

Report from Subcommittee on TRCPs 1-14c
Disposing of Exhibits and Depositions after Notice by Publication
December 21, 2004

I. Scope of task.

At its November 12, 2004 meeting, the full Supreme Court Advisory Committee referred to this subcommittee a letter from Charles Bacarisse, Harris County District Clerk, relating to disposal of exhibits and depositions in a civil cases. A copy of the letter is attached as Appendix A. The letter raises two concerns: (1) the “cumbersome, expensive process of notification” by the clerk’s office prior to disposing of exhibits and depositions in cases that are final; and (2) “on-going problems of storage of depositions and exhibits,” particularly oversized exhibits. The subcommittee was asked by Justice Hecht to report back on the first concern at the January meeting of the Advisory Committee.

II. Meeting of Subcommittee

The subcommittee met on December 14, 2004 after soliciting further information from the Harris County District Clerk’s office and after some initial research with the help of Rules Attorney Lisa Hobbs. The subcommittee members each brought a unique perspective to the issues of disposition of exhibits and depositions: Bonnie Wolbrueck, District Clerk of Williamson County, one of the fastest growing counties in the state; Stephen Yelenosky, newly-elected district judge of Travis County; Robert Valadez, a trial lawyer in San Antonio who practices in both state and federal courts; and Pamela Baron, an appellate specialist. Rules Attorney Lisa Hobbs also attended the meeting.

The subcommittee members attending the meeting were unanimous in supporting the proposals made in this report. All recommendations relate only to civil cases.

III. Notice Issue

A. Current Rules. Currently, the provisions governing disposition of exhibits and depositions by clerks in civil cases is governed by Tex. R. Civ. P. 14b and 191.4(e) (formerly Rule 209), which provide as follows:

Rule 14b. Return or Other Disposition of Exhibits.

The clerk of the court in which the exhibits are filed shall retain and dispose of the same as directed by the Supreme Court.

Rule 191.4(e).

Retention requirement for courts. The clerk of the court shall retain and dispose of deposition transcripts and depositions upon written questions as directed by the Supreme Court.

The Supreme Court, effective January 1, 1988, adopted two orders relating to retention and disposition of exhibits and depositions. The orders are essentially identical:

Supreme Court Order Relating to Retention and Disposition of Exhibits

In compliance with the provisions of Rule 14b, the Supreme Court hereby directs that exhibits offered or admitted into evidence shall be retained and disposed of by the clerk of the court in which the exhibits are filed upon the following basis.

The order shall apply only to: (1) those cases in which judgment has been rendered on service of process by publication and in which no motion for new trial was filed within two years after judgment was signed; and (2) all other cases in which judgment has been signed for one year and in which no appeal was perfected or in which a perfected appeal was dismissed or concluded by a final judgment as to all parties and the issuance of the appellate court's mandate such that the case is no longer pending on appeal or in the trial court.

After first giving all attorneys of record thirty days written notice that they have an opportunity to claim and withdraw the trial exhibits, the clerk, unless otherwise directed by the court, may dispose of the exhibits. If any such exhibits is desired by more than one attorney, the clerk shall make the necessary copies and prorate the cost among all the attorneys desiring the exhibit.

If the exhibit is not a document or otherwise capable of reproduction, the party who offered the exhibit shall be entitled to claim same; provided, however, that the party claiming the exhibit shall provide a photograph of said exhibit to any other party upon request and payment of the reasonable cost thereof by the other party.

Supreme Court Order Relating to Retention and Disposition of Deposition Transcripts and Depositions Upon Written Questions

In compliance with the provisions of Rule 209, the Supreme Court hereby directs that deposition transcripts and depositions upon written questions be retained and disposed of by the clerk of the court in which the same are filed upon the following basis.

The order shall apply only to: (1) those cases in which judgment has been rendered on service of process by publication and in which no motion for new trial was filed within two years after judgment was signed; and (2) all other cases in which judgment has been signed for one year and in which no appeal was perfected or in which a perfected appeal was dismissed or concluded by a final judgment as to all parties and the issuance of the appellate court's mandate such that the case is no longer pending on appeal or in the trial court.

After first giving all attorneys of record written notice that they have an opportunity to claim and withdraw the same, the clerk, unless otherwise directed by the court, may dispose of them thirty days after giving such notice. If any such document is desired by more than one attorney, the clerk shall make the necessary copies and prorate the cost among all the attorneys desiring the exhibit.

These orders permit clerks to destroy exhibits and deposition transcripts in a case one year after final judgment (two years if service was by publication), provided no appeal is pending, upon individual notice to the attorneys of record.

B. Experience of district clerks. District court clerks have complained about these procedures for some time. As reflected in the letter from Charles Bacarisse, Harris County has “an estimated 3.5 million case files, 106,500 civil exhibits, and 19,100 civil depositions currently in inventory. The exhibits range from enlarged charts, texts and photographs to 55-gallon drums, automobile parts, torn clothing, etc.” Mr. Bacarisse’s primary concern is with the notice provision and is two-fold: (1) compliance is expensive, especially in larger counties; and (2) compliance, especially in long disposed cases, is very difficult because attorneys have often either passed away or moved. Bonnie Wolbrueck, District Clerk of Williamson County and a member of the subcommittee agreed that notice is time consuming for the clerks, that many notices are returned as undeliverable by the post office, and that those few attorneys responding to the notices have little recollection of the case or the exhibits. In some instances, however, the attorneys do request return of the exhibits or depositions.

The Harris County District Clerk’s office has twice requested, and received, from the Supreme Court a special order permitting disposition of exhibits and depositions upon publication, as opposed to individual notice. In each instance, the clerk’s office posted a generic notice in the Texas Bar Journal stating that the office would begin disposition of exhibits and depositions in cases that met the requirements of the court’s order (generally, one year after final judgment or two years after final judgment in cases involving service by publication). *See* Appendix B, 55 Tex. B. J. 111, 500 (reprinting orders in Misc. Docket Nos. 92-0024, 92-0060). The effect of these past orders is to eliminate the need

for individual notice in cases that are final and to allow disposition of exhibits and depositions thirty days following the date of publication of the notice.

Mr. Bacarisse has proposed that the standing order be amended to permit notice by publication and that disposition be permitted beginning the third month after publication in the Texas Bar Journal.

C. Analysis of Subcommittee. The subcommittee viewed the notice requirement as a substantial burden on the district clerks in civil cases, especially given that, at the time the notice is given, judgment in the case was rendered one to two years earlier. The subcommittee identified the issues as two-fold: (1) who should have principal responsibility for insuring that any desired exhibits or depositions are timely withdrawn, the clerk or the parties; and (2) whether notice by publication adds any protections that could not be accomplished by either a global change to the standing order or a rule amendment.

The subcommittee agreed that the principal burden for withdrawing exhibits and depositions should be on the parties and not the clerk. The subcommittee looked to federal court practice — each district court by local rule regulates disposition of exhibits. Most of the federal district courts in Texas place the burden on the parties to withdraw exhibits within a certain time period after the case becomes final:

Northern District of Texas Local Rule 79.2 Disposition of Exhibits

Removal or Destruction After Final Disposition of Case. All exhibits in the custody of the court must be removed from the clerk's office within 60 days after final disposition of a case. The attorney who introduced the exhibits shall be responsible for their removal. Any exhibit not removed within the 60-day period may be destroyed or otherwise disposed of by the clerk.

Eastern District of Texas Local Rule CV-79

Books and Records Kept by the Clerk

(a) Disposition of Exhibits And/or Sealed Documents by the Clerk. Thirty days after a civil action has been finally disposed of by the appellate courts or from the date the appeal time lapsed, the clerk is authorized to take the following actions:

- (1) Exhibits. Destroy any sealed or unsealed exhibits filed therein which have not been previously claimed by the attorney of record for the party offering the same in evidence at the trial;
- (2) Sealed documents. Scan the original documents into electronic images that are stored on the court's computer system in lieu of maintaining the original paper copies.

The clerk shall ensure that the database of scanned images is maintained for the foreseeable future, and that no unauthorized access of the stored images occurs. Once a document has been scanned, the paper original will be destroyed.

Western District of Texas CV-79

Books and Records Kept by the Clerk and Entries Therein.

No record, paper or deposition in the files of the Court shall be taken from the office or custody of the clerk, except upon written consent of the Court. The party offering any exhibit or deposition shall be responsible for its removal from the clerk's office within sixty days after the final disposition of the case, including appeal thereof. A detailed receipt shall be given by the party to the clerk. Any exhibit or deposition remaining more than sixty (60) days after final disposition of the case, including appeal, may be destroyed or otherwise disposed of by the clerk.

The subcommittee believed that a similar approach should be taken in the state courts, placing the burden on the parties and not the clerks to ensure the timely withdrawal of exhibits and depositions.

The subcommittee also determined that there was no substantial advantage to notice by publication as opposed to altering the standing order or rules to impose an obligation on the parties to withdraw exhibits and depositions within a certain time period following finality of judgment. The latter approach would establish a rule in all cases and require attorneys to add to their tickler system a date by which exhibits and depositions must be withdrawn. The former approach would make that date less certain, as it would hinge on dates of publication by various district courts across the state.

Recommendation: The subcommittee thus recommends that either the standing order or the rules be amended to adopt an approach similar to that of the federal district courts, setting a time certain following the date a case becomes final by which parties must withdraw exhibits and depositions.

D. Means of Making Change. Current regulation of the disposition of exhibits in civil cases requires only Supreme Court action. The Government Code grants the Texas State Library and Archives Commission authority to issue records retention schedules for local governments and state agencies. TEX. GOV'T CODE §§ 441.158, 441.185. These schedules consist of the Commission's prescribed retention periods as well as retention periods prescribed by other law. *See id.* (requiring the Commission to state in its schedules the retention periods prescribed by federal or state law, rule of court, or regulation for any record and to prescribe retention periods for all other records). The Commission has approved a schedule for district courts; the schedule references the

supreme court's orders on Texas Rules of Civil Procedure 14b and 191.4(e) (formerly 209).

The Government Code expressly provides that, after the adoption of a records retention schedule, a retention period for a record prescribed in a new or amended rule of court that differs from that in a records retention schedule prevails over that in the schedule. TEX. GOV'T CODE § 441.158. Upon inquiry, the Commission has confirmed that it will modify its schedules to accommodate the Court's decision on the Harris County request.

Recommendation: Because disposition of exhibits and depositions is currently regulated by standing order and because the Court has indicated it would like to proceed on this matter quickly, the subcommittee recommends that the standing order be altered to place a time certain by which parties must withdraw exhibits and deposition and to eliminate individual notice. The subcommittee would recommend that the Court encourage district clerks to post the revised order on their websites and in their offices. The subcommittee, however, would recommend that, after a period of time to see whether the change is working well and fairly, the language of the standing order be incorporated into Rules 14b and 191.4(e), as the subcommittee believes that the rules are more accessible than standing orders and provide better notice.

E. Proposed Changes to Standing Orders. The proposed changes immediately follow this report. The changes are three-fold: (1) the notice requirement is eliminated; (2) the changes place the burden on the parties to withdraw exhibits and depositions within thirty days following the date the case becomes subject to the order; and (3) only the party offering the exhibit or deposition may withdraw it.

Under this proposal, the time period for withdrawal is not substantially altered. The changes leave in place the current time schedule: a case becomes subject to the rule on the later of (a) in most cases, one year after final judgment, if no appeal is taken; (b) in cases in which service is made by publication, two years after final judgment; and (c) in cases in which an appeal is taken, thirty days after the appellate court issues its mandate. The clerk may begin disposition thirty days after the case becomes subject to the standing order, as opposed to thirty days after notice that a case had become subject to the standing order.

The subcommittee also believed that the clerk should not be the arbiter of disputes over ownership of exhibits and depositions nor should the clerk have the burden of replicating or photographing disputed items. Under the proposal, only the party who offered the exhibit or depositions has the ability of right to withdraw it. The standing order, however, would allow a non-offering party to obtain a ruling from the court to permit withdrawal or to preserve the items at any time before the period expired.

IV. Storage of Bulky Items

Aside from notice, the clerks are also facing problems of storage space, particularly for bulky items like those identified in Mr. Bacarisse's letter: "enlarged

charts, texts and photographs to 55-gallon drums, automobile parts, torn clothing, etc.” The clerk currently has an obligation to keep these items for one to two years following final judgment.

The subcommittee agreed that the clerk should not be burdened in most cases with serving as a storage facility for oversized items, unless those items are critical to an appeal. Again, the experience of the Texas federal district courts was instructive. Several require the parties to submit a file-sized reproduction or photograph prior to the end of the trial and to withdraw oversized exhibits at that time. The parties would bear the burden of transmitting original exhibits to the appellate court in those rare instances that such items were needed on appeal.

Southern District of Texas LR 79.2(A) Disposition of Exhibits

Exhibits that are not easily stored in a file folder (like posters, parts, or models) must be withdrawn within two business days after the completion of the trial and reduced reproductions or photographs substituted.

Eastern District of Texas Local Rule CV-79(c)(3)

The parties shall provide letter-sized copies of pictures of any physical or oversized exhibit to the court prior to the conclusion of trial. Oversized exhibits will be returned at the conclusion of the trial or hearing. If parties desire the oversized exhibits to be sent to the appellate court, it will be their responsibility to send them.

This approach has several advantages. It greatly reduces the storage burden currently imposed on district clerks. It is also more compatible with electronic storage. Many of the larger clerk’s offices are scanning all court documents. Currently, the clerks have no ability to scan bulky exhibits.

Recommendation. The subcommittee would recommend that the civil rules be amended to impose a requirement that parties substitute file-sized copies or reproductions of bulky items prior to the end of trial and withdraw the items at that time. The subcommittee, however, recognizes that this change would effect several rules: Tex. R. Civ. P. 75b, Filed Exhibits: Withdrawal; Tex. R. App. P. 34.5(f), relating to original exhibits; and possibly other rules. The subcommittee would like to have the benefit of discussion by and input from the full committee prior to embarking on this task.

Subcommittee Recommendation on Proposed Changes to Supreme Court Order Relating to Retention and Disposition of Exhibits

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The party who offered an exhibit must remove it from the clerk's office within thirty days of the later of (1) a case becoming subject to this order, or (2) the date this order is published in the Texas Bar Journal. ~~After first giving all attorneys of record thirty days written notice that they have an opportunity to claim and withdraw the trial exhibits, t~~ The clerk, unless otherwise directed by the court, may dispose of any the exhibits remaining after such time period. ~~If any such exhibits is desired by more than one attorney, the clerk shall make the necessary copies and prorate the cost among all the attorneys desiring the exhibit.~~

~~If the exhibit is not a document or otherwise capable of reproduction, the party who offered the exhibit shall be entitled to claim same; provided, however, that the party claiming the exhibit shall provide a photograph of said exhibit to any other party upon request and payment of the reasonable cost thereof by the other party.~~

**Subcommittee Recommendation on Proposed Changes to
Supreme Court Order Relating to Retention and Disposition of Depositions
Transcripts and Depositions Upon Written Questions**

In compliance with the provisions of Rule ~~209~~191.4(e), the Supreme Court hereby directs that deposition transcripts and depositions upon written questions be retained and disposed of by the clerk of the court in which the same are filed upon the following basis.

The order shall apply only to: (1) those cases in which judgment has been rendered on service of process by publication and in which no motion for new trial was filed within two years after judgment was signed; and (2) all other cases in which judgment has been signed for one year and in which no appeal was perfected or in which a perfected appeal was dismissed or concluded by a final judgment as to all parties and the issuance of the appellate court's mandate such that the case is no longer pending on appeal or in the trial court.

The party who offered a deposition transcript or deposition upon written questions must remove it from the clerk's office within thirty days of the later of (1) a case becoming subject to this order, or (2) the date this order is published in the Texas Bar Journal. ~~After first giving all attorneys of record written notice that they have an opportunity to claim and withdraw the same, t~~ The clerk, unless otherwise directed by the court, may dispose of any deposition transcript or deposition upon written questions remaining after such time period. ~~them thirty days after giving such notice. If any such document is desired by more than one attorney, the clerk shall make the necessary copies and prorate the cost among all the attorneys desiring the exhibit.~~