submit issues broadly with appropriate definitions and instructions as requested.[491] Within a decade, however, it became clear that the Court's unbridled interpretation of "whenever feasible" was too simple.

In a series of cases, the Court reevaluated its earlier decisions. The first suggestion that these decisions had gone too far explained that "Rule 277 is not absolute" noting that "[s]ubmitting alternative liability standards when the governing law is unsettled might very well be a situation where broad-form submission is not feasible."[492] Under this analysis, the omnibus submission of separate theories of liability in one broad-form liability question was not a feasible method of submitting the case to the jury if one of the liability theories was not legally valid.[493]

By the year 2000, the Texas Supreme Court began what is now known as the *Casteel* line of cases by holding in *Crown Life Ins. Co. v. Casteel*, that when a single broad-form liability question commingles valid and invalid legal claims in the same questions, the error is presumed harmful and a new trial is required when the appellate court cannot determine that the jury based its verdict on the invalid theory.[494] In 2002, the Court extended *Casteel's* approach to combination questions by holding that broad-form damages questions that instruct the jury to consider several elements of compensable damages before making an aggregate jury award are also vulnerable to a proper *Casteel* objection, if one of the damage

[490] TEX. R. CIV. P. 277.

[491] Tex. Dep't of Human Servs. v. E.B., 802 S.W.2d 647, 649 (Tex. 1990).

[492] Westgate Ltd. v. State, 843 S.W.2d 448, 455 n.6 (Tex. 1992).

[493] *See id.*; *see also* Crown Life Ins. Co. v. Casteel, 22 S.W. 3d 378, 387–92 (Tex. 2000).

[494] *See Crown Life Ins. Co.*, 22 S.W.3d at 388. The Court's decision rests on the policy expressed in *Westgate* and in *Lancaster v. Fitch*, 246, S.W. 1015, 1016 (Tex. 1923), a case decided long before broad-form submission was permissible, as well as more recent and persuasive secondary authority. *See* William V. Dorsaneo, III, *Broad-Form Submission of Jury Questions and the Standard of Review*, 46 S.M.U. L. REV. 601, 601–36 (1992); *see also* Louis S. Muldrow & William D. Underwood, *Applications of the Harmless Error Standard to Errors in the Charge*, 48 BAYLOR L. REV. 815, 838–40 (1996).

elements is not supported by legally sufficient evidence.[495] This somewhat more controversial decision raised the more fundamental question of whether liability questions that combine valid claims with factually invalid claims are also vulnerable to a proper objection.[496] Although this important question has not been answered by the Texas Supreme Court, it appears that if the broad-form question is based on one liability theory, such as negligence, rather than separate theories of liability, such as fraud and gross negligence, *Casteel's* analysis may be inapplicable.[497]

The adoption of broad-form submission of jury questions whenever feasible also has resulted in a larger role for the submission of accompanying definitions and instructions as well as a substantial reevaluation of the philosophy behind jury charge objection practice and a concomitant reinterpretation of the procedural rules governing charge objections and preservation of charge complaints.[498]

[495] Harris Cnty. v. Smith, 96 S.W.3d 230, 236 (Tex. 2002).

[496] *See id.* at 237–40 (O'Neill, J., joined by Enoch, J. and Hankinson, J., dissenting); *see also* Dorsaneo, *supra* note 494, at 629–30; *see, e.g.*, Romero v. KPH Consolidation, Inc., 166 S.W.3d 212, 225–28 (Tex. 2005).

[497] *See* Columbia Med. Ctr. v. Bush, 122 S.W.3d 835, 857–59 (Tex. App.—Fort Worth 2003, pet. denied) (*Casteel* does not apply to case involving multiple factual claims of negligence); *but see* Laredo Med. Grp. Corp. v. Mireles, 155 S.W.3d 417, 427 (Tex. App.—San Antonio 2004, pet. denied).

[498] *Compare* TEX. R. CIV. P. 277, 36 TEX. B.J. 495, 495–96 (1973, amended 1983), *with* TEX. R. CIV. P. 277, 3 TEX. B.J. 515, 566–67 (1940, amended 1941) (original version of Rule 277 permitted use of instructions and definitions only when "necessary to enable the jury to properly pass upon and render a verdict on such issues;" 1973 amendments changed "necessary" to "proper," suggesting a larger role for instructions and definitions"). For additional discussion, *see* Dorsaneo, *supra* note 494, at 644–48; *see* State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 241 (Tex. 1992) ("There should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly and obtained a ruling. The more specific requirements of the rules should be applied, while they remain, to serve rather than to defeat this principle."); *see also* Tex. Dep't of Human Servs. v. Hinds, 904 S.W.2d 629, 637–38 (Tex. 1995) (request for instruction satisfied TEX. R. CIV. P. 278's "substantially correct" standard, even though request included wrong causation standard because request called "trial court's attention to the causation element missing in Question No. 2); Alaniz v. Jones & Neuse, Inc., 907 S.W.2d 450, 451 (Tex. 1995) (per curiam) (holding that TEX. R. CIV. P. 273's requirement that objections and requests be "separate and apart" not violated when party objected to trial court's refusal to give party's entire request on damages, including references to lost profits).

H. Post-verdict Motion Practice

Under the original 1941 version of Civil Procedure Rule 324, the fundamental error exception to the assignment of error in motions for new trial was eliminated in order to minimize reversals on appeal.[499] Instead, assignments of error were required to be included in motions for new trial in jury cases as a prerequisite to complain about such errors on appeal, with few exceptions.[500] One of the purposes behind this significant change was to reduce the number of appeals by giving the trial judge an opportunity to correct his or her errors.[501] But, according to Chief Justice Clarence Guittard, this purpose was not achieved because "the filing and overruling of the motion became largely perfunctory."[502] The original 1955 version of Civil Procedure Rule 329b provided that motions for new trial "will be overruled by operation of law forty-five (45) days after the same is filed, unless disposed of by an order rendered before said date."[503] As a result, many, if not most, lawyers had the realistic expectation that trial judges would be reluctant to grant motions for new trial and never presented new trial motions to the trial judge and instead allowed them to be overruled by operation of law.[504] Hence, the requirement that a party had to assign errors in a motion for new trial became an appellate preservation requirement rather than a mechanism for correction of errors in the trial court.[505]

During the 1970s and the early 1980s, additional amendments were made to the rules governing postjudgment motion practice and the procedures for preservation of trial court complaints for appellate review.[506]

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[499] *See* Clarence A. Guittard, *Other Significant Changes in the Appellate Rules*, 12 ST. MARY'S L. J. 667, 674 (1981) (concept of fundamental error limited to narrow grounds, such as lack of subject matter jurisdiction and errors directly affecting public interest); *see also* Richard T. Churchill, Note, *Appeal and Error—Fundamental Error Apparent on the Face of the Record—Texas Rules of Civil Procedure*, 29 TEX. L. REV. 369, 370-71 (1951).

[500] *See* TEX. R. CIV. P. 324, 4 TEX. B.J. 167, 175 (1941, amended 1941) ("An assignment in a motion for new trial shall not be a necessary prerequisite to the right to complain on appeal of the action of the court in giving an instructed verdict, or in rendering or refusing to render judgment non obstante veredicto or in overruling a motion for judgment for appellant on the verdict.").

[501] *See* Guittard, *supra* note 499, at 673–75.

[502] *Id.* at 675.

[503] TEX. R. CIV. P. 329b, 17 TEX. B.J. 566, 569 (1954, amended 1960).

[504] Guittard, *supra* note 499, at 675.

[505] *Id.*

[506] *See generally id.*

First, Civil Procedure Rule 324 was amended in 1978 to abolish Rule 324's original, general requirement for assignments of error in a new trial motion as a prerequisite to appellate complaint about such errors in most circumstances in jury cases, with one important exception which provided that "it shall be necessary to file a motion for new trial in order to present a complaint which has not otherwise been ruled upon."[507] At the same time, Rule 324 was amended to provide that "[a] complaint that one or more of a jury's findings have insufficient support in the evidence or are against the overwhelming preponderance of the evidence as a matter of fact may be presented for the first time on appeal."[508] These amendments also proved to be unsatisfactory.[509]

Continued dissatisfaction with Civil Procedure Rule 324's perplexing preservation requirements promulgated in 1978 ultimately resulted in yet additional amendments to Rule 324, effective April 1, 1984.[510] Under these amendments a point in a motion for new trial is not a prerequisite to a complaint on appeal in either a jury or a nonjury case, except for the following complaints:

- A complaint on which evidence must be heard such as one of jury misconduct or newly discovered evidence or failure to set aside a judgment by default;
- A complaint of factual insufficiency of the evidence to support a jury finding;
- A complaint that a jury finding is against the overwhelming weight of the evidence;
- A complaint of inadequacy or excessiveness of the damages found by the jury; or
- Incurable jury argument if not otherwise ruled on by the trial court.[511]

As a result, the fluctuating preservation requirements for new trial motions were finally stabilized by the 1984 amendments.

Second, in 1980 Civil Procedure Rule 329b was completely rewritten to more clearly explain the concept of the trial court's plenary power over its

[507] TEX. R. CIV. P. 324, 40 TEX. B.J. 709, 714 (1977, amended 1980).

[508] *Id.*

[509] *See* Guittard, *supra* note 499, at 675–80.

[510] *See* TEX. R. CIV. P. 324(b), 47 TEX. B.J. Pull-Out Section, 26 (1983, amended 1987).

[511] *Id.*

judgment and further amended in 1984 by the addition of a new postjudgment motion to modify the trial court's judgment.[512]

The purpose of the plenary power amendment was clarification of the distinction between the dual uses of the term "finality."[513] Prior to the 1978 amendments, Rule 329b expressed the durational limits of the trial court's power over its judgment in terms of "finality," such that a final judgment that disposed of all parties and issues would be final in that sense for appeal purposes and would "become final" in the trial court under the trial court timetable set forth in Rule 329b.[514] As amended, Civil Procedure Rules 329b (d) and (e) express this second concept in terms of plenary power rather than finality.[515]

The addition of new subdivision (g) to Rule 329b in 1981, providing for postjudgment motions to modify, correct, or reform judgments that extend the trial court's plenary power in the same manner as motions for new trial, was made to allow parties who did not want a new trial to request modification of the judgment without filing a motion for new trial.[516] But one very significant problem remained because Rule 329b did not explain and still does not explain the types of modification that would trigger the extended period of the trial court's plenary power or extend the time to perfect an appeal.[517] This problem was resolved by a series of Texas Supreme Court decisions holding that "[a]ny post-judgment motion, which, if granted, would result in a substantive change in the judgment as entered, extends the time for perfecting the appeal"[518] and "the trial court's plenary power."[519]

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[512] *See* TEX. R. CIV. P. 329b, 43 TEX. B.J. 767, 779–780 (1980, amended 1983); *see* TEX. R. CIV. P. 329(b), 47 TEX. B.J. Pull-Out Section, 27 (1984).

[513] Guittard, *supra* note 499, at 668.

[514] *See* TEX. R. CIV. P. 329b, 17 TEX. B.J. 566, 569 (1954, amended 1960).

[515] TEX. R. CIV. P. 329b, 43 TEX. B.J. 767, 775 (1980, amended 1983). This "plenary power" concept is expressed in the case law on which the amendment was based. *See* Mathes v. Kelton, 569 S.W.2d 876, 878 (Tex. 1978); Transamerican Leasing Co v. Three Bears, Inc., 567 S.W.2d 799, 800 (Tex. 1978).

[516] TEX. R. CIV. P. 329b, 43 TEX. B.J. 767, 779 (1980, amended 1983).

[517] *See* TEX. R. CIV. P. 329b.

[518] Gomez v. Dept. of Criminal Justice, 896 S.W.2d 176, 177 (Tex. 1995) (per curiam) (quoting Miller Brewing Co. v. Villarreal, 822 S.W.2d 177, 179 (Tex. App.—San Antonio 1991), *rev'd on other grounds*, 829 S.W.2d 770 (Tex. 1992)).

[519] Lane Bank Equip. Co. v. Smith S. Equip., Inc., 10 S.W.3d 308, 309–310, 312–314 (Tex. 2000) (approving Brazos Elec. Corp., Inc. v. Callejo, 734 S.W.2d 126, 128 (Tex. App.—Dallas 1987, no writ)). Justice Hecht's concurring opinion sensibly questions whether the "substantive

Third, by a series of amendments that became effective on January 1, 1981, new Civil Procedure Rule 306a was promulgated to identify the beginning of trial and appellate court timetables as the date the judgment or order "is signed as shown of record,"[520] rather than the date of "rendition of judgment" and, as amended in 1983, effective April 1, 1984, to provide a person who does not receive notice or acquire knowledge of the signing of the final judgment or other appealable order additional time to file postjudgment motions and to perfect an appeal.[521] If the party proves that neither the party adversely affected nor the party's attorney received notice from the clerk of the court[522] or acquired actual knowledge of the signing within twenty days after the judgment or order is signed, the date for the beginning of postjudgment trial and appellate timetables begins on the date the party or the party's attorney first received notice or acquired knowledge of the signing of the judgment or order.[523] But in no event may the period for filing postjudgment motions or for perfecting an appeal begin more than 90 days after the judgment or appealable order is signed.[524] Accordingly, if notice or knowledge is received or obtained after the 90th day, neither Civil Procedure Rule 306a nor its appellate counterpart is available as a mechanism for obtaining additional time.[525]

As a result of the continual and confusing amendments to the rules of civil procedure governing postverdict and postjudgment motion practice and trial (and appellate) court timetables, this section of the Texas Rules of Civil Procedure is particularly in need of reorganization and simplification.

VI. ADOPTION AND UNIFICATION OF RULES OF CIVIL AND CRIMINAL EVIDENCE

Effective September 1, 1983, the Texas Supreme Court promulgated the Rules of Civil Evidence, repealing numerous statutory provisions and

change" requirement should be required to extend the trial court's plenary power or the appellate timetable. *See Lane Bank Equip. Co.*, 10 S.W.3d at 314–322.

[520] *See* TEX. R. CIV. P. 306a, 43 TEX. B.J. 767, 775 (1980, amended 1983).

[521] TEX. R. CIV. P. 306a, 47 TEX. B.J. Pull-Out Section, 25 (1983).

[522] *See* TEX. R. CIV. P. 306a(3), 47 TEX. B.J. Pull-Out Section, 25 (1983) (clerk required to give notice to parties or attorneys by "first class mail").

[523] *See* TEX. R. CIV. P. 306a(4), 47 TEX. B.J. Pull-Out Section, 25 (1983, amended 1986).

[524] *See id.*

[525] TEX. R. APP. P. 4.2; TEX. R. APP. P. 5, 49 TEX. B.J. 326, 329 (Tex. Crim. App. 1986, superseded 1997); *see* Levit v. Adams, 850 S.W.2d 469, 470 (Tex. 1993) (per curiam).

superseding some rules of civil procedure.[526] The Court of Criminal Appeals adopted the Rules of Criminal Evidence in 1986.[527] In 1997, the Texas Supreme Court and the Court of Criminal Appeals ordered the adoption of uniform rules to become effective on March 1, 1998.[528]

VII. ADOPTION AND REVISION OF THE RULES OF APPELLATE PROCEDURE

On September 1, 1981, Senate Joint Resolution 36 became effective and amended Article 5, Section 6 of the Texas Constitution by conferring criminal jurisdiction on the former courts of civil appeals and providing for discretionary review of courts of appeals' decisions in criminal cases by the Court of Criminal Appeals.[529] It was implemented in 1981 by Senate Bill 265, which increased the number of intermediate appellate court justices from fifty-one to seventy-nine.[530]

In the mid-1980s, the criminal-law bar proposed vesting in the Court of Criminal Appeals the power to make rules governing post-trial and appellate procedure in criminal cases.[531] In response, at the urging of the Subcommittee on Criminal Matters of the Select Committee on the Judiciary, chaired by Senator Bob Glasgow,[532] the Court of Criminal Appeals and the Texas Supreme Court appointed a joint committee in 1983

[526] In the Supreme Court of Texas Order, 46 TEX. B.J. 196, 197–217 (1983); *see also* Re: New Rules of Evidence, Order, 641 S.W.2d XXXV, LXVIII (Tex. 1982) (Court listed 39 statutes as repealed). The Rules of Evidence were developed after consultation and collaboration with Senator Kent Caperton, then chairman of the Senate Interim Committee on Rules of Evidence, and Erwin McGee, the Interior Study Committee's general counsel. *See id.*

[527] Order of Dec. 18, Adopting Texas Rules of Criminal Evidence, 49 TEX. B.J. 220, 220 (1986).

[528] Order of Oct. 20, 1997, Final Approval of Revisions of Texas Rules of Evidence, 61 TEX. B.J. 373, 373 (1998).

[529] TEX. S.J. RES. 36, § 4, 66th Leg. R.S., 1979 TEX. GEN. LAWS 3223, 3224–25; TEX. CONST. ART. V, § 6 (amended 1979).

[530] *See* Act of June 8, 1981, 67th Leg., R.S., ch. 291 § 13, 1981 TEX. GEN. LAWS 761, 761–62 (current version at TEX. GOV'T CODE § 22.201 (West Supp. 2012)). For a discussion of these changes, *see generally* Clarence A. Guittard, *The Expanded Texas Courts of Appeals*, 14 TEX. TECH L. REV. 549 (1983).

[531] Guittard, *supra* note 32, at 406.

[532] Clarence A. Guittard, *Proposed Uniform Rules of Appellate Procedure*, 48 TEX. B.J. 24, 24 (1985).

to draft "uniform" rules for appeals of both civil and criminal cases.[533] The joint committee of distinguished lawyers and judges from both civil and criminal practice held meetings from April through October 1984 and presented a draft of the proposed appellate rules covering procedure from perfection of the appeal through issuance of the mandate by the court of appeals. [534] The proposed appellate rules were rearranged in the order of the Federal Rules of Appellate Procedure, renumbered, and, based largely on the provisions of the Texas Rules of Civil Procedure governing civil appeals,[535] were rewritten by the drafting of new rules with informative headings and subheadings for subdivisions contained in the new appellate rules, without making many substantive changes in the rules applicable to civil appeals.[536]

One of the main reasons why the Joint Committee on Appellate Rules did not need to make many "substantive" revisions in appellate practice in civil cases was that the post-trial and the appellate rules had recently been reviewed and revised by another joint committee appointed by the Judicial Section of the State Bar and the State Bar Committee on the Administration of Justice,[537] submitted to and substantially approved by the Advisory Committee, and adopted by the Texas Supreme Court with minor changes

[533] Guittard, *supra* note 32, at 406 ("Justice Clarence Guittard served as chair and Professor William V. Dorsaneo, III was the principal drafter.").

[534] The members of the Advisory Committee on Appellate Rules were as follows: Judge Sam Houston Clinton (Court of Criminal Appeals), Justice James P. Wallace (Texas Supreme Court), Chief Justice Austin McCloud (Eleventh Court of Appeals), Justice Shirley Butts (Fourth Court of Appeals), Judge Don Metcalfe, Judge Robert Blackmon, Hubert Green (Chair, Committee on Administration of Justice), Luther H. Soules, III (Chair, Advisory Committee to Texas Supreme Court), Clifford Brown (past president, Texas Criminal Defense Lawyers Association), Stephan H. Coppelle, Russell H. McMains, Carl E. F. Dally (State Prosecuting Attorney's Office) and Professor William V. Dorsaneo, III. Guittard, *supra* note 532, at 24–25 & n.1. Subsequent work added rules for original and appellate proceedings in the Texas Supreme Court and the Texas Court of Criminal Appeals.

[535] *See* TEX. R. CIV. P. 21c, 38 TEX. B.J. 823, 823 (1975, repealed 1986); TEX. R. CIV. P.14a, 14b TEX. B.J. 532, 532 (1945, repealed 1986); *see also* TEX. R. CIV. P 352–515.

[536] *See* James Hambleton & Jim Paulsen, *Appellate Procedure: New Rules: A Pocket Introduction*, 49 TEX. B.J. 554, 554 (1986).

[537] The members of the joint committee included: Chief Justice Clarence A. Guittard, Chairman, Justice Quentin Keith, Justice Charles L. Reynolds, Justice Bob Shannon, David M. Kendall, Richard J. Clarkson and Professor William V. Dorsaneo, III. Charles W. Barrow, *Appellate Procedure Reform*, 12 ST. MARY'S L.J. 615, 616–617 & n.1 (1981).

in 1980.[538] During this process, specific amendments were made to simplify post-trial procedures, trial and appellate timetables, the procedures for perfection of civil appeals, obtaining and filing the record on appeal, the appellate briefing process, motion for rehearing practice in the courts of appeals, and for further appeal to the Texas Supreme Court.[539] In addition, another round of proposed amendments was recommended to the Texas Supreme Court in 1982 concerning postverdict motion and appellate practice.[540] Most of these proposals were adopted as amendments to the rules of civil procedure, effective April 1, 1984.[541] Ultimately, the amendments to the civil procedure rules concerning appellate practice in the first half of the 1980s were incorporated in the new appellate rules recommended for adoption to the Texas Supreme Court and to the Court of Criminal Appeals.[542]

Notwithstanding the fact that the development and adoption of a unified body of appellate rules was "a magnificent effort," in 1985 Senator Bob Glasgow expressed the view that:

> [E]ven if the merits of this proposal prove persuasive, we are still sensitive to the many changes being digested by the civil bar in Texas with the introduction of the new rules of evidence and substantial amendment of the Rules of Civil Procedure last spring. It just may be that this magnificent work will be the straw that breaks the camel's back.[543]

[538] *See* Order of June 10, Adopting Amendments to the Rules of Civil Procedure, 43 TEX. B.J. 767, 775–794 (1980).

[539] *See generally* Barrow, *supra* note 537.

[540] Meeting of the Texas Supreme Court Advisory Committee, 4 (Nov. 12–13, 1982), *available at* http://www.supreme.courts.state.tx.us/rules/scac/archives/1982/agendas/November_12_1982.pdf

[541] *See* Order of Dec. 5, 1983, Adopting Rules of Civil Procedure, 47 TEX. B.J. Pull-Out Section, 3 (1984).

[542] Order of Oct. 20, 1997, Final Approval of Revisions of Texas Rules of Evidence, 61 TEX. B.J.373, 373 (1998).

[543] S. Bob Glasgow, *Appellate Procedure: An Integrated Code*, 48 TEX. B. J. 142, 142 (1985). Similar reservations about the pace of rule-making by the Texas Supreme Court had been expressed earlier. *See* Steve McConnico and Daniel R. Bishop, *Practicing Law With the 1984 Rules: Texas Rules of Civil Procedure Amendments Effective April 1, 1984*, 36 BAYLOR L. REV. 73, 128 (1984) ("The Courts and bar need time to learn how to effectively use the recent changes before they are confronted with new changes.").

Fortunately, the proposed rules were promulgated by Orders of the Texas Supreme Court and the Court of Criminal Appeals issued on April, 10, 1986.[544] Thus, for the first time, Texas adopted a unified and comprehensive set of rules for both civil and criminal appeals.[545]

Thereafter, the Rules of Appellate Procedure were amended again in 1990[546] and substantially rewritten in 1997.[547] The 1997 revisions to the Texas Rules of Appellate Procedure were first developed over several years beginning in 1991, by the Committee on State Appellate Rules of the Appellate Practice and Advocacy Section of the State Bar of Texas.[548] The Section Committee's objective was to make the appellate rules clear and definite so as to reduce litigation about procedural matters, to remove procedural obstacles to disposition of appeals on the merits, and to make the appellate process less costly for both practitioners and the appellate courts.[549]

Subsequent cumulative reports were prepared by the Section Committee in 1993 and 1995. These cumulative reports were provided to and studied by the Advisory Committee, which recommended adoption of the final product to the Texas Supreme Court and the Texas Court of Criminal Appeals, after an extensive review and revision process.[550] During this process, Bryan A. Garner helped both the Section Committee and the Advisory Committee by redrafting the proposed rules in compliance with contemporary legal writing standards.[551]

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[544] *See* Order of April 10, 1986, Promulgating New Rules of Appellate Procedure, 49 TEX. B.J. 556, 556 (1986); *see* Order Adopting Amendments to Rules of Post-trial, Appellate and Review Procedure in Criminal Cases, 49 TEX. B. J. 558, 558 (1986).

[545] *See generally* Jack Pope & Steve McConnico, *supra* note 419, at 492–528; *see generally* Barrow, *supra* note 537.

[546] *See* Order of Apr. 24, 1990, Changes to the Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, 53 TEX. B.J. 589, 606–616 (1990).

[547] *See* Order of Mar. 20, Approval of Revisions to the Texas Rules of Appellate Procedure, 60 TEX. B.J. 408, 408 (1997).

[548] The committee membership included the following persons: Sarah B. Duncan, Elaine Carlson, Michael A. Hatchell, Chief Justice Austin McCloud, Chief Justice Paul Nye, William V. Dorsaneo, III, Ron Goranson, Kevin Keith, Ruth Kollman, Chief Justice Clarence Guittard, Chairman. Justice Nathan L. Hecht of the Texas Supreme Court and Judge Sam Houston Clinton of Texas Court of Criminal Appeals participated ex officio. Molly Anderson (now Hatchell) acted as the committee's reporter.

[549] Undated Report of Section Committee (on file with author).

[550] Undated Report of Section Committee (on file with author).

[551] Undated Report of Section Committee (on file with author).

The new 1997 Rules of Appellate Procedure were initially promulgated by the Texas Supreme Court and the Court of Criminal Appeals by court orders dated March 20, 1997,[552] to become effective on September 1, 1997, and received final approval by court orders entered on August 15, 1997.[553] The 1997 rules were designed to increase the likelihood that appeals would be decided on the merits, rather than on the grounds of noncompliance with procedural requirements.[554] As summarized by Chief Justice Tom Phillips, the 1997 rules abolished the use of cost bonds to perfect appeals in the courts of appeals, shifted most of the responsibilities for preparing and filing the record to the clerk of the trial court and the official court reporter, and replaced the curiously named "application for writ of error to obtain review of the judgments of the courts of appeals by the Texas Supreme Court" with a petition for review procedure similar to certiorari practice used by the U.S. Supreme Court.[555] Other important changes included a requirement that each party seeking an alteration of the trial court's judgment must file a notice of appeal,[556] allowance in appellate briefs of "issues presented" instead of points of error,[557] and elimination of the former requirement that each party seeking review in the Texas Supreme Court must have filed a motion for rehearing asserting the party's complaints as a prerequisite to further appeal and appellate review in the Texas Supreme Court.[558]

VIII. PROPOSED REVISION OF CIVIL PROCEDURE RULES

A. The 1991 Task Forces

On June 19, 1991, the Texas Supreme Court appointed four task forces to study the Texas Rules of Civil Procedure and to consider more amendments to the rules of civil procedure: (1) the Task Force on the Jury

[552] *See* Order of Mar. 20, *supra* note 547, at 408.

[553] *See* Order of Aug. 15, Final Approval of Revisions to the Texas Rules of Appellate Procedure, 60 TEX. B. J. 876, 876 (1997).

[554] *See generally* Richard R. Orsinger & Lynne Liberato, *Practicing Under the New Appellate Rules*, 60 TEX. B.J. 730 (1997).

[555] Thomas R. Phillips, *Texas Supreme Court Update*, 60 TEX. B.J. 858, 861 (1997).

[556] TEX. R. APP. P. 25.1(c).

[557] TEX. R. APP. P. 38.1 (f), 60 TEX. B.J. 878, 910 (1997, amended 2008).

[558] *See* TEX. R. APP. P. 49.9.

Charge, (2) the Task Force on Discovery, (3) the Task Force on Sanctions, and (4) the Task Force on the Revision of the Rules of Civil Procedure.[559]

Despite earlier controversies about the Texas Supreme Court's rule-making power, the successful adoption of the first set of comprehensive revisions of the Discovery Rules and the Rules of Civil Evidence in 1983 and of the Texas Rules of Appellate Procedure in 1986 encouraged the Court and its committees to believe that the overall revision project could be completed once the task forces completed their work. This naïve optimism was mistaken.

The Task Force on the Jury Charge was directed to study and report to the Texas Supreme Court Advisory Committee on what changes should be made to the jury charge rules.[560] Similarly, the Task Force on Discovery and the Task Force on Sanctions were directed to study and make recommendations to the Texas Supreme Court Advisory Committee concerning changes in the procedural rules governing the scope and conduct of discovery and discovery sanctions.[561] The separate Task Force on Revision of the Texas Rules of Civil Procedure was assigned to consider the overall recodification of the rules of civil procedure "into a more coherent and easily usable body, either with or without substantive change."[562]

[559] Order of Appointment of Task Forces to Consider Changes in the Rules of Procedure in Texas Courts, Misc. Docket No. 91-0048 (Tex. June 19th, 1991), *available at* http://www.supreme.courts.state.tx.us/miscdocket/91/91-0048.pdf.

[560] The following persons were appointed to the Jury Charge Task Force: Judge Ann Tyrell Cochran, Chairman, George W. Bramblett, Mike A. Hatchell, Daniel K. Hedges, P. Michael Jung, John G. Lewis, Richard R. Orsinger, Jorge C. Rangel, and Paula Sweeney. *See id.* at 2.

[561] The following persons were appointed to the Task Force on Discovery: David W. Keltner, Chairman, Paul N. Gold, Mark L. Kincaid, Judge Bonnie Leggat, James W. McCartney, David L. Perry, William Powers, Jr., Dan R. Price, Edwardo R. Rodriguez, James B. Sales, and Jonathan W. Vickery. The following persons were appointed to the Task Force on Sanctions: Charles F. Herring, Jr., Chairman, Lisa Blue, Herbert Boyland, Judge Scott Brister, Carlyle H. Chapman, Jr., Elizabeth A. Crabb, Russell H. McMains, Elizabeth G. Thornburg, and Robert A. Valadez. *Id.* at 1.

[562] The following persons were appointed to the Task Force on Revision of the Texas Rules of Civil Procedure: William V. Dorsaneo, III, Chairman, Alexandra W. Albright, James W. Cannon, David E. Chamberlain, John C. Chambers, Fred Hagans, Judge Lynn N. Hughes, David Lopez, and Linda Turley. *Id.* at 2.

B. The Task Force Reports

The Task Force on the Jury Charge was the first one to complete and submit its written report to the Advisory Committee in April 1993.[563] Judge Ann Tyrell Cochran, Chair of the task force, presented its recommendations at the November 1993 meeting of the Advisory Committee.[564] These recommendations were favorably received by the Advisory Committee.[565]

The able Chair of the Texas Supreme Court Advisory Committee, Luther H. Soules, III, submitted the Jury Charge Task Force's Report to the Advisory Committee Subcommittee on Civil Procedure Rules 216–295.[566] The subcommittee made specific recommendations for revising the proposed rules.[567] The Advisory Committee submitted its "final" report to the Texas Supreme Court on June 5, 1995.[568] Thereafter, on May 6, 1996, Lee Parsley, Rules Staff Attorney for the Court, returned the revised charge rules to the Advisory Committee, which reviewed and extensively discussed the Court's revisions, and recommended only two changes in the Court's draft rules.[569]

Despite the work of the Task Force on the Jury Charge, the subsequent work done by the Advisory Committee, and by the Texas Supreme Court itself, for some reason, even though (or perhaps because) the proposed jury charge amendments were incorporated in a comprehensive draft of the entire rulebook recommended for adoption by the Task Force on Revision of the Rules of Civil Procedure, no rule changes have been made in the jury charge rules, which still are badly in need of remedial work.[570]

David Keltner, the Chair of the Task Force on Discovery, reported its recommendations to the Texas Supreme Court Advisory Committee on

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[563] *See* William V. Dorsaneo, III, *Revision and Recodification of the Texas Rules of Civil Procedure Concerning the Jury Charge*, 41 S.TEX. L. REV. 675, 677 (2000).

[564] *See* Meeting of the Texas Supreme Court Advisory Committee, 284 (Nov. 19–20, 1993).

[565] *See id.* at 553.

[566] *See id.* at 433.

[567] For a detailed discussion of these recommendations and modifications in them by the Advisory Committee, *see* Dorsaneo, *supra* note 563, at 703–716.

[568] Dorsaneo, *supra* note 563, at 733–745.

[569] Dorsaneo, *supra* note 563, at 746–749.

[570] *See* Meeting of the Texas Supreme Court Advisory Committee, 577–626 (Nov. 19–20, 1993); *see also* State Dep't of Highways and Pub. Transp. v. Payne, 838 S.W.2d 235, 241 (Tex. 1992) ("The procedure for preparing and objecting to the charge has lost its philosophical moorings.").

January 22, 1994.[571] Shortly thereafter, the Discovery Subcommittee[572] of the Advisory Committee began meeting and made its first report to the Advisory Committee in March 1994.[573] This report, which recommended specific discovery limits, including limits on deposition discovery and interrogatories, the adoption of standard requests for disclosure, and a six month discovery period, provided the framework for the new discovery rules that became effective on January 1, 1999.[574]

The Task Force on Sanctions also made recommendations, which Chairman Charles Herring characterized as an "incremental effort" to address existing problems and comply with "Supreme Court law." [575] But these recommendations were not well received by the Advisory Committee or by the Texas Supreme Court, who viewed the changes as inadequate in light of the "revolutionary changes" proposed by the other task forces.[576] Ultimately, no significant revisions were made to Civil Procedure Rule 215, which still needs revisions to correspond with the Texas Supreme Court's current approach to discovery and the imposition of discovery sanctions on parties and their attorneys.[577]

The Task Force on the Revision of the Texas Rules of Civil Procedure completed and submitted its detailed written report to the Texas Supreme Court on November 8, 1993.[578] The Task Force Report states that wholesale recodification of the Texas Rules of Civil Procedure is both feasible and desirable and recommended adoption of an entirely new rulebook containing many substantive changes.[579]

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[571] *See* Meeting of the Texas Supreme Court Advisory Committee, 1056–1219 (Jan. 22, 1994) (on file with author).

[572] The Discovery Subcommittee members were: Stephen D. Susman, Chairman, Alex Wilson Albright, Paul Gold, John H. Marks, Jr., Judge Scott McCown, Robert E. Meadows, David L. Perry and David B. Jackson.

[573] *See* Meeting of the Texas Supreme Court Advisory Committee, 1687–1766 (Mar. 19, 1994) (on file with author).

[574] *See* Final Approval of Revisions to the Texas Rules of Civil Procedure, Misc. Docket No. 98-9196 (Tex. Nov. 9, 1998), *available at* http://www.supreme.courts.state.tx.us/miscdocket/98/98-9196.pdf.

[575] Meeting of the Texas Supreme Court Advisory Committee, 10–283 (Nov. 19–20, 1993).

[576] *Id.* at 41–42.

[577] *See, e.g.*, Transamerican Natural Gas Corp. v. Powell, 811 S.W.2d 913 (Tex. 1991).

[578] *See* Meeting of the Texas Supreme Court Advisory Committee, 577–626 (Nov. 19–20, 1993).

[579] Report of Texas Supreme Court Task Force on the Rules of Civil Procedure, 3 (November 8, 1993), *available at* http://www.supreme.courts.state.tx.us/rules/scac/archives/1993/

The Task Force Report reorganized the general structure of the rulebook into a new framework similar to the current Federal Rules of Civil Procedure, reorganized the various sections of the rulebook into a more procedurally logical framework, eliminated obsolete or redundant rules, and combined many of the shorter remaining rules copied from the Revised Civil Statutes of 1925 or from the former Texas Rules for District and County Courts into longer rules with numbered subdivisions having informative headings.[580] These recommendations were presented to the Advisory Committee at the November 1993 meeting.[581] Thereafter, the Advisory Committee met every other month[582] until it substantially completed an entirely new Recodification Draft in late 1997.[583] The Recodification Draft included the draft jury charge rules and provided for the incorporation of revised discovery rules.[584]

At the last meeting of the Advisory Committee chaired by Luke Soules in late 1997, the Advisory Committee completed its discussion of the Recodification Draft and Chief Justice Tom Phillips expressed his and the Court's appreciation for the recodification work done by the Committee.[585] After the adjournment of the meeting, the Court functioned without a formally constituted Advisory Committee until a new committee was appointed in late 1999.[586] This new Advisory Committee has never returned to the unfinished task of overall revision of the Texas Rules of Civil Procedure. Luke H. Soules, Chairman of the Texas Supreme Court Advisory Committee, reported the Advisory Committee's recommendation

supplementary/sc11191993.pdf.

[580] *Id.* at 3–4.

[581] Meeting of the Texas Supreme Court Advisory Committee, 577–626 (Nov. 19–20, 1993). As reported by Chief Justice Clarence A. Guittard, "[t]he Supreme Court Advisory Committee . . . has been meeting every other month since November 1993 . . . For the first time, the Supreme Court has charged the committee with the task of reconsidering the entire body of procedural rules and bringing them up to date in form and substance apart and beyond perceived needs for specific changes." Guittard, *supra* note 32, at 406.

[582] Texas Supreme Court Advisory Committee transcript, November 20, 1993, at 553.

[583] *See* Texas Supreme Court Advisory Committee, Secondary Materials, Report on the Texas Rules of Civil Procedure Recodification Project (July 11, 1997) (on file with author).

[584] *See Id.*

[585] Meeting of the Texas Supreme Court Advisory Committee, 8973–8975 (Sept. 20, 1997).

[586] Order Establishing Supreme Court Rules Advisory Committee, Misc. Docket No. 99-9167 (Tex. Sept. 7, 1999), *available at* http://www.supreme.courts.state.tx.us/miscdocket/99/99-9167.pdf.

for adoption of the Recodification Draft as one of his last acts as the Committee Chair.[587]

With the exception of the promulgation of the 1999 discovery rules in November and December 1998, no other parts of the Recodification Draft were promulgated by the Texas Supreme Court. Once the Advisory Committee was reconstituted in 1999[588] the remainder of the Recodification Draft project was not taken up again.[589]

It appears that a moratorium was imposed on the Court's rule revision project at the end of 1997. The reasons for this moratorium have never been officially explained by the Texas Supreme Court. Thus, as explained in Part 11, many (if not most) of the Civil Procedure Rules still require revision and recodification.

IX. ADOPTION OF THE 1999 DISCOVERY RULES

The 1999 amendments to the discovery rules had three principal goals. First, the rules sought to curb the volume of discovery "when appropriate to preserve litigation as a viable, affordable, and expeditious dispute resolution mechanism."[590] Second, the discovery procedures for objections and assertions of privilege and for depositions were streamlined and made more efficient.[591] Third, the rules were meant to be regrouped "in a more logical sequence" and rewritten to eliminate archaic and confusing language.[592] The Advisory Committee ultimately recommended adoption of seventeen

[587] Undated Report of Section Committee (on file with author).

[588] *Id.*

[589] Plans to publish the Recodification Draft on the Court's website, as reflected in a draft Explanatory Statement prepared by the Rules Staff Attorneys, never achieved fruition.

[590] Final Approval of Revisions to the Texas Rules of Civil Procedure, Misc. Docket No. 98-9196, 4 (Tex. Nov. 9, 1998), *available at* http://www.supreme.courts.state.tx.us/miscdocket/98/98-9196.pdf.

[591] *Id.*

[592] *Id.*; Hon. Nathan L. Hecht & Robert H. Pemberton, *A Guide to the 1999 Texas Discovery Rule Revisions*, 3 (1998), *available at* www.supreme.courts.state.tx.us/rules/tdr/disccle37.pdf.

rules and the repeal of their predecessors.[593] These revisions generally took effect on January 1, 1999.[594]

During the revision process, the overarching rationale was to curb excessive discovery with time and volume limits.[595] To that end, the proposed rules added discrete levels of discovery, deposition time limits, limits on excessive objections, and increased the trial court's power to limit cumulative, duplicative, or unduly burdensome discovery.[596] Civil Procedure Rule 192.1 retained the prior discovery forms, with the addition of requests for disclosure.[597] The general scope of discovery relevance remained largely unchanged under proposed Civil Procedure Rule 192.3, with the incorporation, by an official comment, of several Texas Supreme Court cases.[598]

Privileges, however, changed dramatically. Proposed Civil Procedure Rule 192.5's new definition of "work product" replaced the undefined term "attorney work product" in former Civil Procedure Rule 166b(3)(a) and the "case specific definition" of "party communications" under the earlier rules.[599] The term "work product" was redefined to include materials, mental impressions, and communications created by the party or his representatives, including attorneys.[600] The revised discovery rules also codified a category of undiscoverable "core work product," which the Texas and United States Supreme Courts had recognized under the old

[593] TEX. R. CIV. P. 176, 190–205; Final Approval of Revisions to the Texas Rules of Civil Procedure, Misc. Docket No. 98-9196 (Tex. Nov. 9, 1998), *available at* http://www.supreme.courts.state.tx.us/miscdocket/98/98-9196.pdf. (adding the new rules, modifying Rule 215, and repealing twenty-four predecessor rules).

[594] Final Approval of Revisions to the Texas Rules of Civil Procedure, Misc. Docket No. 98-9196 (Tex. Nov. 9, 1998) (except for Rule 190, establishing discovery levels, which did not apply to cases filed before January 1, 1999, the revisions applied to cases filed after or pending on January 1, 1999).

[595] Kenneth E. Shore, *A History of the 1999 Discovery Rules: The Debates & Compromises*, 20 REV. LITIG. 89, 101–102 (2000).

[596] TEX. R. CIV. P. 190, 192.4, 193.2, 199.5.

[597] TEX. R. CIV. P. 192.1; *see* TEX. R. CIV. P. 194.

[598] Order Approving Revisions to the Texas Rules of Civil Procedure, 61 TEX. B.J. 752, 763 (1998).

[599] Final Approval of Revisions to the Texas Rules of Civil Procedure at 22, Misc. Docket No. 98-9196 (Tex. Nov. 7, 1998), *available at* http://www.supreme.courts.state.tx.us/miscdocket/98/98-9196.pdf.

[600] TEX. R. CIV. P. 192.5(a).

rules.[601] These changes were accompanied by amendments made to the attorney-client privilege under Evidence Rule 503, as amended in 1998, which greatly expanded the scope of the attorney-client privilege under the former "control group" approach to a much broader "subject matter" standard based on an expanded definition of who qualifies as a party's representatives.[602]

Most controversially, under the new discovery rules witness statements are no longer protected as work product, even if made in anticipation of litigation.[603] Instead, statements signed or adopted by the witness became discoverable, while an attorney's notes and mental impressions concerning the witness remained privileged.[604] Unfortunately, some cases show that the definition of the term "witness statement" in Rule 192 is so broad that it can be difficult to determine whether documents are discoverable witness statements or protected work product.[605]

Witness statements quickly became "the single most controversial aspect" of the proposed rules.[606] Some members of the defense bar feared that Civil Procedure Rule 192 would force them "to subsidize, through time and expense, the Plaintiff's discovery."[607] Nonetheless, the Advisory Committee voted unanimously to recommend adoption of the rule,

[601] TEX. R. CIV. P. 192.5(b); Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 201 (Tex. 1993); Hickman v. Taylor, 329 U.S. 495, 511(1947) (codified in part as FED. R. CIV. P. 26(b)(3)).

[602] *Compare* TEX. R. EVID. 503, *with* TEX. R. CIV. P. 192.5; Alex W. Albright, *The Texas Work Product Rule*, 27 ADVOC.10, 10 (Summer 2004).

[603] Final Approval of Revisions to the Texas Rules of Civil Procedure at 20, Misc. Docket No. 98-9196 (Tex. Nov. 7, 1998), *available at* http://www.supreme.courts.state.tx.us/miscdocket/98/98-9196.pdf. (replacing former Rule 166b(3)(c)).

[604] *See* TEX. R. CIV. P. 192.3(h); Kenneth E. Shore, *A History of the 1999 Discovery Rules: The Debates & Compromises*, 20 REV. LITIG. 89, 129–30 (Winter 2000). The SCAC removed "unless the statement is privileged" because it confused the definition of witness statement and work product, which already clearly excluded an attorney's notes. *Id.* at 141, 144.

[605] *See In re* Team Transp., Inc., 996 S.W.2d 256, 258–59 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *See In re* Jimenez, 4 S.W.3d 894, 895 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

[606] Robert H. Pemberton, *The First Year Under the New Discovery Rules: The Big Issues Thus Far* 13 (2000), *available at* http://www.supreme.courts.state.tx.us/rules/tdr/disc1yr.pdf.

[607] *See* Shore, *supra* note 604, at 144 (quoting letter from Evelyn T. Ailts to Justice Hecht).

reasoning that factual witness statements should not be withheld unless another privilege applies.[608]

The new discovery rules also introduced a new procedure for asserting privileges.[609] Rather than objecting, attorneys now withhold information and assert privilege claims under the procedure set out in Rule 193.3.[610] Upon further request, the resisting party is required to create a privilege log.[611] Despite its shortcomings, this process proved to be workable once early cases clarified its mechanics.[612]

After the Advisory Committee voted overwhelmingly to send the Discovery Committee's proposal to the Texas Supreme Court,[613] the Court issued tentative drafts of the proposed discovery rules.[614] Thereafter, on November 9, 1998, the Court issued its "final" order adopting the new discovery rules, providing generally for repeal of former Civil Procedure Rules 176-205, together with an amended Civil Procedure Rule 215, effective January 1, 1999.[615] Finally, a Technical Corrections order was issued on December 31, 1998.[616] Ultimately, however, despite controversy during the drafting process, the rules were generally heralded as a desirable improvement.[617]

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[608] *See* Shore, *supra* note 604, at 129 (quoting David Keltner, "[SCAC] was unanimous [on the elimination of the witness statement privilege] and with an awful lot of Defense and Plaintiffs' lawyers on it, which amazed me.").

[609] *See* TEX. R. CIV P. 193.2(f), 193.3.

[610] *See id.*

[611] *See Id.*

[612] *See In re* Monsanto Co., 998 S.W.2d 917, 924–25 (Tex. App.—Waco 1999, no pet.) (examining mechanics of new 193.3 procedure); Pemberton, *supra* note 606, at 5.

[613] Meeting of the Texas Supreme Court Advisory Committee, 2028 (July 22, 1995), *available at* http://www.supreme.courts.state.tx.us/rules/scac/archives/1995/transcripts/sc07221995a.pdf.

[614] *See* Hecht & Pemberton, *supra* note 592, at 2.

[615] Final Approval of Revisions to the Texas Rules of Civil Procedure at 1, Misc. Docket No. 98-9196 (Tex. Nov. 9, 1998), *available at* http://www.supreme.courts.state.tx.us/miscdocket/98/98-9196.pdf.

[616] Technical Corrections to the Revisions of the Texas Rules of Civil Procedure at 1, Misc. Docket No. 98-9224 (Tex. Dec. 31, 1998), *available at* http://www.supreme.courts.state.tx.us/miscdocket/98/98-9224.pdf.

[617] Pemberton, *supra* note 606, at 6 ("The confusion or consternation initially expressed by some lawyers seems to have gradually been supplanted by general contentment and even pleasant surprise or support."); Shore, *supra* note 604, at 186 ("the result of [SCAC's] efforts is a set of rules that are both fair and workable. While the impact of the rules is still unclear, attorneys in the state seemed pleased.").

These revisions were highly controversial throughout the drafting process.[618] Plaintiffs' lawyers argued that the rules providing for disclosures and discovery limits were unfair to plaintiffs.[619] Likewise, the defense bar feared that a proposed rule allowing for the discovery of witness statements would cause them an undue burden during discovery.[620]

X. DEVELOPMENT OF CLOSER COLLABORATION BETWEEN THE COURT AND THE TEXAS LEGISLATURE

The Texas Supreme Court reconstituted its Advisory Committee in September 1999 by reappointing members who had served on the last Advisory Committee along with several new members to serve until December 31, 2002.[621] The new Chairman of the Advisory Committee, who still presides over the committee at the time of this writing, is Charles L. ("Chip") Babcock.[622] Justice Nathan Hecht, the Court's "Rules Member," resumed service as the liaison to the reconstituted Advisory Committee from the Texas Supreme Court.[623]

Even before the Advisory Committee was reappointed, the Texas Supreme Court promulgated Civil Procedure Rules 735 and 736 for expedited foreclosure proceedings related to the foreclosure of liens under Article 16, Section 50(a)(6) of the Texas Constitution, as recommended by

[618] Shore, *supra* note 604, at 102.

[619] Shore, *supra* note 604, at 162.

[620] Shore, *supra* note 604, at 144.

[621] Order Appointing Supreme Court Rules Advisory Committee at 1–2, Misc. Docket No. 99-9167, (Tex. Sept. 7, 1999), *available at* http://www.supreme.courts.state.tx.us/miscdocket/99/99-9167.pdf. The following persons were appointed in 1999: Prof. Alexandra W. Albright, Charles L. Babcock, Pamela Stanton Baron, Hon. Scott A. Brister, Hon. Harvey Brown, Prof. Elaine A. G. Carlson, Carlyle H. Chapman, Jr., Nina Cortell, Prof. William V. Dorsaneo, III, Ralph H. Duggins, Hon. Sarah B. Duncan, Linda Eads, William R. Edwards, Cindy Ann Lopez Garcia, O.C. Hamilton, Jr., Hartley Hampton, Hon. Phil Hardberger, Michael A. Hatchell, Frank Hill, Tommy Jacks, Wallace Jefferson, Joseph Latting, Jr., Gilbert I. Low, John H. Martin, Hon. Ann Crawford McClure, Hon. F. Scott McCown, Anne McNamara, Robert E. Meadows, Hon. Samuel A. Medina, Richard R. Orsinger, Hon. David Peeples, Hon. Bill Rhea, Luther H. Soules, Stephen D. Susman, Paula Sweeney, Stephen G. Tipps, Charles R. Watson, Jr., and Stephen Yelenosky. *Id.* at 2.

[622] *Id*. at 3. Gilbert I. ("Buddy") Low was appointed vice-chairman of the Advisory Committee. *Id. See also* Supreme Court Advisory Committee at 2, Misc. Docket No. 11-9259 (Tex. Dec. 28, 2011), *available at* http://www.supreme.courts.state.tx.us/miscdocket/11/11925900.pdf.

[623] Supreme Court Advisory Committee, *supra* note 622, at 2.

a task force appointed by the Court to advise it regarding the promulgation of such rules.[624]

Very shortly after the Advisory Committee was reconstituted, as a result of legislative adoption of Chapter 33 of the Family Code in 1999 (providing for judicial approval of abortions for unemancipated minors, without parental notice),[625] the Court appointed a special subcommittee[626] to study and recommend adoption of rules and forms for use by minors seeking judicial waiver of notification requirements, as directed by the legislation.[627] The legislation directed completion of this project "not later than December 15, 1999."[628] Thereafter, by order dated December 22, 1999, the Texas Supreme Court promulgated rules for use in parental notification proceedings in compliance with the legislature's directive.[629]

[624] Approval of Revisions to the Texas Rules of Procedure at 1, Misc. Docket No. 98-9011 (Tex. Jan. 27, 1998), *available at* http://www.supreme.courts.state.tx.us/miscdocket/98/98-9011.pdf. These rules received final approval and took effect on May 15, 1998. Final Approval of Certain Revisions to the Texas Rules of Civil Procedure at 1, Misc. Docket No. 98-9074 (Tex. May 15, 1998), *available at* http://www.supreme.courts.state.tx.us/miscdocket/98/98-9074.pdf. These rules were amended in 2000 as a result of constitutional amendments regarding home equity loans and reverse mortgages. *See* Approval of Revisions to the Texas Rules of Civil Procedure at 1, Misc. Doc. No. 00-9062 (Tex. Apr. 12, 2000), *available at* http://www.supreme.courts.state.tx.us/miscdocket/00/00-9062.pdf. More than a decade later, the Court adopted other amendments to Rules 735 and 736 in accordance with the Act of May 26, 2011, 82nd Leg. R.S. ch. 1282, 2011 Tex. Gen. Laws 3578 (West) (codified as amended in TEX. PROP. CODE ANN. § 209); *See* Amended Final Approval of Amendments to Texas Rules of Civil Procedure 735 and 736 at 1, Misc. Docket No. 11-9260 (Tex. Dec. 30, 2011), *available at* http://www.supreme.courts.state.tx.us/MiscDocket/11/11926000.pdf (applicable to all proceedings filed on or after January 1, 2012).

[625] TEX. FAM. CODE ANN. §§ 33.001–.011 (West 2008 & Supp. 2012).

[626] *See* Amended Order Appointing Supreme Court Rules Advisory Committee Special Subcommittee on Implementation of Family Code Chapter 33 at 1, Misc. Docket No. 99-9198 (Tex. Oct. 21, 1999), *available at* http://www.supreme.courts.state.tx.us/MiscDocket/99/99-9170.pdf. The subcommittee members were: Dr. Ralph J. Anderson, Hon. Elizabeth Ray, Prof. Teresa Collett, Dr. Jane Rider, Hon. Nikki DeShazo, Ms. Debra Saenz, Dr. Bruce Levy, Ms. Marilyn Schramm, Hon. John Specia, Hon. Samuel A. Medina, Ms. Susan Steeg, Dr. Terry Moore, Mr. Paul Watler, Hon. Orlinda Naranjo, Hon. Bonnie Wolbrueck, Ms. Diane O'Neal, and Ms. Trudy Woodson. *Id* at 2. Justice Ann Crawford McClure chaired the subcommittee. *Id.*

[627] *Id.* at 1.

[628] *Id.* at 1.

[629] *See* Promulgation of Rules for Use in Parental Notification Proceedings Under Chapter 33 of the Family Code at 1, Misc. Docket No. 99-9247 (Tex. Dec. 22, 1999), *available at* http://www.supreme.courts.state.tx.us/MiscDocket/99/99-9247.pdf.

In 2000, the Court made extensive amendments to the Appellate Rules by amending Appellate Rules 42.2(A) and 67.1 and adopting Appellate Rule 73, governing dismissal, discretionary review, and post-conviction habeas writs in criminal cases.[630] Two years later, the Advisory Committee recommended and the Court adopted extensive miscellaneous amendments to the appellate rules regarding: the effect of failure to receive notice of a court of appeals' judgment or order on the time to file motions for rehearing and petitions for review; service of documents; adoption of another party's brief or other documents by reference; requirements for amicus briefs; issuance of appellate courts' mandates; the plenary power of the courts of appeals; notice of appellate judgments and orders; duties of court reporters; appeals in criminal cases; preservation of sufficiency of evidence complaints in nonjury cases; preparation and correction of the appellate record; dismissal and settlement of cases on appeal; voluntary remittiturs; appellate court opinions; and the record in original proceedings, among others.[631]

During this same period, the Court appointed a special committee, chaired by Houston attorney Joe Jamail, to consider overall improvements to the civil litigation system.[632] The "Jamail Committee" reported on attorney referral fees, settlement offers, class actions, and multidistrict litigation.[633] While the Advisory Committee was considering these proposals, the legislature incorporated many of them into House Bill 4,

[630] Order Approving Amendments to the Texas Rules of Appellate Procedure at 1, Misc. Docket No. 00-9136 (Tex. Sept. 12, 2000), *available at* http://www.supreme.courts.state.tx.us/MiscDocket/00/00-9136.pdf.

[631] Final Approval of Amendments to the Texas Rules of Appellate Procedure, Misc. Docket No. 02-9237 (Tex. Dec. 23, 2002), *available at* http://www.supreme.courts.state.tx.us/MiscDocket/02/02923700.pdf (amending Appellate Rules 4.5, 9.5, 9.7, 12.6, 13.1, 18.1, 19.1, 25.2, 29.5, 33.1(d), 34.5(a), (c), 34.6(e), (f), 37.1, 38.2(a)(1), 38.6(d), 42.1, 46.5, 47, 52.7(c), 55.1, 55.2(e), 56.3, 68.4(g) and 71). Justices Schneider and O'Neill, by concurring opinion, noted their disagreement with the Court's failure to adopt substantive amendments to Rule 13.1, which would have made the presence of a court reporter optional, unless requested, as the Advisory Committee had recommended. *Id.* at 3–5.

[632] Order Creating the Supreme Court Task Force on Civil Litigation Improvements at 1, Misc. Docket No. 01-9149 (Tex. Aug. 24, 2001), *available at* http://www.supreme.courts.state.tx.us/miscdocket/01/01-9149.pdf (appointing Joseph D. Jamail, Charles L. Babcock, Ricardo G. Cedillo, James E. Coleman, Tommy Jacks, Dee Kelly, Harry Reasoner, Steve Susman, and Professor Elizabeth Thornburg).

[633] *Id.*

which largely directed the exercise of the Court's rulemaking power on a number of subjects.[634]

With the passage of House Bill 4 (Omnibus Civil Justice Reform) by the Texas Legislature in 2003, the Texas Supreme Court was assigned the task of promulgating or amending court rules for class action practice, offers of settlement, disclosure and regulation of attorney referral fees, and suspension of the enforcement of money judgments, among others.[635] House Bill 4 also required the Court to make changes in the venue and forum selection rules, to adopt rules of practice and procedure for multidistrict litigation in Texas Courts,[636] and to amend Civil Procedure Rules 292 and 226a to require a unanimous verdict on exemplary damages to correspond with legislative amendments to Chapter 41 of the Civil Practice and Remedies Code.[637] As a result of House Bill 4, the Advisory Committee, which the Court had reappointed in 2003,[638] met for two-day

[634] Alex Wilson Albright, *Texas Supreme Court Advisory Committee Update*, ADVOC., Winter 2003, at 98, 98.

[635] Act of June 2, 2003, 78th Leg., R.S., ch. 204, §§ 1.01-22.01, 2003 Tex. Gen. Laws 847 (codified at TEX. CIV. PRAC. & REM. CODE ANN. §§ 15.003, 16.012, 18.091, 26.001–.003, .051, 33.002(a), .003–.004, .011(1)–(2), (5)–(6), .012(b)–(c) (amended 2005), .013 (amended 2007), .017, 35.006, 41.001(1), (3)–(5), (7)–(13), .002(a)–(b), .003, .004(b), .008 (amended 2007), .010(b), .0105, 42.001–.005, 51.014(a)–(c), 52.006, 71.051(a)–(b), .052, 82.003, . 008, 74.001 (amended 2011)–.004, .051–.053, .101, .102–.103 (amended 2005), .104–.106, .151 (amended 2007), .152–.154, .301–303, .351 (amended 2005), .352, .401–.403, .451, .501–.507, 75.002(h), 78.101–.104, 84.004(a), (c), 85.003 (amended 2007), .004, .0065, 108.002(a)–(b), 150.001 (amended 2005), .002 (amended 2009) (West 2003); TEX. EDUC. CODE ANN. §§ 22.051 (amended 2013), .0511 (amended 2007), .0513–.0514, .0516–.0517, 23.053(a), 30.024(c), .055(c) (amended 2013), 105.301(e) (West 2003); TEX. FIN. CODE ANN. §§ 304.003(c) (amended 2005), .1045 (West 2003); TEX. GOV'T CODE ANN. §§ 22.001(e), 22.225, 74.024(c), 74.161–.164 (West 2003); TEX. HEALTH & SAFETY CODE ANN. §§ 242.017, 281.056(a), 261.051–.052, 285.071–.072, 311.041 (West 2003); TEX. HUM. RES. CODE ANN. § 32.060 (amended 2005) (West 2003); TEX. LAB. CODE ANN. § 417.001(b) (West 2003); Tex. PROB. CODE ANN. § 5B (West 2003).

[636] For discussion of these subjects, *see* Lonny S. Hoffman, *The Trilogy of 2003:Venue, Forum Non Conveniens & Multidistrict Litigation*, ADVOC., Fall 2003, at 74, 74.

[637] Lisa Bowlin Hobbs, *Court Amends Standard Jury Instructions in Cases Involving Exemplary Damages*, ADVOC., Summer 2005, at 15, 15.

[638] Supreme Court Rules Advisory Committee, Misc. Docket No. 03-9023 (Tex. Apr. 2, 2003), *available at* http://www.supreme.courts.state.tx.us/MiscDocket/03/03902300.PDF. The following people were appointed to the committee in 2003: Prof. Alexandra W. Albright, Charles L. Babcock, Pamela Stanton Baron, Hon. Levi Benton, Hon. Jane Bland, Jeffrey S. Boyd, Hon. Scott A. Brister, Harvey Brown, Prof. Elaine A. G. Carlson, Hon. Tracy E. Christopher, Nina Cortell, Alistair B. Dawson, Prof. William V. Dorsaneo, III, Ralph H. Duggins, Hon. Sarah B. Duncan, William R. Edwards, Hon. David B. Gaultney, Frank Gilstrap, Hon. Tom Gray, W.

sessions in June, July, and August of 2003 to develop rules or rule amendments in compliance with the legislation.[639]

In response to House Bill 4, the Court amended and promulgated rules as follows:

- As a result of House Bill 4, § 1.0.1, which amended Civil Practice and Remedies Code § 26.001 by requiring that "the Supreme Court shall adopt rules to provide for fair and efficient resolution of class actions," the Court amended Rule 42 based on the recommendations of the Advisory Committee.[640]
- As a result of House Bill 4, § 2.01, which amended Civil Practice and Remedies Code § 42.005 by requiring that the Court "promulgate rules implementing" the legislature's settlement provisions, the Court amended Rule 167 to conform to the legislative scheme.[641] These provisions provide for awards of attorney fees if a judgment is "significantly less favorable" than an earlier rejected settlement offer.[642]
- As a result of House Bill 4, § 3.01, which amended Government Code § 74.024 by suggesting that the Court "may consider" new

Wendell Hall, O.C. Hamilton Jr., Hon. Andy Harwell, Michael A. Hatchell, Sen. Juan "Chuy" Hinojosa, Tommy Jacks, David Jackson, Lamont Jefferson, Hon. Terry Jennings, Hon. Tom Lawrence, Hon. Carlos Lopez, Gilbert I. Low, John H. Martin, Anne McNamara, Robert E. Meadows, Richard G. Munzinger, Richard R. Orsinger, Hon. Jan Patterson, Hon. David Peeples, Robert H. Pemberton, Pete Schenkkan, Luther H. Soules, Kent C. Sullivan, Stephen D. Susman, Paula Sweeney, Stephen G. Tipps, Robert A. Valadez, Charles R. Watson, Jr., Hon. Bonnie Wolbrueck, and Hon. Stephen Yelenosky.

[639] Albright, *supra* note 634, at 98. Professor Alex Albright expressed concern at the time that the legislature's expanding role in assigning rule-making projects to the Texas Supreme Court by legislation could relegate the Court and its Advisory Committee to become a "scrivener for ideas of others." *See* Albright *supra* note 634, at 99–100 ("the Supreme Court wants to preserve its rule-making authority, so the Court seems to be trying to work more closely with the Legislature. . . . [And] rulemaking becomes more radical than the legislative process . . . . [T]he decisions made in the legislature cannot have been thought through as carefully as they are when a committee of several lawyers spends several months pondering unforeseen consequences.").

[640] Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 1.01, 2003 Tex. Gen. Laws 847, 849 (current version at TEX CIV. PRAC. & REM. CODE Ann. §§ 26.001–.003(West 2008)); Amendments to the Texas Rules of Civil Procedure at 7–14, Misc. Docket No. 03-9160 (Tex. Oct. 9, 2003), *available at* http://www.supreme.courts.state.tx.us/MiscDocket/03/03916000.PDF.

[641] Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 2.01, 2003 Tex. Gen. Laws 847, 850–851 (current version at TEX CIV. PRAC. & REM. CODE ANN. § 42.005(West 2008)).

[642] Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 2.01, 2003 Tex. Gen. Laws 847, 851 (current version at TEX CIV. PRAC. & REM. CODE ANN. § 42.004(West Supp. 2012)).

rules for "consolidated or coordinated pretrial proceedings" for multidistrict litigation, the Court amended Civil Procedure Rule 166 and Rule of Judicial Administration 11 and promulgated Rule of Judicial Administration 13.[643] Taken together, these rules created a process for transferring pretrial proceedings to the Multidistrict Litigation Panel.

- As a result of House Bill 4, § 4.12, which required the Court to amend Rule 194.2 "as soon as practical" to include disclosures of the name, address, and phone number of any person who may be designated a responsible third party, the Court amended the rule accordingly.[644]
- As a result of House Bill 4, § 5.03, which required the Court to amend Texas Rule of Evidence 407(a) (Subsequent Remedial Measures) "as soon as practical" to conform to Federal Rule of Evidence 407, the Court amended Rule 407(a) to delete a sentence which provided that "Nothing in this rule shall preclude admissibility in products liability cases based on strict liability."[645]
- As a result of House Bill 4, § 7.01, which amended Civil Practice and Remedies Code § 35.006 concerning security for suspending enforcement of judgments on appeal, the Court amended Appellate Rule 24.2 to change the procedure for posting a bond, deposit, or security.[646] This amendment made lowering the amount of security mandatory on showing that the amount of security otherwise required would cause the

[643] Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 3.01, 2003 Tex. Gen. Laws 847, 852 (current version at TEX GOV. CODE ANN. § 74.024(c) (West 2008)); Amendments to the Texas Rules of Civil Procedure, The Texas Rules of Appellate Procedure, the Texas Rules of Evidence, and the Texas Rules of Judicial Administration, Misc. Docket No. 03-9145 (Tex. Aug. 29, 2003), *available at* http://www.supreme.courts.state.tx.us/MiscDocket/03/03914500.pdf.

[644] Act of June 2, 2003, 78th Leg., R.S., ch 204, § 4.12, 2003 Tex. Gen. Laws 847, 859; Amendment to Rule 194.2, Texas Rules of Civil Procedure, Misc. Docket No. 04-9041 (Tex. Mar. 3, 2004), *available at* http://www.supreme.courts.state.tx.us/MiscDocket/04/04904100.pdf.

[645] Act of June 2, 2003, 78th Leg., R.S., ch 204, § 5.03, 2003 Tex. Gen. Laws 847, 862; Amendments to the Texas Rules of Civil Procedure, The Texas Rules of Appellate Procedure, the Texas Rules of Evidence, and the Texas Rules of Judicial Administration, *supra* note 643, at 6.

[646] Act of June 2, 2003, 78th Leg., R.S., ch 204, § 7.01, 2003 Tex. Gen. Laws 847, 863 (current version at TEX CIV. PRAC. & REM. CODE § 35.006(West)); Amendments to the Texas Rules of Civil Procedure, The Texas Rules of Appellate Procedure, the Texas Rules of Evidence, and the Texas Rules of Judicial Administration, *supra* note 643, at 5.

judgment debtor substantial economic harm and created a new procedure for determining and reviewing the judgment debtor's net worth.[647]

- As a result of House Bill 4, § 13.03, which amended Civil Practice and Remedies Code § 41.002 to require a unanimous verdict for an award of exemplary damages, the Court amended Rules 226a and 292, which brought jury instructions into compliance with Chapter 41. [648]

During 2005, Civil Procedure Rule 173 also was amended to establish limits on the duties and responsibilities of guardians ad litem as well as their compensation.[649] Further, Civil Procedure Rules 103 and 536 were amended in 2005 and 2006 to provide for certification of private process servers for civil litigation.[650] Civil Procedure Rule 145(Affidavit of Indigency) was also amended in 2005 to prohibit the contest of affidavits of indigency that are supported by IOLTA certificates.[651]

After the appointment of yet another Supreme Court Rules Advisory Committee in 2006,[652] the Court ordered final approval of Administrative Rule 14 establishing the basic framework for certification of private process servers by the Process Server Review Board[653] and Administrative Rule 15 providing for consolidating multiple appeals from the five counties that lie in overlapping courts of appeals districts.[654]

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[647] Amendments to the Texas Rules of Civil Procedure, *supra* note 643, at 4–5.

[648] Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 13.03, 2003 Tex. Gen. Laws 847, 888 (current version at TEX CIV. PRAC. & REM. CODE ANN. §§ 41.002(a), (b) (West 2008)); Final Approval of Amendments to Jury Instructions Under Rule 226a, Texas Rules of Civil Procedure at 5, Misc. Docket No. 05-9022 (Tex. Jan. 27, 2005), *available at* http://www.supreme.courts.state.tx.us/MiscDocket/05/05902200.pdf (amending Rule 226a); Final Approval of Amendments to the Texas Rules of Civil Procedure and the Texas Rules of Judicial Administration at 8, Misc. Docket No. 05-9021 (Tex. Jan. 27, 2005), *available at* http://www.supreme.courts.state.tx.us/MiscDocket/05/05902100.pdf (amending Rule 292).

[649] *See* TEX. R. CIV. P. 173.1–.6.

[650] *See* TEX. R. CIV. P. 103; TEX. R. CIV. P. 536 (1985, repealed 2013).

[651] *See* TEX. R. CIV. P. 145.

[652] *See* Texas Supreme Court Advisory Committee, Misc. Docket No. 06-9019 (Tex. Mar. 1, 2006), *available at* http://www.supreme.courts.state.tx.us/MiscDocket/06/06901900.pdf.

[653] Final Approval of Texas Rule of Judicial Administration 14 at 3, Misc. Docket No. 07-9032 (Tex. Feb. 27, 2007), *available at* http://www.supreme.courts.state.tx.us/MiscDocket/07/07903200.pdf.

[654] Order Promulgating Rule of Judicial Administration 15 at 3–4, Misc. Docket No. 08-9118 (Tex. Aug. 20, 2008), *available at* http://www.supreme.courts.state.tx.us/MiscDocket/08/0891

More significantly, that same Advisory Committee recommended adoption of extensive revisions to the Rules of Appellate Procedure, including amendments altering briefing requirements, citation and publication of opinions, the en banc reconsideration process, proof of indigency, and the use of party names in suits affecting the parent child relationship.[655] Specifically in response to the Legislature's amendments to Civil Practice and Remedies Code § 51.014, Civil Procedure Rules 28 and 29 were rewritten to match the legislative amendments.[656] Further, the Advisory Committee recommended and the Court adopted revisions of the parental notification rules to assure consistency with the legislature's revisions of the Texas Family Code regarding parental notification.[657]

Another order establishing the 2009 Supreme Court Advisory Committee reappointed most of the same committee members on January 15, 2009.[658]

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[655] Amendments to the Texas Rules of Appellate Procedure at 3–12, Misc. Docket No. 08-9115 (Tex. Aug. 20, 2008), *available at* http://www.supreme.courts.state.tx.us/MiscDocket/08/08911500.pdf. More recently, the Texas Supreme Court modified appellate briefing requirements, replacing page limits with word limits. Final Approval of Amendments to Texas Rules of Appellate Procedure 9, 38, 49, 52, 53, 55, 64, 68, 70, and 71, Final Approval of Amendments to Texas Rules of Appellate Procedure, Misc. Docket No. 12-9190 (Tex. Nov. 13, 2012), *available at* http://www.supreme.courts.state.tx.us/ MiscDocket/12/12919000.pdf.

[656] Amended Order Adopting Rule 168 of the Texas Rules of Civil Procedure and Amendments to Rule 28 of the Texas Rules of Appellate Procedure at 1, Misc. Docket No. 11-9183 (Tex. Sept. 9, 2011), *available at* http://www.supreme.courts.state.tx.us/MiscDocket/11/11918300.pdf.

[657] Final Approval of Amendments to Texas Parental Notification Rules and Forms for Use in Proceedings Under Chapter 33 of the Family Code at 1, Misc. Docket No. 07-9035 (Tex. Feb. 27, 2007), *available at* http://www.supreme.courts.state.tx.us/MiscDocket/07/07903500.pdf.

[658] Supreme Court Advisory Committee, Misc. Docket No. 09-9004 (Tex. Jan. 15, 2009), *available at* http://www.supreme.courts.state.tx.us/MiscDocket/09/09900400.pdf. The following persons were appointed to the committee in 2009: Prof. Alexandra W. Albright, Charles L. Babcock, Pamela Stanton Baron, Levi Benton, Hon. Jane Bland, Jeffrey S. Boyd, Harvey Brown, Prof. Elaine A. G. Carlson, Hon. Tracy E. Christopher, Nina Cortell, Alistair B. Dawson, Prof. William V. Dorsaneo, III, Ralph H. Duggins, Hon. Sarah B. Duncan, Hon. David Evans, L. Hayes Fuller, III, Hon. David B. Gaultney, Frank Gilstrap, Mark Glasser, Hon. Tom Gray, Hon. Eva Guzman, O. C. Hamilton, Rusty Hardin, Michael A. Hatchell, Prof. Lonny S. Hoffman, Roger W. Hughes, Tommy Jacks, David Jackson, Lamont Jefferson, Hon. Terry Jennings, Hugh Rice Kelly, Hon. Tom Lawrence, Gilbert I. Low, Robert E. Meadows, Richard G. Munzinger, Richard R. Orsinger, Hon. Jan Patterson, Hon. David Peeples, Hon. Robert H. Pemberton, Jim M. Perdue, Jr., Shannon H. Ratliff, Thomas C. Riney, Eduardo R. Rodriguez, Pete Schenkkan, William E. (Gene)

In 2010 and 2011, the new Advisory Committee recommended and the Texas Supreme Court adopted amendments of Civil Procedure Rules 281[659] and 284,[660] which allow jurors, with court's permission to take notes the jurors took during the trial to the jury room and to require the trial court to instruct the jurors not to communicate with anyone by cellphone or through any electronic device and not to post information or search for information on the Internet to try to learn more about the case.[661] In addition, during 2011, after extensive discussion by the Advisory Committee the Court adopted amendments to Civil Procedure Rules 18a[662] and 18b[663] concerning the procedure and the grounds[664] for the recusal and disqualification of trial judges.[665]

Storie, Hon. Kent C. Sullivan, Stephen D. Susman, Stephen G. Tipps, Hon. R. H. Wallace, Jr., Charles R. Watson, Jr., and Hon. Stephen Yelenosky.

[659] Tex. R. Civ P. 281 (Papers Taken to Jury Room).

[660] Tex. R. Civ. P. 284 (Judge to Caution Jury).

[661] Amendments to Texas Rules of Civil Procedure 281 and 284 and to The Jury Instructions Under Texas Rule of Civil Procedure 281 and 184 and to The Jury Instructions Under Texas Rule of Civil Procedure 226A, Misc. Docket No. 10-9210 (Tex. Dec. 13, 2010), *available at* https://www.supreme.courts.state.tx.us/miscdocket/10/10921000.pdf; Amendments to Texas Rules of Civil Procedure 281 and 284 and to The Jury Instructions Under Texas Rule of Civil Procedure 281 and 184 and to The Jury Instructions Under Texas Rule of Civil Procedure 226A, Misc. Docket No. 11-9047, (Tex. Mar. 15, 2011), *available at* http://www.supreme.courts.state.tx.us/miscdocket/11/11904700.pdf; *see also* Technical Correction to the Amendments to the Jury Instructions . . . , Misc. Docket No. 11-9047a, (Tex. Apr. 13, 2011), *available at* http://www.supreme.courts.state.tx.us/miscdocket/11/119047a.pdf.

[662] *See* Tex. R. Civ. P. 18a (Recusal and Disqualification of Judges).

[663] *See* Tex. R. Civ. P. 18b (Grounds for Recusal and Disqualification of Judges).

[664] In June 2009, Justice Nathan L. Hecht, the Court's Rules Member, wrote Chip Babcock, Chair of the Advisory Committee, requesting the Advisory Committee to consider whether the Supreme Court's opinion in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) required revision of Civil Procedure Rules 18a and 18b. For the next two years, the Advisory Committee studied these rules and made recommendations for amendments. The *Caperton* decision, which explained the circumstances under which campaign contributions would be grounds for recusal, had no apparent effect on the amendments made to Rules 18b. Comment to 2011 change by Misc. Docket No. 11-9126 ("The amendments to Rule 18b are not intended to be substantive."). *See* Final Approval of Amendments to Rules 18a and 18b of the Texas Rules of Civil Procedure, Misc. Docket No. 11-9126 (Tex. July 5, 2011), *available at* http://www.supreme.courts.state.tx.us/miscdocket/11/11912600.pdf; Order Amending Rules 18a and 18b . . ., Misc. Docket No. 11-9064 (Tex. Apr. 11, 2011), *available at* http://www.supreme.courts.state.tx.us/miscdocket/11/11906400.pdf.

[665] Several significant procedural changes were made to Civil Procedure Rule 18a, including the requirements that recusal motions "not be based solely on the judge's rulings in the case"

The workload of the 2009 Advisory Committee increased dramatically as a result of legislation enacted in 2011. As directed or required by House Bill 274, House Bill 79, and other legislation enacted in 2011, the Advisory Committee proposed rule revisions and the Texas Supreme Court amended or promulgated numerous court rules to comply with the legislation. House Bill 274 required the Texas Supreme Court to promulgate or to amend a number of court rules, as follows:

- As a result of the amendment of Civil Practice and Remedies Code § 51.014 for permissive appeals from orders "not otherwise appealable," the Court amended Appellate Rule 29 and adopted Civil Procedure Rule 168 (Permission to Appeal) which governs the procedure for obtaining permission to appeal in the trial court.[666]
- As a result of amendments to Chapter 42 of the Civil Practice and Remedies Code, the Court amended Civil Procedure Rule 167 (Offer of Settlement; Award of Litigation Costs).[667]
- As a result of the addition of Government Code § 22.004(g), which calls for rules "for the dismissal of causes of action that have no basis in law or fact on motion and without evidence . . . [to be] granted or denied with 45 days of the filing of the motion,"[668] the Court referred the dismissal rule to a ten-member subcommittee chaired by Judge David Peeples, which

(Tex. R. Civ. P. 18a (a)(3)); that the motion must state facts "with particularity and detail" (TEX. R. CIV. P. 18a(a)(4); and, that a recusal motion "that does not comply with this rule may be denied without an oral hearing" by the Regional Presiding Judge (TEX. R. CIV. P. 18a (g) (3)(3)); *see* Litman v. Litman, 402 S.W.3d 280, 284 (Tex. App.—Dallas 2013, no pet. h.) (facially deficient motion to recuse filed on eve of trial properly denied without hearing). *See* Final Approval of Amendments to Rules 18a and 18b of the Texas Rules of Civil Procedure, Misc. Docket No. 11-9126 (Tex. July 5, 2011), *available at* http://www.supreme.courts.state.tx.us/miscdocket/11/11912600.pdf; Order Amending Rules 18a and 18b . . . , Misc. Docket No. 11-9064 (Tex. Apr. 11, 2011), *available at* http://www.supreme.courts.state.tx.us/miscdocket/11/11906400.pdf.

[666] *See* Amended Order Adopting Rule 168 of the Texas Rules of Civil Procedure and Amendments to Rule 28 of the Texas Rules of Appellate Procedure, Misc. Docket No. 11-9183 (Tex. Sept. 9, 2011), *available at* http://www.supreme.courts.state.tx.us/miscdocket/11/11918300.pdf.

[667] *See* Amended Order Adopting Amendments to Texas Rule of Civil Procedure, Misc. Docket No. 11-1982 (Tex. Sept. 9, 2011), *available at* http://www.supreme.courts.state.tx.us/miscdocket/11/11918200.pdf.

[668] TEX. GOV'T CODE ANN. § 22.004(g) (West 2011).

proposed adoption of a draft rule.[669] Following review by the Advisory Committee, the Court promulgated Civil Procedure Rule 91a (Dismissal of Baseless Causes of Action).[670]

- As a result of the addition of Government Code § 22.004(h), which requires "rules to promote the prompt, efficient, and cost-effective resolution of civil actions . . . in which the amount in controversy, inclusive of all claims for damages of any kind, whether actual or exemplary, a penalty, attorney's fees, expenses, costs, interest, or any other type of damage of any kind, does not exceed $100,000,"[671] the Court appointed a Task Force to propose rule changes for these "expedited actions."[672] After reviewing the Task Force report and referring it to the Advisory Committee for further review, the Court adopted new Civil Procedure Rule 169 and amended Civil Procedure Rules 47 and 190 and Evidence Rule 902, compelling the use of expedited procedures in smaller cases.[673]

House Bill 79 included the following two directives to the Texas Supreme Court, prompting the Court to promulgate the following rules:

- As a result of the repeal of Government Code Chapter 28, abolishing small claims courts, incorporating those courts into the Justice Court section of Chapter 27, and directing that the Texas Supreme Court "shall promulgate (1) rules to define cases that constitute small claims (2) rules of civil procedure applicable to small claims cases [and] (3) rules for eviction

[669] The subcommittee members were the Hon. Jeffrey S. Boyd, Prof. Elaine Carlson, Nina Cortell, Prof. William V. Dorsaneo, III, Frank Gilstrap, Rusty Hardin, Prof. Lonny S. Hoffman, Richard G. Munzinger, Hon. David Peeples, William E. Storie, and Marisa Secco. Meeting of the Texas Supreme Court Advisory Committee, 23014-15 (Nov. 18, 2011).

[670] Adoption of Rules for Dismissals and Expedited Actions at 1, Misc. Docket No. 12-9191 (Tex. Nov. 13, 2012), *available at* http://www.supreme.courts.state.tx.us/MiscDocket/12/12919100.pdf. *See also* Final Approval for Dismissals and Expedited Actions, Misc. Docket No. 13-9022 (Tex. Feb. 12, 2013), *available at* http://www.supreme.courts.state.tx.us/MiscDocket/13/13902200.pdf.

[671] TEX. GOV'T CODE ANN. § 22.004(h) (West 2011).

[672] Appointment of Task Force for Rules in Expedited Actions, Misc. Docket No. 11-9193 (Tex. Sept. 26, 2011), *available at* http://www.supreme.courts.state.tx.us/MiscDocket/11/11919300.pdf.

[673] Adoption of Rules for Dismissals and Expedited Actions, *supra* note 670, at 1, 8–14.

proceedings,"[674] the Court appointed a special task force to recommend changes.[675] The task force submitted its proposed rules on March 28, 2012.[676] Those rules were reviewed and discussed by the Advisory Committee and have now been adopted.[677]

- As a result of amendments to Government Code § 74.024, requiring the Texas Supreme Court to adopt rules allowing for additional resources in certain cases to ensure efficient judicial management, after consultation with the Advisory Committee the Court adopted Rule of Judicial Administration 16, which created the Judicial Committee for Additional Resources and a procedure for allotting resources.[678]

The work done by the Texas Supreme Court, the Advisory Committee, and the Court's other committees during the chairmanship of Chip Babcock and under the leadership of Rules Member Nathan Hecht has been extensive and well crafted, rivaling the work product of the Babcock Committee's predecessors. But during this time period the Texas Supreme Court's rule-making activity has for the most part originated from and been based on legislation, rather than the Court's independent exercise of its rule-making power. In particular, the Court's plan to completely revise the Texas Rules of Civil Procedure has been displaced by other rule-making projects generated by legislation.

[674] Act of June 29, 2011, 82nd Leg., 1st C.S., ch. 3 § 5.06–.07, 2011 Tex. Gen. Laws 5206, 5225.

[675] Appointment of Task Force for Rules in Small Claims Cases and Justice Court Proceedings, Misc. Docket No. 11-9180 (Tex. Sept. 7, 2011), *available at* http://www.supreme.courts.state.tx. us/miscdocket/11/11918000.pdf.

[676] Adoption of Rules for Justice Court Cases, Misc. Docket No. 13-9023 (Tex. Feb. 12, 2013), *available at* http://www.supreme.courts.state.tx.us/MiscDocket/13/13902300.pdf; Appointment of Task Force for Rules in Small Claims Cases and Justice Court Proceedings, *supra* note 675.

[677] *See* Final Approval of Rules for Justice Court Cases, Misc. Docket No. 13-9049 (Tex. Apr. 15, 2013) *available at* http://www.supreme.courts.state.tx.us/miscdocket/13/13904900.pdf.

[678] *See* Final Approval of Adoption of Texas Rule of Judicial Administration 16, Misc. Docket No. 12-9033 (Tex. Mar. 1, 2012), *available at* http://www.supreme.courts.state.tx.us/ miscdocket/12/12903300.pdf.

XI. CONTINUING NEED FOR REVISION OF THE RULES OF CIVIL PROCEDURE

As explained in the official report made by the Task Force on Revision of the Texas Rules of Civil Procedure in November 1993, revision and recodification of the Texas Rules of Civil Procedure is both feasible and desirable.[679] In fact, revision and recodification is necessary and long overdue

First, the overall organization of the Texas Rules of Civil Procedure is outdated and unsatisfactory for a number of reasons. The original structure, which is based roughly on a homespun amalgamation of the Revised Civil Statutes of 1925, predecessor Texas rules, and many federal rules, is too complex and unwieldy. It is also something of a mishmash because the original advisory committee cobbled together the three primary sources, often without changing the text of the Revised Civil Statutes or the predecessor state and federal rules of civil procedure that were included in the "new" Texas rules and without sensibly harmonizing the source material when sections of the rulebook include source material from more than one of the sources.[680] One by-product of this conservative process was the inclusion of a number of predecessor statutes and rules of procedure in the rulebook that simply should have been repealed and discarded.[681]

The original structure has also been rendered obsolete, particularly as a result of subsequent Texas Supreme Court orders, including the adoption of the Texas Rules of Appellate Procedure, which repealed and replaced approximately 130 rules of civil procedure with appellate rules.[682] As a result, a large gap exists in the rules of civil procedure.[683] The organization of the Texas Rules of Civil Procedure also makes it difficult to locate pertinent rules and to understand the relationship between rules that deal with the same subjects because the pertinent rules are frequently separated

[679] Report of Texas Supreme Court Task Force on the Rules of Civil Procedure, *supra* note 579, at 3.

[680] *Id. See, e.g.*, TEX. R. CIV. P. 28–44 (Section 3 (Parties to Suits) of Part II (Rules of Practice in District and County Court)).

[681] Report of Texas Supreme Court Task Force on the Rules of Civil Procedure, *supra* note 579, at 4. At least the following obsolete or unnecessary rules should be repealed: TEX. R. CIV. P. 3, 14, 18, 19, 20, 32, 35, 37, 46, 53, 119a, 143a, 219, 225, 237, 238, 246, 249, 302, 303, 304, 311, 312.

[682] *Id.* at 1.

[683] *Id.*

from each other by a number of other rules.[684] Similar problems exist within the separate sections of the Texas rulebook, which are themselves poorly organized and difficult to understand and use.[685] As was the case in the drafting and promulgation of the Rules of Evidence and the Rules of Appellate Procedure, the organization of the federal rulebook should have been followed when the Texas Rules of Civil Procedure were drafted in1940.[686]

Second, the failure of the rulebook to have a comprehensive review and revision for nearly 75 years has resulted in a rulebook that is replete with awkward and outdated 19th century language.[687] Many of the 1940 rules were copied with only minor changes, if any, from earlier codifications and are poorly worded.[688] Much of the rulebook's language predates the original codification of 1879. For example, Civil Procedure Rule 84 is nearly a verbatim copy of the original legislation.[689]

Unlike each of the Codes drafted by the Texas Legislative Council "recodifying" the Texas statutes, the rules of civil procedure, despite numerous amendments and the revision of some entire sections and subsections, have not been systematically restated in modern language or cleansed of duplicative, irrelevant, inconsistent, or otherwise ineffective

[684] *Id.* at 4. For example, Part I (General Rules) of the Texas Rules of Civil Procedure contains seventeen rules. Immediately thereafter, section 1 (General Rules) of Part II (Rules of Practice in District and County Courts) contains twelve more "general rules." TEX. R. CIV. P. 1–21(b).

[685] *Id.* Notably, the pleading rules include an opening subsection of 32 "general" rules, followed by a short section on plaintiff's pleadings and a longer section on defendant's pleadings, which includes some rules that are also applicable to plaintiff's pleadings. Similar problems in the rules concerning the jury charge and postverdict motion practice were identified and dealt with by the Jury Charge Task Force and by the Advisory Committee's comprehensive work on the Recodification Draft.

[686] *Id.*

[687] *Id.*

[688] *Id.*

[689] *Compare* I. George W. Paschal, *A Digest of the Laws of Texas* § 1441,at 353, 553 (4th ed. 1875) ("The defendant in his answer may plead as many several matters, whether of law or fact, as he shall think necessary for his defense, and which may be pertinent to the cause: Provided, that he shall file them all at the same time, and in due order of pleading."), *with* TEX. R. CIV. P. 84 ("The defendant in his answer may plead as many several matters, whether of law or fact, as he may think necessary for his defense, and which may be pertinent to the cause, and such matters shall be heard in such order as may be directed by the court, special appearance and motion to transfer venue, and the practice thereunder being excepted herefrom.").

language.[690] In fact, now that the Texas Judicial Council has completed its statutory recodification work, the rules of civil procedure will remain the last piece of the revised civil statutes that has not been subject to a comprehensive review and revision.[691]

Third, there are many substantive problems in the current rulebook. Many of the rules that were taken in substantially verbatim form from the 1937 federal rules have not been amended to correspond with amendments made in the federal rulebook to correct mistakes that were made when the federal rules were drafted and promulgated.[692] In addition, in adopting some federal rules and amalgamating them into the overall structure of the 1940 Texas Rules, a number of textual changes were made. In many instances, these changes were unnecessary or simply unwise.[693] Similarly, some of the federal rules adopted by the Texas Supreme Court were placed in the

[690] Report of Texas Supreme Court Task Force on the Rules of Civil Procedure, *supra* note 579, at 4.

[691] *See* TEX. GOV'T CODE § 323.007 (West 2013); TEXAS LEGISLATIVE COUNCIL DRAFTING MANUAL, § 8.09, at 150 (2012), *available at* http://www.tlc.state.tx.us/legal/dm/drafting manual.pdf; *See generally* 1 William V. Dorsaneo III, *Texas Litigation Guide* § 4.01 (2012).

[692] *See* TEX. R. CIV. P. 51(a), 97(a). Like its source, former Federal Rule of Civil Procedure. 18, Texas Rule of Civil Procedure 51(a) contains two sentences referencing rules on the joinder of claims pursuant to Texas Rule of Civil Procedure 39, 40, and 43. *See* FED. R. CIV. P. 18(a); TEX. R. CIV. P. 51(a), 39, 40, 43. Federal Rule 18(a) was amended in 1966 by eliminating any reference to limitations on claim joinder by the joinder of parties rules. *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (II)*, 81 HARV. L. REV. 591, 597 (1968); *cf.* Louis R. Frumer, *Multiple Parties and Claims in Texas*, 6 SW. L.J. 135, 144 (1952) (discussing proper interpretation of Texas Rule 51(a) with last two sentences). The effect of the amendment of the federal rules permits joinder of unrelated claims, subject to severance or separate trial procedures in the discretion of the trial judge, as long as there is one common claim against the multiple defendants. Similarly, as a result of the Texas Supreme Court's failure to amend TEX. R. CIV. P. 97(a) to correspond to amendments made to its companion federal source, FED. R. CIV. P. 13(a), a defendant served with a petition, can race to the courthouse and file another action before the defendant's answer day in the original case and avoid the compulsory counterclaim rule. *But see* Commint Tech. Servs. v. Quickel, 314 S.W.3d 646, 652 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

[693] *See* TEX. R. CIV. P. 38(c), 51(b), 67. Both Rules 38(c) and 51(b) expressly state that their provisions do not authorize joinder of liability insurers, unless the liability insurer is directly liable to the claimant by statute or contract. *See* TEX. R. CIV. P. 38(c), 51(b).There is no need for this language in the procedural rules because insurance liability policies preclude suit from being brought by third party claimants until there is a judgment or settlement against or with the liability insured. Similarly, a proviso was added to Texas Rule of Civil Procedure 67 making amendments necessary in jury cases, even though a matter was tried by consent. *See* TEX. R. CIV. P. 67. There is also no need for the imposition of such a pleading requirement.

wrong, or at least, a different section of the Texas rulebook than in the federal rulebook.[694] Moreover, the selective failure to adopt some federal rules that were part of the same general subject as other federal rules that were adopted needs to be remedied. For example, the failure to adopt the federal intervention rule[695] has yielded a very limited test for permissive intervention under Texas law, which is both unwise and inconsistent with procedural law in other American jurisdictions.[696]

Similarly, the amalgamation of Texas law and federal procedural law developed in the late 1930s in the same rulebook has produced some ambiguities that still have not been resolved[697] and some inconsistencies.[698]

Other matters that require attention and revision include:

- the elimination of the historic code pleading requirement that pleadings setting forth claims for relief state a "cause of action" rather than a claim;[699]
- revision of the affirmative defense rule to provide a list of matters in avoidance that actually matches current Texas substantive law; [700]
- revision of the third-party practice rule to clarify its scope and when leave of court is required;[701]

[694] For example, the third-party practice rule is a "parties" rule in Texas. *See* TEX. R. CIV. P. 38. It is a pleading rule under federal law. *See* FED. R. CIV. P 14. Similarly, the Texas joinder of claims and remedies rule is made part of the "general" pleadings rules. *See* TEX. R. CIV. P. 51. Under federal law, it is included in the "parties" section of the federal rulebook. *See* FED. R. CIV. P. 18.

[695] *See* FED. R. CIV. P. 24.

[696] *See In re* Union Carbide Corp., 273 S.W.3d 152, 155 (Tex. 2008) (holding that permissive joinder standards do not govern permissive intervention because intervenors must have a justiciable interest in the original claimant's cause of action).

[697] *See* TEX. R. CIV. P. 47, discussed at note 185. *See also* TEX. R. CIV. P. 37 (Additional Parties).

[698] *See e.g.*, TEX. R. CIV. P. 41, 162. Like its federal counterpart, Federal Rule of Civil Procedure 21, Texas Rule of Civil Procedure 41 expressly does not allow a party to be dropped absent a court order permitting such a nonsuit. In contrast, Texas Rule of Civil Procedure 162 gives a plaintiff the absolute right to take a nonsuit at any time before the plaintiff has introduced all of the plaintiff's evidence, other than rebuttal evidence. *See* FED R. CIV. P 21; TEX. R. CIV. P. 41, 162; *See also* BHP Petroleum Co. v. Millard, 800 S.W.2d 838, 840 (Tex. 1990) ("The plaintiff's right to take a nonsuit is unqualified and absolute as long as the defendant has not made a claim for affirmative relief.").

[699] *See* TEX. R. CIV. P. 47; *cf.* FED. R. CIV. P. 8(a)(2).

[700] *See* TEX. R. CIV. P. 94.

[701] *See* TEX. R. CIV. P. 38.

- the addition of new rules for the conduct of voir dire examination[702] and for making *Batson/Edmonson* challenges to the exercise of peremptory challenges;[703]
- the probable repeal of the Texas jury shuffle rule;[704]
- the development and adoption of a rule or rules for the conduct of voir dire examination during jury selection in civil cases;[705]
- revision and reorganization of the rules governing preservation of complaints about the court's charge to the jury;[706] and
- revision and reorganization of the rules governing postverdict motion practice because repeated attempts to clarify and simplify the rules governing postverdict and postjudgment motion practice has yielded a set of rules that are much more complicated and much less informative than they need to be.[707]

Even some of the most beneficial rule-making incorporated into the Texas rulebook in 1940 has obvious flaws that require correction.[708] Subsequent amendments, including the 1983 amendments to the venue rules and parts of the amended 1999 discovery rules also require more attention.[709]

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[702] *See* TEX. R. CIV. P. 230. This is the only rule that discusses the scope of voir dire examination and its coverage is suspect.

[703] *See* TEX. R. CIV. P. 233.

[704] *See* TEX. R. CIV. P. 223.

[705] *See* Jury Task Force Final Report, September 8, 1997, pp. 164–68, recommending adoption of procedural rule concerning duration, scope and method of attorneys' conduct of voir dire examination; *see also* TEX. R. CIV. P. 230 (question not to be asked).

[706] *See* TEX. R. CIV. P. 274.

[707] *See* TEX. R. CIV. P. 737.10.

[708] *See* TEX. R. CIV. P. 90. Chief Justice Alexander's revolutionary waiver of pleading defect rule has two serious flaws. First, Rule 90 allows an exception to be made "before the instruction or charge to the jury or in a nonjury case, before the judgment is signed" rather than during the pretrial phase of the litigation. Second, waiver is only the result of a failure to except by "the party seeking reversal on such account." *See* TEX. R. CIV. P. 90. Both of these aspects of TEX. R. CIV. P. 90 should be corrected.

[709] *See* TEX. R. CIV. P. 190, 192.3(h). As explained above, the newly promulgated provisions of the 1999 discovery rules need further study and evaluation because the retention of the definitions of "any person with knowledge of relevant facts" and witness statement in Rule 192.3(h) are too broad and conflict with the new definition of "work product" in Rule 192.5. *See* TEX. R. CIV. P. 192.3(h), 192.5.

XII. CONCLUSION

Texas lawyers and judges deserve a well-organized rulebook that is well-written and consistent with widely held procedural principles. That is not the current situation. By any yardstick, reorganization and revision of the Texas Rules of Civil Procedure is past being long overdue.

Despite the enormous contributions made to Texas procedural law by a cavalcade of leading legal citizens, including members of the original Advisory Committee led by Chief Justice Alexander, Chief Justice McClendon, Professors Stayton and McDonald, subsequent Rules Members of the Texas Supreme Court, including Chief Justice Calvert, Chief Justice Pope, Chief Justice Hecht and Justices Walker, Wallace, andKilgarlin, and the many members of the Court's committees and task forces identified in this article, there is a substantial continuing need to complete the revision process that unfortunately did not quite happen at the end of the 20th century.