

MINUTES OF THE
SUPREME COURT ADVISORY COMMITTEE
SEPTEMBER 20, 1996

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock on Friday, September 20, 1996, pursuant to call of the Chair.

Friday, September 20, 1996:

Supreme Court of Texas Justice and Liaison to the Supreme Court Advisory Committee, Justice Nathan L. Hecht was present.

Members present: Luther H. Soules III, Chair, Professor Alexandra W. Albright, Pamela Stanton Baron, Honorable Scott A. Brister, Professor Elaine A. Carlson, Professor William V. Dorsaneo III, Donald M. Hunt, David E. Keltner, Joseph Latting, Gilbert I. Low, John H. Marks, Jr., Russell H. McMains, Anne McNamara, Robert E. Meadows, Richard R. Orsinger, Honorable David Peeples, and Stephen Yelenosky.

Ex-officio Members present: Honorable Sam Houston Clinton, Paul N. Gold, O.C. Hamilton, David B. Jackson, Doris Lange, Mark Sales and Bonnie Wolbrueck.

Members absent: Alejandro Acosta, Jr., Charles L. Babcock, David J. Beck, Honorable Ann T. Cochran, Honorable Sarah B. Duncan, Michael T. Gallagher, Anne L. Gardner, Honorable Clarence A. Guittard, Michael A. Hatchell, Charles F. Herring, Jr., Tommy Jacks, Franklin Jones, Jr., Thomas S. Leatherbury, Honorable F. Scott McCown, David L. Perry, Anthony J. Sadberry, Stephen D. Susman, and Paula Sweeney.

Ex-Officio Members absent: Honorable Nathan L. Hecht, Honorable William Cornelius, W. Kenneth Law, and Honorable Paul Heath Till.

Others present: Lee Parsley (Supreme Court Staff Attorney) and Holly Duderstadt (Soules & Wallace).

Chairman Soules brought the meeting to order.

Gilbert Low presented the subcommittee report on the Texas Rules of Civil Evidence and the Unified Rules Project. Mr. Low provided a summary of the rules that have been voted on previously by the committee.

Mr. Low explained the changes to Rule 606.

Mr. Low explained the changes to Rule 702 and advised that the subcommittee recommended no change. A vote was taken and by a vote

of 11 to zero the committee adopted the subcommittee's recommendation.

Mr. Low explained the changes to Rule 503(a)(2). Discussion followed. Professor Dorsaneo proposed changing the phrase "other than a legal entity" to "who is a natural person" in the first line. Discussion continued.

Mark Sales explained that the focus of the subcommittee was not to deal with the issue of work product in litigation, the focus of the committee was what happens day to day outside of the litigation context, when no litigation is anticipated. Discussion continued.

John Marks requested taking a vote on two things. Number one, should we change the rule at all? And two, should this be the way we change it? Gilbert Low made a motion that there be no change to the rule. Donald Hunt seconded the motion. A vote was taken and by a vote of 8 to 7, there will be no change.

Mr. Low explained the proposed changes to Rule 504. Discussion followed. There being no opposition to the change, the rule was passed unanimously.

Mr. Low explained new Rule 1009, Translation of Foreign Language Records. Discussion followed. Richard Orsinger proposed taking the word "accurate" out of the first line. There being no opposition, that will be done. Discussion continued.

Alex Albright proposed deleting paragraph (f). Discussion continued. A vote was taken on those in favor of leaving (f) as it is written in the proposed rule. One member voted in favor.

Mr. Low indicated he needed to know whether we want to go to the alternative that if there are material differences then they would be submitted to the jury. Discussion followed.

Chairman Soules indicated he needed to get a consensus on whether it should be a question of law for the court or a question of fact for the trier of fact that is the resolution of competing translations of the same foreign language contract. Discussion continued.

David Keltner proposed putting in the terminology regarding "accuracy" in paragraph (f). Discussion continued. Buddy Low inquired whether the word "accurate" in paragraph (d) should also be deleted. Discussion followed.

Chairman Soules indicated he is going to put together a group larger than the evidence subcommittee to assist with redrafting Rule 1009. Buddy Low indicated that he thinks if we leave the rule as it is and leave off (f) most people would be satisfied. Judge

Clinton inquired why there is a differentiation as to why you are not also serving a copy on the opposite party in a criminal case like you are in civil. Mr. Sales indicates that the criminal practitioners who are on the committee that drafted this rule thought there must be some difference in the two practices. Discussion continued.

Chairman Soules requested a show of hands of those who will help Buddy's subcommittee on working on a rewrite to this rule. Volunteers were Joe Latting, Mark Sales, John Marks.

Chairman Soules suggested writing two alternatives on how to handle it, one would be that the judge would make the call on which translation would be used. The next would assume that in some circumstances a jury would decide which translation would control the case and under what circumstances. And then also in that context, what is the judge's role in determining the admissibility of the evidence of the translation.

Richard Orsinger proposed addressing the question of whether an expert can rely on a translation that cannot be admitted.

Rusty McMains indicated we needed to fix the problem regarding the requirement that we file something 60 days before notice of trial and yet we only need to have 45 days notice. Chairman Soules proposed changing it to 45 days and 15 days, leaving 30 days for the counter-translation. Discussion followed.

Buddy Low presented a report on the merging of the civil and criminal rules of evidence.

Richard Orsinger presented the report on TRCP 15-165a. Mr. Orsinger requested that Bonnie Wolbrueck give the clerk's committee report. Ms. Wolbrueck explained that Rules 23, 24, 25, 26, 27, 89, 218, 245, 246, 261, and 656 have been consolidated into a new rule number ____, Duties of the Clerk of the Court. A discussion was held regarding the language regarding consolidation of cases, assignment of number therefore. Ms. Wolbrueck continued her report.

A discussion was had regarding (h), Transfer or Venue Change. Chairman Soules proposed changing "A transcript of" to "All original papers of the cause." Discussion continued. Chairman Soules proposed "All original papers in the case other than orders and copies of all orders." Discussion continued.

Richard Orsinger proposed adding a sentence that says if an appeal is taken that the physical transfer will not occur until the appeal is resolved. Discussion continued.

Ms. Wolbrueck continued with her report. Discussion was had regarding paragraph (j), Disposition of Exhibits, Depositions and

Discovery. Chairman Soules proposed changing "without" to "with notice." Discussion continued.

Richard Orsinger commented that he felt that the parties ought to only be able to take the exhibits that they offered into evidence, not the other party's exhibits. Discussion followed.

Ms. Wolbrueck continued with her report. A discussion was had regarding (1) Notices specifically the language regarding an appealable order and the disposition notice. A discussion was had regarding the language in the second line which said "give notice of the signing to the parties" and whether that should be changed to "give notice of the signing to each party or the party's attorney." Discussion followed.

Chairman Soules proposed having a general rule that would say something to the effect of "notice to an attorney of record or an attorney is notice to a party." Discussion continued.

Ms. Wolbrueck brought up for discussion the changes to Rule 246 which talks about a notice of setting. The language is now paragraph (4) Settings of the new rule. Discussion followed.

A discussion was had regarding the clerk giving the notice versus the court coordinator giving the notice when the court sets a case for trial or for dismissal for want of prosecution on its own initiative. Discussion followed.

Ms. Wolbrueck concluded her report on the section entitled "The Duties of the Clerk." Chairman Soules called for a vote on that rule. There being no objection, the rules were unanimously approved with the changes and edits that have been made.

Ms. Wolbrueck presented the report on Rule ____, Electronically Transmitted Court Documents. Discussion followed. Carl Hamilton suggested adding a provision that the clerk has to either file something or publish something to let people know that they have elected to use the electronically transmitted court documents for filing purposes. Discussion continued.

Chairman Soules proposed deleting all the language regarding payment of fees. Richard Orsinger indicated he would prefer leaving the financial arrangement language in but saying that your fax filing is effective when it is received subject to something later on happening if you don't send your filing fee. Discussion continued.

Richard Orsinger proposed taking everything out in (3) except for "Court costs and fees shall be paid by a payment method authorized by the clerk of the court." Discussion continued.

Ms. Wolbrueck brought up for discussion the proposed changes to Rule 142, Security for Costs. Discussion followed.

Chairman Soules indicated the policy proposition is that the fax filing would not be burdened with the requirement that the fees be paid at the time of filing. A vote was taken with 13 members in favor and two opposed.

Richard Orsinger indicated we need to eliminate the distinction between receipt and filing because the only reason to distinguish receipt from filing was the payment of a fee. Discussion continued.

Chairman Soules indicated "and accepted for filing" no longer have any function in the rule. A discussion was had regarding what would be done if the transmission was incomplete. Chairman Soules indicated that they ought to file the incomplete transmission. Discussion continued. Richard Orsinger indicated it should be considered filed after it has received the first page. Discussion continued. Richard Orsinger indicated we need to decide what paragraph (11) is supposed to accomplish. Discussion continued.

Chairman Soules instructed the subcommittee to work on the rule and bring it back at the next meeting.

Ms. Wolbrueck continued presenting her report on the clerk's rules.

Chairman Soules proposed that in Rule 99(11) that the words "for the relief demanded in the petition" be added in the last line after the words "default judgment."

A discussion was had regarding Rule 103.

Ms. Wolbrueck continued presenting her report. A discussion was had regarding Rule 116, Publication of Citation and Rule 117a, Citation in Suits for Delinquent Ad Valorem Taxes.

Ms. Wolbrueck continued presenting her report. Chairman Soules proposed putting something in Rule 120 that if you enter an appearance, you must have notice before any judgment can be taken. Discussion followed. Chairman Soules proposed the following language "No judgment can be taken against a party who has appeared without notice to the party." Discussion continued.

Ms. Wolbrueck continued presenting her report. A discussion was had regarding Rule 126, Fee for Execution of Process, Demand.

Rule 142, Security for Costs, was brought up for discussion. Chairman Soules inquired what the meaning of the phrase "or the request for services" meant. Discussion followed.

Chairman Soules proposed the following language "All statutory fees that are required to be collected by the clerk of the court are due for payment at the time of filing or request for services" instead of "shall be paid." Discussion continued.

Richard Orsinger proposed "all statutory filing fees are due and all fees for requests of services shall be paid at the time services are rendered." Discussion continued.

Chairman Soules proposed "statutory filing fees are due for payment at the time of filing." And "clerk shall require from a party fees for other services or for any process before performing any other services or issuing any other process." Chairman Soules requested Ms. Wolbrueck to rewrite the rule and bring it back to take a look at it.

Ms. Wolbrueck continued presenting her report. Rule 245, Assignment of Cases for Trial, was brought up for discussion. Richard Orsinger indicated on the second line of Rule 245(a) the language "Court's own motion" should be changed "Court's own initiative."

The committee was in agreement with all of the changes subject to the edit in this report.

Richard Orsinger presented the report regarding the rules in the disposition chart on Rules 15-165a.

Rule 18a, a proposal from Jim Parker, was brought up for discussion. Lee Parsley provided an explanation of the draft of the subcommittee on TRCP 18a. Discussion followed.

Mr. Parsley indicated he needed to know two things to redraft the rule. In number 1, does he merge 2 with it, or delete paragraph 2 altogether and does he still refer to the third degree of consanguinity. Discussion continued. Mr. Parsley continued with his explanation of the draft of the rule. Discussion continued. Judge Brister volunteered to rewrite the rule in an attempt to compress the grounds for recusal. Chairman Soules asked the committee if the committee was disposed to a compression on the grounds of recusal. Discussion followed.

Mr. Parsley continued his explanation of the proposed rule. Professor Dorsaneo proposed deleting the words "for disqualification" in (g)(2)(B)(ii). Discussion continued.

Judge Scott Brister proposed language to the effect that "scheduling of the hearing shall not interrupt the trial proceedings." Discussion continued.

Mr. Parsley proposed the language "the judge may proceed with the trial or hearing." Chairman Soules inquired as to what

happened to the words "except for good cause stated in the order in which such action was taken." Discussion followed.

Judge Brister inquired why in paragraph (g) (2) (B) the language was added that it has to be before the first hearing or trial. Discussion continued.

Mr. Parsley inquired whether the final version is suppose to say if it is filed within 10 days of the hearing or trial, the judge may proceed with the hearing or trial. Discussion continued.

Judge Peoples commented that we ought to authorize telephone hearings in the discussion of the recusal judge. Secondly, we ought to be able to use fax copies instead of certified copies. And third, the recusal judge ought to be able to rule on the pleadings if the pleadings don't state a recusal ground. Discussion continued.

Professor Dorsaneo proposed breaking out the disqualification rule and not put any parameters on it and call it "grounds for disqualification." Discussion followed.

Richard Orsinger presented the report on his disposition chart on TRCP 15-165a. Mr. Orsinger brought up for discussion Buddy Low's proposal to amend Rule 63 permitting the amendment of pleadings to include a party that has been overlooked or misidentified in the original pleadings if certain criteria are met. Mr. Orsinger advised that this problem is taken care of in the pleadings rules under the rule entitled "voluntary dismissals and non-suits."

Richard Orsinger brought up for discussion the suggestion by Richard Sommer that Rule 64 be amended so that you can amend your pleadings by changing and reprinting and filing only the changed paragraphs without having to restate the entire pleading. The subcommittee recommended no change. There being no objection, tje subcommittee's recommendation was approved.

Richard Orsinger brought up for discussion the proposal by Glen Wilkerson regarding Rule 67 that the deadline for amending pleadings should be pushed back to 30 days before trial and after that fact only on good cause and proposing shifting the burden of proving no surprise to the party who wanted to amend. The subcommittee recommends no change as to the burden issue and have previously recommended that the pleading deadline work backward from the closure of the discovery window. There being no objection the subcommittee's recommendation was approved.

Mr. Orsinger brought up for discussion Rule 74, the recommendation to permit fax filings which is currently being worked on by the subcommittee.

Mr. Orsinger brought up for discussion the suggestion by Michael Northrup regarding Rules 75a and 75b regarding the problem with exhibits being filed with the court clerk, but the court reporter is the one that transmits them to the appellate court. Richard Orsinger indicated that this has been taken care of in the revision to the TRAP rules.

Mr. Orsinger brought up for discussion the proposed amendment to Rule 76a submitted by Bernard Fischman to make the rule clear that temporary sealing order is analogous to a TRO and can't be appealed. The subcommittee recommended no change. There being no objection the subcommittee's recommendation was approved.

Mr. Orsinger brought up the letter from Jack J. Garland advising that a court of appeals case says that Rule 76a does not apply to protective orders and a protective order would be an order that prohibits a party from disseminating information obtained through discovery.

The subcommittee's recommended that Rule 76a be changed to provide that a confidentiality order relating to unfiled discovery is not a 76a order subject to appeal unless the order is contested based on Rule 76a; and if the 76a issue is raised, then even if it's styled as a confidentiality order instead of a sealing order, it is subject to the interlocutory review; and if it's just a request for confidentiality and no one has raised the 76a rights then it would not be subject to interlocutory appeal. The subcommittee feels the rule needs to be clarified to define "court records" as excluding unfiled discovery for which a protective order is sought and there is no claim that 76a applies. Discussion followed.

Judge Scott Brister made a motion that the committee consider dropping paragraph (c) and would move that the subcommittee consider whether we limit court records to court records. Professor Albright seconded the motion. Richard Orsinger proposed tabling the motion and bringing it up at the next meeting.

Richard Orsinger brought up for discussion the suggestion by J. Hadley Edgar regarding Rule 86. Due to the fact that the venue rules are in the process of being rewritten this suggestion was tabled until that time. Discussion was had regarding the venue rules.

Richard Orsinger advised that the suggestion by William J. Wade regarding Rule 87 is also regarding venue and will be tabled until such time that the venue rules will be discussed.

Richard Orsinger brought up for discussion Hadley Edgar's proposal that Rule 90 be amended so that special exceptions be presented to the trial court prior to trial to avoid waiver. Mr.

Orsinger recommended this be tabled until we have the pleading rules to discuss.

Richard Orsinger brought up for discussion Broadus Spivey's proposal to amend Rule 91 to resolve special exceptions 10 days prior to trial. The subcommittee is in favor of resolving them prior to trial but their preference is to do that with reference to the closure of the discovery window. If there is no discovery window, the subcommittee would approve a period in advance of trial by which your exceptions have to be presented or they are waived. Therefore, this suggestion will need to be tabled until the discovery window question is answered.

Richard Orsinger brought up for discussion the suggestion by Bill Willis that Rule 93 be amended to reflect the correct numbered paragraphs instead of letter paragraphs in the notes and comments. Richard Orsinger indicated that this would be fixed.

Richard Orsinger brought up for discussion the letter from Charles Hayworth to Judge Peeples wherein Mr. Hayward was enclosing a letter from Hugh Hackney that had to do with offer of judgment. Mr. Hackney is referring to the Federal Rule of Civil Procedure that permits you to offer a judgment early on in the case and if you don't accept it and then their recovery is for less than, then you might have to pay the defendant's attorney's fees. Richard Orsinger indicated if anyone was interested in it he would draft a rule. David Peeples and Robert Meadows indicated an interest. Carl Hamilton advised that the court rules committee debated this for two meetings and finally decided to vote it down. Discussion followed. Richard Orsinger indicated they would bring back a proposal on Federal Rule 68.

Richard Orsinger brought up for discussion a letter from E.J. Wolt wherein he was complaining that a district clerk charged him a \$5.00 research fee. There being no action requested, the subcommittee recommended no change. There being no objection, the subcommittee's recommendation was approved.

Richard Orsinger brought up for discussion the letters submitted by Robert Hurlbut, Joe G. Bax, and Judge Louis Lopez regarding Rule 103 requesting efforts to amend the rule to regulate private process servers. The subcommittee's recommendation is to reject all efforts to address these problems through the rules. There being no objection, the subcommittee's recommendation was approved.

Richard Orsinger brought up for discussion the proposal regarding Rule 105 to add a clause that would permit the officer who has a writ of execution to fail or decline or hold off on serving the writ upon oral request. The subcommittee was against the proposal. Richard Orsinger explained why the committee

unanimously approved the subcommittee's recommendation for no change.

Richard Orsinger brought up the proposal to amend Rule 106 to permit service by delivery to an occupant over 16 years of age at the defendant's place of abode without first securing a court order for substitute service. There being no support the suggestion was rejected.

Richard Orsinger brought up for discussion the proposal by David J. Garcia, Bexar County District Clerk, to amend Rule 117(a)(6) to delete the paragraph that says "If this citation is not served within 90 days after the date of its issuance, it shall be returned unserved" so that citations do not have to be reissued. Professor Albright advised that this has been changed in the Clerk's Committee Rules. Chairman Soules advises then that this has been unanimously approved already.

Mr. Orsinger advised that in Rule 124 the parenthesis around 21a need to be deleted. There being no objection, that change was approved.

Richard Orsinger brought up for discussion the proposal regarding Rule 145 regarding district clerks having the opportunity to challenge indigency affidavits. Mr. Orsinger advised we have already adopted a new Rule 145 that permits district clerks to challenge the affidavits.

Mr. Orsinger indicated that the letters from Herb Finklestein were regarding Justice of the Peace rules and should be referred to Judge Till's subcommittee.

The meeting was adjourned.