The Supreme Court of Texas

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

Chambers of
Justice Nathan L. Hecht

September 22, 2006

Charles L. "Chip" Babcock
Chair, Supreme Court Rules Advisory Committee
Jackson Walker, L.L.P.
1401 McKinney, Suite 1900
Houston, TX 77010

Re: Referral of Various Proposed Changes to Rules of Civil and Appellate Procedure
Via e-mail

Dear Chip:

The Court requests the Advisory Committee's recommendations on a number of proposed changes to the Rules of Civil Procedure and Rules of Appellate Procedure. These proposals are summarized in two attached appendices. Appendix A contains three proposals submitted to the Court by the State Bar Rules Committee. Appendix B contains proposals submitted to the Court over the past six months or so from various sources: members of the bar, members of the Advisory Committee, and members of the Court or the Court's staff. Although a number of rules proposals received by the Court are not being referred at this time, the Court believes that the proposals discussed in the attached appendices warrant the Committee's evaluation.

The Court greatly appreciates the Committee's thoughtful consideration of these issues, for its dedication to the rules process, and for your continued leadership on the Committee. I look forward to seeing you all in October.

Sincerely,

Nathan L. Hecht
Justice

Rule: 199 (**Depositions Upon Oral Examination**)

Text:

199.2 Procedure for Noticing Oral Deposition

(a) *Time to Notice Deposition.* A notice of intent to take an oral deposition must be served on the witness and all parties a reasonable time before the deposition is taken. An oral deposition may be taken prior to the appearance of all parties only by agreement of the parties or with leave of court. An oral deposition may be taken outside the discovery period only by agreement of the parties or with leave of court.

Summary of Issue:

The State Bar Rules Committee recommends the above change in response to the observation that there have been times where a party has sought an early deposition prior to appearance of all parties to a lawsuit for strategic purposes only. The SBRC notes that the proposed change would restrict the first deposition to occurring after all parties had appeared unless otherwise agreed or with leave of court.

Rule: TRCP 245 **(Assignment of Cases for Trial)**

Text of Existing Rule:

The court may set contested cases on written request of any party, or on the court's own motion, with reasonable notice of not less than forty-five days to the parties of a first setting for trial, or by agreement of the parties; provided, however, that when a case previously has been set for trial, the Court may reset said contested case to a later date on any reasonable notice to the parties or by agreement of the parties. Non-contested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time.

A request for trial setting constitutes a representation that the requesting party reasonably and in good faith expects to be ready for trial by the date requested, but no additional representation concerning the completion of pretrial proceedings or of current readiness for trial shall be required in order to obtain a trial setting in a contested case.

Proposed New Text (proposed additions underlined):

1. The court may set contested cases on written request of any party or on the court's own motion. Unless all parties agree otherwise, the court shall give reasonable notice of the first setting for trial of not less than seventy-five [75] days to the parties who have appeared when notice is given.
2. When a case previously has been set for trial, the court may reset the case to a later date on any reasonable notice to the parties who have appeared or by agreement of those parties. Non-contested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time.

3. If a party is joined or appears after a case has been set for trial, the court shall give reasonable notice of the trial setting to that party of not less than seventy-five [75] days after that party has appeared, unless that party agrees otherwise. For good cause, the court has discretion to shorten the notice to the newly joined or appearing party of an existing trial setting; provided, that the court shall grant that party a reasonable period to resolve its pretrial motions and conduct discovery.

4. A request for trial setting constitutes a representation that the requesting party reasonably and in good faith expects to be ready for trial by the date requested, but no additional representation concerning the completion of pretrial proceedings or of current readiness for trial shall be required in order to obtain a trial setting in a contested case.

Summary of Issue:

The State Bar Rules Committee felt that two matters had rendered the 45-day period under the existing rule insufficient time to prepare for trial. First, the SBRC notes that changes in statutory law and rules of procedure made it difficult to resolve a number of pre-trial motions (including motions for summary judgment, change of venue, and forum non conveniens, and designation of responsible third parties and of experts) before trial if a case is set shortly after it is filed. Second, the rule does not provide a minimum notice period for parties first joined after the case is set for trial.

Rule: TRCP 296 **(Requests for Findings of Fact and Conclusions of Law)**

Text:

In any case tried in the district or county court without a jury, or in any matter where findings are required or permitted, any party may request the court to state in writing its findings of fact and conclusions of law. Such request shall be entitled "Request for Findings of Fact and Conclusions of Law" and shall be filed within twenty days after judgment is signed with the clerk of the court, who shall immediately call such request to the attention of the judge who tried the case. The party making the request shall serve it on all other parties in accordance with Rule 21a. The findings of fact shall only include the elements of each ground of recovery or defense.

Comment: The trial court is not required to support its findings of fact with recitals of the evidence.

Summary of Issue:

The State Bar Rules Committee observes that many courts and practitioners feel compelled to make or propose voluminous and detailed findings of fact, out of fear that omitting a single key fact may undermine the validity of a subsequent judgment or broaden the basis for appeal. This is said to be time-consuming and a waste of both judicial economy and the litigants' resources.

The SBRC proposes that a solution to this problem may lie in a combination of the proposed additional language to Rule 296 and the comment that follows. The proposed comment and rule text would clarify that while the elements of each ground of recovery or defense must be contained in findings of fact, a trial court would not be required to support its findings with recitals of the evidence on which its findings are based, or to make findings on every controverted fact.

Rule: TRCP 306a (**Periods to Run From Signing of Judgment**)

Current text:

1. **Beginning of Periods.** The date of judgment or order is signed as shown of record shall determine the beginning of the periods prescribed by these rules for the court's plenary power to grant a new trial or to vacate, modify, correct or reform a judgment or order and for filing in the trial court the various documents that these rules authorize a party to file within such periods including, but not limited to, motions for new trial, motions to modify judgment, motions to reinstate a case dismissed for want of prosecution, motions to vacate judgment and requests for findings of fact and conclusions of law; but this rule shall not determine what constitutes rendition of a judgment or order for any other purpose.

***

4. **No Notice of Judgment.** If within twenty days after the judgment or other appealable order is signed, a party adversely affected by it or his attorney has neither received the notice required by paragraph (3) of this rule nor acquired actual knowledge of the order, then with respect to that party all the periods mentioned in paragraph (1) [the trial court's plenary power to grant a new trial or to vacate, modify, correct, or reform a judgment or order] shall begin on the date that such party or his attorney received such notice or acquired actual knowledge of the signing, whichever occurred first, but in no event shall such periods begin more than ninety days after the original judgment or other appealable order was signed.

5. **Motion, Notice and Hearing.** In order to establish the application of paragraph (4) of this rule, the party adversely affected is required to prove in the trial court, on sworn motion and notice, the date on which the party or his attorney first either received a notice of the judgment or acquired actual knowledge of the signing and that this date was more than twenty days after the judgment was signed.

Summary of Issue:

TRAP 4.2 generally mirrors TRCP 306a by granting additional time to file post-judgment pleadings when a party did not receive notice of judgment within 20 days after it was signed. The main difference is that TRCP 306a addresses pleadings governed by the rules of civil procedure (such as a motion for new trial), whereas TRAP 4.2 addresses pleadings governed by the rules of appellate procedure (such as a notice of appeal). However, unlike TRCP 306a, TRAP 4.2(c) also specifically requires the trial court to "sign a written order that finds the date when the party or the party's attorney first either received notice or acquired actual knowledge that the judgment or order was signed." The issue for

the Committee's study is whether this or similar language should be added to TRCP 306a(5) to require the trial court to specify the date a party received late notice of judgment. See *In re The Lynd Co.*, No. 05-0432 (holding that TRAP 4.2(c)'s required finding stating the date of late notice cannot be implicitly read into TRCP 306a, and disapproving court of appeals decisions holding otherwise).

Rule: TRAP 13 (**Court Reporters and Court Recorders**)

Current text:

13.2 Additional Duties of Court Recorder

The official court recorder must also:**(a)** ensure that the recording system functions properly throughout the proceeding and that a complete, clear, and transcribable recording is made;**(b)** make a detailed, legible log of all proceedings being recorded, showing:

(1) the number and style of the case before the court;**(2)** the name of each person speaking;**(3)** the event being recorded such as the voir dire, the opening statement, direct and

cross-examinations, and bench conferences;**(4)** each exhibit offered, admitted, or excluded;**(5)** the time of day of each event; and**(6)** the index number on the recording device showing where each event is recorded;

(c) after a proceeding ends, file with the clerk the original log;

(d) have the original recording stored to ensure that it is preserved and is accessible; and

(e) ensure that no one gains access to the original recording without the court's written order.

Summary of Issue:

This proposal was submitted to the Court by Justice David Gaultney. He notes that TRAP 13 currently places no duty on the court recorder to transcribe the electronic recording of the trial. He further observes that parties to appeals often must request extensions of time because the electronic recordings of the trial have not been transcribed at the time the parties file them with the court of appeals, which is the event that triggers the countdown for filing briefs (assuming the clerk's record has already been filed), and that needless delay results while the parties obtain a transcription. He proposes to amend TRAP 13.2 to address the duty of transcribing electronic recordings by expressly assigning that duty to the recorder, or, in the alternative, by allowing parties to prepare transcriptions from a certified copy of the recording provided by the recorder.

Rule: TRAP 20.1 (**When Party Is Indigent**)

Current text:

20.1 Civil Cases

(a) *Establishing Indigence*. A party who cannot pay the costs in an appellate court may proceed without advance payment of costs if:

(1) the party files an affidavit of indigence in compliance with this rule.

****

(c) *When and Where Affidavit Filed*.

(1) Appeals. An appellant must file the affidavit of indigence in the trial court with or before the notice of appeal. An appellee who is required to pay part of the cost of preparation of the record under Rule 34.5(b)(3) or 34.6(c)(3) must file an affidavit of indigence in the trial court within 15 days after the date when the appellee becomes responsible for paying that cost.

Summary of Issue:

The rule requires an indigent appellant to file an affidavit "in the trial court with or before the notice of appeal." TRAP 20.1(c)(1). Although indigence affidavits previously submitted for trial purposes are literally filed "before the notice of appeal," several courts of appeals have held that such trial affidavits do not satisfy the affidavit requirement of TRAP 20.1(c)(1). *See In re J.B.*, 2003 WL 1922835 at *1 n.1 (Tex. App.—Tyler 2003, no pet.); *Holt v. F.F. Enters.*, 990 S.W.2d 756, 758 (Tex. App.—Amarillo 1998, pet. denied). The Committee is asked to consider whether TRAP 20.1 should be amended to clarify that an affidavit of indigence filed at trial does not satisfy TRAP 20.1.

Proponents would argue that the rule should be clarified to remove any ambiguity suggesting that prior trial affidavits can satisfy the appellate requirement. Pro se litigants are generally held to the standard of an attorney responsible for following the rules of procedure; however, pro se and other litigants may find it difficult to perceive from the rule itself the necessity of a new affidavit at the time appeal is perfected. Proponents would argue that, while it is reasonable to require indigents to file a new affidavit at the time appeal is perfected, even if they had previously filed one for trial purposes, the rule should be amended to clarify that the trial affidavit does not satisfy the requirement of TRAP 20.1.

The Court recently issued a *per curiam* opinion in *Higgins v. Randall County Sheriff's Office*, No. 05-0095, holding that because the indigence-affidavit requirement on appeal is not jurisdictional, courts of appeals must allow a reasonable time to cure the defect. 2006 WL 1450042, at *1. To the extent that non-compliance results from the failure of pro se litigants and others to look beyond the text of TRAP 20.1, the *Higgins* decision may not

resolve the ambiguity concern described above. However, the decision arguably makes the perceived need for clarification less urgent, as it clarifies that the initial failure to file an appeal affidavit will not result in immediate dismissal.

Rule: TRAP 24 (**Suspension of Enforcement of Judgment Pending Appeal in Civil Cases**)

Current text:

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.

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).

Summary of Issues:

(1) TRAP 24.2(c) does not presently address the situation in which the judgment debtor files a net worth affidavit that is either facially defective (*i.e.*, it fails to state "complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained"), or is facially sufficient in that respect but is found not to be credible. An example of the latter situation was presented in *In re Smith*, No. 06-0107, and *In re Main Place Homes*, No. 06-0108, which were decided in a per curiam opinion of the Supreme Court issued May 5, 2006. In those cases, which involved separate mandamus petitions arising from the same trial, the judgment debtor submitted a net worth affidavit supported by an accounting statement, but the trial court's finding of an alter ego led the court to attribute to the debtor a significantly higher net worth than the debtor claimed.

The present rule notes that "[t]he judgment debtor has the burden of proving net worth," and it requires the trial court to make a net worth finding that "states with particularity the factual basis for that determination." TRAP 24.2(c)(3). However, it is arguably unclear whether a net worth affidavit that is deficient or is found to lack credibility serves to supersede the judgment pending appeal—particularly where the judgment creditor did not provide competing financial data sufficient to let the trial court make a net worth finding supported by detailed evidence, as required by the rule. Accordingly, the Committee is requested to consider:

- whether Rule 24 should be amended to state that a judgment is not superseded when the judgment debtor fails to obtain a net worth finding in line with his net worth affidavit; and

- whether Rule 24 should be amended to explicitly allow a judgment creditor to file a motion to strike a net worth affidavit for facial deficiencies, providing for a hearing on the motion within a relatively short time, and providing that the judgment is no longer superseded if the trial court grants the motion to strike.

(2) TRAP 24.4(a) provides that, "[o]n a party's motion to the appellate court, that court may review" various aspects of a trial court's supersedeas rulings. The 1990 amendment to former TRAP 49, which changed "court of appeals" to "appellate court," introduced uncertainty in at least two respects. First, it is unclear whether the current rule gives either a court of appeals or the Supreme Court jurisdiction over a supersedeas ruling when there is no appeal of the underlying case yet pending before the court. Second, if the rule authorizes an appellate court to review supersedeas rulings when the underlying case is not before it, the rule does not specify by what procedural vehicle supersedeas issues should be presented to the Supreme Court, *i.e.*, whether by motion or by mandamus. (The Supreme Court is

an "appellate court" as defined by TRAP 3.1(b)). The Court addressed this issue in *Smith/Main Place Homes* by treating the "Tex. R. App. P. 24.4 Motion" as a mandamus petition. *In re Smith*, 2006 WL 1195327, at *3 (Tex. May 5, 2006). The Committee is further asked to address whether Rule 24 should be amended to address either of the above issues.

Rule: TRAP 41 (**Panel and En Banc Decision**)

Current text (with potential revisions shown):

41.1 Decision by Panel

(a) *Constitution of panel.* Unless a court of appeals with more than three justices votes to decide a case en banc, a case must be assigned for decision to a panel of the court consisting of three justices, although not every member of the panel must be present for argument. If the case is decided without argument, three justices must participate in the decision. A majority of the panel, which constitutes a quorum, must agree on the judgment. Except as otherwise provided in these rules, a panel's opinion constitutes the court's opinion, and the court must render a judgment in accordance with the panel opinion.

(b) *When panel cannot agree on judgment.* After argument, if for any reason a member of the panel cannot participate in deciding a case, the case may be decided by the two remaining justices. If they cannot agree on a judgment, the chief justice of the court of appeals must designate another justice of the court to sit on the panel to consider the case, request the assignment of a qualified ~~retired or former~~ justice or judge to sit on the panel to consider the case, or convene the court en banc to consider the case. The reconstituted panel or the en banc court may order the case reargued.

(c) *When court cannot agree on judgment.* After argument, if for any reason a member of a court consisting of only three justices cannot participate in deciding a case, the case may be decided by the two remaining justices. If they cannot agree on a judgment, that fact must be certified to the Chief Justice of the Supreme Court. The Chief Justice may then temporarily assign a justice of another court of appeals or a qualified ~~retired or former~~ justice or judge to sit with the court of appeals to consider the case. The reconstituted court may order the case reargued.

Summary of Issue:

In 2003, Section 74.003 of the Government Code, which delineates the qualifications of a justice or judge serving on assignment in the appellate courts, was amended to add subsection (h):

> Notwithstanding any other provision of law, an active district court judge may be assigned to hear a matter pending in an appellate court.

This new provision permitted the Chief Justice of the Supreme Court, for the first time, to use active district court judges for assignments in the intermediate appellate courts. Many appellate courts prefer using active district judges to avoid using visiting judge funds. The Committee is asked to consider whether the limitation on the qualifications of assigned

judges contained in the TRAP 41.1 should be revised in light of the statutory amendment, perhaps by replacing the term "retired or former justice or judge" with "qualified justice or judge," as suggested above.

Rule: TRAP 49 (**Motion and Further Motion for Rehearing**)

Current text:

49.7 En Banc Reconsideration.
While the court of appeals has plenary jurisdiction, a majority of the en banc court may, with or without a motion, order en banc reconsideration of a panel's decision. If a majority orders reconsideration, the panel's judgment or order does not become final, and the case will be resubmitted to the court for en banc review and disposition.

Summary of Issue:

TRAP 49.7 provides that a majority of an en banc court of appeals may, "with or without a motion," order en banc reconsideration at any time "[w]hile the court of appeals has plenary jurisdiction." Although Rule 49 contemplates the filing of en banc motions, it does not specify a deadline for filing them—only that the court of appeals can consider them within its plenary jurisdiction. The court of appeals's plenary power expires "30 days after the court overrules all timely filed motions for rehearing, including motions for en banc reconsideration of a panel's decision under Rule 49.7...." TRAP 19.1. Thus, under the current rules, an en banc motion would presumably have to be filed within 30 days after the overruling of a motion for rehearing; if so, the appellate court's plenary power extends until 30 days after it overrules the en banc motion. The Court's recent decision in *City of San Antonio v. Hartman*, No. 05-0147, holds that an en banc motion counts as a motion for rehearing for purposes of the 45-day rule in TRAP 53.7. In light of that decision, the Committee is asked to consider whether TRAP 49 should be amended to provide specific procedural guidelines governing motions for en banc reconsideration, such as:

- whether to clarify or shorten the existing deadline for when such motions must be filed;
- whether they should be subject to the 15-day extension rule in TRAP 49.8;
- the page limit applicable to such motions;
- whether the rule should specify procedures for responses, as in TRAP 49.2;
- whether an en banc motion can be filed in the same motion with a motion for panel rehearing, or whether separate motions can simultaneously be filed, or whether a party can or must wait to file an en banc motion until after its motion for panel rehearing is denied;
- whether, as in Fifth Circuit practice, the en banc motion is initially to be treated as a motion for rehearing by the panel if no motion for rehearing was previously filed (See "Handling of Petition by the Judges" following Fifth Circuit local rule 35.6);
- when it is appropriate to seek en banc reconsideration, *compare* FRAP 35(b)(1) (requiring statement that panel decision either (1) conflicts with precedent from the U.S. Supreme Court or the court to which the en banc motion is addressed, or (2)

involves questions of exceptional importance), *with* TRAP 41.2(c) (noting that "en banc consideration is not favored and should not be ordered unless necessary to secure or maintain uniformity of the court's decisions or unless extraordinary circumstances require en banc reconsideration").

- whether the TRAP rule should specify the availability of sanctions, to discourage frivolous en banc motions. *See* Fed. Local R. App. P. 35.1 (noting that court is "fully justified in imposing sanctions on its own initiative . . . for manifest abuse of the procedure").

Rule: TRAP 52 (**Original Proceedings**)

Current text:

Rule 52.3 Original Proceedings; Form and Content of Petition
All factual statements in the petition must be verified by affidavit made on personal knowledge by an affiant competent to testify to the matters stated. [Remainder of paragraph omitted]

Summary of Issues:

Some appellate practitioners have asked the Court to modify TRAP 52 to account for situations in which the Relator's attorney cannot verify, based on personal knowledge, that all facts stated in the mandamus petition are true and correct. These proponents argue that the purpose of Rule 52's verification requirement would be satisfied by including in the mandamus record a copy of the witness's sworn affidavit, and they suggest amending TRAP 52 to allow sworn testimony or affidavits in the record to satisfy the verification requirement.

In practice, an attorney will often lack the personal knowledge of the facts demanded by the verification requirement, unless the facts relevant to the mandamus concern events witnessed by the attorney at trial. Thus, to comply with the requirement, it may be necessary to obtain sworn statements from witnesses or others with personal knowledge of the facts. However, mandamus petitions often must be prepared and filed on little notice due to circumstances beyond the attorney's control. Thus, the Committee is asked to consider whether a central purpose of the verification requirement—to avoid factual disputes in mandamus proceedings—might be achieved in a manner that is less burdensome to practitioners. *See Cantrell v. Carlson*, 313 S.W.2d 624, 626 (Tex. Civ. App.—Dallas 1958, no writ) (noting that verification must constitute a positive statement of factual knowledge as to support a charge of perjury if the facts were found to be untrue); *see also Hooks v. Fourth Court of Appeals*, 808 S.W.2d 56, 60 (Tex. 1991) (appellate courts may not deal with disputed factual matters in mandamus proceedings).

Several other issues are raised when the facts pertinent to the mandamus are neither within the attorney's personal knowledge nor the personal knowledge of any single witness. Must the petition be verified by multiple affiants? If so, how should their verifications reflect those facts to which each respective affiant is competent to swear? The Committee is further asked to consider whether TRAP 52.3 should be amended to address these issues.

Rule: none

Current text: none

Summary of Issue:

Government Code §22.010 states: "The supreme court shall adopt rules establishing guidelines for the courts of this state to use in determining whether in the interest of justice the records in a civil case, including settlements, should be sealed." Pursuant to that statutory requirement, the Court in 1990 promulgated TRCP 76a, which governs sealing records in trial courts. However, there is no comparable TRAP rule that governs requests to seal records in the appellate courts. Accordingly, the Committee is asked to consider whether the Appellate Rules should contain a provision that governs requests to seal records in the appellate courts.