

MINUTES OF THE
SUPREME COURT ADVISORY COMMITTEE

JANUARY 20-21, 1995

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock on Friday, January 20, 1995, pursuant to call of the Chair.

Friday, January 20, 1995:

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, Alejandro Acosta, Jr., Prof. Alexandra W. Albright, Charles L. Babcock, Pamela Stanton Baron, Honorable Scott A. Brister, Prof. Elaine A. Carlson. Honorable Ann Tyrrell Cochran, Prof. William V. Dorsaneo III, Sarah B. Duncan, Honorable Clarence A. Guittard, Charles F. Herring Jr., Donald M. Hunt, David E. Keltner, Joseph Latting, Gilbert I. Low, John H. Marks Jr., Honorable F. Scott McCown, Russell H. McMains, Anne McNamara, Robert E. Meadows, Richard R. Orsinger, Honorable David Peeples, David L. Perry, Anthony J. Sadberry, Stephen D. Susman, and Stephen Yelenosky.

Ex-officio Members present: Hon. Sam Houston Clinton, Hon William Cornelius, Paul N. Gold, David B. Jackson, Hon. Doris Lange, Hon. Paul Heath Till and Hon. Bonnie Wolbrueck

Members absent: David J. Beck, Michael T. Gallagher, Anne L. Gardner, Michael A. Hatchell, Tommy Jacks, Franklin Jones, Jr., Thomas S. Leatherbury, Harriett E. Miers, Paula Sweeney.

Ex-Officio Members absent: Kenneth Law, Doyle Curry, and Thomas C. Riney.

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

Bill Dorsaneo called the meeting to order and begins discussion of the Appellate Subcommittee's report.

Bill Dorsaneo discusses changes to TRAP 5(g) regarding computation of time as it pertains to bankruptcy. Dorsaneo discusses TRAP 19(g)(6) which embraces the same concept and moves for the adoption of both.

Discussion followed.

Pam Baron recommended that after "suspended" adding "from the date the petition is filed."

Additional discussion followed.

Pam Baron moves for the adoption of the changes to TRAP 5(g) and 19(g).

A vote was taken and the changes to TRAP 5(g) and 19(g) were passed by a unanimous vote.

Bill Dorsaneo and Clarence Guittard bring TRAP 18 regarding removal of the transcript from the clerk office after a decision from the Supreme Court up for discussion. The new version is to allow you to take transcript.

Clarence Guittard moves for the adoption of the changes. There was no discussion. A vote was taken and the changes to TRAP 18 were passed by a unanimous vote.

TRAP 22, Public Access to Appellate Court Records, is brought up for discussion. Bill Dorsaneo explains that it tries to be consistent with Rule 76a.

Bill Dorsaneo moves for adoption of the changes to TRAP 22.

Discussion followed.

Joe Latting makes a motion to table.

Bill Dorsaneo suggests withdrawing (4).

Joe Latting moves again to table.

Clarence Guittard moves for the adoption of (a) (b) (1)(2)&(3) and (c). (b)(4) is reserved for further study and work to conform to 76a.

Charles Babcock seconds the motion.

Bill Dorsaneo calls for a vote on how many think that (4) needs to be taken out along with the language in (c) that talks about hearings and findings of fact. No vote was actually taken.

Joe Latting moves to table. Vote to table fails. Discussions continues.

Stephen Yelenosky moves it be written with reference back to 76(a) either to be determined by the trial court or the appellate court.

Ann Cochran rearticulates Mr. Yelenosky's motion: adopt everything through (b)(3), delete (4), and then (5) delete "as may be appropriate", substitute the phrase "in accordance with Rule 76(a), Texas Rules of Civil Procedure" and delete the last sentence.

Further discussion of this motion.

Ann Cochran restates her motion for (c) as "An appellate court shall refer any motion to seal court records to the trial court for proceedings in accordance with Rule 76(a)."

Further discussion followed.

Bill Dorsaneo suggests they move on to the mandate rule and bring this back up tomorrow after discovery.

TRAP 23 regarding Mandate is brought up for discussion. Clarence Guittard explains this rule applies to all appellate courts. It would replace TRAP 86, 156, 231 and 232.

Clarence Guittard moves for the adoption of the proposed changes to TRAP 23. Steve Susman seconds the motion. A vote was taken and the proposed changes to TRAP 23 were adopted.

TRAP 24 - Plenary Powers brought up for discussion.

Clarence Guittard explains the conventional wisdom is that plenary power stops at end of the term. New rule is expiration of term has no effect. Clarence Guittard moves for adoption of Rule 24.

A vote was taken and the proposed changes to TRAP 24 were passed by a unanimous vote.

Bill Dorsaneo begins the discussion on TRAP 52. Trying to accomplish (1) non-waiver sentence, same general standard as charge rule; (2) third sentence to codify Cecil v. Smith rule; (3) don't need separate motion for directed verdict and written order; (4) default judgment - can't be in better position by not showing up.

Bill Dorsaneo moves for adoption of all concepts of general preservation rule be included in TRAP 52(a). Discussion followed.

David Keltner moves for amending the rule to say "An order may be recited by the trial judge if the judgment entered as a separate signed order, shown in the statement of facts, or otherwise made to appear in the record."

Don Hunt suggests "a ruling may be shown in the judgment, in a signed separate order, or in the statement of facts."

Bill Dorsaneo indicates the proposal is "A ruling may be shown in the judgment in a signed separate order" or "separate signed order". Then the question is whether it says "or shown in the statement of facts" period or whether its "shown in the statement of facts or otherwise made to appear in the record".

A vote was taken in favor of stopping with the statement of facts.

Discussion continued regarding stopping with the statement of facts.

A revote was taken on those in favor of requiring it to be in the judgment, in a separate order, or in the statement of facts in order for the complaint to be preserved. Vote is 9 in favor and 4 opposed.

Richard Orsinger moves for the adding of "or by formal bill of exception".

Bill Dorsaneo discusses adding "or before the judgment is signed in a non-jury case" to TRAP 52(b). So in nonjury cases you have to make your offer of proof, your bill of exception before the judgment is signed. A vote was taken and this proposed change passed unanimously.

A discussion was had regarding the last sentence of 52(a). Justice Guittard explains that it changes the law. Justice Guittard moves that this be recommitted to the subcommittee.

Judge Peebles moves the sentence be dropped and start with "party properly notified". Justice Duncan second the motion.

A vote was taken to remove the last sentence of 52(a) and was passed by a vote of (4) four in favor and (3) three opposed.

Change to TRAP 52(d) is to eliminate some of the excess verbiage. No change in the law. No vote was taken.

Discussion was had regarding TRAP 57 - Docketing Statement in Criminal Cases.

Justice Guittard moves for a change in subdivision (6) to read "the offense charge, the date of the offense" and so forth.

Bill Dorsaneo moves the adoption of the rule with that change. A vote was had and the changes to TRAP 57 were passed unanimously.

Bill Dorsaneo moves for the repeal of TRAP 61 because it is unnecessary in light of the Govt Code. Richard Orsinger seconds. The committee voted unanimously to repeal TRAP 61.

Discussion was had on TRAP 80 and 180. Clarence Guittard advises this is only an attempt to codify the law. Paragraph (c) Remand in Interest of Justice - must find reversible error.

Richard Orsinger moves for the insertion of "vacate the judgment of the court of appeals" in Rule 180. A vote was taken and the changes to TRAP 180 were passed.

Bill Dorsaneo begins the discussion regarding electronic recordings.

Bill Dorsaneo moves for the adoption of 264a and 264b. A vote was taken with the house to one in favor of the changes.

Bill Dorsaneo begins the discussion regarding TRAP 74 - Appendix in Electronic Recording Appeals. Must send notice of filing and a statement of the parts that have been transcribed. Service of a copy of the appendix is not required. Bill Dorsaneo moves for adoption. Discussion followed.

Steve Susman second the motion

A vote was taken in favor of the changes.

Judge Scott Brister discusses the changes to TRAP 74(i)(4) regarding the inability to pay. Suggests the person who isn't able to pay should type the transcript himself. If all contests to the affidavit are overruled then it shifts to the duty of the court reporter.

Justice Duncan moves adding to the first sentence "shall file in the trial court".

Judge Brister moves the amending the fourth line to read "if all contests" instead of "if any contest".

Discussion continues.

Steven Yelenosky proposed that the burden should be on the affiant, on the opposite party to show that they have a typewriter.

Bill Dorsaneo calls for a vote on the burden, who wants to have the burden stay on all issues on the same side as opposed to having it depend upon the issue as to who has the burden of persuasion as to who prepares it. Vote is in favor of it being the same side.

Proposal is as follows "Any party unable to pay the cost of an appendix shall file in the trial court"... balance of sentence stays the same and then "if all contests to the affidavit are overruled the recorder shall transcribe". Vote was taken on this amendment, majority to one in favor of the amendment.

Bill Dorsaneo begins the discussion TRCP 296. The last sentence now reads "A request for findings is not proper and has no effect with respect to an appeal of the summary judgment." Discussion followed.

Rusty McMains proposes an amendment of "issues of fact in any case tried to the court".

Richard Orsinger proposed appending a comment that we did not intend to change the procedure related to deemed findings under Rule 279. Justice Sarah Duncan moves for the adoption of Mr. Orsinger's proposal.

Professor Dorsaneo calls for a vote on Rule 296 with the comment and with the proposed changes. Vote unanimous in favor of Rule 296 as amended.

Discussion on TRCP 634 - Filing and approval of a bond. Revisions deal with do I need to get a writ? The answer is no. The clerk or justice shall immediately issue a writ if you want one. Assuming the bond has been filed and approved. Items from previous discussions are (1) the bond stops everything and (2) you can get a writ if you want one.

A discussion was had regarding "suspend the commencement" language.

Justice Duncan moves for the adoption of TRCP 634, seconded by Justice Cornelius.

VOTE was had in favor of adopting TRCP 634 with no changes.

Professor Dorsaneo brings up TRCP 657 for discussion. Steve Susman moves that there not be a revote on things that have already been voted on. A vote was taken to not reconsider which passed.

Justice Guittard proposes a change to Rule 9 Substitution of Parties, that would apply not just to original proceedings but to all proceedings in terms of substitution of parties. The same rule for substitution of parties would be applicable generally not just limited to original proceedings. Bill Dorsaneo moves for adoption. A vote was taken in favor of the change.

Rusty McMains brings up a discussion regarding the cost provisions. Professor Dorsaneo moves for the deletion of the part about costs. Judge McCown seconds the motion. A vote was taken in favor of this amendment.

Bill Dorsaneo announces this is the conclusion of Appellate Rules Subcommittee report.

Steve Susman presents the Discovery Subcommittee Report.

Steve Susman starts with Rule 11, Request for Production and Inspection. Mr. Susman moves for the adoption of Rule 11 (1), Requests. Your request for production can be served with citation, can be served 30 days until the close of the discovery window. A vote was taken and the changes to Rule 11(1) were passed.

Rule 11(2), Contents of Request for Production brought up for a vote. A vote was taken and the changes Rule 11(2) were passed.

Rule 11(3), Response was brought up for a vote. A vote was taken and the changes to Rule 11(3) were passed.

Rule 11(4), Production was brought up for a vote. Professor Albright explains the change. A vote was taken and the changes to Rule 11(4) were passed.

Rule 11(5), Electronic or magnetic data was brought up for a vote. Discussion followed. Justice Guittard suggests putting the footnote into the rule itself. Discussion was had on this amendment. Judge McCown proposes changing in the second sentence to say "must produce" instead of "shall produce" and then add a third sentence to say that before production in its response the responding party must identify the estimated cost and must state whether it thinks that the cost is an ordinary cost that it will bear or whether it thinks the cost is an extraordinary cost that the requesting party must bear, and if there is a disagreement they can go to the courthouse.

Discussion continued regarding what type of documents, what is extraordinary step, what is ordinary course of business.

No vote was taken on Rule 11(5). It will be redrafted.

Rule 11(6), Destruction or Alteration was brought up for a vote. A vote was taken and the changes to Rule 11(6) were passed.

Rule 11(7), Expenses of Production was brought up for a vote. A vote was taken and the changes to Rule 11(7) were passed.

A short recess was taken.

A discussion was had regarding Rule 12, Interrogatories to Parties.

Rule 12(1), Availability, was brought up for a vote. A vote was taken and the changes to Rule 12(1) were passed.

Rule 12(2), Response, was brought up for a vote. A vote was taken and the changes to Rule 12(2) were passed.

Rule 12(3), Scope of Interrogatories, was brought up for a vote. A vote was taken and the changes to Rule 12(3) were passed.

Rule 12(4), Use at Trial, was brought up for a vote. A vote was taken and the changes to Rule 12(4) were passed.

Rule 12(5), Option to Produce Records, was brought up for a vote. A vote was taken and the changes to Rule 12(5) passed.

Rule 13, Request for Admissions, is brought up for a vote. It is a verbatim copy of Rule 169. A vote was taken and the changes to Rule 13 were passed.

A discussion was had regarding Rule 14, Depositions Upon Oral Examination.

Rule 14(1), When Depositions May Be Taken, is brought up for a vote with the following being added to the end of the Rule 14(1): "Leave of court, granted with or without notice, must be obtained if a party seeks to take a deposition prior to the appearance day of any defendant". A vote was taken and Rule 14(1) passes with that amendment.

Rule 14(2), Notice; Subpoena. Justice Guittard advises that the second and third sentences are repetitive. Proposes that the second sentence should be stricken. A vote was taken and Rule 14(2) was passed with Justice Guittard's revision.

Rules 14(3), Production, was brought up for a vote. A vote was taken and the changes to Rule 14(3) were passed.

Rule 14(4), Party, was brought up for a vote. A vote was taken and the changes to Rule 14(4) were passed.

Professor Dorsaneo requests they back up to 14(4) and brings up a discussion about the problems with figuring out who a person subject to the control of a party is. Discussion on this issued followed.

Joe Latting suggests it be left alone. Judge McCown agrees. There is no motion to reconsider the vote on Rule 14(4).

Rule 14(5), Time and Place, was brought up for a vote. A vote was taken and the changes to Rule 14(5) were passed.

Steve Susman advised that Rule 14 has passed in its entirety.

A discussion was had regarding Rule 15, Examination, Objection, and Conduct During Oral Deposition.

Rule 15(1), Oath; Examination is brought up for a vote. Justice Guittard proposes adding to the last line of subdivision (1) the following language: "the officer, who shall open the envelope and propound the questions to the witnesses". Discussion followed.

Rule 15(1) will be worked on by the subcommittee and resubmitted.

Rule 15(2), Time Limitations is brought up for a vote. John Marks moves that the discussion regarding the time limits be reopened. No second, motion fails. Paul Gold proposes that in the first sentence of 15(2)(a) "their" be changed to "the opposing party's control". Discussion followed regarding what the court is suppose to do when the defendants can't agree on who gets how much time. Discussion was had regarding third party defendants sharing the defendants hours.

Buddy Low and Judge McCown propose amending the second sentence to say "with regard to issues common to third party defendants and defendants."

A discussion was had on Rule 15(2)(b), time per deposition.

A vote was taken on Rule 15(2). Rule 15(2) was passed on a vote of fifteen (15) in favor and three (3) opposed.

A discussion was had on Rule 15(2)(c) regarding record of deposition time.

Rule 15(3), Conduct during the Deposition, was brought up for discussion. Justice Guittard proposed the last sentence be amended to say "testimony to be introduced in evidence at the trial" instead of "testimony to be presented to the jury during trial". Judge McCown suggests just taking out "to the jury". Joe Latting suggests taking out "presented to the jury" and include "introduced in evidence".

A discussion was had regarding what this does to the evidence rules, shouldn't that be sanctionable that's dealt with by the court rather than presenting it to the jury?

A discussion was had regarding recesses.

A vote was taken on Rule 15(3) and was passed unanimously.

Rule 15(4), Instructions not to Answer, was brought up for discussion.

Rule 15(5) Terminating the Deposition was brought up for discussion. Steven Yelenosky proposed that there should be something in the real that a reason for terminating a deposition is exceeding the time limit. A discussion followed regarding the term "in bad faith".

Judge McCown suggests saying that a party or the deponent may move to terminate or limit the deposition when it is conducted or defended in violation of these rules. The subcommittee accepted this suggestion.

A discussion was had regarding 15(4)(c) regarding "an abusive question".

Further discussion was had regarding 15(5) on terminating a deposition. Rusty McMains proposes deleting "pursuant to Rule 8". Alex Albright says take out "move to" and "pursuant to Rule 8". Judge McCown says not "move to" just "pursuant to Rule 8". David Keltner proposed changing "A party or the deponent may move to terminate or limit" to "A party or the deponent may suspend or limit". Discussion followed.

Steve Susman calls for a vote on Rule 15(4). A vote was taken and Rule 15(4) was passed unanimously.

A vote was taken and passed unanimously to refer Rule 15(5) back to the subcommittee.

Rule 15(6), Objections to testimony, was brought up for discussion. Discussion followed. A vote was taken and Rule 15(6) was passed unanimously.

Rule 16, Non-Stenographic Recording; Deposition by Telephone, was brought up for discussion.

Rule 16(1), Non-Stenographic Recording was discussed. A vote was taken and Rule 16(1) was approved by a vote of sixteen (16) in favor and five (5) opposed.

Rule 16(2), Deposition by Telephone, was brought up for discussion. Bill Dorsaneo makes a motion to take out the last sentence. Pam Baron seconded the motion. Discussion was had regarding this motion. Steve Susman indicated that sense of the committee was to take out everything after "substantiate" in the last sentence. Pam Baron makes it into a motion which is seconded by Steve Susman.

Judge McCown makes a motion to substitute the words "and the witness is sworn by a person present with the witness". Discussion followed.

A vote was taken on the concept of Rule 16(2) with twenty (20) in favor and one (1) opposed. The subcommittee will work on a redraft of this rule.

Rule 17, Deposition on Written Questions, was brought up for discussion. The committee voted unanimously to adopt current TRCP 208 as Rule 17.

Rule 18, Physical and Mental Examinations, was brought up for discussion. The committee voted unanimously to adopt current TRCP 167a as Rule 18.

Rule 19, Motion for Entry Upon Property, was brought up for discussion. Justice Guittard proposes changing 19(2) to read "If the person in possession or control of the property is not a party to the suit, a true copy of the motion..." Paul Gold seconds the amendment. Discussion followed. A vote was taken and Rule 19 was passed with a vote of 18 in favor and 1 opposed.

A discussion was had regarding obtaining documents from third parties. David Keltner is assigned the responsibility of drafting a rule that deals with getting documents from a third party.

Rule 166, Pretrial Conference, was brought up for discussion. Joe Latting proposed the following language "The court may consider any matter that would aid in the disposition including, among other" or "including without limitation".

Paul Gold moves the withdrawal of Rule 166 from consideration and send it back to the subcommittee. Steve Susman seconded the motion. By unanimous vote Rule 166 was returned to the subcommittee.

Rule 63, Amendments and Responsive Pleadings, was brought up for discussion. Judge McCown proposing inserting before the very last sentence something that says if the trial judge is going to, even if there is sufficient time on the calendar to complete the discovery so that the trial judge is going to grant leave to amend, the trial judgement nevertheless should think through the problem of whether the discovery hours need to be enlarged, not that they have to be enlarged, but they need to think through that and enlarge the discovery hours if that's what's fair.

Anne Cochran suggest also amending the next to last sentence to say "the court has to grant leave unless" to add another "unless" along the lines of "unless the trial court finds that the reason for the late amendment to the pleadings was because they were trying to get around the discovery limitations.

A straw vote was taken resulting in a vote of eleven (11) in favor of Judge Peoples suggestion that the trial judge has discretion to not grant leave to twelve (12) that trial judges do not have discretion.

Discussion continued.

A vote was taken on whether or not there should be some deadline on pleading during that discovery window before the discovery period ends. Result of the vote was nineteen (19) in favor with four (4) opposed.

Discussion was had on what the standard should be for amending after the free amendment period expires.

Steve Susman provides an introduction to RULE 1, provides an explanation of the 3 tiers. Discussion followed. Justice Guittard proposed striking the words "for damages" and saying the amount in controversy is \$50,000 or less. Discussion followed.

Steve Susman calls for a vote on the concept of Tier 1 which is taking a group of cases defined generally and put them into a Tier 1 that has a clock limitation, and no calendar limitation. There are some amendments that need to be made, have to deal with definitional problem of what is a \$50,000-or-under case, but other than that this is the concept. A vote was taken on the concept of tier 1 cases. Unanimously in favor.

Continued debate on having a \$50,000 lid for Tier 1 cases.

David Perry indicates that the sense of the committee was to vote overwhelmingly for Tier 1 with a stricter limit on amendments. Suggests adding "but in no event, not later than 30 days before trial", which says you could not amend out of Tier 1 at a time that unduly prejudices the opponent but in no event not later than 30 days before.

Chairman Soules suggests it ought to be 30 days before the first trial setting.

Steve Susman reads the amendment to be "No amendment bringing the amount above \$50,000 shall be allowed at such time as to unduly prejudice the opposing party and in no event later than 30 days prior to trial"

A vote was taken on this amendment resulting in eighteen (18) in favor, two (2) opposed. Tier 1 is adopted.

Steve Susman provides an introduction of Tier 2 cases.

A discussion was had regarding the 50 hour time limitation and whether not neutral fact witnesses are included in the hour limitation.

John Marks makes a motion for adoption of Clarence Guittard's proposal - merge tier 1 and 2 and increase tier 1 limits, then have tier 3.

A vote was taken on Tier 2 resulting in a vote of sixteen (16) in favor and three (3) opposed.

Steve Susman provides an introduction of Tier 3 cases. Tier 3 is the Discovery Control Plan theory.

Prof. Albright suggests it should go back to subcommittee and think about what should be in the discovery control plan. See court rules plan.

Steve Susman proposed they adopt the concept of Tier 3 with a Discovery Control Plan to be made by agreement of the parties or imposed by court order. What is going to be contained in the Discovery Control Plan should be referred back to subcommittee for recommendation and that the committee should be directed to consider how that impacts the other limitations in the rules that we have adopted.

Paul Gold seconds this proposal.

A vote was taken and tier 3 passed as to by agreement or order and back to subcommittee to decide what is required by tier 3.

Discussion was had regarding availability of mandamus if trial court abuses its discretion.

Discussion continued regarding the differences between tier 2 and tier 3, how to change from one to the other, deposition time limits.

David Keltner says if you have gone to Tier 3 there would be some absolutes that you would have to tell the court about, like a trial date and those types of things. We need to vote on whether the trial judge can override agreement or rules.

A vote was had on whether the trial judge should be able to overrule and parties and can. Unanimous agreement.

Ann Cochran says the problem is calling tier 3 a tier - it is a process. You should have two tiers, then if either the court wants to change it or you want to change it by Rule 11 you go to Rule 2 and here is the procedure. Wouldn't it make more sense just to move all Tier 3 business out and make a comprehensive Rule 2 about if either you or the trial judge want to not be in Tier 1 or Tier 2 here is the process and mechanism to get there.

Steve Susman calls for a vote on who favors Ann Cochran's proposal. No vote was actually taken.

Discussion continued.

The meeting was adjourned until Saturday, January 21, 1995 at 8:30 o'clock a.m.

Saturday, January 21, 1995:

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock on Saturday, January 21, 1995, pursuant to call of the Chair.

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, Alejandro Acosta, Jr., Prof. Alexandra W. Albright, Pamela Stanton Baron, Honorable Scott A. Brister, Prof. Elaine A. Carlson, Honorable Ann Tyrrell Cochran, Prof. William V. Dorsaneo III, Sarah B. Duncan, Anne L. Gardner, Honorable Clarence Guittard, Charles F. Herring Jr., Donald M. Hunt, Tommy Jacks, David E. Keltner, Joseph Latting, Gilbert I. Low, John H. Marks Jr., Honorable F. Scott McCown, Russell H. McMains, Anne McNamara, Robert E. Meadows, Honorable David Peeples, David L. Perry, Stephen D. Susman, and Stephen Yelenosky.

Ex-officio Members present: Hon William Cornelius, Paul N. Gold, David B. Jackson, Hon. Doris Lange, Hon. Paul Heath Till and Hon. Bonnie Wolbrueck

Members absent: Charles L. Babcock, David J. Beck, Michael T. Gallagher, Michael A. Hatchell, Franklin Jones, Jr., Thomas S. Leatherbury, Harriett E. Miers, Richard R. Orsinger, Anthony J. Sadberry and Paula Sweeney.

Ex-Officio Members absent: Honorable Sam Houston Clinton, Kenneth Law, Doyle Curry, and Thomas C. Riney.

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

Steve Susman continues presenting the Discovery Task Force Report.

Mr. Susman advises there has been no change to Rule 2, Modification of Discovery Procedure and Limitation, from before. A vote was taken and Rule 2 passed.

Mr. Susman brings Rule 3, Permissible Discovery: Forms and Scope, up for discussion

Mr. Susman advises there have been no real changes to Rule 3(1), Forms of Discovery. A vote was taken and Rule 3(1) passed.

Rule 3(2), Scope of Discovery was brought up for discussion.

Rule 3(2)(c), Persons with Knowledge, was brought up for discussion. Steve Susman explains the comment was changed to provide that you don't have to say what persons with knowledge know or what they are going to testify, just provide a brief description of the person's relationship to the case.

Rule 3(2)(d), Trial Witnesses, was brought up for discussion. Steve Susman explains it was changed to add "A party may obtain discovery of the identity and location of persons who are expected to be called to testify at trial". No change to the rest. A discussion followed.

Steve Susman calls for a vote on Rule 3(a), 3(b) and 3(c). The committee voted unanimously for in favor of these rules.

Discussion continued regarding 3(2)(d). A vote was taken and Rule 3(2)(d) was passed on a vote of thirteen (13) in favor and five (5) opposed.

Rule 3(2)(e), Experts, was brought up for discussion. A vote was taken and Rule 3(2)(e) was passed unanimously.

Rule 3(2)(f), Indemnity, Insuring and Settlement Agreements, was brought up for discussion. A vote was taken on Rule 3(2)(f) subject to Professor Dorsaneo providing language which will put similar limitations on settlement agreements that now occur for insurance agreements. A vote was taken and Rule 3(2)(f) was passed unanimously.

Rule 3(2)(g), Witness Statements, was brought up for discussion. David Perry provides an explanation as to the thoughts of the task force on this rule. A vote was taken and Rule 3(2)(g) was passed with a vote of the house to one. Chairman Soules indicates this isn't a fair record vote, there has been zero discussion. The vote may be a straw vote but there shouldn't be a record vote. Discussion followed.

Judge McCown proposed the following amendment "A witness statement means (1) a written statement signed or otherwise adopted or approved by the person making it, or (2) a stenographic, mechanical, electrical, or other type of recording or (3) any transcription thereof which is a substantially verbatim recital of a statement made by the person and contemporaneously adopted." Discussion followed. A vote was taken and Rule 3(2)(g) was approved with a vote of sixteen (16) in favor and (2) opposed.

Judge Peoples proposes putting in a sentence that notes are not discoverable. Discussion followed.

Chairman Soules moved that (g) be modified as follows: (g) witness statements. A witness statement regardless of when made is discoverable except as provided in Rule 4. A "witness statement" means : (1) a written statement signed or otherwise adopted or approved by the person making it, or (2) a stenographic, mechanical, electrical, or

other type of recording which is a substantially verbatim recital of a statement made by the person and contemporaneously adopted or any transcription thereof; but does not mean attorneys' notes of witness interviews not signed or otherwise adopted by the person interviewed". Motion seconded by Joe Latting.

Discussion followed. Robert Meadows is appointed to redraft the rule.

Chairman Soules proposes the last clause should say "does not mean the notes of an attorney or the representative of the attorney."

A vote was taken authorizing the subcommittee to draft some language that makes it clear that an attorney's notes or interview or an attorney's agent's notes or an interview that has not been signed or adopted by the witness is not a witness statement within this definition. Passed unanimously.

Rule 4, Exemptions and Privileges from Discovery, was brought up for discussion.

Steve Susman advises that Rule 4(a) will not be presented today.

A vote was taken on Rule 4(b) and Rule 4(c) which were passed unanimously.

Steve Susman advises that Rule 4(d) will not be presented today.

Rule 5, Response to Discovery Requests; Supplementation and Amendment, was brought up for discussion.

A vote was taken on Rule 5(1), Duty to Respond and was passed unanimously.

Discussion was had on Rule 5(2), Duty to Amend or Supplement Discovery Responses. A vote was taken on the concept that you can supplement or amend through what you say in a deposition, what a witness, in a letter or through another discovery device but you cannot do it through simply producing a bunch of documents. The concept of Rule 5(2) failed by a vote of ten (10) in favor and fourteen (14) opposed.

Discussion continued.

Steve Susman submits new proposal: The sentence stays except you must supplement directly the identify of witnesses with relevant knowledge of facts, expected trial witnesses, experts and documents.

Discussion was had about document production.

A vote was taken on Rule 5(2) with the understanding that insofar as witnesses with relevant knowledge, expert witnesses, and trial witnesses you have to do that

specifically and for a document request you have to produce the document. Rule 5(2) passed with a unanimous vote.

Rule 5(3), Additional Discovery After Amendment or Supplementation, was brought up for discussion. Steve Susman provides the following amendment: "If the amendment or supplement occurs at such time that it is impossible to conduct discovery about the amendment or supplement within the discovery period the party may re-open discovery". A vote was taken and with that amendment Rule 5(3) passed unanimously.

Rule 6, Failure to Provide Discovery, was brought up for discussion.

Rule 6(1), Exclusion or Continuance, was discussed. A discussion was had regarding the difference between "continuance" and "postponement".

Judge McCown proposing the following amendment "The burden of showing that the opposing party is not unprepared in a way that may affect the outcome of the trial is on the offending party." Discussion followed.

Chairman Soules proposed changing the first sentence to say "...unless the failure to disclose does not cause the opposing party to be prejudiced in any way that may affect the outcome of the trial."

A discussion followed regarding using "may" or "shall" exclude .. or continue.

Steve Susman reads the changes to the rule are as follows "If the party fails to timely disclose information during discovery, the court shall exclude the information not timely disclosed or continue the trial to allow the opposing party to prepare to confront or use the previously undisclosed information unless the failure to disclose does not cause the opposing party to be unprepared in a way that may affect the outcome of the trial.

Chairman Soules says to delete "The burden of showing is on the offending party".

Judge McCown proposes you move the "unless" clause up to the top.

Discussion followed on these amendments.

Judge McCown states the concept would be that if there is a failure to timely disclose, the trial judge is confronted with three options. If the failure does not cause the opposing party to be unprepared in a way that may affect the outcome of the trial, so that the burden or the presumption is on the offending party, the trial judge can let the evidence in and move forward, if the failure does cause the opposing party to be unprepared in a way that may affect the outcome of the trial then the trial judge has to either exclude or continue it. Discussion continued.

A vote was taken on the concept of Rule 6(1) with fifteen (15) in favor and one (1) against.

Justice Peeples feels "may effect the outcome" is not strong enough, out efforts to rigidly confine trial court discretion here are not going to work. A discussion was had regarding this issue.

A discussion was had regarding Rule 6 going to the Sanctions rule for review also.

Steve Susman brought up Rule 7 - withholding privileged documents for discussion. The concept is that the way to preserve a privilege is by withholding the document and filing a withholding statement that says you are withholding a document and the privilege you are relying on. You need not file a withholding statement in advance, its when you actually hold the document back from discovery. The party that receiving the withholding statement can ask for a privilege log which must be given within 15 days.

Judge Cochran proposes that we need to clarify in the last sentence exactly what is meant by "trial counsel". Justice Guittard suggests striking "trial".

Discussion continued.

Steve Susman proposes they limit the discussion to subdivision (1) without the last sentence.

A vote was taken on Rule 7(1), Withholding Privileged Information and Materials, without last sentence, 13 in favor, 3 opposed.

A discussion was had regarding "trial counsel". Anne McNamara suggests deleting the word "trial".

Joe Latting asks what is "this litigation"? Alex Albright explains.

Steve Susman advises this goes to privilege problem and will be discussed with Rule 4. Suggests deferring this sentence.

Rule 7(2), Objections, was brought up for discussion.

John Marks has a problem with "obscured by numerous unfounded objections is waived". Discussion followed.

Tommy Jacks proposing the following language "If written discovery request is objectionable on grounds other than privilege". Steve Susman accepts the amendment. Discussion followed.

David Perry suggests this rule be redrafted.

Steve Susman calls for a vote on the concept of Rule 7(2).

Discussion continued.

A vote was taken on whether or not the third sentence, or something like it, should be in the rule, seventeen (17), three (3) against.

Discussion was regarding whether the last sentence should be mandatory or permissive?

A vote was had on the concept of last sentence of Rule 7(2) as mandatory, unanimously approved.

Rule 7(3), Hearing, and Rule 7(4), Ruling, were brought up for discussion.

Scott McCown suggests a comments that says generally speaking hearings on objections and withholding statements should occur before trial; however, there may be circumstances in which a hearing during trial is reasonable.

Rusty McMains proposal was to say that if you are a party opposing the privilege, the assertion of the privilege, it's been asserted. You don't do anything about it and the discovery window closes, that basically you should never have to worry about the assertion of that privilege or sustaining of that assertion of privilege relating to anything dealing with discovery. The only time that the issue of privilege should be re-opened is if there is new material that comes to light as a result of supplementation. At that time you should be able to have a hearing on the objection if that raises new information.

No vote was taken on Rule 7(3) or 7(4).

Steve Susman advises that Rule 8, Protective Orders, was approved unanimously at the last meeting.

Rule 9, Requests for Standard Disclosure, was brought up for discussion.

Steve Susman advises that in subdivision (2) need to add something that shows when you can make the request, we don't have the timing in there.

Chairman Soules proposes that since you have (e) and (f) for PI cases we should have a corollary basis for the claim of damages for other cases. Discussion followed.

The meeting was adjourned until March.