

MINUTES OF THE
SUPREME COURT ADVISORY COMMITTEE
May 16, 1997

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock on Friday, May 16, 1997, pursuant to call of the Chair.

Friday, May 16, 1997:

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, Charles L. Babcock, Pamela Stanton Baron, David J. Beck, Honorable Scott A. Brister, Prof. Elaine A. Carlson, Prof. William V. Dorsaneo III, Honorable Sarah B. Duncan, Anne L. Gardner, Donald M. Hunt, Gilbert I. Low, John H. Marks, Jr., Anne McNamara, Anthony J. Sadberry, Stephen D. Susman, Paula Sweeney, and Stephen Yelenosky.

Ex-officio Members present: Honorable William Cornelius, Carl Hamilton, Doris Lange, Mark Sales, and Bonnie Wolbrueck.

Members absent: Alejandro Acosta, Jr., Prof. Alexander Albright, Hon. Ann T. Cochran, Michael T. Gallagher, Hon. Clarence A. Guittard, Michael A. Hatchell, Charles T. Herring, Jr., Tommy Jacks, Franklin Jones, Jr., David E. Keener, Joseph Latting, Thomas S. Leatherbury, Hon. F. Scott McCown, Russell McMains, Robert E. Meadows, Richard R. Orsinger, Hon. David Peeples, and David L. Perry.

Ex-Officio Members absent: Hon. Paul Womack, Paul N. Gold, David B. Jackson, W. Kenneth Law, and Hon. Paul Heath Till.

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

Chairman Soules brought the meeting to order.

Chairman Soules advised that Lee Parsley has indicated that the court has asked for some indication from the State Bar Rules Committee and the Supreme Court Advisory Committee concerning having the court appoint court experts or case experts in addition to the experts selected by the parties. Chairman Soules indicated that the Committee doesn't even need to get into the substance of a rule until the Committee decides whether or not a rule is needed. Mark Sales and Buddy Low each presented the position of their respective subcommittees. Judge Brister provided an explanation as to why he was in favor of such a rule. Discussion followed regarding whether or not there should be such a rule. Chairman Soules called for a vote on the concept of having a Rule 706 that would be limited to the expert gate keeping function of the trial

court. The Committee voted 10 to 1 in favor of having a rule. Chairman Soules assigned Judge Brister, Mark Sales, Buddy Low, Paula Sweeney, John Marks, and Paul Gold to work together and come up with a rule.

Buddy Low presented the report of the Subcommittee on the Texas Rules of Civil Evidence.

Buddy Low brought up for discussion the changes to Rule 702 proposed by Michael T. Gallagher. Mr. Low advised that the Committee had previously voted to take no action because this matter is being studied by the Family Law Council as well as by the State Bar Evidence Committee. Mark Sales advised that the State Bar Committee had proposed not changing the rule but just adding a comment. Chairman Soules advised that this rule will be put on the July agenda for further report.

Buddy Low provided the Subcommittee's report on whether Civil Rule 705 should read like Criminal Rule 705. Discussion followed. There being no opposition, the proposed change was unanimously approved.

Buddy Low brought up for discussion the proposal by the State Bar Evidence Committee to amend Rule 106 to change the reference to "Texas Code Criminal Procedure" to "Rule 107." There being no opposition, that was unanimously approved.

Buddy Low brought up for discussion the proposal by the State Bar Evidence Committee to amend Rules 202 and 204 to provide for mandatory judicial notice upon motion of the party if the other requirements are met. There being no opposition, the proposed amendment was unanimously approved.

Buddy Low brought up for discussion the proposal by the State Bar Evidence Committee to amend Rule 410 so that the last sentence beginning with "however" becomes a new paragraph. Discussion followed. The Committee voted that the "however" clause should be part of paragraph four as it is in the Criminal Rules.

Buddy Low brought up for discussion the letter from Ken Lewis regarding clean up revisions to Rule 509 and 510 to change the citations to cite the correct authority. There being no opposition, that was unanimously approved.

Buddy Low brought up for discussion proposed amendments to 513(d), which were referred by the State Bar Evidence Committee so that paragraph (d) would apply to both civil and criminal cases. Discussion followed. There being no opposition, the proposed amendment was unanimously approved.

Mr. Low brought up for discussion the State Bar Evidence Committee proposal to amend Rule 802 to make hearsay "no evidence"

as in Federal Court. The Subcommittee recommended no change. Discussion followed. A vote was taken and by a vote of 10 to 2, the Committee accepted the Subcommittee's recommendation.

A discussion was had regarding what items, if any, are left on the agenda of Buddy Low's Committee and on the agenda of Mark Sales' Committee.

Chairman Soules brought up for discussion the proposal by the Court Rules Committee to amend Rule 103(a)(2) by removing the words "in criminal cases." There being no opposition, the proposal was approved.

Professor Dorsaneo brought up for discussion Rule 6, Time, paragraph (c) Use of United States Postal Service, which is current Rule TRCP 5. There being no opposition, the rule was unanimously approved.

Professor Dorsaneo brought up for discussion Rule 10, Service and Filing of Pleadings, paragraph (b) Methods of Service. Chairman Soules proposed adding the words "confirmed facsimile" in paragraph (d). Discussion followed. Lee Parsley advised that the paid consultant has indicated we should use the word "fax" instead of "facsimile." A vote was taken that there being no opposition, the language "confirmed fax" was unanimously approved.

Professor Dorsaneo brought up for discussion Rule 27, Third Party Practice. Chairman Soules proposed saying 60 days after the new party is added. Discussion continued. Chairman Soules indicated that it's 60 days after the petition is filed adding the new plaintiff. Discussion followed. A vote was taken and there being no opposition, Rule 27 was unanimously approved as modified. Professor Dorsaneo proposed changing the 90 days after the appearance date of a third party plaintiff as a defending party to 90 from service. There being no opposition to making it same, that will be done.

Professor Dorsaneo brought up for discussion an unnumbered rule entitled Default Judgment. Professor Dorsaneo explained that the specific assignment was to deal with Judge David Evans' letter concerning Court Rule 243. Judge Evans wanted an explicit authorization in the rule for use of affidavits to prove up unliquidated damages. The rest of the rule amalgamates into one rule the default judgment provisions that are contained in a number of distinct shorter rules beginning at 237a in the current rule book. Professor Dorsaneo continued explaining the specific provisions of the default judgment rule. Discussion followed. Don Hunt proposed making the word affidavit singular instead of plural. The Committee had no opposition to doing that.

David Beck proposed moving the phrase "on the record" in the last line to after the word "evidence" so that it says "the

plaintiff must present evidence on the record." Mr. Beck also suggested putting a period after the word "upon" and then starting at a new sentence "Such evidence may consist of affidavits" Discussion followed. Chairman Soules proposed the following language, "The plaintiff must prove the damages caused by the events sued upon by presenting evidence on the record or by presenting affidavits." Discussion continued. Professor Dorsaneo will make revisions to the rule and present it at the next meeting.

Justice Sarah Duncan presented the report on John Chapin's recommendation that the Committee consider an amendment to Federal Rule 72a which incorporates a time line for objecting to a Master's Report. Judge Peeples looked at the rule and recommended no change. There being no opposition, Judge Peeples recommendation was approved unanimously.

Judge Scott Brister presented the report on Rule 174, Separate and Bifurcated Trials. Discussion followed. Carl Hamilton brought up for discussion a problem with the wording "may order separate trials before separate juries." Discussion continued. Chairman Soules called for a vote on Rule 174 down to the final sentence. There being no opposition, everything down to that point was approved. Discussion was had regarding the last sentence of the rule. A vote was taken and there being no opposition, the last sentence of the rule was approved unanimously.

Judge Scott Brister presented his report on a motion in limine rule. Discussion followed. The Committee voted unanimously against having a rule on motion in limine.

Scott Brister presented his report on Rule 76a(c) and whether or not "court records" ought to cover discovery that's in your file and not filed with the court. Discussion followed. Judge Brister proposed dropping from the definition of "court records" anything that's not at the courthouse, in other words deleting (c). Mark Sales seconded the motion. Discussion continued. Chairman Soules called for a vote on deleting paragraph (c) and by a vote of 9 to 6, paragraph (c) was deleted.

Professor Dorsaneo inquired what to do with the separate part of Judge Brister's motion about adding back in the responsibility to evaluate information that the party's treat as confidential if someone raises the public importance of the disclosure of the information.

Chairman Soules advised that 76a has been discussed and a vote of 9 to 6 was had to delete (2)(c) and refer it back to Committee for drafting in response to that vote. Chip Babcock and Paula Sweeney will assist Judge Brister in redrafting the rule. Discussion continued regarding deleting paragraph (c).

Don Hunt presented the report of the subcommittee on TRCP 296-331 with regard to the Third Supplemental Agenda.

Mr. Hunt brought up for discussion the case of Grossnickle v. Grossnickle which indicated that Rule 298 should be changed to allow the 10 day period of time in which to request additional or amended findings of fact to commence on the day the original findings and conclusions are either mailed or received rather than when the original findings and conclusions are "filed" as Rule 298 now states. Mr. Hunt sets forth the reasons why his Subcommittee recommends no change. He also indicated Rule 298 as amended takes care of most of the problems that can be solved. The Committee voted unanimously to adopt the Subcommittee's recommendation.

Mr. Hunt brought up for discussion the suggestion by Hugh Harrell to amend either Rule 300 or 301 to require a trial court to render a decision within 30 days after taking a matter "under advisement." Discussion followed. Mr. Hunt advised that the Subcommittee recommended no change. There being no dissent, the Committee unanimously approved the Subcommittee's recommendation.

Don Hunt brought up for discussion the Court Rules Committee's suggestion that Rule 329b be amended to permit the appealing of the granting of a motion for new trial on an abuse of discretion standard. The Subcommittee recommended no change. Discussion followed. The Committee voted 6 to 6 in favor of a change. Discussion continued regarding this matter. David Beck proposed appointing somebody to look into this further. Mr. Beck volunteered to do it. Justice Duncan asked that David's Subcommittee think about an interlocutory certification procedure also. Anne Gardner volunteered to help along with John Marks.

Chairman Soules indicated the status was that the rule failed to pass by a tie vote of 6 to 6 and then the Committee took action to permit David Beck an ad hoc committee to offer something in its place if they choose to do so.

Paula Sweeney presented the report for the Subcommittee on TRCP 216-295 with regard to the Third Supplemental Agenda.

Ms. Sweeney advised that the suggestions forwarded to her by Richard Orsinger regarding various jury rules should be tabled pending the report of the Task Force constituted by Justice Cornyn to take a look at the Arizona Rules and other like rules and see how they would do with the Texas Rules.

Ms. Sweeney advised that the letter from Scott Brister regarding the jury scuffle has already been dealt with and voted down.

Ms. Sweeney advised that Mr. Orsinger's letter regarding adopting rules permitting jurors in civil cases to submit written

questions and to take notes and adopting a rule giving the trial court the power to permit lawyers to reargue the case if the jury is deadlocked will be tabled until the Task Force has finished its work.

Ms. Sweeney advised that the Court Rules Committee proposed rule changes to 226a and 281 should be tabled until the Task Force has finished its work.

Ms. Sweeney advised that the issues raised in the letter from Louis Muldrow have all been covered, voted on, adopted, and sent to the Supreme Court.

Chairman Soules presented the report of the Subcommittee on TRCP 523-734.

Chairman Soules advised that the Court Rules Committee's proposed amendment to 539 permitting justice of the peace courts to hold trial sooner than 45 days as required by Rule 245 has previously been approved by the Committee.

Chairman Soules brought up for discussion the Court Rules Committee's proposed change to Rule 528 to provide that there would be a limit of two transfers per case because some defendants are presenting these affidavits at trial time on repeat occasions. There being no opposition, the proposed amendment was unanimously approved.

Chairman Soules presented the report of the Subcommittee on TRCP 1-14.

Chairman Soules brought up for discussion Justice O'Connor's letter requesting a new rule regarding the way rules are cited in the case law. Discussion followed. Chairman Soules suggested that this be forwarded on to the attention of Mr. Gardner, Chip Babcock seconded the motion, there being no opposition, the suggestion was approved.

Chairman Soules brought up for discussion Judge Tom Lawrence's letter requesting amendments to Rule 3a and 3b to provide authority for the Harris County Justice Courts to make local rules. Discussion followed. There being no motion regarding whether or not to amend 3a and 3b, the Committee voted unanimously for no change.

Chairman Soules brought up for discussion the case of Peacock v. Humble regarding the fact that the Government Code counts different than the rules. Chairman Soules advised that the Committee has already discussed this and has decided not to make a change in the civil rules.

Professor Dorsaneo presented the report on the TRAP rules with regard to the Third Supplemental Agenda.

Professor Dorsaneo advised that the issues raised by Katherine Butler have been addressed and dealt with in the appellate rules.

Professor Dorsaneo advised that the issue raised by Justice Grant in the opinion Cates v. Cincinnati Life Insurance Company has gone away or has been ameliorated to the extent it can be.

Professor Dorsaneo advised that the problem language in the case entitled Galil Moving & Storage v. McGregor has been eliminated from TRAP Rule 1.1.

Professor Dorsaneo brought up for discussion the letter from the Chief Justice and the Justices of the Ninth Court of Appeals regarding the requirement in the former appellate rules that all papers be sent to all parties to the trial court's final judgment. This has been taken care of by the appellate rules as promulgated. Discussion followed regarding this issue.

Professor Dorsaneo brought up for discussion the letter from Chief Justice Bob L. Thomas regarding proposed amendments to Rule 18. Professor Dorsaneo advised that his concerns regarding responsibility for lost items has been taken care of in the amended new appellate rule 12.3.

Professor Dorsaneo advised that the issue raised in the case styled Trevino v. Pemberton, had been dealt with in the published Appellate Rule 20.1(i). Discussion followed.

Professor Dorsaneo advised that the issues raised in the case entitled In the Matter of L.V., have been resolved by the new appellate rules.

Professor Dorsaneo advised that the problem raised in the case of Baker v. Trand, Inc. have been resolved by the new appellate rules.

Professor Dorsaneo advised that the problem raised in the case of Knight v. Sam Houston Memorial Hospital et al. have been resolved by the amendments to the appellate rules.

Professor Dorsaneo brought up for discussion the letter from Charles Spain complaining about the draft administrative appeal rule, TRAP 55. Professor Dorsaneo advised that this letter was reviewed during the time that the TRAP rules were being prepared.

Professor Dorsaneo brought up for discussion the letter received from four Harris County clerks regarding proposed changes to TRAP 57 and how the docketing statement would be handled.

Professor Dorsaneo advised that this problem has been resolved in the new appellate rules.

Professor Dorsaneo brought up for discussion the letters from J. Shelby Sharpe and the Court Rules Committee regarding proposed changes to Rule 84. Professor Dorsaneo advised that TRAP 84 has been rewritten in response to comments and is now codified as TRAP 45.

Professor Dorsaneo brought up for discussion the correspondence from Paul C. Murphy and Kathleen Beirne regarding proposed revisions to TRAP 120 and 121. Professor Dorsaneo advised that their concerns have been dealt with in the new TRAP Rule 52.7.

Professor Dorsaneo brought up for discussion the Court Rules Committee's proposed changes to Rule 121. To remove the personal stigma attached to naming the judge or other official in the style of the case. Professor Dorsaneo advised that these changes were made in the new TRAP 52.1.

Professor Dorsaneo advised that the comments provided in the letter from Mike Prince regarding proposed changes to section 9 of the appellate rules have been addressed and dealt with in the new TRAP rules.

Professor Dorsaneo advised that the concerns voiced by Pamela Baron, Charles B. Lord, Douglas W. Alexander, and Jimmy Vought regarding replacing the petition for review proposal with a different approach were considered and rejected.

Professor Dorsaneo advised that Justice Guittard's comments regarding the petition for review were considered and some of his comments found their way in and some of them did not.

Professor Dorsaneo advised that pages 415 through 511 of the Third Supplemental Agenda are responses to Chief Justice Phillips' inquiry to other courts around the State regarding their procedure for appealing to the highest court.

Professor Dorsaneo advised that the concerns raised by Charles Spain regarding proposed TRAP 180(a)(6) have been considered, discussed, and taken care of in new Appellate Rule 43.2.

Professor Dorsaneo advised that the concerns raised by Shelby Sharpe regarding Rule 182(b) have been dealt with in TRAP 45.

Professor Dorsaneo advised that completed his report.

Steve Susman presented the report of the Subcommittee on TRCP 166-209 as it pertains to the Third Supplemental Agenda.

Mr. Susman advised that the letters from the Court Rules Committee, Judge Scott Brister, Dean Schaner, Fred Davis, and Rob H. Holt, are all regarding Rule 166a, Summary Judgment, therefore, no action is required.

Mr. Susman advised that the proposed discovery rules deal with prophylactic objections in response to the letter from Paul Gold.

Mr. Susman brought up for discussion the Court Rules Committee's proposed changes to Rule 167. Mr. Susman advised the discovery rule submitted to the Supreme Court did not make any major changes in this rule. Chairman Soules requested that his Subcommittee take a look at the Court Rules Committee's suggestion.

Steve Susman brought up for discussion the letter received from Robert Gwinn regarding Rule 167. This letter will be addressed by the Subcommittee along with the Court Rules Committee's proposal.

Steve Susman advised that the issue raised by Richard Tulk regarding TRCP 168 and providing a diskette when responding to discovery requests is covered in the proposed discovery rules.

Chairman Soules inquired as to whether or not the issue of whether supplemental answers to interrogatories had to be verified had been resolved. Discussion followed. The recollection of the Committee was that the original verification rules deemed to apply to supplements.

Chairman Soules requested Steve Susman's Subcommittee take another look at the request from Steven Amis regarding proposed amendments to Rule 168.

Steve Susman brought up for discussion the letter from Kevin Madison regarding having a rule for firearms as evidence in courtrooms. Discussion followed. Mr. Parsley advised that the Committee has already considered and rejected this type of rule.

Mr. Susman brought up for discussion the Court Rules Committee's proposed changes to Rule 200, paragraph (b) that deals with expert's costs. Discussion followed. Chairman Soules indicated he did not see any problem with the first sentence but the second sentence bothered him. Discussion continued. Chairman Soules called for a vote on the first sentence and there being no opposition, the first sentence was approved.

Discussion continued regarding the second sentence. A vote was taken and the Committee voted unanimously to delete the second sentence. Carl Hamilton abstained from the vote.

Chairman Soules advised that Rules 167 and 168 will be put on the July agenda for a report by Steve Susman.

Chairman Soules presented the Subcommittee's report on TRCP 15-165a as it pertains to the Third Supplemental Agenda.

Chairman Soules brought up for discussion the letter from Dana Womack regarding proposed amendments to Rule 17 to permit advanced collection of fees. The Subcommittee advised no further action was necessary. The SCAC has already approved the new clerk's rules submitted in which TRCP 17 has been deleted and TRCP 126 has been amended to permit such fees to be collected in advance. Discussion followed.

Chairman Soules brought up for discussion the Court Rules Committee's proposed changes to Rule 18a. The Subcommittee suggested no further action on TRCP 18, the rule has already been extensively debated and voted on. There being no objection, the Subcommittee's recommendation was approved.

Chairman Soules brought up for discussion the Court Rules Committee's proposed changes to Rule 21 to include a provision about how to count periods of three days or less. The Subcommittee recommended the proposal be rejected. The Subcommittee believes that TRCP 4 applies to and explains TRCP 21 and that there is no need to repeat Rule 4 inside Rule 21. There being no objection, the Subcommittee's recommendation was approved.

Chairman Soules brought up for discussion the case of Graco Robotics. The Subcommittee recommended no action. The case correctly applies TRCP 21a.

Chairman Soules brought up for discussion the letter from Paul Purtha regarding a situation where a party was dropped and limitations ran due to an inadvertent mistake in amending a petition. The Subcommittee recommended no further action. There is already a rule adopted on voluntary dismissals in non-suits which includes a relation back for inadvertent omissions from amended pleadings that resolves this problem. There being no objection, the Subcommittee's recommendation was approved.

Chairman Soules brought up for discussion Professor J. Patrick Hazel's letter regarding the venue rules, the Subcommittee recommended tabling this until the venue rules are discussed.

Chairman Soules brought up for discussion the Court Rules Committee's proposed changes to the venue rules. The Subcommittee recommended tabling these until the venue rules have been discussed.

Chairman Soules brought up for discussion the letter from Michael P. Fleming regarding proposed changes to TRCP 145 to permit district clerks to challenge a pauper's oath. The Subcommittee advised that this has already been taken care of by the Committee; therefore, no further action is necessary.

Chairman Soules advised that that concluded the Subcommittee's report on TRCP 15-165a.

Chairman Soules brought up for discussion Joe Jamail's letter dated May 9, 1997, regarding the amendments to TRCP 166a. Chairman Soules informed the Committee that he talked to Chief Justice Phillips yesterday or the day before and advised the Committee as to what was said. Discussion followed regarding Rule 166a as promulgated by the Supreme Court of Texas.

Chairman Soules adjourned the meeting.