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December 12, 1996

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The Honorable Thomas R. Phillips Chief Justice, Supreme Court Supreme Court Bldg. P.O. Box 12248 Capitol Station Austin, Texas 78711

RE: Court Rules Committee - Rule 121(a)(2)(B) and Appellate Rules 84 and

182(b)

Dear Justice Phillips:

The Court Rules Committee has approved suggested changes to Rules 121(a)(2)(B), Texas Rules of Civil Procedure and Appellate Rules 84 and 182(B), copies of which I am enclosing herewith for the Supreme Court's consideration.

Sincerely,

By:

O. C. Hamilton, Jr.

OCH/sam

**Enclosures** 

cc: Mr. Luther H. Soules, III (w/encl.)

Soules & Wallace

Fifteenth Floor, Frost Bank Tower 100 W. Houston Street, Suite 1500 San Antonio, Texas 78205-1457 Correspondence December 12, 1996 Page Two

Ms. Vicki Wilhelm (w/encl.) State Bar of Texas Committees CC:

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#### STATE BAR OF TEXAS

## COMMITTEE ON COURT RULES

## REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

## TEXAS RULES OF APPELLATE PROCEDURE

I. Exact Wording of Existing Rule: RULE 182(b). Damages for Delay.

Whenever the Supreme Court shall determine that application for writ of error has been taken for delay and without sufficient cause, then the court may award each prevailing respondent an appropriate amount as damages against such petitioner.

A request for damages pursuant to this rule, or an imposition of such damages without request, shall not authorize the court to consider allegations of error that have not bee otherwise properly preserved or presented for review.

## II. New Rule:

RULE 182(b). Frivolous Appeal.

- (1) Certification to Court. The signing of an application for writ of error constitutes a certificate by the signatory that to the signatory's best knowledge after reviewing the record of the case and the applicable law that:
  - (a) each point of error is warranted by existing law or by a logical argument for the extension, modification, or reversal of existing law or the establishment of new law; and
  - (b) the signatory has filed or made a good faith effort to file the necessary record for the court to decide each point of error asserted.
- (2) Violation. This rule is violated if the certification is untrue. The signatory who violates this rule may be required to pay damages and/or be subject to sanction.
- violated shall file a motion specifying each alleged violation and serve a copy on the signatory of the brief or petition believed to be in violation of the rule. The court on its own initiative may invoke this rule by giving written notice to the signatory of the brief or petition believed to violate subdivision (a) which shall specify each alleged violation of the rule. The signatory shall have fifteen days from receipt of the motion or notice to file a written response. The court shall thereafter rule on the motion or notice after reviewing the brief or petition, the record, and any response of the signatory.
- (4) Order. The court shall sign an appropriate order. If the court finds that this rule has been violated, the court's order shall specify the particular violation(s) found,

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findings to support the violation(s), state the amount of damages, if any, as may be appropriate to each injured party and/or assess any sanctions deemed appropriate. Any order of sanction shall specify to whom any sanction is to be paid.

(5) Remedies. When damages are awarded the court should consider reasonable and necessary attorneys fees and reasonable and necessary costs in addition to such other economic damage found by the court to have resulted from the violation. In making a determination for sanctions, the court shall take into account the severity of the violation, whether bad faith was involved, and whether or not the offending party has a history of previously violating the rule.

## III. Brief Statement of Reasons for New Rule:

Existing Rule 182(b), T.R.A.P., has several major deficiencies. Its title does not accurately describe the objective of the rule. The rule also fails to clearly define for the courts and counsel conduct which constitutes a frivolous appeal. It is very inadequate in providing for damages to fit the consequences of a frivolous appeal. And, finally, due process protections are totally absent.

The proposed new rule has a more descriptive title. Subdivisions (1) and (2) clearly set out what is required of those who would seek appellate court review. Subdivisions (3) and (4) provide due process protections for a signatory who becomes a subject of enforcement of the rule. Subdivision (4) also provides the court with the opportunity to have a sanction payable either to a party or the registry of the court because of economic harm to the judicial system or both. The order may be reviewable by the supreme court.

Respectfully submitted,

J. SHELBY SHARPE 2400 Bank One Tower 500 Throckmorton Street Fort Worth, Texas 76102

Dated: October 22, 1996

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