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### **SUBCOMMITTEE REPORT: TRCP 216-299a**

In response to Justice Hecht's letter of September 22 and David Beck's correspondence dated June 15, 2006, the Subcommittee met and considered proposed changes to TRCP 245, 296 and 226a. The subcommittee's recommendations are as follows:

#### **TRCP 245**

**Proposal:** The State Bar Rules Committee proposed modifications to TRCP 245 that would enlarge the notice of a first trial setting from 45 days to 75 days. In addition, Rule 245 would be amended under that proposal to clarify that a party joined or who appears after a case has been set for trial, is entitled to that same notice, with the trial court having the discretion to shorten that period for good cause.

**Recommendation:** The subcommittee does not recommend the adoption of this proposal for several reasons. First, the subcommittee is unaware of any compelling problems with the current operation of the rule. Second, in many cases a docket control order will set a deadline for adding parties as well as a trial setting and thus there is not an opportunity for unfair surprise. Finally, the subcommittee questioned whether the proposed enlargement of time for notice of a trial setting is desirable, especially when attempting to obtain a hearing in a case seeking injunctive relief or a declaratory judgment.

The subcommittee also discussed whether current Rule 245 is sufficiently clear as to the right of a party added after a case is set for trial to the same notice of an initial trial setting as to originally named parties. Some members of the subcommittee were concerned the current rule is silent as to this specific matter, and the subcommittee would recommend a clarifying amendment. Changing "with reasonable notice of not less than forty-five days to the parties of a first setting for trial" to "with reasonable notice of not less than forty-five days to all [the] parties of a first trial setting..." may be sufficient to address this concern.

## **TRCP 296**

Proposal: The State Bar Rules Committee proposed the following addition to TRCP 296, which addresses findings of fact in bench trials: "The findings of fact shall only include the elements of each ground of recovery or defense." Under this proposal, the following comment would be added as well: "The trial court is not required to support its findings of fact with recitals of the evidence."

Recommendation: The subcommittee does not recommend the adoption of this proposal. Appellate court decisions support that the trial court may make broad form findings of fact, so it is not accurate to state that the trial court is required to make findings as to each element of grounds raised by the pleadings and the proof, although the trial court may do so. The Committee also expressed concern that in some instances, statutory provisions require findings of fact that may include evidentiary support.

## **TRCP 226a**

David Beck, in his capacity as President of the American College of Trial Lawyers, has recommended a change to Rule 226a. Specifically, he suggests an addition to the instructions given by the trial court to venirepersons before voir dire, to clarify the role of trial counsel in an effort to combat the negative images of trial lawyers held by the public at large. The subcommittee shares this concern and endorses the addition of the following language to the admonitory instructions mandated by TRCP 226a:

Those of you who will be chosen as jurors for this case will be performing a very important service, guaranteed by both the United States and Texas Constitutions. Our founding fathers believed it was essential that the right to trial by jury and the right to serve on a jury be conferred upon all of our citizens, including you. Your presence here today is a tribute to their beliefs and the importance of the jury system to our democratic form of government.

Before the attorneys begin their questioning, you need to be aware that our judicial system is an adversary system. ~~which means that during the trial the parties will seek to present their respective cases in the best light possible. Attorneys in general, and trial attorneys in particular, are frequently criticized. That criticism often results from a basic understanding of our adversary system, in which the attorneys act as advocates for the competing parties.~~ As an advocate, an attorney is ethically obligated to zealously assert his or her client's position under the rules of our adversary system. By presenting the best case possible on behalf of their clients, the attorneys enable the jurors to weigh the applicable facts, to determine truth, and to arrive at a just verdict based on

the evidence. Our system has served us well for over 200 years and trial attorneys have been, and continue to be, a critical part of that process.

The attorneys will now proceed with their examination.

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