

STATE BAR OF TEXAS
COURT RULES COMMITTEE
REQUEST FOR NEW RULES OR CHANGE OF EXISTING RULE
TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording existing Rule:

Rule 166a. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion for summary judgment shall state the specific grounds therefor. Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response. No oral testimony shall be received at the hearing. The judgment sought shall be

rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response. Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal. A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

(d) Appendices, References and Other Use of Discovery Not Otherwise on File.

Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least twenty-one days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least seven days before the hearing if such proofs are to be used to oppose the summary judgment.

(e) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the

court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(f) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(g) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(h) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or

solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

II. Proposed Rule:

Rule 166a. Summary Judgment

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits or other summary judgment evidence for a summary judgment ~~in his favor~~ upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits or other summary judgment evidence for a summary judgment ~~in his favor~~ as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** ~~The~~ A motion for summary judgment shall state the specific grounds therefor list in numerical order (i) the undisputed facts upon which the motion relies and (ii) the contested issues of law. The response to a motion for summary judgment shall list in numerical order (i) the disputed facts upon which the response relies and (ii) the contested issues of law. Each party shall, in the motion for summary judgment or in the response thereto, specifically refer by page to any

portions of depositions relied upon; and copies of said deposition excerpts shall be attached to the motion for summary judgment or response. The motion and response may be contained in a single document with any supporting brief. Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits or other summary judgment evidence shall be filed with the court and served on the respondent at least ~~twenty-one~~ thirty days before the time specified for hearing. Except on leave of court, ~~the adverse party, not later than seven days prior to the day of hearing may file and serve~~ for good cause shown, the respondent shall file and serve a written response, and any opposing affidavits or other written response summary judgment evidence, no later than twenty days following receipt of the motion. No oral testimony shall be received at the hearing. ~~The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response. Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.~~ A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and

direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

~~(d) Appendices, References and Other Use of Discovery Not Otherwise on File.~~

~~Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least twenty one days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least seven days before the hearing if such proofs are to be used to oppose the summary judgment.~~ Burdens of Movant and Respondent. A party moving for summary judgment, on an issue upon which the movant would have the burden of proof at trial, shall have the burden to present evidence sufficient to establish facts which, if proved at trial, would entitle the movant to an instructed verdict. The movant shall not have the burden to produce evidence to establish the absence of a genuine issue of material fact with respect to an issue on which the respondent would have the burden of proof at trial. When a motion for summary judgment is made and supported as provided in this rule, the respondent may not rest upon the mere allegations or denials of the respondent's pleadings, but the respondent's response, by affidavits or as otherwise provided in this rule, must present specific facts showing that there is a genuine issue for trial as to a material fact. If the motion is based upon the absence of proof on an issue upon which the respondent has the burden of proof, the respondent must respond with evidence sufficient to entitle the respondent to submission of the issue to a jury. If

the respondent does not so respond, summary judgment shall be granted in favor of the movant, provided the motion complies with the other requirements of this rule.

(e) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(f) **Form of Affidavits; Further Testimony.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(g) **When Affidavits Are Summary Judgment Evidence is Unavailable.** Should it appear from the affidavits of by affidavit that a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may

~~refuse the application for judgment or may~~ that party's opposition, and if the affidavit sufficiently describes the expected proof, why the respondent expects the proof to be forthcoming, and how the proof will help it defeat the motion, the court shall order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just. ^{MUST} The Court ~~has~~ reset the hearing on the motion for summary judgment in the order granting the continuance.

(h) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused ~~him~~ such other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

III. Purpose of the Proposed Changes. The proposed changes in this rule are designed to state the requirements for a the motion for summary judgment, the response thereto, the evidence to be considered by the court and to define who has the burden of proof both in the motion and the response. The proposed rule is more similar to the federal rule on summary judgments than the existing rule. The Court Rules Committee is of the opinion that the proposed rule will simplify the use of motions for summary judgment and will permit the courts to dispose of more suits by summary judgment than under the existing rule.