

STATE BAR OF TEXAS
COMMITTEE ON COURT RULES
REQUEST FOR NEW RULE
TEXAS RULE OF CIVIL PROCEDURE

I. Exact wording of existing Rule 91 Special Exceptions:

A special exception shall not only point out the particular pleading excepted to, but it shall also point out intelligibly and with particularity the defect, omission, obscurity, duplicity, generally, or other insufficiency to the allegations in the pleading excepted to.

II. Proposed Rule Modification:

Rule 91.1. Special Exceptions. A special exception shall not only point out the particular pleading or motion excepted to, but it shall also point out intelligibly and with particularity the defect, omission, obscurity, duplicity, generally, or other insufficiency to the allegations in the pleading or motion excepted to.

Rule 91.2. Dismissal for Failure to State a Claim.

(a) If the trial court has sustained a special exception to a pleading as provided by Rule 91.1 and provided an opportunity to re-plead, and the pleading party's amended pleading remains defective or the pleading party chooses not to re-plead, a party may move to dismiss on the ground that the pleading against it fails to state a valid cause of action, or that the pleading fails to state a valid defense upon which relief may be granted as a matter of law. A party may move under this rule to dismiss all or any part of the claims or defenses against it.¹

(b) A motion to dismiss under this rule shall state specifically the grounds therefor. Except on leave of court, with notice to opposing counsel, the motion shall be filed and served at least twenty-one days before the date specified for submission or hearing. Except on leave of court, the adverse party, not later than seven days prior to the submission or hearing may file and serve its written response. No testimony or other evidence shall be received at the

¹ Modified from Tex. R. Civ. P. 166a(a) and (b) as well as Fed. R. Civ. P. 12(b)(6)

submission or hearing. A dismissal shall be granted if the pleading at the time of the hearing or filed thereafter and before judgment with permission of the court shows that the pleading fails to state a valid cause of action or defense and the moving party is entitled, as a matter of law, to dismissal of those claims or defenses asserted against it. Issues not expressly presented to the trial court by written motion, answer, or response shall not be considered on appeal as grounds for reversal.²

(c) If, on a motion to dismiss under this rule, matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 166a(c). All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.³

(d) If dismissal under this rule does not resolve the whole case or for all the relief asked and a trial is necessary, the judge may at a hearing examine the pleadings, interrogate counsel, ascertain what legal claims or defenses remain, and make an order specifying any claims or defenses that are resolved as a matter of law and directing such further proceedings in the action as are just.⁴

(e) Rule 91.2 only applies to special exceptions to a pleading. Rule 91.2 does not apply to special exceptions to a motion.

Comments:

1. Rule 91.2 is intended to provide a specific rule incorporating the practice under existing law.⁵
2. A court may not consider matters outside the pleadings on a motion made under Rule 91.2.
3. This Rule is not intended to and does not change application of the other Rules of Civil Procedure including application of Rules 45 and 59 in particular.

² Modified from Tex. R. Civ. P. 166a(c)

³ Modified from Fed. R. Civ. P. 12(d)

⁴ Modified from Tex. R. Civ. P. 166a(e)

⁵ See e.g., *Friesenhahn v. Ryan*, 960 S.W.2d 656, 658 (Tex. 1998); *Perry v. Cohen*, 285 S.W.3d 137, 142, 146 (Tex. App.—Austin 2009, pet. denied); *Mowbray v. Avery*, 76 S.W.3d 663, 677-79 (Tex. App.—Corpus Christi 2002, pet. denied).

III. Brief statement of reasons for requested changes and advantages to be served by the proposed new rule:

The proposed revision is intended solely to clarify the practice under existing law allowing special exceptions to motions as well as pleadings, particularly in the summary judgment context.

To place in an easily accessible rule the practice under existing law⁶, as well as to facilitate the process under Texas civil procedure of allowing courts to dismiss claims or defenses in pleadings that fail to state a cause of action.

⁶ See e.g., *Friesenhahn v. Ryan*, 960 S.W.2d 656, 658 (Tex. 1998); *Perry v. Cohen*, 285 S.W.3d 137, 142, 146 (Tex. App.—Austin 2009, pet. denied); *Mowbray v. Avery*, 76 S.W.3d 663, 677-79 (Tex. App.—Corpus Christi 2002, pet. denied).

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I. Exact wording of existing Rule 252 (Application for Continuance):

If the ground of such application be the want of testimony, the party applying therefore shall make affidavit that such testimony is material, showing the materiality thereof, and that he has used due diligence to procure such testimony, stating such diligence, and the cause of failure, if known; that such testimony cannot be procured from any other source; and, if it be for the absence of a witness, he shall state the name and residence of the witness, and what he expects to prove by him; and also state that the continuance is not sought for delay only, but that justice may be done; provided that, on a first application for a continuance, it shall not be necessary to show that the absent testimony cannot be procured from any other source.

The failure to obtain the deposition of any witness residing within 100 miles of the courthouse or the country in which the suit is pending shall not be regarded as want of diligence when diligence has been used to secure the personal attendance of such witness under the rules of law, unless by reason of age, infirmity or sickness, or official duty, the witness will be unable to attend the court, or unless such witness is about to leave, or has left, the State or county in which the suit is pending and will not probably be present at the trial.

II. Proposed rule modification to first sentence of second paragraph:

The failure to obtain the deposition of any witness residing within ~~100~~ 150 miles of the ~~courthouse of the~~ county in which the suit is pending

III. Brief statement of reasons for requested changes and advantages to be served by the proposed new rule:

Essentially, this paragraph provides that failure to depose a witness within subpoena range will not be regarded as lack of diligence. The current rule tracks the former “100 miles from the courthouse” subpoena range. TRCP 176.3 now provides a subpoena range of 150 miles from where the witness resides or can be found. This change would provide consistency between TRCP Rules 252 (continuance rule) and 176.3 (subpoena rule).