

NEW APPELLATE RULES AND NEW TRIAL RULES

Author

RICHARD R. ORSINGER

Attorney at Law
1616 Tower Life Building
San Antonio, Texas 78205
210-225-5567 (Telephone)
210-267-7777 (Telefax)
richard@orsinger.com

McCurley, Orsinger, McCurley, & Nelson, LLP
5950 Sherry Lane, Suite 800
Dallas, Texas 75225
214-273-2400 (Telephone)
214-273-2470 (Telefax)
richard @momn.com

State Bar of Texas
**17TH ANNUAL ADVANCED CIVIL APPELLATE
PRACTICE COURSE**
September 11-12, 2003
Austin, Texas

CHAPTER 3

CURRICULUM VITAE OF RICHARD R. ORSINGER

Education: Washington & Lee University, Lexington, Virginia (1968-70)
University of Texas (B.A., with Honors, 1972)
University of Texas School of Law (J.D., 1975)

Licensed: Texas Supreme Court (1975); U.S. District Court, Western District of Texas (1977-1992; 2000-present); U.S. District Court, Southern District of Texas (1979); U.S. Court of Appeals, Fifth Circuit (1979); U.S. Supreme Court (1981)

Board Certified by the Texas Board of Legal Specialization
Family Law (1980), Civil Appellate Law (1987)

Organizations and Committees:

Chair, Family Law Section, State Bar of Texas (1999-2000)
Chair, Appellate Practice & Advocacy Section, State Bar of Texas (1996-97)
Chair, Continuing Legal Education Committee, State Bar of Texas (2000-02)
Vice-Chair, Continuing Legal Education Committee, State Bar of Texas (2002-03)
Member, Supreme Court Advisory Committee on Rules of Civil Procedure (1994-present); Chair, Subcommittee on Rules 16-165a
Member, Pattern Jury Charge Committee (Family Law), State Bar of Texas (1987-2000)
Supreme Court Liaison, Texas Judicial Committee on Information Technology (2001-present)
Tx. Bd. of Legal Specialization, Civil Appellate Law Advisory Commission (Member 1994-2003) and Civil Appellate Law Exam Committee (1990-present; Chair 1991-1995)
Tx. Bd. of Legal Specialization, Family Law Advisory Commission (1987-1993)
Member, Supreme Court Task Force on Jury Charges (1992-93)
Member, Supreme Court Advisory Committee on Child Support and Visitation Guidelines (1989, 1991; Co-Chair 1992-93; Chair 1994-98)
President, Texas Academy of Family Law Specialists (1990-91)
President, San Antonio Family Lawyers Association (1989-90)
Associate, American Board of Trial Advocates
Fellow, American Academy of Matrimonial Lawyers
Director, San Antonio Bar Association (1997-1998)
Member, San Antonio, Dallas and Houston Bar Associations

Professional Activities and Honors:

Texas Academy of Family Law Specialists' *Sam Emison Award* (2003)
State Bar of Texas *Presidential Citation* "for innovative leadership and relentless pursuit of excellence for continuing legal education" (June, 2001)
State Bar of Texas Family Law Section's *Dan R. Price Award* for outstanding contributions to family law (2001)
State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* (1996)
State Bar of Texas *Certificate of Merit*, June 1995, June 1996, & June 1997
Listed in the BEST LAWYERS IN AMERICA (1987-to date)

Continuing Legal Education and Administration:

Course Director, State Bar of Texas Practice Before the Supreme Court of Texas Course (2001, 2002)
Co-Course Director, State Bar of Texas *Enron, The Legal Issues* (March, 2002) [Won National ACLEA Award]
Course Director, State Bar of Texas Advanced Expert Witness Course (2001, 2002, 2003)
Course Director, State Bar of Texas 1999 Impact of the New Rules of Discovery
Course Director, State Bar of Texas 1998 Advanced Civil Appellate Practice Course
Course Director, State Bar of Texas 1991 Advanced Evidence and Discovery Course
Director, Computer Workshop at Advanced Family Law Course (1990-94)
and Advanced Civil Trial Course (1990-91)
Course Director, State Bar of Texas 1987 Advanced Family Law Course
Course Director, Texas Academy of Family Law Specialists First Annual Trial Institute, Las Vegas, Nevada (1987)

Books and Journal Articles:

---Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (Vols. II & III) (1999)
---Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992)

(900 + pages)

---*Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal*, 41 SOUTH TEXAS LAW REVIEW 111 (1999)

---*Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce*, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994)

---Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)

---*Characterization of Marital Property*, 39 BAY. L. REV. 909 (1988) (co-authored)

---*Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage That Crosses States Lines*, 13 ST. MARY'S L.J. 477 (1982)

SELECTED CLE SPEECHES AND ARTICLES

State Bar of Texas' [SBOT] Advanced Family Law Course: Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Characterization and Reimbursement (1986); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998); The Expert Witness Manual (1999); Reimbursement in the 21st Century (2000); Personal Goodwill vs. Commercial Goodwill: A Case Study (2000); What Representing the Judge or Contributing to Her Campaign Can Mean to Your Client: Proposed New Disqualification and Recusal Rules (2001); Tax Workshop: The Fundamentals (2001); Blue Sky or Book Value? Complex Issues in Business Valuation (2001); Private Justice: Arbitration as an Alternative to the Courthouse (2002); International & Cross Border Issues (2002)

SBOT's Marriage Dissolution Course: Property Problems Created by Crossing State Lines (1982); Child Snatching and Interfering with Possess'n: Remedies (1986); Family Law and the Family Business: Proprietorships, Partnerships and Corporations (1987); Appellate Practice (Family Law) (1990); Discovery in Custody and Property Cases (1991); Discovery (1993); Identifying and Dealing With Illegal, Unethical and Harassing Practices (1994); Gender Issues in the Everyday Practice of Family Law (1995); Dialogue on Common Evidence Problems (1995); Handling the Divorce Involving Trusts or Family Limited Partnerships (1998); The Expert Witness Manual (1999); Focus on Experts: Close-up Interviews on Procedure, Mental Health and Financial Experts (2000); Activities in the Trial Court During Appeal and After Remand (2002)

UT School of Law: Trusts in Texas Law: What Are the Community Rights in Separately Created Trusts? (1985); Partnerships and Family Law (1986); Proving Up Separate and Community Property Claims Through Tracing (1987); Appealing Non-Jury Cases in State Court (1991); The New (Proposed) Texas Rules of Appellate Procedure (1995); The Effective Motion for Rehearing (1996); Intellectual Property (1997); Preservation of Error Update (1997); TRAPs Under the New T.R.A.P. (1998); Judicial Perspectives on Appellate Practice (2000)

SBOT's Advanced Evidence & Discovery Course: Successful Mandamus Approaches in Discovery (1988); Mandamus (1989); Preservation of Privileges, Exemptions and Objections (1990); Business and Public Records (1993); Grab Bag: Evidence & Discovery (1993); Common Evidence Problems (1994); Managing Documents--The Technology (1996); Evidence Grab Bag (1997); Evidence Grab Bag (1998); Making and Meeting Objections (1998-99); Evidentiary Issues Surrounding Expert Witnesses (1999); Predicates and Objections (2000); Predicates and Objections (2001); Building Blocks of Evidence (2002); Strategies in Making a Daubert Attack (2002); Predicates and Objections (2002); Building Blocks of Evidence (2003); Predicates & Objections (High Tech Emphasis) (2003)

SBOT's Advanced Civil Appellate Practice Course: Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever

"Appealing" (1998); Enforcing the Judgment, Including While on Appeal (1998); Judges vs. Juries: A Debate (2000); Appellate Squares (2000); Texas Supreme Court Trends (2002)

SBOT's Annual Meeting: Objections (1991); Evidentiary Predicates and Objections (1992-93); Predicates for Documentary & Demonstrative Evidence (1994); "Don't Drink That! That's My Computer!", (1997); The Lawyer As Master of Technology: Communication With Automation (1997); Technology Positioning (1999); Objections Checklist (2000); Evidence from Soup to Nuts (2000)

Various CLE Providers: SBOT Advanced Civil Trial Course: Judgment Enforcement, Turnover and Contempt (1990-1991); SBOT Advanced Civil Trial Course: Offering and Excluding Evidence (1995); SBOT Advanced Civil Trial Course: New Appellate Rules (1997); SBOT Advanced Civil Trial Course: The Communications Revolution: Portability, The Internet and the Practice of Law (1998); SBOT Advanced Civil Trial Course: Daubert With Emphasis on Commercial Litigation, Damages, and the NonScientific Expert (2000); College of Advanced Judicial Studies: Evidentiary Issues (2001); El Paso Family Law Bar Ass'n: Foreign Law and Foreign Evidence (2001); American Institute of Certified Public Accounts: Admissibility of Lay and Expert Testimony; General Acceptance Versus Daubert (2002); Texas and Louisiana Associations of Defense Counsel: Use of Fact Witnesses, Lay Opinion, and Expert Testimony; When and How to Raise a Daubert Challenge (2002); SBOT In-House Counsel Course: Marital Property Rights in Corporate Benefits for High-Level Employees (2002); State Bar College Spring Training: Current Events in Family Law (2003)

TABLE OF CONTENTS

II. OVERVIEW OF 2002 AMENDMENTS.	1
III. OVERVIEW OF 2003 AMENDMENTS	1
IV. DETAILS ON RECENT TRAP AMENDMENTS	1
1. TRAP 4.5, No Notice of Judgment.	1
2. TRAP 9.5, Service of Documents.	1
3. TRAP 9.7, Adoption by Reference.	1
4. TRAP 11, Amicus Curiae Briefs	1
5. TRAP 12.6, Notices of Court’s Judgments and Orders.	1
6. TRAP 13.1, Duties of Court Reporters.	2
7. TRAP 18.1, Issuance of Mandate.	2
8. TRAP 19.1, Plenary Power of Courts of Appeals.	2
9. TRAP 24, Suspending Enforcement of Judgment.	2
10. TRAP 25.2, Perfecting Appeal in Criminal Cases.	2
11. TRAP 29.5, Further Proceedings in Trial Court Pending Interlocutory Appeal	3
12. TRAP 33.1, How to Preserve Appellate Complaints.	3
13. TRAP 34.6, Reporter’s Record.	3
14. TRAP 38.2, Appellee’s Brief.	3
15. TRAP 38.6, Extending Time to File Briefs.	3
16. TRAP 42.1, Voluntary Dismissal and Settlement.	3
17. TRAP 46.5, Voluntary Remittitur.	3
18. TRAP 47, Court of Appeals’ Opinions.	3
19. TRAP 52.7, Service of Record in Original Proceedings.	3
20. TRAP 55.1, Consolidating Briefs in the Supreme Court	3
21. TRAP 55.2, Petitioner’s Brief on the Merits.	4
22. TRAP 56.3, Disposing of Settled Cases	4
23. TRAP 68.4, Contents of PDR.	4
24. TRAP 71, Direct Appeals in Death Penalty Cases.	4
V. DETAILS ON THE AUGUST 29, 2003, RULE AMENDMENTS	4
A. Multidistrict Litigation Panels	4
B. Supersedeas Bonds	4
C. Evidence of Remedial Measures	4
VI. OTHER 2003 RULE AMENDMENTS	4
A. Offer of Settlement Rule	4
B. Class Action Rules	5
VII. NEW CONCEPT OF CONFLICT JURISDICTION	5
VIII. APPENDIX 1 – 2002 AND 2003 AMENDMENTS TO TRAPS	7
1. TRAP 4.5.	7
2. TRAP 9.5.	7
3. TRAP 9.7.	7
4. TRAP 11.	8
5. TRAP 12.6.	8
6. TRAP 13.1.	8
7. TRAP 18.1.	9

8. TRAP 19.1.	9
9. TRAP 24.2.	9
10. TRAP 24.4.	10
11. TRAP 25.2.	10
12. TRAP 29.5.	12
13. TRAP 33.1.	12
14. TRAP 34.6.	12
15. TRAP 38.2.	13
16. TRAP 38.6.	14
17. TRAP 42.1.	14
18. TRAP 46.5.	15
19. TRAP 47.	15
20. TRAP 52.7.	16
21. TRAP 55.1.	17
22. TRAP 55.2.	17
23. TRAP 56.3.	17
24. TRAP 68.4.	18
25. TRAP 71.	18
IX. APPENDIX 2 – AUGUST 29, 2003 AMENDMENTS TO RULES	19
X. APPENDIX 3 – SCAC PROPOSED CLASS ACTION RULE	28
XI. APPENDIX 4 – JAMAIL COMMITTEE PROPOSAL FOR CLASS ACTIONS: INCHOATE CLAIMS AND OPT IN CLASSES	37

New Appellate Rules and New Trial Rules[®]

by
Richard R. Orsinger

*Board Certified Family Law
& Civil Appellate Law
Texas Board of Legal Specialization*

I. INTRODUCTION.

This article discusses the 2002 amendments to the Texas Rules of Appellate Procedure [TRAPs], and the 2003-2004 proposed changes to the TRAPs. The article also describes the 2003 amendment to the Texas Civil Practice & Remedies Code pertaining to offer of settlement, as well as proposed changes to the TEX. R. CIV. P. 42, relating to class action.

II. OVERVIEW OF 2002 AMENDMENTS.

On December 23, 2002, the Texas Supreme Court adopted changes to the Texas Rules of Appellate Procedure, effective January 1, 2003. In this article, these changes will be called “the 2002 changes,” to differentiate them from the changes to the Rules issued on August 29, 2003. The 2002 changes mostly corrected glitches that existed after the comprehensive revision to the TRAPs effective September 1, 1997. You are also referred to Pamela Baron’s article at the 2002 Advanced Civil Appellate Practice Course, *The 2002 Amendments to the Texas Rules of Appellate Procedure, With Commentary* (Sept. 2002), which can be obtained on-line from the State Bar of Texas’ Online Library: <http://www.texasbarcle.com/publications/articles.asp>.

III. OVERVIEW OF 2003 AMENDMENTS.

In House Bill 4, the 78th Legislature authorized and/or required the Texas Supreme Court to promulgate new rules of procedure and evidence relating to “multi-district litigation” [MDL], supersedeas bonds, TEX. R. EVID. 407(a) (re: subsequent remedial measures), and class actions. New rules pertaining to MDL, supersedeas bonds, and Tex. Rule Evid. 407(a), were promulgated by the Supreme Court on August 29, 2003. As of the writing of this article, the Supreme Court had not yet promulgated rule changes relating to offer of settlement and class actions. However, the Texas Supreme Court’s Rules Advisory Committee has made recommendations that were forwarded to the Supreme Court in late August, and rules are expected to be adopted prior to September 11, 2003, to be published in the October Texas Bar Journal.

IV. DETAILS ON RECENT TRAP AMENDMENTS.

Recent amendments to the TRAPs are discussed below. The actual rules reflecting the 2002 changes in language are set out in Appendix 1, at p. 6 below. The language of the 2003 TRAP amendments are included in Appendix 2.

1. TRAP 4.5, No Notice of Judgment.

Former TRAP 4.5 provided an extended deadline to file documents when the party did not receive from the clerk notice of a judgment, and did not otherwise have actual notice. The 2002 amendment extends this provision to orders of the appellate court, which would include motions for rehearing.

2. TRAP 9.5, Service of Documents.

Former TRAP 9.5 provided that a party filing a document in connection with an “appeal or review proceeding” must, at or before the time the document is filed, serve a copy on all parties to the appeal or review proceeding. The 2002 amendment dropped “appeal or review” leaving “proceeding,” to make clear that the service requirement applies to original proceedings as well as appeals.

3. TRAP 9.7, Adoption by Reference.

Former TRAP 9 did not contain a provision expressly permitting parties to adopt other parties’ filings by reference. In 2002, new subsection 9.7 was added to provide express authorization of adoption by reference.

4. TRAP 11, Amicus Curiae Briefs.

Former TRAP 11 contained no provision that required the court to consider an amicus curiae brief, or permitted the court to disregard it. The 2002 amendment expressly gives the court the power to refuse to consider an amicus curiae brief, but only for “good cause,” which is not defined. Fifth Circuit Local Rule of Appellate Procedure 29.4 permits the court, after handing down a decision, to refuse to grant amicus curiae status, if it would result in the disqualification of any member of the panel or en banc court. The Texas provision subsumes the recusal circumstance, but is broader than just recusal.

5. TRAP 12.6, Notices of Court’s Judgments and Orders.

Former TRAP 12.6 required appellate court clerks to send notice of an appellate court judgment to all parties. The 2002 amendment expanded that duty to include other court orders, and the court’s mandate.

6. TRAP 13.1, Duties of Court Reporters.

Former TRAP 13.1 provided that the official court reporter attend court sessions and make a full record “unless excused by agreement of the parties.” The 2002 amendment moved the clause “unless excused by agreement of the parties” to an earlier place in the sentence, to clarify the sentence. The Supreme Court Advisory Committee had recommended that official court reporters not be summoned to the courtroom unless requested by a party. This proposal was rejected, because the Supreme Court preferred for the default (by all Justices save Justice Schneider and Justice O’Neill), to be the court reporter’s attendance, and it takes an affirmative agreement of the parties to excuse the court reporter. TRAP 13.1 appears to contravene Tex. Gov’t Code § 52.046, “General Powers and Duties,” which provides in part:

(a) On request, an official court reporter shall:

(1) attend all sessions of the court

In *Polasek v. State*, 16 S.W.3d 82, 88-89 (Tex. App.--Houston [1st Dist.] 2000, no pet.), the Court of Appeals declared TRAP 13.1 to be void, saying the amended rule:

change[d] the right to have a court reporter from a right that must be requested to a right that must be expressly waived. We view this as an enlargement of a defendant's substantive rights, in violation of the mandate that rules not modify the substantive rights of the litigants. Accordingly, we hold that rule 13.1(a) is void.

In *Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003), the Court of Criminal Appeals considered the amendment to be merely a procedural change, but still held that a defendant must object to the absence of a court report in order to preserve appellate complaint about the court reporter being absent from a trial proceeding.

7. TRAP 18.1, Issuance of Mandate.

Former TRAP 18.1 provided for the clerk of the appellate court to send a copy of the mandate to the clerk of the trial court. The 2002 amendment requires the clerk of the appellate court to send a copy of the mandate to all parties to the proceeding, as well.

8. TRAP 19.1, Plenary Power of Courts of Appeals.

Former TRAP 19.1 provided that the court of appeals’ plenary power expired 30 days after the court overruled all timely filed motions for rehearing. The 2002 amendment makes it clear that plenary power extends until 30 days after all timely motions for en banc reconsideration of the panel’s decision under Rule 49.7 have been overruled.

9. TRAP 24, Suspending Enforcement of Judgment.

TRAP 24.2 previously provided that a supersedeas bond for a money judgment had to be at least the amount of the judgment, plus interest accruing during appeal, plus costs. If the normal bond would cause substantial economic harm to the judgment debtor, the trial court could lower the bond to an amount, provided it would not substantially impair the judgment creditor’s ability to collect the judgment after appeal. HB 4 amended Tex. Civ. Pract. & Rem. Code §52.006 to provide that a supersedeas bond must equal the compensatory damages, plus interest during appeal, plus costs awarded in the judgment. However, the amount of the bond or security cannot exceed the lesser of 50% of the judgment debtor’s net worth, or \$25 million. Additionally, if the judgment debtor shows that it is likely to suffer substantial economic harm if required to post the normal bond, the trial court *must* lower the amount of the bond to an amount that will not cause the judgment debtor substantial economic harm. The concern for impairment of collectability is gone. However, the trial court can enjoin the judgment creditor from making transfers to avoid satisfaction of the judgment, but not transfers of assets in the normal course of business. *See* Tex. Civ. Pract. & Rem. Code §52.006.

TRAP 24.2 implements the new standards in amended Section 52.006, and further provides a procedure for determining the judgment debtor’s net worth, through the use of affidavits and contest procedures patterned after the TRAP 20 procedure for indigent appeals.

10. TRAP 25.2, Perfecting Appeal in Criminal Cases.

TRAP 25.2, regarding perfecting appeal in a criminal case, was revised to conform the rule to the Code of Criminal Procedure and case law.

11. TRAP 29.5, Further Proceedings in Trial Court Pending Interlocutory Appeal.

Former TRAP 29.5 provided that, during an interlocutory appeal, the trial court could proceed to trial on the merits. In 2002, the rule was amended to recognize that Tex. Civ. Pract. & Rem. Code § 51.014(b) prohibited trial in certain kinds of cases. HB 4 added appeals from class action certification orders, governmental immunity claims, and pleas to the jurisdiction by governmental entities, to the types of cases where the trial court cannot proceed to trial.

12. TRAP 33.1, How to Preserve Appellate Complaints.

Former TRAP 33.1 made no mention of how to preserve error to challenge the sufficiency of the evidence in non-jury trials. Because the old TRAPs used to cover the issue, confusion arose when the old language was dropped in 1997. The 2002 amendment to TRAP 33.1(d) reinstated the old concept that legal and factual sufficiency challenges do not have to be preserved in the trial court. The Rule makes clear that complaints regarding amended and additional findings of fact do have to be preserved.

13. TRAP 34.6, Reporter's Record.

Former TRAP 34.6 was amended to make it easier to rescue the reporter's record when testimony or exhibits are lost.

14. TRAP 38.2, Appellee's Brief.

TRAP 38.2 was amended to clarify a cross-reference to TRAP 38.1.

15. TRAP 38.6, Extending Time to File Briefs.

Former TRAP 38.6 provided that the court of appeals could extend the time for filing appellant's brief. The 2002 amendment extends that power to all briefs.

16. TRAP 42.1, Voluntary Dismissal and Settlement.

TRAP 42.1 was amended to clarify the procedures for ending the appeal based on a settlement.

17. TRAP 46.5, Voluntary Remittitur.

TRAP 46.5 was amended to clarify the procedure for voluntary remittitur. The party who loses some of a recovery in an appeal can offer remittitur in a motion for rehearing, while preserving the right to appeal the reversal to the Supreme Court.

18. TRAP 47, Court of Appeals' Opinions.

Former TRAP 47 provided that the court of appeals should not publish opinions unless they contradicted or extended existing law. Unfortunately, some courts of appeals would sometimes designate an opinion "do not publish" (dnp) even though it contradicted existing cases or created new law or dealt with matters of first impression. Additionally, some courts of appeals published a high percentage of opinions while other courts published a low percentage of opinions, thus creating an imbalance in the development of stare decisis. Also, as technology progressed, practicing lawyers and courts grew away from hard-bound case books to electronic access to digitally-stored case law, thus removing the earlier incentive to "dnp" ordinary cases in order to contain the growth of law libraries. Now storage capacity for appellate opinions is essentially limitless. The sense that the actions of appellate courts should be readily available to the public won the day, and under new TRAP 47 all court of appeals opinions in civil cases must be made available to the public and case reporting systems. The justices must designate an opinion as a "memorandum opinion" unless it meets the criteria that required publication under the old version of the rule. A memorandum opinion, indicated when the issues are settled, should be "no longer than necessary to advise the parties of the court's decision and the basic reasons for it." TRAP 47.4. So far, in practicing for the most part, the courts of appeals have not used the rule amendment to justify one paragraph opinions reciting no law and no facts, other than dismissals for failure to pay a filing fee, file an appellant's brief, and the like. The courts seem to realize that litigants expect a meaningful justification of the appellate court's decision, and are giving them.

For criminal cases, the memorandum opinion procedure was adopted, but the practice of "publish" and "do not publish" continues.

19. TRAP 52.7, Service of Record in Original Proceedings.

TRAP 52.7 was amended to provide that the party filing records in an original proceeding must serve a copy of those records on other parties, except where copies have already been provided. An index of the records must also be served.

20. TRAP 55.1, Consolidating Briefs in the Supreme Court.

TRAP 55.1 was amended in 2002 to authorize the Supreme Court to realign parties and require them to file consolidated briefs.

21. TRAP 55.2, Petitioner’s Brief on the Merits.

TRAP 55.2 was amended in 2002 to correct a misnomer referring to the petition in a rule relating to briefs on the merits.

22. TRAP 56.3, Disposing of Settled Cases.

TRAP 56.3 was amended in 2002 to permit the Supreme Court to dispose of a severable part of the appeal, in case of settlement.

23. TRAP 68.4, Contents of PDR.

TRAP 68.4 was amended in 2002 to relabel a subdivision of the rule to avoid confusion.

24. TRAP 71, Direct Appeals in Death Penalty Cases.

TRAP 71 was amended to permit the Court of Criminal Appeals to discard information not relevant to the issues on appeal, after disposition of the case.

V. DETAILS ON THE AUGUST 29, 2003, RULE AMENDMENTS.

The rule amendments promulgated by the Texas Supreme Court on August 29, 2003, dealt with three topics: MDL, supersedeas bonds, and evidence of subsequent remedial measures. Because HB 4 mandated these rule changes effective September 1, 2003, these rule amendments were adopted prior to the ordinary period of public comment. The Supreme Court is now soliciting comments from the public, bench and bar, through December 1, 2003. Any comments may be sent to the Court by mail, fax, or e-mail.

A. Multidistrict Litigation Panels.

HB 4 created a judicial panel on multidistrict litigation, consisting of five members designated from time to time by the chief justice of the Texas Supreme Court. The panel may select a judge to handle pre-trial matters in cases with one or more common questions of fact. Cases will be transferred to the judge “for the convenience of the parties” and to “promote the just and efficient conduct of the actions.”

The cases referred by the MDL panel must be returned to the court in which the case was filed, for trial.

In response to HB 4, the Texas Supreme Court on August 29, 2003, promulgated new Rule of Judicial Administration 13. New RJA is set out beginning on p. 19 below. New RJA 13 outlines the method for requesting that similar cases be consolidated for pretrial handling. Under RJA 13, the MDL panel can determine whether consolidation is appropriate, determine the specific judge to act as the pretrial judge, and order

subsequent similar cases (called “tag-along” cases) to be consolidated in the pretrial court.

RJA 13 was modeled on both the Federal multidistrict litigation rule and on existing RJA 11. RJA 13 describes the methods the pretrial court may use in the consolidated matter, the return of cases after the end of the consolidate proceeding to the original trial court for trial, and the method for appealing from the MDL panel’s order.

RJA 13 applies to cases filed on or after September 1, 2003. However, existing RJA 11 was amended to allow cases governed by existing Rule 11 to be subject to the new multidistrict litigation rule--by agreement of the parties.

B. Supersedeas Bonds.

HB 4 provided caps on the amount of bond that can be required to suspend collection of a money judgment, pending appeal. On August 29, 2003, the Texas Supreme Court amended TRAP 24 to reflect these statutory caps on supersedeas bonds. Under new TRAP 24, the maximum amount of a supersedeas bond is the lesser of \$25 million or one-half the party’s net worth. The amendment to TRAP 24 also provides a method for proving a party’s net worth. The amendment to TRAP 24 also authorizes the trial court to prohibit a party, who is subject to a judgment, from dissipating or transferring assets that may be necessary to satisfy the judgment. New TRAP 24 is set out beginning on page 8 below.

C. Evidence of Remedial Measures.

HB 4, § 5.03, provided that, “[a]s soon as practicable after the effective date of this Act, the supreme court shall amend Rule 407(a), Texas Rules of Evidence, to conform that rule to Rule 407, Federal Rules of Evidence.” On August 29, 2003, the Texas Supreme Court amended Tex. R. Evid. 407(a) to conform to Federal Rule of Evidence 407. Under old TRE 407(a), evidence of subsequent remedial measures was generally not admissible to prove negligence or culpable conduct in connection with an event, except in products liability cases based on strict liability. Under new TRE 407 (a), the products liability exception has been removed. New TRE 407 is set out on page 19 below.

VI. OTHER 2003 RULE AMENDMENTS.**A. Offer of Settlement Rule.**

HB 4 created Chapter 42 of the Texas Civil Practice and Remedies Code, which contains offer of settlement provisions designed to give litigants an incentive to make and accept reasonable settlement offers early in lawsuits. This is done by shifting

litigation-related costs to the other party when that party refuses a pre-trial settlement offer that turns out to be as good as or better than what that party ultimately wins.

The cost-shifting mechanism is available in most civil cases (excluding class actions, shareholders' derivative actions, actions for and against governmental units, actions under the Family Code, and workers' comp. actions), and comes into play upon a party filing an election to have the mechanism operate in that case. The defendant's litigation costs are shifted to the plaintiff if the plaintiff's judgment is less than 80% of the defendant's settlement offer. The plaintiff's litigation costs are shifted to the defendant if the plaintiff's judgment is more than 120% of the plaintiff's settlement offer. Even if costs are shifted against the plaintiff, the plaintiff still recovers at least 50% of his or her economic damages plus the amount of any statutory liens against the plaintiff's recovery. Litigation costs are defined to include money actually spent and obligations actually incurred that are directly related to the case, and includes court costs, reasonable fees for up to two experts, and reasonable attorney's fees. Tex. Civ. Pract. & Rem. Code § 42.001(5). The shifting occurs only for litigation costs incurred after rejection of the settlement offer.

HB 4 required the Supreme Court to promulgate a rule implementing the statute, to go into effect no later than January 1, 2004. A rule is expected to be issued by the Court in mid-September, for publication in the October Texas Bar Journal.

B. Class Action Rules.

Under Tex. Gov't Code § 22.225(b)(3), appellate jurisdiction over interlocutory appeals is generally final in the court of appeals. See *Collins v. Ison-Newsome*, 73 S.W.2d 178, 180 (Tex. 2001). However, the Supreme Court has appellate jurisdiction to review appealable interlocutory orders where the justices of the courts of appeals disagree on a question of law material to the decision, or where one court of appeals holds differently from a prior decision of another court of appeals or of the Texas Supreme Court. In a few areas, dissent and conflict is not required for the Supreme Court to have appellate jurisdiction. See Tex. Gov't. Code §22.225. House Bill 4 amended Tex. Gov't Code § 22.225 to eliminate the dissent or conflict precondition for Texas Supreme Court's appellate jurisdiction to hear an interlocutory appeal from a trial court order certifying or refusing to certify a class.

HB 4 also requires that, before a class is certified, the trial court must rule on any plea to the jurisdiction in which it is asserted that the plaintiff's claims are within

the jurisdiction of a state agency. See Tex. Civ. Pract. & Rem. Code §26.051.

HB 4 provides that an appeal from an order certifying or refusing to certify a class stays all proceedings in the trial court pending that appeal. Tex. Civ. Pract. & Rem. Code § 22.225.¹ Thus, the new statute limits the effect of TRAP 29.5, acknowledging the power of the trial court to make further orders while the interlocutory appeal is pending.

HB 4 required the Texas Supreme Court to promulgate, by December 31, 2003, rules to be used by trial courts in calculating the fees to be awarded to class counsel, including rules requiring that:

- the fee be calculated using the "lodestar method," which requires a reasonable fee based on the hours actually worked by class counsel;
- if part of the recovery by the class is non-cash, the fee paid to class counsel must be in cash and non-cash in the same percentage as the recovery by the class.

HB 4 permits the Supreme Court to determine whether to give the trial court discretion to increase or decrease the fee award, calculated by using the Lodestar method, by no more than four times based on specified factors. Tex. Civ. Pract. & Rem. Code § 26.003. The Supreme Court Advisory Committee recommended that a multiplier be allowed.

At the time this article is written, the Supreme Court has not promulgated its 2003 amendments to TRCP 42, pertaining to class actions. However, a copy of the SCAC recommend action is attached in Appendix 3.

Appendix 3 also sets out the "Jamail Committee" proposals to prohibit class certification of inchoate claims, and to make Texas the only jurisdiction in America to have "opt in" as opposed to "opt out" classes. If you have an opinion about these two proposals, write, fax or email Supreme Court Rules Attorney Chris Griesel, at the address given on page 17 of this Article.

VII. NEW CONCEPT OF CONFLICT JURISDICTION.

While the following change will not require a rule amendment, it is worth noting in the context of the

¹ The HB 4 amendment also stays trial proceedings during appeals from denial of summary judgment based upon governmental immunity, and from the grant or denial of a governmental unit's plea to the jurisdiction. Tex. Civ. Pract. & Rem. Code § 51.014(b).

present discussion that House Bill 4 gives us a statutory definition of “conflict jurisdiction” for the Supreme Court. Under prior case law, the conflicting cases must be “so far upon the same state of facts that the decision of one case is necessarily conclusive of the decision in the other. . . . [T]he decision must be based practically upon the same state of facts, and announce antagonistic conclusions. . . . An apparent inconsistency in the principles announced, or in the application of recognized principles, is not sufficient. . . . We must examine the facts in the case [alleged for conflict] and in the instant case as the facts are reflected in the opinions before us, to determine whether they are so nearly the same that the decision in one of the cases would be conclusive of the decision in the other.” *Christy v. Williams*, 298 S.W.2d 565, 567 (1957).

The new statutory definition of “conflict jurisdiction” is in Tex. Gov’t Code §22.225(e):

For purposes of Subsection (c), one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants.

VIII. APPENDIX 1 – 2002 AND 2003 AMENDMENTS TO TRAPS.

1. TRAP 4.5.

TRAP 4.5. No Notice of Judgment or Order of Appellate Court; Effect on Time to File Certain Documents

(a) *Additional Time to File Documents.* A party may move for additional time to file a motion for rehearing in the court of appeals, a petition for review, or a petition for discretionary review, if the party did not--until after the time expired for filing the document--either receive notice of the judgment or order from the clerk or acquire actual knowledge of the rendition of the judgment or order.

(b) *Procedure to Gain Additional Time.* The motion must state the earliest date when the party or the party's attorney received notice or acquired actual knowledge that the judgment or order had been rendered. The motion must be filed within 15 days of that date but in no event more than 90 days after the date of the judgment or order.

(c) *Where to File.*

* * *

(d) *Order of the Court.* If the court finds that the motion for additional time was timely filed and the party did not--within the time for filing the motion for rehearing, petition for review, or petition for discretionary review, as the case may be--receive the notice or have actual knowledge of the judgment or order, the court must grant the motion. If the court grants the motion, the time for filing the document will begin to run on the date when the court grants the motion.

Comment to 2002 change

Subdivision 4.5 is amended to clarify that a party may obtain additional time to file documents when the party fails to receive notice not only of an appellate court judgment, but of an appellate court order--such as one denying a motion for rehearing--that triggers the appeal period.

2. TRAP 9.5.

TRAP 9.5. Service.

(a) *Service of All Documents Required.* At or before the time of a document's filing, the filing party must serve a copy on all parties to the ~~appeal or review~~ proceedings. But a party need not serve a copy of the record. . . .

Comment to 2002 change

The change clarifies that the filing party must serve a copy of the document filed on all other parties, not only in an appeal or review, but in original proceedings as well. The rule applies only to filing parties. Thus, when the clerk or court reporter is responsible for filing the record, as in cases on appeal, a copy need not be served on the parties. The rule for original civil proceedings, in which a party is responsible for filing the record, is stated in subdivision 52.7.

3. TRAP 9.7.

TRAP 9.7. Adoption by Reference

Any party may join in or adopt by reference all or any part of a brief, petition, response, motion, or other document filed in an appellate court by another party in the same case.

4. TRAP 11.**TRAP 11. Amicus Curiae Briefs**

An appellate clerk may receive, but not file, an amicus curiae brief. But the court for good cause may refuse to consider the brief and order that it be returned. An amicus curiae brief must:

- (a) comply with the briefing rules for parties;
- (b) identify the person or entity on whose behalf the brief is tendered;
- (c) disclose the source of any fee paid or to be paid for preparing the brief; and
- (d) certify that copies have been served on all parties.

Comment to 2002 change

The change expressly recognizes that a court may refuse to consider an amicus curiae brief for good cause.

5. TRAP 12.6.**TRAP 12.6. Notices of Court's Judgments and Orders.**

In any proceeding, the clerk of an appellate court must promptly send a notice of any judgment, mandate, or other court order ~~of the court~~ to all parties to the proceeding.

Comment to 2002 change

Subdivision 12.6 is amended to require the clerk to notify the parties of all of the court's rulings, including the mandate.

6. TRAP 13.1.**TRAP 13.1. Duties of Court Reporters and Recorders.**

The official court reporter or court recorder must:

- (a) unless excused by agreement of the parties, attend court sessions and make a full record of the proceedings ~~unless excused by agreement of the parties~~;
- (b) take all exhibits offered in evidence during a proceeding and ensure that they are marked;
- (c) file all exhibits with the trial court clerk after a proceeding ends;
- (d) perform the duties prescribed by Rules 34.6 and 35; and
- (e) perform other acts relating to the reporter's or recorder's official duties, as the trial court directs.

Comments to 2002 change

Subdivision 13.1(a) is amended merely for clarification.

7. TRAP 18.1.**TRAP 18.1. Issuance.**

The clerk of the appellate court that rendered the judgment must issue a mandate in accordance with the judgment and send it to the clerk of the court to which it is directed and to all parties to the proceeding when one of the following periods expires:

Comment to 2003 change

Subdivision 18.1 is amended consistent with the change in subdivision 12.6.

8. TRAP 19.1.**TRAP 19.1. Plenary Power of Courts of Appeals**

A court of appeals' plenary power over its judgment expires:

- (a) 60 days after judgment if no timely filed motion to extend time or motion for rehearing is then pending; or
- (b) 30 days after the court overrules all timely filed motions for rehearing, including motions en banc reconsideration of a panel's decision under Rules 49.7, and motions to extend time to file a motion for rehearing.

Comment to 2002 change

Subdivision 19.1 amended to clarify that a motion for en banc reconsideration extends the court of appeals' plenary power in the same manner as a motion for rehearing addressed to the panel of justices who rendered the judgment or under consideration.

9. TRAP 24.2. The following changes to TRAP 24.2 were issued on August 29, 2003, to become effective for final judgments signed on or after September 1, 2003. The amendments to TRAP 24 reflect changes to the Civil Practice & Remedies Code made by House Bill 4.

TRAP 24.2. Amount of Bond, Deposit or Security(a) *Type of Judgment.*

(1) For Recovery of Money. When the judgment is for money, the amount of the bond, deposit, or security must be at least equal the amount-sum of compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment. But the amount must not exceed the lesser of:

(A) 50 percent of the judgment debtor's current net worth; or

(B) 25 million dollars.

(b) *Lesser Amount.* The trial court ~~may order a lesser amount than~~ must lower the amount of security required by (a) to an amount that will not cause the judgment debtor substantial economic harm if, after notice to all parties and a hearing, the court finds:

~~(1) that posting a bond, deposit, or security in the amount required by (a) will irreparably harm~~ is likely to cause the judgment debtor substantial economic harm; and

~~(2) that posting a bond, deposit, or security in a lesser amount will not substantially impair the judgment creditor's ability to recover under the judgment after all appellate remedies are exhausted.~~

(c) *Determination of Net Worth.*

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

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

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

(d) *Injunction.* The trial court may enjoin the judgment debtor from dissipating or transferring assets to avoid satisfaction of the judgment, but the trial court may not make any order that interferes with the judgment debtor's use, transfer, conveyance, or dissipation of assets in the normal course of business.

10. TRAP 24.4. The following change to TRAP 24.4 were issued on August 29, 2003, to become effective for final judgments signed on or after September 1, 2003. The amendments to TRAP 24 reflect changes to the Civil Practice & Remedies Code made by House Bill 4.

TRAP 24.4. Appellate Review

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

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

(2) the sureties on any bond;

(3) the type of security;

(4) the determination whether to permit suspension of enforcement; and

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

11. TRAP 25.2. [This Rule was substantially rewritten and, to avoid confusion, it is not redlined in this Article]

TRAP 25.2. Criminal Cases*(a) Rights to Appeal.*

(1) Of the State. The State is entitled to appeal a court's order in a criminal case as provided by Code of Criminal Procedure article 44.01.

(2) Of the Defendant. A defendant in a criminal case has the right of appeal under Code of Criminal Procedure article 44.02 and these rules. The trial court shall enter a certification of the defendant's right of appeal in every case in which it enters a judgment of guilt or other appealable order. In a plea bargain case--that is, a case in which defendant's plea is guilty or nolo contendere and the punishment did not exceed the punishment recommended by the prosecutor and agreed to by the defendant--a defendant may appeal only:

- (A) those matters that were raised by written motion filed and ruled on before trial, or
- (B) after getting the trial court's permission to appeal.

(b) Perfection of Appeal. In a criminal case, appeal is perfected by timely filing a sufficient notice of appeal. In a death-penalty case, however, it is unnecessary to file a notice of appeal.

(c) Form and Sufficiency of Notice.

- (1) Notice must be given in writing and filed with the trial court clerk.
- (2) Notice is sufficient if it shows the party's desire to appeal from the judgment or other appealable order, and, if the State is the appellant, the notice complies with Code of Criminal Procedure article 44.01.

(d) Certification of Defendant's Rights of Appeal. If the defendant is the appellant, the record must include the trial court's certification of the defendant's right of appeal under Rule 25.2(a)(2). The certification should be part of the record when notice is filed, but may be added by timely amendment or supplementation under this rule or Rule 34.5(c)(1) or Rule 37.1 or by order of the appellate court under Rule 34.5(c)(2). The appeal must be dismissed if a certification that shows the defendant has the right of appeal has not been made part of the record under these rules.

(e) Clerk's Duties. The trial court clerk must note on the copies of the notice of appeal and the trial court's certification of the defendant's right of appeal the case number and the date when as filed. The clerk must then immediately send one copy of each to the clerk of the appropriate court of appeals and, if the defendant is the appellant, one copy of each to the State's attorney.

(f) Amending the Notice. An amended notice of appeal or trial court's certification of the defendant's right of appeal correcting a defect or omission in an earlier filed notice or certification may be filed in the appellate court in accordance with Rule 37.1, or at any time before the appealing party's brief is filed if the court of appeals has not used Rule 37.1. The amended notice or certification is subject to being struck for cause on the motion of any party affected by the amended notice or certification. After the appealing party's brief is filed, the notice or certification may be amended only on leave of the appellate court and on such terms as the court may prescribe.

(g) Effect of Appeal. Once the record has been filed in the appellate court, all further proceedings in the trial court--except as provided otherwise by law or by these rules--will be suspended until the trial court receives the appellate-court mandate.

Comment to 2002 change

Rule 25.2, for criminal cases, is amended. Subdivision 25.2(a) states the parties' rights of appeal that are established by Code of Criminal Procedure article 44.01 and by article 44.02, the proviso of which was repealed when rulemaking power was given to the Court of Criminal Appeals. Subdivision 25.2(b) is given the requirement that a notice of appeal be in "sufficient" form, which codifies the decisional law. The requirement in former subdivision 25.2(b)(3) that a plea-bargaining appellant's notice of appeal specify the right of appeal is replaced by a requirement in subdivision 25.2(d) that the trial court certify the defendant's right of appeal in every case in which a judgment or other appealable order is entered. The certificate should be signed at the time the judgment or other appealable order is pronounced. The form of certification of the defendant's right of appeal is provided in an appendix to these rules. If the record does not include the trial court's certification that the defendant has the right of appeal, the appeal must be dismissed. If a sufficient notice of appeal or certification is not filed after the appellate court deals with the defect (see Rules 34.5(c) and 37.1), preparation of an appellate record and representation by an appointed attorney may cease.

12. TRAP 29.5.

TRAP 29.5. Further Proceedings in Trial Court.

While an appeal from an interlocutory order is pending, the trial court retains jurisdiction of the case and may make further orders, including one dissolving the order appealed from, and if permitted by law, may proceed with a trial on the merits. But the court must not make an order that:

- (a) is inconsistent with any appellate court temporary order; or
- (b) interferes with or impairs the jurisdiction of the appellate court or effectiveness of any relief sought or that may be granted on appeal.

Comment to 2002 change

Rule 29.5 is amended to acknowledge that a trial court may be prohibited by law from proceeding to trial during the pendency of an interlocutory appeal, as for example by section 51.014(b) of the Texas Civil Practice and Remedies Code.

13. TRAP 33.1.

TRAP 33.1. Preservation; How Shown.

* * *

(d) Sufficiency of Evidence Complaints in Nonjury Cases. In a nonjury case, a complaint regarding the legal or factual insufficiency of the evidence-- including a complaint that the damages found by the court are excessive or inadequate, as distinguished from a complaint that the trial court erred in refusing to amend a fact finding or to make an additional finding of fact--may be made for the first time on appeal in the complaining party's brief.

Comment to 2002 change

The last sentence of former Rule 52(d) of the Rules of Appellate Procedure has been reinstated in substance.

14. TRAP 34.6. [34.6(e) and (f) were substantially rewritten and is not redlined]

TRAP 34.6. Reporter's Record.

* * *

(e) Inaccuracies in the Reporter's Record.

(1) Correction of Inaccuracies by Agreement. The parties may agree to correct an inaccuracy in the reporter's record, including an exhibit, without the court reporter's recertification.

(2) Correction of Inaccuracies by Trial Court. If the parties cannot agree on whether or how to correct the reporter's record so that the text accurately discloses what occurred in the trial court and the exhibits are accurate, the trial court must--after notice and hearing--settle the dispute. If the court finds any inaccuracy, it must order the court reporter to conform the reporter's record (including text and any exhibits) to what occurred in the trial court, and to certify and file in the appellate court.

(3) Correction After Filing in Appellate Court. If the dispute arises after the reporter's record has been filed in the appellate court, that court may submit the dispute to the trial court for resolution. The trial court must then proceed as under subparagraph (e)(2).

(f) Reporter's Record Lost or Destroyed. An appellant is entitled to a new trial under the following circumstances:

(1) if the appellant has timely requested a reporter's record;

(2) if, without the appellant's fault, a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed or--if the proceedings were electronically recorded--a significant portion of the recording has been lost or destroyed or is inaudible;

(3) if the lost, destroyed, or inaudible portion of the reporter's record, or the lost or destroyed exhibit, is necessary to the appeal's resolution; and

(4) if the lost, destroyed or inaudible portion of the reporter's record cannot be replaced by agreement of the parties, or the lost or destroyed exhibit cannot be replaced either by agreement of the parties or with a copy determined by the trial court to accurately duplicate with reasonable certainty the original exhibit.

* * *

Comment to 2002 change

Subparagraphs 34.6(e) and (f) are amended to clarify the application to exhibits. The language in subparagraphs (e)(2) referring to the text of the record is simplified without substantive change. Subparagraph (e)(3) incorporates the procedures specified in (e)(2). The language in subparagraph (f) is clarified to require agreement only as to the portion of the text at issue, and to provide that the trial court may determine that a copy of an exhibit should be used even if the parties cannot agree.

15. TRAP 38.2.**TRAP 38.2. Appellee's Brief.***(a) Form of Brief.*

(1) An appellee's brief must conform to the requirements of ~~subdivision~~ Rule 38.1, except that:

* * *

16. TRAP 38.6.

* * *

(d) *Modifications of Filing Time.* On motion complying with Rule 10.5(b), the appellate court may extend the time for filing ~~the appellant's~~ a brief and may postpone submission of the case. A motion to extend the time to file ~~the~~ a brief may be filed before or after the date the brief is due. The court may also, in the interests of justice, shorten the time for filing briefs and for submission of the case.

Comment to 2002 change

Rule 38.6(d) is amended to clarify that an appellate court may postpone the filing of any brief, not just the appellant's brief.

17. TRAP 42.1.

TRAP 42.1. Voluntary Dismissal and Settlement in Civil Cases.

(a) *On Motion or By Agreement.* The appellate court may dispose of an appeal as follows:

~~(1) in accordance with an agreement signed by all parties or their attorneys and filed with the clerk; or~~

~~(2) in accordance with a motion of appellant to dismiss the appeal or affirm the appealed judgment or order; but no party may be prevented from seeking any relief to which it would otherwise be entitled.~~

(1) On Motion of Appellant. In accordance with a motion of appellant, the court may dismiss the appeal or affirm the appealed judgment or order unless disposition would prevent a party from seeking relief to which it would otherwise be entitled.

(2) By Agreement. In accordance with an agreement signed by the parties or their attorneys and filed with the clerk, the court may:

(A) render judgment effectuating the parties' agreements;

(B) set aside the trial court's judgment without regard to the merits and remand the case to the trial court for rendition of judgment in accordance with the agreements; or

(C) abate the appeal and permit proceedings in the trial court to effectuate the agreement.

(b) *Partial Disposition.* A severable portion of the proceeding may be disposed of under (a) if it will not prejudice the remaining parties.

(c) *Effect on Court's Opinion.* In dismissing a proceeding, the appellate court will determine whether to withdraw any opinion it has already issued. An agreement or motion for dismissal cannot be conditioned on withdrawal of the opinion.

(d) Costs. Absent agreement of the parties, the court will tax costs against the appellant.

Comment to 2002 change

Rule 42.1 is amended to clarify the procedures for implementing settlements on appeal and to expressly give courts flexibility in effectuating settlements. The rule is also clarified to expressly permit the dismissal of an appeal without dismissal of the action itself. The rule does not permit an appellate court to order a new trial merely on the agreement of the parties absent reversible error, or to vacate a trial court's judgment absent reversible error or a settlement.

18. TRAP 46.5.

TRAP 46.5. Voluntary Remittitur. If a court of appeals reverses the trial court's judgment because of a legal error that affects only part of the damages awarded by the judgment, the affected party may--within 15 days after the court of appeals' judgment-- voluntarily remit the amount ~~that the court of appeals determined should not have been awarded by the judgment~~ that the affected party believes will cure the reversible error. A party may include in a motion for rehearing--without waiving any complaint that the court of appeals erred--a conditional request that the court accept the remittitur and affirm the trial court's judgment as reduced. If the court of appeals determines that the voluntary remittitur is not sufficient to cure the reversible error, but that remittitur is appropriate, the court must suggest a remittitur in accordance with Rule 46.3. If the remittitur is timely filed and the court of appeals determines that the voluntary remittitur cures the reversible error, then the court must accept the remittitur and reform and affirm the trial court judgment in accordance with the remittitur.

Comment to 2002 change

Subdivision 46.5 is amended to clarify the procedure for offering a voluntary remittitur. The offer may be made in a motion for rehearing without waiving any complaint that the court of appeals erred, thereby extending the deadlines for further appeal.

19. TRAP 47. [Rule 47 was substantially rewritten and is not redlined]**TRAP 47. Opinions, Publication, and Citation.**

47.1 Written Opinions. The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.

47.2 Designating and Signing of Court Opinions; Participating Justices.

- (a) Each opinion of the court must be designated either an "Opinion" or a "Memorandum Opinion." A majority of the justices who participate in considering the case must determine whether the opinion will be signed by a justice or will be per curiam and whether it will be designated an opinion or memorandum opinion. The names of the participating justices must be noted on all written opinions or orders of the court or a panel of the court.
- (b) *Criminal Cases.* In addition, each opinion in a criminal case must bear the notation "publish" or "do not publish" as determined--before the opinion is handed down--by a majority of the justices who participate in considering the case. Any party may move the appellate court to change the notation, but the court of appeals must not change the notation after the Court of Criminal Appeals has acted on any party's petition for discretionary review or other request for relief. The Court of Criminal Appeals may, at any time, order that a "do not publish" notation be changed "publish."

47.3 Distribution of Opinions.

All opinions of the courts of appeals are open to the public and must be made available to public reporting services, print or electronic.

47.4 Memorandum Opinions.

If the issues are settled, the court should write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reasons for it. An opinion may not be designated a memorandum opinion if the author of a concurrence or dissent opposes that designation. An opinion must be designated a memorandum opinion unless it does any of the following:

- (a) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases;
- (b) involves issues of constitutional law or other legal issues important to the jurisprudence of Texas;
- (c) criticizes existing law; or
- (d) resolves an apparent conflict of authority.

47.5 Concurring and Dissenting Opinions.

Only a justice who participated in the decision of a case may file or join in an opinion concurring in or dissenting from the judgment of the court of appeals. Any justice on the court may file an opinion in connection with a denial of a hearing or rehearing en banc.

47.6 Change in Designation by En Banc Court.

A court en banc may change a panel's designation of an opinion.

47.7 Citation of Unpublished Opinions.

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

Comment to 2002 change

The rule is substantively change to discontinue the use of the "do not publish" designation in civil cases, to require that all opinions of the court of appeals be made available to public reporting services, and to remove prospectively any prohibition against the citation of opinions as authority in civil cases. The rule favors the use "memorandum opinions" designated as such except in certain types of cases but does not change other requirements, such as those in *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635-636 (Tex. 1986). An opinion previously designated "do not publish" has not precedential value but may be cited. The citation must include the notation, "(not designated for publication)." Of course, whenever an opinion not readily available is cited, copies should be furnished to the court and opposing counsel.

20. TRAP 52.7.

TRAP 52.7. Record.

* * *

(c) Service of Record on All Parties. Relator and any party who files materials for inclusion in the record must--at the same time--serve each party:

(1) those materials not previously served on that party as part of the record in another original appellate proceeding in the same or another court; and

(2) and index listing the materials filed and describing them in sufficient detail to identify them.

Comment to 2002 change

Subdivision 52.7(c) added to specify how record materials in original proceedings are to be served. Ordinarily, a party must serve records materials and an index of those materials on all other parties. But when materials have already been served in related original proceedings, they need not be served again. Examples are when original proceedings, raising the same issues are brought in both the court of appeals and the Supreme Court, or when separate original proceedings are filed arising out of the same underlying lawsuit. The purpose of this procedure is to ensure that all parties have record materials readily available without requiring unnecessary duplication.

21. TRAP 55.1.

TRAP 55.1. Request by Court.

A brief on the merits must not be filed unless requested by the Court. With or without granting the petition for review, the Court may request the parties to file briefs on the merits. In appropriate cases, the Court may realign parties and direct that parties file consolidated briefs.

Comment to 2002 change

Subdivision 55.1 is clarified to provide that the Court may realign parties require consolidated briefing for a clearer and more efficient presentation of the case.

22. TRAP 55.2.

TRAP 55.2. Petitioner's Brief on the Merits.

* * *

(e) Statement of Jurisdiction. The petition brief must state, without argument, the basis of the Court's jurisdiction.

23. TRAP 56.3.

TRAP 56.3. Settled Cases.

If a case is settled by agreement of the parties and all parties so move, the Supreme Court may grant the petition if it has not already been granted and, without hearing argument or considering the merits, render a judgment to effectuate the agreement. The Supreme Court's action may include setting aside the judgment of the court of appeals or the trial court without regard to the merits and remanding the case to the trial court for rendition of a judgment in accordance with the agreement. The Supreme Court may abate the case until the lower court's proceedings to effectuate the agreement are complete. A severable portion of the proceeding may be disposed of if it will not prejudice the remaining parties. In any event, the Supreme Court's order does not

vacate the court of appeals' opinion unless the order specifically provides otherwise. An agreement or motion cannot be conditioned on vacating the court of appeals' opinion.

Comment to 2002 change

Subdivision 56.3 is clarified to provide for partial settlements.

24. TRAP 68.4.

TRAP 68.4. Contents of Petition.

A petition for discretionary review must be as brief as possible. It must be addressed to the "Court of Criminal Appeals of Texas" and must state the name of the party or parties applying for review. The petition must contain the following items:

* * *

(g) *Reasons for Review*. *Argument*. The petition must contain a direct and concise argument, with supporting authorities, amplifying the reasons for granting review. See Rule 66.3. The court of appeals' opinions will be considered with the petition, and statements in those opinions need not be repeated if counsel accepts them as correct.

* * *

Comment to 2002 change

The original catchline of subdivision 68.4(g) was "Reasons for Review," which caused confusion because of its similarity to the catch line in subdivision 66.3 ("Reasons for Granting Review"). It is changed to "Argument."

25. TRAP 71.

TRAP 71. Direct Appeals.

71.1 Direct Appeal.

Cases in which the death penalty has been assessed under Code of Criminal Procedure article 37.071, and cases in which bail has been denied in non- capital cases under Article I, Section 11a of the Constitution, are appealed directly to the Court of Criminal Appeals.

71.2 Record.

The appellate record should be prepared and filed in accordance with Rules 31, 32, 34, 35 and 37, except that the record must be filed in the Court of Criminal Appeals. After disposition of the appeal, the Court may discard copies of juror information cards or other portions of the clerk's record that are not relevant to an issue on appeal.

71.3 Briefs.

Briefs in a direct appeal should be prepared and filed in accordance with Rule 38, except that the brief need not contain an appendix (Rule 38.1(j)), and the brief in a case in which the death penalty has been assessed

may not exceed 125 pages. All briefs must be filed in the Court of Criminal Appeals. The brief must include a short statement of why oral argument would be helpful, or a statement that oral argument is waived.

Comment to 2002 change

A requirement that briefs include a statement regarding oral argument is added.

IX. APPENDIX 2 – AUGUST 29, 2003 AMENDMENTS TO RULES. In the rule set out below, previous language that has been deleted is in ~~overstrike~~, while new language is underscored. Entirely new rules or subsections are not redlined.

Misc. Docket No. 03–9145

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

ORDERED that:

1. As required by the Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws ____ (“HB 4”), and in accordance with its mandatory deadlines:
 - a. Rule 166 of the Texas Rules of Civil Procedure is amended as follows, effective September 1, 2003;
 - b. Rules 24.2(a)(1), 24.2(b), and 24.4(a) of the Texas Rules of Appellate Procedure are amended, and Rules 24.2(c)-(d) are added, as follows, effective in all cases in which a final judgment is signed on or after September 1, 2003 (see HB 4 §§ 7.02, 7.03, 7.04(b));
 - c. Rule 407(a) of the Texas Rules of Evidence is amended as follows, effective in all cases filed on or after July 1, 2003 (see HB § 5.03, 23.02(c));
 - d. Rule 11.1 of the Texas Rules of Judicial Administration is amended, and Rule 11.7 is added, as follows, effective in all cases pending on August 31, 2003; and
 - e. Rule 13 of the Texas Rules of Judicial Administration is added as follows, effective in all cases filed on or after September 1, 2003 (see HB 4 §§ 3.03, 23.02(a)).
2. The Clerk is directed to:
 - a. file a copy of this Order with the Secretary of State;
 - b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the Texas Bar Journal;
 - c. send a copy of this Order to each elected member of the Legislature; and
 - d. submit a copy of the Order for publication in the Texas Register.

3. These amendments may be changed in response to comments received before December 1, 2003. Any interested party may submit comments in writing as follows:

by mail addressed to

Rules Attorney
The Supreme Court of Texas
P.O. Box 12248
Austin TX 78711

by fax to the attention of the Rules Attorney at 512-463-1365

by email to chris.griesel@courts.state.tx.us.

SIGNED AND ENTERED this 29th day of August, 2003.

Thomas R. Phillips, Chief Justice
Nathan L. Hecht, Justice
Craig T. Enoch, Justice
Priscilla R. Owen, Justice
Harriet O'Neill, Justice
Wallace B. Jefferson, Justice
Michael H. Schneider, Justice
Steven Wayne Smith, Justice
J. Dale Wainwright, Justice

1. Rule 166, Texas Rules of Civil Procedure, is amended by adding the following paragraph to the end of the rule:

Pretrial proceedings in multidistrict litigation may also be governed by Rules 11 and 13 of the Rules of Judicial Administration.

2. Rule 24.2(a)(1) of the Texas Rules of Appellate Procedure is amended as follows:

24.2. Amount of Bond, Deposit or Security

(a) *Type of Judgment.*

(1) For Recovery of Money. When the judgment is for money, the amount of the bond, deposit, or security must be at least equal the amount sum of compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment. But the amount must not exceed the lesser of:

(A) 50 percent of the judgment debtor's current net worth; or

(B) 25 million dollars.

3. Rule 24.2(b) of the Texas Rules of Appellate Procedure is amended as follows:

24.2. Amount of Bond, Deposit or Security

* * *

(b) *Lesser Amount.* The trial court ~~may order a lesser amount than~~ must lower the amount of security required by (a) to an amount that will not cause the judgment debtor substantial economic harm if, after notice to all parties and a hearing, the court finds-

~~(1) that posting a bond, deposit, or security in the amount required by (a) will irreparably harm is likely to cause the judgment debtor substantial economic harm; and~~

~~(2) that posting a bond, deposit, or security in a lesser amount will not substantially impair the judgment creditor's ability to recover under the judgment after all appellate remedies are exhausted.~~

4. Rules 24.2(c)-(d) of the Texas Rules of Appellate Procedure are added as follows:

24.2. Amount of Bond, Deposit or Security

* * *

(c) *Determination of Net Worth.*

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

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

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

(d) *Injunction.* The trial court may enjoin the judgment debtor from dissipating or transferring assets to avoid satisfaction of the judgment, but the trial court may not make any order that interferes with the judgment debtor's use, transfer, conveyance, or dissipation of assets in the normal course of business.

5. Rule 24.4(a) of the Texas Rules of Appellate Procedure is amended as follows:

24.4. Appellate Review

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

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

(2) the sureties on any bond;

(3) the type of security;

- (4) the determination whether to permit suspension of enforcement; and
- (5) the trial court's exercise of discretion under 24.3(a).

6. Rule 407(a) of the Texas Rules of Evidence is amended as follows:

RULE 407. Subsequent Remedial Measures; Notification of Defect

(a) Subsequent Remedial Measures. When, after an injury or harm allegedly caused by an event, measures are taken ~~which~~ that, if taken previously, would have made the ~~event~~ injury or harm less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence, ~~or~~ culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction ~~in connection with the event~~. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. ~~Nothing in this rule shall preclude admissibility in products liability cases based on strict liability.~~

7. Rule 11.1 of the Texas Rules of Judicial Administration is amended as follows:

11.1 Applicability. This rule applies to any case filed before September 1, 2003, that involves material questions of fact and law in common with another case pending in another court in another county on or after October 1, 1997.

8. Rule 11.7 of the Texas Rules of Judicial Administration is added as follows [since the entire rule is new, there is no underscoring]:

11.7 Relationship to Rule 13.

- (a) *Generally.* This rule is to be construed and applied so as to facilitate the implementation of Rule 13 to the greatest extent possible.
- (b) *Application of Rule 13 by Agreement of the Parties.* Parties may agree to the application of Rule 13. Such an agreement must be in writing and must be joined by all parties to the case. An agreement is effective and irrevocable when it is filed with the trial court if:
 - (1) no pretrial judge has been appointed in the case, or
 - (2) a pretrial judge has been appointed in the case, and the parties in all related cases to which the same pretrial judge has been assigned have likewise agreed to the application of Rule 13.
- (c) *Assignments of Pretrial Judges After September 1, 2003.* An assignment of a pretrial judge to any case after September 1, 2003, must be made in consultation with the Chair of the Multidistrict Litigation Panel.
- (d) *Consultation of Pretrial Judges.* In conducting pretrial proceedings and deciding pretrial matters, a pretrial judge assigned under this rule must consult with the judge of a pretrial court to which related cases have been transferred under Rule 13.

9. Rule 13 of the Texas Rules of Judicial Administration is added as follows [since the entire rule is new, there is no underscoring]:

Rule 13. Multidistrict Litigation

13.1 Authority and Applicability.

- (a) *Authority.* This rule is promulgated under sections 74.161-.164 of the Texas Government Code.
- (b) *Applicability.* This rule applies to civil actions that involve one or more common questions of fact and that were filed in a constitutional county court, county court at law, probate court, or district court on or after September 1, 2003. Cases filed before that date are governed by Rule 11 of these rules.

13.2 Definitions. As used in this rule:

- (a) *MDL Panel* means the judicial panel on multidistrict litigation designated pursuant to section 74.161 of the Texas Government Code, including any temporary members designated by the Chief Justice of the Supreme Court of Texas in his or her discretion when regular members are unable to sit for any reason.
- (b) *Chair* means the chair of the MDL Panel, who is designated by the Chief Justice of the Supreme Court of Texas.
- (c) *MDL Panel Clerk* means the Clerk of the Supreme Court of Texas.
- (d) *Trial court* means the court in which a case is filed.
- (e) *Pretrial court* means the district court to which related cases are transferred for consolidated or coordinated pretrial proceedings under this rule.
- (f) *Related* means that cases involve one or more common questions of fact.
- (g) *Tag-along case* means a case related to cases in an MDL transfer order but not itself the subject of an initial MDL motion or order.

13.3 Procedure for Requesting Transfer.

- (a) *Motion for Transfer; Who May File; Contents.* A party in a case may move for transfer of the case and related cases to a pretrial court. The motion must be in writing and must:
 - (1) state the common question or questions of fact involved in the cases;
 - (2) contain a clear and concise explanation of the reasons that transfer would be for the convenience of the parties and witnesses and would promote the just and efficient conduct of the cases;
 - (3) state whether all parties in those cases for which transfer is sought agree to the motion; and
 - (4) contain an appendix that lists:
 - (A) the cause number, style, and trial court of the related cases for which transfer is sought; and

- (B) all parties in those cases and the names, addresses, telephone numbers, fax numbers, and email addresses of all counsel.

(b) *Request for Transfer by Judges.* A trial court or a presiding judge of an administrative judicial region may request a transfer of related cases to a pretrial court. The request must be in writing and must list the cases to be transferred.

(c) *Transfer on the MDL Panel's Own Initiative.* The MDL Panel may, on its own initiative, issue an order to show cause why related cases should not be transferred to a pretrial court.

(d) *Response; Reply; Who May File; When to File.* Any party in a related case may file:

- (1) a response to a motion or request for transfer within twenty days after service of such motion or request;
- (2) a response to an order to show cause issued under subparagraph (c) within the time provided in the order; and
- (3) a reply to a response within ten days after service of such response.

(e) *Form of Motion, Response, Reply, and Other Documents.* A motion for transfer, response, reply, or other document addressed to the MDL Panel must conform to the requirements of Rule 9.4 of the Texas Rules of Appellate Procedure. Without leave of the MDL Panel, the following must not exceed 20 pages: the portions of a motion to transfer required by subparagraphs (a)(1)-(2); a response; and a reply. The MDL Panel may request additional briefing from any party.

(f) *Filing.* A motion, request, response, reply, or other document addressed to the MDL Panel must be filed with the MDL Panel Clerk. The MDL Panel Clerk may require that all documents also be transmitted to the clerk electronically. In addition, a party must send a copy of the motion, response, reply, or other document to each member of the MDL Panel.

(g) *Filing Fees.* The MDL Panel Clerk may set reasonable fees approved by the Supreme Court of Texas for filing and other services provided by the clerk.

(h) *Service.* A party must serve a motion, response, reply, or other document on all parties in related cases in which transfer is sought. The MDL Panel Clerk may designate a party or parties to serve a request for transfer on all other parties. Service is governed by Rule 9.5 of the Texas Rules of Appellate Procedure.

(i) *Notice to Trial Court.* A party must file in the trial court a notice — in the form prescribed by the MDL Panel — that a motion for transfer has been filed. The MDL Panel Clerk must cause such notice to be filed when a request for transfer by a judge has been filed.

(j) *Evidence.* The MDL Panel will accept as true facts stated in a motion, response, or reply unless another party contradicts them. A party may file evidence with the MDL Panel Clerk only with leave of the MDL Panel. The MDL Panel may order parties to submit evidence by affidavit or deposition and to file documents, discovery, or stipulations from related cases.

(k) *Hearing.* The MDL Panel may decide any matter on written submission or after an oral hearing before one or more of its members at a time and place of its choosing. Notice of the

date of submission or the time and place of oral hearing must be given to all parties in all related cases.

(l) *Decision*. The MDL Panel may order transfer if three members concur in a written order finding that related cases involve one or more common questions of fact, and that transfer to a specified district court will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of the related cases.

(m) *Orders Signed by Chair or Clerk; Members Identified*. Every order of the MDL Panel must be signed by either the chair or by the MDL Panel Clerk, and must identify the members of the MDL Panel who concurred in the ruling.

(n) *Notice of Actions by MDL Panel*. The MDL Panel Clerk must give notice to all parties in all related cases of all actions of the MDL Panel, including orders to show cause, settings of submissions and oral arguments, and decisions. The MDL Panel Clerk may direct a party or parties to give such notice. The clerk may determine the manner in which notice is to be given, including that notice should be given only by email or fax.

(o) *Retransfer*. On its own initiative, on a party's motion, or at the request of the pretrial court, the MDL Panel may order cases transferred from one pretrial court to another pretrial court when the pretrial judge has died, resigned, been replaced at an election, requested retransfer, recused, or been disqualified, or in other circumstances when retransfer will promote the just and efficient conduct of the cases.

13.4 Effect on the Trial Court of the Filing of a Motion for Transfer.

(a) *No Automatic Stay*. The filing of a motion under this rule does not limit the jurisdiction of the trial court or suspend proceedings or orders in that court.

(b) *Stay of Proceedings*. The trial court or the MDL Panel may stay all or part of any trial court proceedings until a ruling by the MDL Panel.

13.5 Transfer to a Pretrial Court.

(a) *Transfer Effective upon Notice*. A case is deemed transferred from the trial court to the pretrial court when a notice of transfer is filed with the trial court and the pretrial court. The notice must:

(1) list all parties who have appeared and remain in the case, and the names, addresses, phone numbers, and bar numbers of their attorneys or, if a party is pro se, the party's name, address, and phone number;

(2) list those parties who have not yet appeared in the case; and

(3) attach a copy of the MDL transfer order.

(b) *No Further Action in Trial Court*. After notice of transfer is filed in the trial court, the trial court must take no further action in the case except for good cause stated in the order in which such action is taken and after conferring with the pretrial court. But service of any process already issued by the trial court may be completed and the return filed in the pretrial court.

- (c) *Transfer of Files; Master File and New Files in the Pretrial Court.* If the trial court and pretrial court are in the same county, the trial court must transfer the case file to the pretrial court in accordance with local rules governing the courts of that county. If the trial court and pretrial court are not in the same county, the trial court clerk must transmit the case file to the pretrial court clerk. The pretrial court clerk, after consultation with the judge of the pretrial court, must establish a master file and open new files for each case transferred using the information provided in the notice of transfer. The pretrial court may direct the manner in which pretrial documents are filed, including electronic filing.
- (d) *Filing Fees and Costs.* Unless the MDL Panel assesses costs otherwise, the party moving for transfer must pay the cost of refileing the transferred cases in the pretrial court, including filing fees and other reasonable costs.
- (e) *Transfer of Tag-along Cases.* A tag-along case is deemed transferred to the pretrial court when a notice of transfer — in the form described in Rule 13.5(a) — is filed in both the trial court and the pretrial court. Within 30 days after service of the notice, a party to the case or to any of the related cases already transferred to the pretrial court may move the pretrial court to remand the case to the trial court on the ground that it is not a tag-along case. If the motion to remand is granted, the case must be returned to the trial court, and costs including attorney fees may be assessed by the pretrial court in its remand order. The order of the pretrial court may be appealed to the MDL Panel by a motion for rehearing filed with the MDL Panel Clerk.

13.6 Proceedings in Pretrial Court.

- (a) *Judges Who May Preside.* The MDL Panel may assign as judge of the pretrial court any active district judge, or any former or retired district or appellate judge who is approved by the Chief Justice of the Supreme Court of Texas. An assignment under this rule is not subject to objection under chapter 74 of the Government Code. The judge assigned as judge of the pretrial court has exclusive jurisdiction over each related case transferred pursuant to this rule unless a case is retransferred by the MDL Panel or is finally resolved or remanded to the trial court for trial.
- (b) *Authority of Pretrial Court.* The pretrial court has the authority to decide, in place of the trial court, all pretrial matters in all related cases transferred to the court. Those matters include, for example, jurisdiction, joinder, venue, discovery, trial preparation (such as motions to strike expert witnesses, preadmission of exhibits, and motions in limine), mediation, and disposition by means other than conventional trial on the merits (such as default judgment, summary judgment, and settlement). The pretrial court may set aside or modify any pretrial ruling made by the trial court before transfer over which the trial court's plenary power would not have expired had the case not been transferred.
- (c) *Case Management.* The pretrial court should apply sound judicial management methods early, continuously, and actively, based on its knowledge of each individual case and the entire litigation, in order to set fair and firm time limits tailored to ensure the expeditious resolution of each case and the just and efficient conduct of the litigation as a whole. After a case is transferred, the pretrial court should, at the earliest practical date, conduct a hearing and enter a case management order. The pretrial court should consider at the hearing, and its order should address, all matters pertinent to the conduct of the litigation, including:
 - (1) settling the pleadings;

- (2) determining whether severance, consolidation, or coordination with other actions is desirable and whether identification of separable triable portions of the case is desirable;
 - (3) scheduling preliminary motions;
 - (4) scheduling discovery proceedings and setting appropriate limitations on discovery, including the establishment and timing of discovery procedures;
 - (5) issuing protective orders;
 - (6) scheduling alternative dispute resolution conferences;
 - (7) appointing organizing or liaison counsel;
 - (8) scheduling dispositive motions;
 - (9) providing for an exchange of documents, including adopting a uniform numbering system for documents, establishing a document depository, and determining whether electronic service of discovery materials and pleadings is warranted;
 - (10) determining if the use of technology, videoconferencing, or teleconferencing is appropriate;
 - (11) considering such other matters the court or the parties deem appropriate for the just and efficient resolution of the cases; and
 - (12) scheduling further conferences as necessary.
- (d) *Trial Settings.* The pretrial court, in conjunction with the trial court, may set a transferred case for trial at such a time and on such a date as will promote the convenience of the parties and witnesses and the just and efficient disposition of all related proceedings. The pretrial court must confer, or order the parties to confer, with the trial court regarding potential trial settings or other matters regarding remand. The trial court must cooperate reasonably with the pretrial court, and the pretrial court must defer appropriately to the trial court's docket. The trial court must not continue or postpone a trial setting without the concurrence of the pretrial court.

13.7 Remand to Trial Court.

- (a) *No Remand If Final Disposition by Pretrial Court.* A case in which the pretrial court has rendered a final and appealable judgment will not be remanded to the trial court.
- (b) *Remand.* The pretrial court may order remand of one or more cases, or separable triable portions of cases, when pretrial proceedings have been completed to such a degree that the purposes of the transfer have been fulfilled or no longer apply.
- (c) *Transfer of Files.* When a case is remanded to the trial court, the clerk of the pretrial court will send the case file to the trial court without retaining a copy unless otherwise ordered. The parties may file in the remanded case copies of any pleadings or orders from

the pretrial court's master file. The clerk of the trial court will reopen the trial court file under the cause number of the trial court, without a new filing fee.

13.8 Pretrial court orders binding in the trial court after remand.

- (a) *Generally.* The trial court should recognize that to alter a pretrial court order without a compelling justification would frustrate the purpose of consolidated and coordinated pretrial proceedings. The pretrial court should recognize that its rulings should not unwisely restrict a trial court from responding to circumstances that arise following remand.
- (b) *Concurrence of the Pretrial Court Required to Change Its Orders.* Without the written concurrence of the pretrial court, the trial court cannot, over objection, vacate, set aside, or modify pretrial court orders, including orders related to summary judgment, jurisdiction, venue, joinder, special exceptions, discovery, sanctions related to pretrial proceedings, privileges, the admissibility of expert testimony, and scheduling.
- (c) *Exceptions.* The trial court need not obtain the written concurrence of the pretrial court to vacate, set aside, or modify pretrial court orders regarding the admissibility of evidence at trial (other than expert evidence) when necessary because of changed circumstances, to correct an error of law, or to prevent manifest injustice. But the trial court must support its action with specific findings and conclusions in a written order or stated on the record.
- (d) *Unavailability of Pretrial Court.* If the pretrial court is unavailable to rule, for whatever reason, the concurrence of the MDL Panel Chair must be obtained.

13.9 Review.

- (a) *MDL Panel Decision.* Orders of the MDL Panel, including those granting or denying motions for transfer, may be reviewed only by the Supreme Court in original proceedings.
- (b) *Orders by the Trial Court and Pretrial Court.* Orders and judgments of the trial court and pretrial court may be reviewed by the appellate court that regularly reviews orders of the court in which the case is pending at the time review is sought, irrespective of whether that court issued the order or judgment to be reviewed.

13.10 MDL Panel Rules. The MDL Panel will operate at the direction of its Chair in accordance with rules prescribed by the panel and approved by the Supreme Court of Texas.

X. APPENDIX 3 – SCAC PROPOSED CLASS ACTION RULE. The following amendments to TRCP 42 have been recommended by the Supreme Court Advisory Committee to the Texas Supreme Court, but have not yet been determined by the Supreme Court.

AUGUST 26, 2003 DRAFT OF CLASS ACTION RULE

[NOTE: This draft is based on the SCAC subcommittee recommendation of August 18, 2003 and the changes recommended by the full committee on August 22-23.]

Rule 42. Class Actions

(a) Prerequisites to a Class Action.

[NOTE: This subdivision (a) is the current subdivision (a) of the Texas rule, except as noted.]

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law, or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

[NOTE: This is the current first paragraph of subdivision (a) of the Texas rule unchanged.]

~~**Derivative Suit.**—In a derivative suit brought pursuant to Article 5.14 of the Texas Business Corporation Act, the petition shall contain the allegations (1) that the plaintiff was a record or beneficial owner of shares, or of an interest in a voting trust for shares at the time of the transaction of which he complains, or his shares or interest thereafter devolved upon him by operation of law from a person who was the owner at that time, and (2) with particularity, the efforts of the plaintiff to have suit brought for the corporation by the board of directors, or the reasons for not making any such efforts. The derivative suit may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders similarly situated in enforcing the right of the corporation. The suit shall not be dismissed or compromised without the approval of the court, and notice in the manner directed by the court of the proposed dismissal or compromise shall be given to shareholders.~~

COMMENT TO 2003 AMENDMENT:

The second paragraph of former subdivision (a), involving derivative suits, has been deleted because Article 5.14 of the Business Corporation Act, sets forth detailed procedures for derivative suits. *See Christian v. IGC Telecom Canada, Inc.*, 996 S.W.2d 270, 274-275 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

(b) Class Actions Maintainable.

[NOTE: This is the current subdivision (b) of the Texas rule, except as noted.]

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

- (1) the prosecution of separate actions by or against individual members of the class would create a risk of
 - (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or
 - (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;

or

~~(3) where the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or~~

[NOTE: Paragraph (3) is deleted as unnecessary.]

~~(4) (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include these questions include:~~

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

[NOTE: This is a suggested change based on the full committee discussion of Friday, August 22.]

(c) Determining by Order Whether to Certify a Class Action; ~~Appointing Class Counsel; Notice and Membership in Class; Judgment.;~~ ~~Multiple Classes and Subclasses.~~

[NOTE: The language of this subdivision (c) comes verbatim from the pending revision of subdivision (c) of federal rule 23, except as noted.]

COMMENT:

See TEX.CIV.PRAC. & REM. CODE § 51.014 (b) (An interlocutory appeal of an order that certifies or refuses to certify a class “stays all other proceedings in the trial court pending resolution of that appeal.”).

(1) (A) When a person sues or is sued as a representative of a class, the court must — at an early practicable time — determine by order whether to certify the action as a class action.

COMMENT TO 2003 AMENDMENT:

The requirement that certification be decided “at an early practicable time” is a change from the previous Texas rule 42 (c)(1) and federal rule 23 (c)(1), which required the trial court to decide the certification issue “as soon as practicable after the commencement of [the suit].”

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under ~~Rule 23(g)~~ Rule 42 (g).

(C) An order under ~~Rule 23(e)(1)~~ Rule 42 (c)(1) may be altered or amended before final judgment.

(D) An order granting or denying certification under Rule 42(b)(3) must state:

(i) the elements of each claim or defense asserted in the pleadings;

(ii) any issues of law or fact common to the class members;

(iii) any issues of law or fact affecting only individual class members.

(iv) the issues that will be the object of most of the efforts of the litigants and the court.

(v) other available methods of adjudication that exist for the controversy.

In addition, pursuant to the requirements of Rule 42(b)(3)(A)-(D), the certification must further state:

(vi) why the issues common to the members of the class do or do not predominate over individual issues.

(vii) why a class action is or is not superior to other available methods for the fair and efficient adjudication of the controversy, and

(viii) if a class is certified, how the class claims and any issues affecting only individual members, raised by the claims or defenses asserted in the pleadings, will be tried in a manageable, time efficient manner.

[NOTE: This codifies the requirements of *Southwestern Refining Co. v. Bernal*, 22 S.W.2d 425, 434 (Tex.2000), and *Henry Schein, Inc. v. Stromboe*, 102 S.W.2d 675, 689 (Tex.2002). This is professor Dorsaneo’s rewrite based on the committee discussion of August 22.]

(2) (A) For any class certified under ~~Rule 23(b)(1) or (2)~~ Rule 42 (b)(1) or (2), the court may direct appropriate notice to the class.

[NOTE: Currently Texas rule 42 (c)(2) requires all classes certified to be given “the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable efforts.” But under this change, classes certified under rule 42 (b) (1) or (2) will now receive only “appropriate notice.” The individual notice requirement will continue to apply only to classes certified under 42 (b)(3).]

(B) For any class certified under ~~Rule 23(b)(3)~~ Rule 42 (b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded and
- the binding effect of a class judgment on class members under ~~rule 23(e)(3)~~ Rule 42 (c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

~~**(4)** When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.~~

[NOTE: This language has been deleted because it is currently appears in subdivision (d) of the Texas rule.]

(d) Actions Conducted Partially as Class Actions; Multiple Classes and Subclasses. When appropriate

- (1)** an action may be brought or maintained as a class action with respect to particular issues, or
- (2)** a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

[NOTE: This is current subdivision (b) of the Texas rule, which is identical to subdivision (c), paragraph (4), of the current and pending federal rules.]

(e) Settlement, ~~Voluntary~~ Dismissal, or Compromise.

[NOTE: The language of this subdivision (e) comes verbatim from the pending revision of subdivision (e) of federal rule 23, except as noted. The full committee decided to delete the word “voluntary” throughout this subdivision.]

(1) (A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

~~**(B)** The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise. Notice of the [material terms of the] proposed [settlement,] dismissal or compromise [together with an explanation of when and how the members may elect to be excluded from the class] shall be given to all members in such manner as the court directs.~~

[NOTE: The committee recommended rejecting the language of paragraph (1) (B) of the pending federal rule (which has been stricken through above). Instead the committee recommended retention of the last clause of current subdivision (e) of the current Texas and federal rules (“ . . . notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.”) with the additional language shown in brackets.]

(C) The court may approve a settlement, ~~voluntary~~ dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, ~~voluntary~~ dismissal, or compromise is fair, reasonable, and adequate.

[NOTE: For an explanation of “fair, reasonable, and adequate,” see *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 955-957 (Tex. 1996).]

(2) The parties seeking approval of a settlement, ~~voluntary~~ dismissal, or compromise under ~~Rule 23(e)(1)~~ Rule 42 (e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, ~~voluntary~~ dismissal, or compromise.

(3) In an action previously certified as a class action under ~~Rule 23(b)(3)~~ Rule 42 (b)(3), the court may ~~refuse to~~ not approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

[NOTE 1: The committee recommended that the language of the pending federal revision of paragraph (3) be changed to require notice to all class members. Accordingly the phrase “may refuse to” has been replaced with the phrase “may not.” This notice can be sent out as part of the notice of settlement.]

(4) (A) Any class member may object to a proposed settlement, ~~voluntary~~ dismissal, or compromise that requires court approval under ~~Rule 23(e)(1)(A)~~ Rule 42 (e)(1)(A).

(B) An objection made under ~~Rule 23(e)(4)(A)~~ Rule 42 (e)(4)(A) may be withdrawn only with the court’s approval.

(g) Class Counsel.

[NOTE: The language of this subdivision (g) comes verbatim from the pending revision of subdivision (g) of the federal rule, except as noted. The Jamail Committee proposal differs in some respects.]

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

- the work counsel has done in identifying or
- investigating potential claims in the action
- counsel’s experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
- counsel’s knowledge of the applicable law, and
- the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) Appointment Procedure.

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

[NOTE: Compare with the pending amendment to subdivision (c), paragraph (1) (A), *supra*, p. 26, which allows for some delay in appointing class counsel.]

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under ~~Rule 23-42 (g)(1)(B) and (C)~~ Rule 42 (g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant or applicants best able to represent the interests of the class.

[NOTE: The phrase “or applicants” is added to make it clear that more than one class counsel can be appointed.]

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under ~~Rule 23(h)~~ Rule 42(h) & (i).

(h) Procedure for determining Attorney Fees Award.

[NOTE: The language of this subdivision (h) comes verbatim from the pending revision of subdivision (h) of the federal rules, except as noted. It is also identical to subdivision (h) of the Jamail Committee proposal.]

In an action certified as a class action, the court may award ~~reasonable~~ attorney fees in accordance with subdivision (i) and nontaxable costs authorized by law or by agreement of the parties as follows:

[NOTE: The first sentence of subdivision (h) of the pending federal revision allows award of “reasonable” attorney’s fees, but this could conflict with the specific provisions of subdivision (i) of this draft revision.]

(1) Motion for Award of Attorney Fees. A claim for an award of attorney fees and nontaxable costs must be made by motion ~~under Rule 54(d)(2)~~, subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

[NOTE: The reference to federal rule 54(d)(2) is deleted because there is no corresponding provision in the Texas rules.]

(2) Objections to Motion. A class member, or a party from whom payment is sought, may object to the motion.

(3) Hearing and Findings. The court ~~may~~ must hold a hearing in open court and must find the facts and state its conclusions of law on the motion ~~under Rule 52(a)~~. The court must state its findings and conclusions in writing or orally on the record.

[NOTE: The reference to federal rule 52(a) is deleted and the last sentence is added because Texas has no clear procedure for making findings and conclusions outside of Rule 297, Tex.R. Civ.P., which is inapplicable here.]

~~**(4) Reference to Special Master or Magistrate Judge.** The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).~~

[NOTE: This subparagraph was rejected because there are no provisions in the Texas rules corresponding to federal rules 52 (a) and 54 (d).]

(i) Attorney's fees award

(1) In awarding attorney's fees, the court shall first determine a Lodestar figure by multiplying the number of hours reasonably worked times a reasonable hourly rate. The court may increase or decrease the Lodestar figure, but the attorney's fees award must not exceed four times the Lodestar figure and it must not be less than 25% of the Lodestar figure. In making these determinations, the court shall consider TEX.DISCIPLINARY. R. PROF. CONDUCT § 1.04 (b) and other applicable law.

COMMENTS:

a. This provision implements TEX. CIV. PRAC. & REM. CODE § 26.003 (a).

b. In determining the hourly rate and in calculating the multiplier, the court may consider the factors set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-719 (5th Cir.1974). Ten of these factors are codified in Tex. Disciplinary. R.Prof.Conduct 1.04 (b) (quoted in *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 818 (Tex.1997)).

(2) If any portion of the benefits recovered for the class are in the form of coupons or other noncash common benefits, the attorney's fees awarded in the action must be in cash and noncash amounts in the same proportion as the recovery for the class.

[NOTE: Compare TEX. CIV. PRAC. & REM. CODE § 26.003(b).]

(j) Effective date

The 2003 amendments will apply only to an actions filed on or after ~~September 1, 1977~~ 2003 [the effective date of the rule].

[NOTE: This full committee voted for the above language 14 to 12. The rejected proposal would have read something like this:

The 2003 amendment to subdivision (i) will apply only to an action filed on or after [the effective date of the rule]. All other 2003 amendments will apply only to proceedings that occur after [the effective date of the rule].

Thus, if certification occurred in a pending suit after the effective date, then the new certification provisions would control, but if certification occurred before the effective date, then certification would be controlled by the old rule.

The provision concerning attorney's fees in subdivision (i) above are mandated by House Bill 4, which "applies only to an action filed on or after [September 1, 2003]." HB4 § 23.02, p.130. Moreover, the legislature is directed to pass a rule concerning attorney's fees "on or before December 31, 2003." *Id.* § 1.01, p.1 (adding TEX.CIV. PRAC.& REM.CODE § 26.001 (b)). The other changes in Rule 42 are not mandated by the legislature.]

XI. APPENDIX 4 – JAMAIL COMMITTEE PROPOSAL FOR CLASS ACTIONS: INCHOATE CLAIMS AND OPT IN CLASSES. The following proposals were forwarded to the Supreme Court by the Jamail Committee, a group gathered together to make proposals for rule changes. The Jamail Committee made various proposals relating to class actions, two of which are set out below, one relating to inchoate claims, and the other converting Texas from an "opt out" procedure to and "opt in" procedure.

Rule 42. Class Actions

(1) Certain Inchoate Claims.

(A) In a class action for personal injuries, death, products liability or property damage involving mass tort or disaster litigation, claimants whose injuries or claims are wholly inchoate may not be certified as a class or subclass or included within another certified class or subclass. Injuries or claims are considered "wholly inchoate" where there has been no discernable or detectable manifestation of injury or damage using admissible expert evidence.

(B) In certifying classes, the court is shall, after a hearing and upon proper evidence presented, determine whether any claimants assert wholly inchoate claims. Inchoate claims excluded from class certification shall, by court order, be protected against the running of any applicable statute of limitations by a specific finding that the claims have not manifested, ripen~~ed~~ accrued or been discoverable as of the date of the written order. Entry of an order containing such findings shall not trigger any applicable statute of limitations.

[NOTE: The underlined material does not appear in the Jamail Committee proposal.]

(2) After the court has determined that a class action may be maintained it shall order the party claiming the class action to direct to the members of the class the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort. In all class actions maintained under subdivisions (b)(1), (b)(2), and (b)(3), this notice shall advise the members of the class (A) the nature of the suit, (B) the binding effect of the judgment, whether favorable or not, and (C) the right of any member to appear before the court and challenge the court's determinations as to the class and its representatives. In all class actions maintained under subdivision (b)(4) this notice shall advise each member of the class (A) the nature of the suit; (B) that the court will include him in the class only if he so requests by a specified date; (C) that the judgment, whether favorable or

not, will include and bind all members who do request inclusion by the specified date; and (D) that any member who does not request inclusion may if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivisions (b)(1), (b)(2), and (b)(3), whether or not favorable to the class, shall include, describe, and be binding upon all those whom the court finds to be members of the class and who received notice as provided in subdivision (c)(2). The judgment in an action maintained as a class action under subdivision (b)(4), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have requested inclusion and whom the court finds to be members of the class.