

PROPOSED NEW COMMENT TO TRCP 749
January 12, 2007

Background: Practitioners report that forcible entry and detainer cases (evictions) are tried at the justice of the peace court level under justice of the peace rules, and that confusion exists regarding whether a jury trial on *de novo* appeal to the county court or county court at law should proceed under the justice of the peace procedural rules or the regular rules for jury trials in county and district courts. The sense of the Committee is that the trial at the justice of the peace court should proceed using justice of the peace procedural rules for forcible entry and detainer cases, but that the *de novo* appeal to the county court, once the appeal was perfected, should proceed using the normal county court at law rules governing jury trials.

The proposed new comment to Rule 749 clarifies that when a forcible entry and detainer case is appealed and tried *de novo* the perfected appeal proceeds under the regular district and county court rules governing trials in that court, including Rule 277. The Rule 746 limitation on the sole issue to be decided in a forcible entry and detainer case applies in the county or district court trial on *de novo* appeal.

TRCP 749

[No change to Rule text.]

Comment: Rule 746 does not limit the county court's ability to determine questions of fact or to submit questions to a jury pursuant to Rule 277 in a case appealed *de novo* to the county court pursuant to TRCP 749.

MINUTES
STATE BAR OF TEXAS
COURT RULES COMMITTEE MEETING

Austin, Texas
Friday, January 12, 2007

1. Call to Order

The Chair, Ken K. Slavin, called the meeting to order on Friday, November 3, 2006, at approximately 10:061 a.m.

The following members were present:

Ken K. Slavin [Chairman]
J. Hamilton Rial [Vice Chairman]
Ann L. Diamond
Roberta Hegland
Mack Ray Hernandez
Jody Hughes
Roger Hughes
Judge Scott Jenkins
Justice Evelyn Keyes
A.M. (Russ) Meyer (by teleconference)
Robert O'Keefe
Ronald Rodriguez (by teleconference)
John Matthew Rogers
Justice Rebecca Simmons
Chris Stacy

The following were granted an excused absence:

Mitchell Chaney
Richard (Rick) Davis (by teleconference)
Janie Jordan
G. Leroy Street

2. Approval of Prior Minutes

Hamilton Rial moved, and Robert O'Keefe seconded, that the minutes of the November 3, 2006, meeting be approved as submitted. Motion carried.

3. Texas Supreme Court Advisory Committee Update (Jody Hughes)

Jody Hughes stated that the Supreme Court Advisory Committee (SCAC) had discussed the pros and cons of 'rocket docket' court scheduling at its September meeting, but no recommendation to the Court is anticipated at this time. Discussion was also had regarding a proposed Rule of Evidence (perhaps 904) providing for an affidavit for services rendered, similar to Civil Practice & Remedies Code chapter 18, Affidavit Concerning Cost & Necessity of Services. Discussion was had regarding whether a rule of evidence is needed and what it should look like. It was reported that the State Bar Evidence Committee is working on the issue.

The TRCP 296 issue, findings of fact and conclusions of law, is the subject of a closely divided SCAC; the Court has not acted on the issue and it remains under consideration. This Committee's Chair (Ken Slavin) indicated that SCAC's TRCP 296 split was generated by this Committee's proposal regarding limiting findings of fact and conclusions of law to be filed.

David Beck's proposal for TRCP 226a jury instructions to remind jurors of the role of lawyers in the adversarial system, intended to reduce criticism against lawyers, was rejected by SCAC. The rules regarding en banc consideration, and TRAP 49, are under review by SCAC to ensure compliance with *City of San Antonio v. Hartman*, 201 S.W.3d 667 (Tex. 2006). TRAP 53 regarding calculating time periods for en banc motions, TRAP 19, regarding plenary power, TRAP 52.3 regarding mandamus verification, are all under review. SCAC appears to favor amendment to the mandamus verification rule to permit verification based on record evidence, not just personal knowledge of the underlying facts; the Court has not acted on the issue. There has been some discussion regarding court recorders instead of court reporters.

The proposal from this Committee regarding TRCP 199.2 and 245 have been reviewed by SCAC, and SCAC has decided not to recommend the proposals to the Court. SCAC's comments regarding TRCP 245 indicate that SCAC does not perceive the 45-day period to be a problem needing to be remedied. The Chair stated that our proposed website can assist in determining, in the future, what members of the bar perceive to be problems. A SCAC subcommittee suggested a change regarding parties brought late into an ongoing suit, to ensure that all parties would be entitled to 45 days notice of the trial setting.

The Chair thanked Jody Hughes for his report and stated that the Court would be continued to be invited to our Committee's lunches.

4. Task Force on Communicating with Members of the Bar (Russ Meyer)

Russ Meyer gave a brief history of the communication issue, reminding the Committee that we had previously decided to have the State Bar host the website because the experiences of other Committees who have had others host sites for State Bar activities indicate that a Bar-hosted site is less likely to encounter difficulties. The Chair asked the Subcommittee to attempt to have a bare-bones site up and operational by the next Committee meeting. The Chair recommended a link to post the meeting agenda of the upcoming meeting, and abbreviated minute summaries – we will not be posting the fully detailed meeting minutes. Roger Hughes suggested that the official State Bar statement of the Charge of this Committee be posted at the site.

Discussion was had regarding whether less detailed minutes would be just as helpful; the Committee prefers that such minutes be kept because they may be useful years later. However, publicly posting the full, long minutes online was not the intent of the Committee. Judge Simmons suggested that fully detailed minutes might be appropriate for a Committee member-only portal within the site.

Roger Hughes stated that upon review of the SCAC discussions, he was not concerned that posting of the proposals would be viewed negatively as any sort of pressure.

Discussion was had regarding whether a proposal should be ‘ready’ but for public comment before we post it; the Chair proposed that a proposal be posted when we believe it is ready to be transmitted to the Court, that the posting be for the period until our next scheduled meeting, and that at that meeting any comments be reviewed before the rule is sent to the Court. Roberta Hegland and Hamilton Rial agreed, with Hamilton Rial suggesting that we be open to changing the procedure if this turns out to be too cumbersome or otherwise unworkable. Roger Hughes suggested that any proposed rules that we post be sent at the same time for comment to the litigation and appellate sections of the bar.

John Matthew Rogers asked Jody Hughes whether the Court prefers to receive proposals one at a time or in ‘batches’ periodically. Jody Hughes stated that it is best to send them in batches because that is how they are sent to the Court. Jody proposed that we send proposals once or twice a year, except where a proposal might be time sensitive. Following discussion, Justice Rebecca Simmons moved, and Roger Hughes seconded, that the Committee submit proposed rules to the Supreme Court Rules attorney for consideration in batches following the

January and May Committee meetings each year, excepting matters that are time sensitive. Motion passed.

Discussion was had regarding the archive CD that exists of this Committee's prior work. It is not user-friendly, and it was the consensus of the Committee that putting the comprehensive archive online would not be useful.

**5. Subcommittee on Forcible Entry and Detainer Suit
Jury Charge for *De Novo* Eviction Appeals to County Court
(Ann Diamond)**

Discussion was had regarding the proposed rule language. IT was pointed out that the word "Rule" should always be spelled out. The Chair moved, Roberta Hegland seconded, that the proposal be adopted with minor text clean-up. The motion passed unanimously, and Ann Diamond will clean up the text and email the proposal to the Chair to forward to Jody Hughes.

6. Rules 1-175 and 180-185 Subcommittee Report

Russ will look further at TRCP 145 and 148 to see if the 2005 amendments have addressed the issues regarding indigence. The Chair asked whether a corporation can be indigent under current Rules. And, one member offered an example in which the attorney signed the statement that the party was indigent, but the party nonetheless posted bond.

John Rogers stated that Rule 38 and Civil Practice & Remedies Code 33.004 regarding third party practice are not really a conflict and no change is necessary. A party can name someone as responsible third party and leave it at that, or may bring the responsible party in as an actual party.

Discussion regarding TRCP 41 pointed out that the name of the Rule is misleading and consideration should be given to renaming the Rule "Consolidation and Severance." The last sentence of current TRCP 41 is not true following *Guaranty Federal Sav. Bank v. Horseshoe Operating Company*, 793 SW3d 652 (Tex. 1990); a responsible third party cannot be severed out. A reference adding *Horseshoe* was suggested. Discussion was had regarding the Rule's application to Justices of the Peace. Several members pointed out the discretionary language of the Rule; Roger Hughes asked when severing might be an abuse of discretion. Robert O'Keefe supported the idea of deleting the last sentence. Discussion was had regarding whether the passive voice ("may") was the problem with the Rule's language, or whether "any" is the problem. Judge Jenkins and Justice Simmons support retain the trial court's discretion to not sever. John Matthew Rogers stated

that the cases are replete with references to the discretionary nature of severance. John Rogers will work on language incorporating the test from *Horseshoe*.

No discussion was had on TRCP 106, 86-89, 165(a), or 21, 21a, and 21b.

Hamilton Rial met with Representative Smithey's staff and anticipated that the Representative would carry legislation regarding the use of unsworn declarations instead of affidavits in motion practice. The bill would likely be assigned to the Civil Practice & Remedies Committee. Hamilton was optimistic about an early hearing. Kaylynn Laney, the Legislative Affairs Representative for SBOT, stated that there was normally a June even-year deadline for official bar request legislation, and at present the bill is not endorsed by SBOT, it is a bill endorsed by Ken Slavin in his personal capacity. Roger Hughes stated that he had an inquiry from a state Representative asking why such a provision is needed within this country and how we would know that declarant was in fact the purported signatory without a witness.

[A lunch break was taken at this time.]

7. Rules 176 and 190-215 Subcommittee Report (Roberta Hegland)

Roberta Hegland stated that she had received information from Mack Ray Hernandez regarding e-discovery, including a paper that suggested practitioners in Texas fear that adopting federal e-discovery is not well-suited to Texas state practice. The specific concern is that the federal rules, flaws and all, might be adopted to fill a perceived vacuum unless Texas drafts better rules. Robert O'Keefe stated that the Office of the Texas Attorney General participates in a lot of federal litigation, but that it is too early to know the pitfalls of federal e-discovery yet. Mack Ray Hernandez agreed that it is still very early, there is no case law yet and it has just gone into effect at the end of 2006. Mack Ray disseminated guidelines from the Conference of Chief Justices.

Jody Hughes stated that SCAC and the Court have not formally looked at e-discovery, preferring to wait to see what is learned in the use of the federal rules.

Hamilton Rial said that he has his first federal Rule 26 conference in an ESI case coming up, and that he will report on that at the next meeting.

Roger Hughes pointed out that the federal system requires an early conference, making it easy to know early in the case what must be preserved. Mack Ray Hernandez stated that in heavy-ESI cases, lawyers are derelict if they do not get an appropriate preservation order entered early on. Roger asked what the goal of an e-discovery rule would be – preservation of evidence and protection from spoliation, or smooth and easy disseminate in discovery and use in trial?

Discussion was had regarding whether the e-discovery rule was more evidentiary or more procedural; The Chair, Russ Meyer, and Justice Simmons stated that it would be more procedural than evidentiary.

Robert O'Keefe suggested that e-discovery be carried as a regular agenda item for this Committee.

8. Rules 216-330 Subcommittee Report (Roger Hughes)

A handout was provided to the Committee with proposed revisions to TRCP 301, regarding Motions for Judgment NOV. Roger Hughes recommended changes to TRAP 26.1 as set out in his handout.

Hamilton Rial suggested some editorial changes, referring to "parties" (plural), using the English, not Latin, name of the Motion, and the use of "or" in part 2. Other changes offered included the change of "he" to "they" or "each". Roger will incorporate the wording changes into the next draft.

9. Appellate Rules Subcommittee (Leroy Street)

Leroy Street was unavailable, and the Chair stated that Leroy would be asked to propose language like the federal rule setting out the requirement of an explanation of why oral argument is necessary, and would be asked to consider whether argument should be mandatory if the majority of the court wishes to grant it.

Jody Hughes stated that the issue of an explanation regarding the need for oral argument was recently submitted to SCAC.

10. Old Business

No old business was addressed outside the above reports.

11. New Business

Jody Hughes stated that SCAC would be looking at proposed amendments to the parental notification rules, and at proposed Rule 14 regarding private process servers.

It was announced that the 1st and 14th Courts of Appeals now have new local rules that govern transfer between the two courts.

12. Adjourn

There being no further business to come before the Committee, the Chair adjourned the meeting at 1:12 p.m. The next meeting will be in Austin on Friday, March 9, 2007, at 10:00 a.m..

Respectfully submitted,

Ann Diamond

3/8/2007 am draft

DRAFT