

MINUTES OF THE  
SUPREME COURT ADVISORY COMMITTEE  
JULY 11, 1997

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock a.m. on Friday, July 11, 1997, pursuant to call of the Chair.

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The 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, Professor Elaine A. Carlson, Professor William V. Dorsaneo III, Donald M. Hunt, David E. Keltner, John H. Marks, Jr., Russell H. McMains, Anne McNamara, Richard R. Orsinger, Honorable David Peeples, David L. Perry and Stephen D. Susman.

Ex-Officio Members Present: Honorable William Cornelius, Carl Hamilton, and Doris Lange.

Members Absent: Alejandro Acosta, Jr., Professor Alexandra Albright, Charles L. Babcock, Pamela Stanton Baron, David J. Beck, Honorable Scott Brister, Honorable Ann T. Cochran, Honorable Sarah B. Duncan, Michael T. Gallagher, Anne L. Gardner, Honorable Clarence A. Guittard, Michael A. Hatchell, Charles F. Herring, Tommy Jacks, Franklin Jones, Jr., Joseph Latting, Thomas S. Leatherbury, Gilbert I. Low, Honorable F. Scott McCown, Robert E. Meadows, Anthony J. Sadberry, Paula Sweeney and Stephen Yelenosky.

Ex-Officio Members Absent: Honorable Paul Womack, Paul N. Gold, David B. Jackson, W. Kenneth Law, Mark Sales, Honorable Paul Heath Till and Bonnie Wolbrueck.

Also present: Rene Mouledoux (Vice Chair of the State Bar Rules of Evidence Committee), Lee Parsley (Supreme Court Staff Attorney) and Holly H. Duderstadt (Soules & Wallace).

Chairman Soules brought the meeting to order.

Chairman Soules welcomed Rene Mouledoux who is Vice Chair for the State Bar Rules of Evidence Committee. Chairman Soules also welcomed John Gray who is a second year law student at SMU who has been working with Professor Dorsaneo on the rewrite of the Rules of Civil Procedure.

John Marks presented the report on the Rules of Evidence.

Mr. Marks presented the report on TRCE 702 and advised that the subcommittee was waiting for the Haynor decision to come down

and the report from Richard Orsinger's family law group. Therefore at this time there is not anything to report on Rule 702. Mr. Marks requested that this be put on the September agenda.

Mr. Marks presented the report on Rule 706, Advisory Experts Retained to Assist the Court. Mr. Mouledoux presented the Court Rules Committees' report on Rule 706. Discussion followed.

Rusty McMains made a motion that the Committee reject the notion of a rule authorizing the appointment of court appointed experts. Steve Susman seconded the motion. A vote was taken and by a vote of 10 to zero the Committee voted against having such a rule.

Professor Dorsaneo advised that Rule 165a needs to be coordinated and made compatible with the successor to Rule 329b in the Hunt report.

Professor Dorsaneo advised as to the status of the comparison of the appellate rules to the trial rules and the recommendations on conformity of same. Discussion followed.

A discussion was had regarding the differences in the appellate rules and the civil rules regarding service of papers and whether it should be by certified mail or regular mail and what the trigger would be etc. A vote was taken and by a vote of 6 to 3 notice of appeal should be served by certified mail.

Richard Orsinger advised that the subcommittee is not ready to present a report on the offer of judgment, therefore Rule 98a will go on the September docket. Chairman Soules advised that 165a will also go on the September agenda.

Chairman Soules presented Judge Brister's report on Rule 76a. Discussion followed. Carl Hamilton brought up for discussion the problem with not being able to seal an order. Discussion followed.

Rusty McMains proposed deleting paragraph (9). Don Hunt seconded the motion. A vote was taken and by a vote of 5 to 4 paragraph (9) stays in.

A vote was taken on Rule 76a as proposed by Judge Brister and by a vote of 10 to 1 the rule was approved.

Chairman Soules advised that the item regarding 329b is delete it from the docket for failure of a report and will not be re-docketed unless something is received in writing to act on.

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

Mr. Susman advised that the suggestions by the Court Rule's Committee, Judge Scott Brister, Dean Schaner, Fred Davis and Rob Holt regarding 166a were taken into consideration by the court when it promulgated the new rule and therefore the Subcommittee recommends rejection of these proposals. There being no objection the Committee approved the Subcommittee's recommendations.

Chairman Soules put on the record that the Advisory Committee is not retreating from what it recommended to the court to be the changes in Rule 166a. But in light of the Court's action the Subcommittee's recommendation seems to be the appropriate disposition of these particular requests regardless of the Committee's sentiment as to their merit.

Steve Susman brought up for discussion the recommendation by Paul Gold that Rule 166b be amended to change present practice where appellate court affirms sustaining objections to discovery if any objection, whether or not relied on by trial court, has merit. The Subcommittee recommended rejection of this proposal because the proposed rule goes as far as the Supreme Court Advisory Committee thought appropriate. There being no opposition the Committee approved the Subcommittee's recommendation.

Steve Susman brought up for discussion the proposal by the Court Rules Committee to amend Rule 167. The Subcommittee felt that if the Court feels compelled that something more should be done on the subject of document requests, the rule proposed by the Court Rules Committee is a good one. Carl Hamilton presented the views of the Court Rules Committee in amending this rule. Discussion followed.

Chairman Soules advised that the Committee will consider revisions to Rule 167 only if it gets direction from the Court to do so.

Mr. Susman advised that the letter from Bob Gwinn also addressed this issue.

Mr. Susman brought up for discussion the proposal by Richard E. Tulk to amend Rule 168 to require parties serving discovery requests to provide computer disk so that answer do not need to retype the requests. Mr. Susman advised that this has already been taken care of in the proposed discovery rules.

Mr. Susman brought up for discussion the proposal by Stephen Amis to amend Rule 168 to say a party may call as a witness any person identified by the opposing party in a discovery response. The Subcommittee recommended rejection of this proposal. There being no opposition the Subcommittee's recommendation was approved.

Mr. Susman brought up for discussion Mr. Amis' proposal that Rule 168 be amended to say only those interrogatory answers to which the party has personal knowledge need be verified by that party. Mr. Susman advised that our current rule 12 does not distinguish between the types of answers to interrogatories but requires personal verification in all cases by the party. The Subcommittee thought it might be a good idea to make that distinction. Discussion followed. Steve Susman advised that the Subcommittee recommended approval of this proposal. Discussion continued.

A vote was taken and by a vote of 8 to 2 the Committee voted to reject the Subcommittee's recommendation.

Steve Susman brought up for discussion the Court Rules Committee's proposed changes to Rules 173, 177b and 181. Carl Hamilton advised that these rules are not in final form and therefore should not be voted on at this meeting. They should be put on the September agenda which they will be.

Mr. Susman brought up for discussion the proposal by Kevin Madison to have a new rule for handling firearms in court by civil litigants. The Subcommittee recommended rejecting this proposal. There being no opposition the Committee approved the Subcommittee recommendation.

Mr. Susman brought up for discussion the Court Rules Committee's proposed amendment to Rule 200 regarding paying a non-retained expert. The Subcommittee recommended rejection of the proposal. Chairman Soules advised that this was voted on at the last meeting and that the rejection will stand approved.

Justice Hecht addressed the committee regarding the Court's position on the amendments to Rule 166a. Comments from the members of the Committee followed.

Professor William Dorsaneo III presented the report on the recodification project of the Texas Rules of Civil Procedure.

Professor Dorsaneo proposed changing the 42 day answer following citation by publication to 60 day answer following citation by publication in Rules 8 and 9. There being no opposition that was approved.

Rusty McMains brought up for discussion whether or not there are any statutes involved with regard to publication and how that affects this rule change. Discussion followed.

Professor Dorsaneo recommended changing Rule 7 to 60 days and leaving the rest of it alone as to the number of days of publication. We will also need to examine the feasibility of

getting that done in Rule 9 which involves tax suits. There being no objection the recommendation was approved.

Chairman Soules assigned the venue rules to Professor Dorsaneo for report at the September meeting.

Justice Hecht requested comment from the Committee regarding whether or not to do away with the general denial practice. Discussion followed. Chairman Soules called for a consensus on whether or not there should be any change to the general denial practice. By a vote of 8 to 2 the Committee favored no change.

Professor Dorsaneo requested that current Rule 173, new Rule 30(c)(2), Guardians Ad Litem be placed on the September agenda. Chairman Soules requested that Carl Hamilton take the proposed Rule 30(c) to the Court Rules Committee to be factored into their consideration of Rule 173.

Professor Dorsaneo requested that proposed Rule 38, Derivative Suits, and Rule 41, Substitution of Parties, be placed on the September agenda.

Professor Dorsaneo presented the report on Section 6, Scheduling and Pretrial Conferences. Professor Dorsaneo advised that Rule 60, Scheduling and Pretrial Conferences (current Rule 166) has already been approved.

Rule 61, Dismissal for Want of Prosecution (current Rule 165a) has been placed on the September agenda.

Professor Dorsaneo brought up for discussion proposed Rule 62, Masters and Auditors and advised it is a verbatim reproduction of current Rules 171 and 172. There being no opposition Rule 62 was approved.

Professor Dorsaneo advised that Rule 63 is the summary judgment rule as ordered by the Court including subdivision (i), the no evidence motion.

Professor Dorsaneo explained Rule 64, Default Judgment (current Rules 237a, 239, 240, 241, 243, 239a, and 244). Professor Dorsaneo advised that the last sentence of current Rule 237a is the only part of 237a that has been brought forward. The balance of 237a could be brought forward and located in Section 2 or 3. A vote was taken and the Committee felt that the first two sentences should be in the rule somewhere. Chairman Soules proposed changing the time to answer from 15 days to 30 days. There being no opposition the proposal was approved.

Chairman Soules called for a vote on Section 6 with the exception of Rule 61. There being no opposition Section 6 was

approved.

Professor Dorsaneo explained Section 7 and advised it is based largely on Paula Sweeney's report and Don Hunt's report. Carl Hamilton advised that the Court Rules Committee sent to the court some changes on the jury charge rules and requested that the Supreme Court Advisory Committee consider those changes before it goes into Mr. Dorsaneo's final draft.

Justice Hecht indicated that this work is further complicated by the fact the Court has a jury task force that is preparing a report. The Committee's action will be deferred on these matters until everyone has had a chance to look at the task force report.

Professor Dorsaneo continued presented the report on Section 7. A vote was taken and there being no opposition, Rule 70, 71 and 72 were approved.

Professor Dorsaneo advised that Rule 73 needs to go back on the agenda to match up with the State Bar Rules Committee's suggestions on Rule 177b.

Professor Dorsaneo brought up for discussion whether the subpoena rule should be in the trial part of the book or in the discovery part of the book. A vote was taken and the Committee voted to have it in the trial rules.

A vote was taken on Rule 73 with the exception of those items and there being no opposition Rule 73 was approved.

Professor Dorsaneo explained Rule 74, 75, 75 and 77. There being no opposition those rules were approved. Chairman Soules advised that Rule 77 was still open for Mr. Hamilton's additions.

Professor Dorsaneo explained Rule 78 and advised that it combines current Rules 227, 228, 229 and 231. There being no opposition Rule 78 was approved.

Professor Dorsaneo explained Rule 79(b), Prohibited Challenges. Chairman Soules called for a discussion on whether we need 79(b), anything on Batson in the rules. Discussion followed.

At this time a break was taken for lunch.

Justice Hecht brought up for discussion the Texas Commission on Judicial Efficiencies recommendation regarding recusal, having something in the rule that says that a judge who accepts campaign contributions from a party to a lawsuit or from counsel to the party that exceed the limits in the Judicial Campaign fairness act which was passed session before last, should be subject to automatic disqualification on motion of the opposing party. The

Court would like to know whether that should be added to the TRAP rules before they become effective in September. Discussion followed.

Chairman Soules called for a vote of those in favor of the contribution levels being a ground for automatic recusal. By a vote of 8 to 3 the Committee voted in favor of such a rule.

Discussion continued regarding what would happen if a judge ran afoul of this, during what term would this be applicable to, etc.

Professor Dorsaneo continued the discussion regarding Rule 79(b) and the Batson challenge. Chairman Soules requested that Professor Elaine Carlson prepare a report regarding Batson and present it at the September meeting.

Chairman Soules indicated that Rule 79 and 80 have been approved.

Professor Dorsaneo advised that Section C, The Jury Charge, has been previously approved. Professor Dorsaneo advised that Section D, Jury Deliberations, has been approved.

Richard Orsinger inquired why Rule 83, Preservation of Appellate Complaints is stuck in the middle of the jury rules. Discussion followed. Chairman Soules proposed changing the title to "Preservation of Charge Error." Discussion continued. Professor Dorsaneo proposed changing the title to "Preservation of Charge Complaints" or "Complaints Concerning the Charge." Discussion continued. Chairman Soules indicated that there is no change to the title to Rule 83.

Professor Dorsaneo advised that Section E, Nonjury Trials, has been previously approved. Professor Dorsaneo advised that Section 8, Judgments: Motions for Judgment; New Trials has been approved in its entirety but requested that Don Hunt take a look at 7(E) and (8) to make sure it is correct.

Richard Orsinger indicated that there are some parallelism with the appellate rules that need to be considered in Section 8.

Mr. Orsinger requested that Rule 102(f) be put on the September agenda.

Mr. Orsinger brought up for discussion Rule 103(c), Nonjury cases; Legal and Factual Sufficiency of Evidence. This language was in the TRAP rules when sent to Supreme Court and Supreme Court took it out. Professor Dorsaneo explained that it was taken out of TRAP 33 because it was unnecessary. Rusty McMains explained that the reason the Supreme Court took it out of the appellate rules was

because it belonged in the trial rules. Chairman Soules indicated Rule 103(c) will stay as it is in the draft.

Richard Orsinger brought up for discussion Rule 103(d), Informal Bills of Exception and Offers of Proof. Mr. Orsinger advised that is covered in the rules of evidence, do we need it in the rules of procedure. A vote was taken and there being no opposition it will stay in both places.

Mr. Orsinger advised that Rule 103(e), Formal Bills of Exception, should be identical to the appellate rule. There being no opposition that will be done.

Don Hunt requested that Rule 104(e)(8) be put on the September agenda because the premature filing rule may or may not be in conflict with TRAP 27. Professor Dorsaneo, Richard Orsinger and Don Hunt were appointed to take a look at this and bring back a report for the September meeting.

Mr. Orsinger advised that Rule 105(b) is not identical but is parallel to the TRAP rule and should be put on the September agenda.

Don Hunt brought up for discussion a problem with Rule 105(a) and requested that it be looked at to see if we need to say anything about either inherent power or implied power. Discussion followed. Chairman Soules proposed deleting the word "express." Chairman Soules also proposed adding "power as is authorized by law."

Chairman Soules called for a vote on Section 8 with the exception of the items identified on the record. There being no opposition Rule 8 was approved.

Carl Hamilton brought up a problem in Rule 104 with regard to the 75 days and the 105 days, the court has up to 105 days to vacate the judgment anyway. Shouldn't this be consistent? Discussion followed. Chairman Soules inquired whether anyone other than Mr. Hamilton had a concern about the 75 + 30 rather than an absolute 105 days. There being no concern the rule will stay as is.

Professor Dorsaneo explained Section 11, Counsel, Courts, Clerks, Court Reporters, Court Records, and Court Costs.

Professor Dorsaneo requested that the following rules be put on the agenda for the September meeting for matching up with the TRAP rules: Rule 130, 132, and 133. A discussion was had regarding Rule 133 and the requirement to file the agreement. The TRAP rules do not require filing but the civil rules do. Richard Orsinger proposed picking up the TRAP grammatical structure and



leaving in the requirement that it be filed. Chairman Soules suggested that the word "entered" is wrong in 133. Discussion followed. Richard Orsinger proposed "unless it is made in open court and recorded by the reporter." Carl Hamilton proposed "made in open court on the record." Professor Dorsaneo proposed just "on the record." The Committee adopted Professor Dorsaneo's suggestion.

Professor Dorsaneo brought up for discussion Rule 131, Attorney Conduct During Argument and questioned whether this is the right place to put it in the rules. Nobody had a problem with it being placed where it is. A discussion was had regarding the title and the Committee decided to have the title read "Attorney Conduct in Court."

Professor Dorsaneo brought up for discussion Rule 134, Effect of Vacant Judgeship on Proceedings (current Rule 18) and proposed that it be deleted entirely. There being no objection Rule 134 was deleted.

Professor Dorsaneo advised that Rule 135 has been approved.

Professor Dorsaneo explained Rule 136, Interpreters. There being no objection Rule 136 was approved.

Professor Dorsaneo explained Rule 137, Recording and Broadcasting of Court Proceedings, which is current Rule 18c. There being no objection Rule 137 was approved. Mr. Orsinger requested that the record reflect that the Committee is to forward a minority report on this rule.

Chairman Soules advised that Rule 138, Duties of Clerk, has previously been approved.

Chairman Soules advised that Rule 139, Electronically Transmitted Court Documents, has previously been approved.

Professor Dorsaneo brought up for discussion Part D, Court Reporters. Professor Dorsaneo indicated Rule 140, Duties, needs to be checked for parallelism to the TRAP rules and put on the September agenda. A discussion was had regarding the differences between the trial rule and the appellate rule.

Professor Dorsaneo brought up for discussion the suggestion by Bonnie Wolbrueck that paragraph (d), Retention of Notes, be deleted. Discussion followed. There being no opposition paragraph (d) was deleted. Discussion continued regarding (d). Chairman Soules advised that the consensus of the Committee was there will be no rule on this for civil cases.

Professor Dorsaneo advised that Rules 141, 142, 143 and 144

need to be put on the September agenda for TRAP conformity.

Chairman Soules advised that Rules 140, 142, and 143 have been approved.

Professor Dorsaneo advised that Rule 145 will be what we passed on today.

Professor Dorsaneo brought up for discussion Rule 146, Lost Records and Papers. A discussion was had regarding the terminology "brief statement." Chairman Soules proposed "or agreed brief statement" or "a brief statement agreed to by the parties." Richard Orsinger proposed "agreed brief statement" which was agreeable with Chairman Soules. With that amendment, there being no opposition Rule 146 was approved.

Discussion continued regarding Rule 146. Chairman Soules suggested taking the word "brief" out of (b). Discussion continued. Richard Orsinger indicated that the word "brief" needed to come out of (c) also. Judge David Peeples advised the word "agreed" needed to be added before the word "statement" in paragraph (c). Another vote was taken on Rule 146 as changed, there being no opposition Rule 146 was approved.

Professor Dorsaneo brought up for discussion Rule 147, Parties Liable for Costs. Discussion followed. Professor Dorsaneo advised that Rules 147 through 152 need more work and requested they be placed on the September agenda.

Professor Dorsaneo advised that Rule 153, Affidavit of Indigency had previously been approved.

Justice Cornelius brought up for discussion his concerns with TRAP 39.9. Discussion followed. Justice Cornelius urged that Rule 39.9 be changed to delete the requirement for notice when a case is not going to be argued.

Justice Cornelius brought up for discussion his concerns regarding TRAP 41.1, Submission to the Panel. Justice Cornelius proposed defining the word "submission". Discussion followed. Richard Orsinger proposed adding the following language "in the event oral argument has been waived by all parties the court will determine when submission occurs." Chairman Soules proposed "when oral argument has been waived by all parties the case will be submitted 21 days after the filing of all appellee's briefs." Discussion continued.

Chairman Soules indicated that there are two alternatives: (1) as the court may determine; and (2) twenty-one days after all appellee's briefs are due. Discussion continued. Lee Parsley advised that he would be prepared to talk about these issues at the

meeting of the Council of Chief Judges.

The meeting was adjourned.