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July 14, 1999

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

Re: Proposed Rule Changes to Rule 265(g)

Dear Justice Phillips:

Enclosed are proposed rule changes to Rule 265(g), which have been approved for submission to the Supreme Court by the Court Rules Committee.

By copy of this letter, I am forwarding copies of these proposed rules to Luke Soules, Chairman of the Supreme Court Advisory Committee.

Sincerely,

By: 
O. C. Hamilton, Jr.

OCH/rlo
Enclosures

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The Honorable Thomas R. Phillips
July 14, 1999
Page 2

cc: Mr. Luther H. Soules, III (w/encl.)
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San Antonio, Texas 78205-1457

The Honorable Nathan Hecht (w/encl.)
Justice, Supreme Court of Texas
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201 West 14th Street, Room 104
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Ms. Vicki Wilhelm (w/encl.)
STATE BAR OF TEXAS COMMITTEES
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STATE BAR OF TEXAS
COMMITTEE ON COURT RULES
REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE
TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording existing Rule:

Rule 265. ORDER OF PROCEEDINGS ON TRIAL BY JURY.

The trial of cases before a jury shall proceed in the following order unless the court should, for good cause stated in the record, otherwise direct:

(a) The party upon whom rests the burden of proof on the whole case shall state to the jury briefly the nature of his claim or defense and what said party expects to prove and the relief sought. Immediately thereafter, the adverse party may make a similar statement, and intervenors and other parties will be accorded similar rights in the order determined by the court.

(b) The party upon whom rests the burden of proof on the whole case shall then introduce his evidence.

(c) The adverse party shall briefly state the nature of his claim or defense and what said party expects to prove and the relief sought unless he has already done so.

(d) He shall then introduce his business.

(e) The intervenor and other parties shall make their statement, unless they have already done so, and shall introduce their evidence.

(f) The parties shall then be confined to rebutting testimony on each side.

(g) But one counsel on each side shall examine and cross-examine the same witness, except on leave granted.

II. Proposed Rule:

Rule 265. ORDER OF PROCEEDINGS ON TRIAL BY JURY.

The trial of cases before a jury shall proceed in the following order unless the court should, for good cause stated in the record, otherwise direct:

(a) The party upon whom rests the burden of proof on the whole case shall state to the jury briefly the nature of his claim or defense and what said party expects to prove and the relief sought. Immediately thereafter, the adverse party may make a similar statement, and intervenors and other parties will be accorded similar rights in the order determined by the court.

(b) The party upon whom rests the burden of proof on the whole case shall then introduce his evidence.

(c) The adverse party shall briefly state the nature of his claim or defense and what said party expects to prove and the relief sought unless he has already done so.

(d) He shall then introduce his evidence.

(e) The intervenor and other parties shall make their statement, unless they have already done so, and shall introduce their evidence.

(f) The parties shall then be confined to rebutting testimony on each side.

(g) But one counsel ~~on~~ for each side party shall examine and cross-examine the same witness, except on leave granted.

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

Recently adopted Rule 190.3(b)(2) uses the term "side" in connection with allocating the number of hours available to examine and cross-examine witnesses at a deposition.¹ That rule, and its comments, indicate that "side" is to be defined in a manner similar to that term's definition in Rule 233 where parties are aligned according to common interests.² On the other hand, Texas Rule of Civil Procedure 265(g) also uses the term "side." It provides that "one counsel on each side shall examine and cross-examine the same witness, except on leave

¹ See TEX. R. CIV. P. 190.3(b)(2).

² See *id.*; TEX. R. CIV. P. 233.

granted."³ But the longstanding practice has been to allow one counsel for each party to examine and cross-examine the same witness.

Although only one case⁴ was located that addressed the meaning of "side" under Rule 265(g), that case follows the longstanding practice of allowing one counsel for each party to examine and cross-examine witnesses. For this reason, it would appear that the meaning of "side" in Rule 265(g) is different from the meaning in Rules 190.3 and 233. To avoid confusion between these rules, the committee recommends that Rule 265(g) be amended to allow one attorney for each *party* to examine and cross-examine witnesses.

The committee also feels that, on balance, this proposal is fair to both sides of the docket in most types of cases.

³ TEX. R. CIV. P. 265(g).

⁴ *Russell v. Dunn Equipment, Inc.*, 712 S.W.2d 542, 545-46 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).