

MINUTES OF THE  
SUPREME COURT ADVISORY COMMITTEE MEETING

September 12-13, 1986

The Advisory Committee of the Supreme Court of Texas convened at 8:30 a.m. on September 12, 1986, pursuant to call of the Chairman.

Members of the Committee in attendance were Mr. Luther H. Soules III, Chairman, Mr. Gilbert Adams, Professor Newell H. Blakely, Mr. Frank Branson, Professor William V. Dorsaneo III, Professor J.H. Edgar, Mr. Vester T. Hughes, Jr., Mr. Franklin Jones, Jr., Mr. Gilbert I. Low, Mr. Russell H. McMains, Mr. Charles Morris, Mr. Harold W. Nix, Chief Justice Jack Pope, Mr. Tom L. Ragland, Mr. Harry M. Reasoner, Mr. Sam Sparks, Mr. Sam D. Sparks, Mr. Broadus A. Spivey, Honorable Linda B. Thomas, Mr. Harry Tindall, Honorable Bert H. Tunks, Honorable James P. Wallace, Mr. L.N.D. Wells, Jr.

The minutes of the last meeting were unanimously approved upon motion by Frank Branson and a second by Professor Blakely.

Mr. Spivey reported that the ad hoc committee working with the Supreme Court and their space requirements met and it was the consensus of the committee that it would not be in the best interest of the Supreme Court to make a recommendation seeking financial or or budgetary support at this time for additional facilities.

Professor Edgar moved that the suggestion by Ray Hardy to change Rule 8 be rejected, and the motion was seconded by Mr. Ragland. The suggestion to change Rule 8 was unanimously rejected by vote of the Committee.

Mr. Branson moved to reject the suggestion by Ray Hardy to change Rule 10, and Mr. Jones seconded. The suggestion to change Rule 10 was unanimously rejected by the Committee.

After discussion, Judge Pope's recommendation to add the language "Any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the Court," to Rule 7 was unanimously recommended by show of hands, as was Professor Edgar's suggestion to change the title of Rule 7

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to "Appearance and Withdrawal of the Attorney." Judge Thomas will re-write Rule 7 using these recommendations as well as language from Appellate Rule 7.

The Committee decided, after discussion of same, that Rule 8 is awkwardly worded and Chairman Soules directed it be sent back to Judge Thomas' subcommittee for re-writing. Professor Dorsaneo will work with Judge Thomas in Rule 8's revision.

By a vote of 9-2 the Committee decided against the addition of the following sentence to Rule 18a "The motion shall be verified and must state with particularity the grounds why the Judge before whom the case is pending should not sit." Discussion concerning verification as opposed to verification based on information and belief ensued. Chairman Soules suggested that the sentence "The motion shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence provided that facts may be stated based upon information and belief if the grounds of such belief are specifically stated." be added to subparagraph a of 18a. Professor Blakely moved that Chairman Soules' suggestion be adopted, Professor Dorsaneo seconded the motion, and it carried unanimously by show of hands. The proposal that states "the grounds are limited to" died for lack of a motion.

Proposed Rule 14b was unanimously approved. There was discussion regarding who is responsible for withdrawing model exhibits. The Committee decided that the clerk is to give written notice to the party who offered the exhibit to come and get same within thirty days or it will be destroyed, with the clerk bearing the costs of destroying the exhibits and keeping the proceeds, if any, of such dispositions. The Committee unanimously decided to add the words "by the offering party" after the words "will be withdrawn." Judge Thomas will re-write the rule, using the suggestions of the Committee as follows: retain all of the first paragraph, delete all of the next paragraph, retain the third paragraph, except strike the words "as provided by Rule 356" and the fourth paragraph will be changed so that the clerk will give written notice to a party to withdraw the exhibits within 30 days or they will be disposed of by the clerk.

With respect to Rule 277, the Committee unanimously decided, after extensive discussion, that the phrase "on questions containing a combination of elements" be stricken. The Committee voted, 18 to 1, that the first paragraph will state "In all jury cases the Court shall submit the cause upon broad form questions to the extent feasible. The Court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict. The second paragraph will state "Inferential rebuttal questions shall not be submitted in the charge. The placing of the burden of proof may be accomplished by instructions rather

than by inclusion in the question." The next paragraph will state "In any cause in which the jury is required to apportion the loss among the parties, the Court shall submit a question or questions inquiring what percentage, if any, of the negligence of causation, as the case may be, that caused the occurrence or injury in question, is attributable to each of the persons found to have been coupled. The Court shall also instruct the jury to answer the damage question or questions without any reduction because of the percentage of the negligence of causation, if any, of the person injured. The Court may predicate the damage question or questions upon affirmative findings of liability." The next paragraph will state "The court may submit a question disjunctively when it is apparent from the evidence that one or the other of the conditions or facts inquired necessarily exists." The next paragraph will state "The court shall not in its charge comment directly on the weight of the evidence or advise the jury of the effect of their answers but the court's charge shall not be objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence or advises the jury of the effect of their answers where it is a part of a proper instruction or definition."

The Committee unanimously decided that the word "controlling" would be deleted in proposed Rule 278 (formerly Rule 279). After discussion, it was voted 9-1 that the sentence "Various phases of different shades of the same question, definition, or instruction shall not be submitted" be deleted. It was voted, 8-7, that the term "inferential rebuttal" should not be mentioned in the rule. After a recount, it was again voted, 10-7 that it not be used. By a show of 15 hands to 2, the rule will be submitted to the Supreme Court as follows: "The Court shall submit the questions, instructions, and definitions in the form provided by Rule 277 which are raised by the written pleadings and the evidence and, except in trespass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to submission of any question raised only by a general denial and not raised by affirmative written pleading by that party. Nothing herein shall change the burden of proof from what it would have been under a general denial. Failure to submit a question shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however that the objection to such failure shall suffice in such respect if the question is one relied upon by the opposing party. Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment."

The Committee voted unanimously that the first sentence of proposed Rule 279 shall remain renumbered in proposed Rule 278 as it is written. The Committee voted unanimously that the first sentence will read, "Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and no element of which is submitted or requested are waived." Professor Edgar moved that applied findings will be deemed in such a way as to support the the judgment even if it contradicts the verdict, Mr. Low seconded the motion, and the motion carried by show of hands, 12-4. Chief Justice Pope moved that the paragraph stating "If a contention is made that a submission. . ." be deleted in its entirety, Mr. Sparks (El Paso) seconded the motion, and it was carried, 10-9. The record is to reflect that this is a tie vote, since the Chairman broke the tie in favor of the motion with his vote.

The meeting recessed at 5:30 p.m.

The Advisory Committee of the Supreme Court of Texas re-convened on September 13, 1986, at 8:30 a.m. pursuant to call of the Chairman.

Members of the Committee in attendance were Mr. Luther H. Soules III, Chairman, Mr. Gilbert Adams, Professor Newell H. Blakely, Mr. David J. Beck, Professor William V. Dorsaneo III, Professor J.H. Edgar, Mr. Anthony J. Sadberry, Mr. Franklin Jones, Jr., Mr. Gilbert I. Low, Mr. Russell H. McMains, Mr. Charles Morris, Mr. Harold W. Nix, Chief Justice Jack Pope, Mr. Tom L. Ragland, Mr. Harry M. Reasoner, Mr. Sam Sparks, Mr. Sam D. Sparks, Mr. Broadus A. Spivey, Honorable Linda B. Thomas, Mr. Harry Tindall, Honorable Bert H. Tunks, Honorable James P. Wallace, and Mr. L.N.D. Wells, Jr.

The meeting was brought to order by the Chairman and discussion ensued regarding the last paragraph of proposed renumbered Rule 278. It was unanimously voted by show of hands that the last paragraph "A claim that evidence was legally or factually insufficient. . ." be recommended to the Supreme Court.

The Committee voted unanimously to change "of" to "from" and "change" to "charge" in Rule 286.

Whether to change the caption of Rule 295 was discussed next with 11 favoring the title "Correction of Verdict"; 6 favoring "Correction of Defective Verdict" and 6 voting for the caption "Correction of Informal or Defective Verdict." It was moved by Mr. Tindall that the caption read "Correction of Defective Verdict". The motion was seconded by Mr. Sparks (San Angelo), with a show of hands 12-4 in favor. Mr. Morris moved that the last sentence in Rule 295 be deleted in its entirety. Mr. Beck seconded the motion and by show of hands the motion was carried 11-1, to delete the last sentence. Mr Low moved and Professor

Edgar seconded, that Rule 295 be submitted to the Supreme Court as follows: "If the purported verdict is defective, the Court may direct it to be reformed. If it is incomplete, not responsive to the questions contained in the court's charge, or the answers to the questions are in conflict, the court shall, in writing, instruct the jury in open court of the nature of the incompleteness, unresponsiveness, or the conflicts, provide the jury such additional instructions as may be proper, and retire the jury for further deliberations.

Professor Edgar requested that the record reflect that Rule 294 needs to be changed, using Professor Dorsaneo's suggestions that the word "issue" be replaced with the word "question" when appropriate, and the term "explanatory instruction" be replaced with the word "instruction", and that Rule 301 and Rule 324c be changed using those terms as well.

Mr. Tindall then took the floor with his report. Discussion ensued regarding Rule 324. Mr. Tindall moved that the proposed amendments to Rule 324 be rejected, Mr. Low seconded, and by show of hands, the proposal was rejected.

After discussion, Mr. Tindall moved that Chairman Soules' suggestion that Rule 329(d) state "If the motion is filed more than 30 days after the judgment was signed, the time period shall be computed pursuant to Rule 306a(7)" be adopted, Judge Thomas seconded the motion, and it carried unanimously by show of hands. The suggestion that additional language in Rule 329(a) regarding service upon the attorney under Rule 21(a) was also unanimously rejected by show of hands.

Mr. Tindall moved that Rule 331 be repealed and Professor Edgar seconded. Chairman Soules deferred Rules 315 through 331 to the next meeting so that Mr. Tindall may study them more closely.

Chief Justice Pope moved to recommend that Rule 331 be repealed and Mr. Tindall seconded. The motion was unanimously approved by show of hands.

Mr. Tindall will address Rule 330 at the next meeting.

Mr. Sparks (El Paso) then took the floor with his report. He gave a brief history of the Rule 103 changes that have come before the Committee. The Committee voted unanimously that Rule 103 shall be amended and the Committee will propose the following: "All process may be served by (1) any sheriff or constable or (2) by any person who is not less than eighteen years of age and who is authorized by written order of the Court. No person who is a party to or interested in the outcome of the suit shall serve any process. In addition to the above, service by registered or certified mail and citation by publication

shall, if requested, be made by the clerk of the court in which the case is pending. The order authorizing a person to serve process may be made without written motion and no fee shall be imposed for issuance of such order."

Mr. Tindall's suggested Rule 107 amendment was unanimously approved by show of hands, with the modification of the word "any" being changed to "the return of citation."

Mr. Tindall made the following suggestions regarding Rule 106: strike "officer" and replace it with the word "person" in the second line of 106(a). In 106b(1) delete the phrase "an officer or by any disinterested adult named in the court's order" so that it would read "by leaving a true copy of the citation. . ." The caption "Service of Citation" will be changed to "Method of Service."

The proposals regarding Rules 103-107 were tabled with the consensus that Mr. Tindall will again change the rules in conformity with the Committee's discussions and they will be brought up for approval at the next meeting.

The Committee agreed that it would meet on Friday, November 7, 1986, from 8:30 a.m. to 6:30 p.m. and on Saturday, November 8, 1986, from 8:30 a.m. to 1:30 p.m.

Chairman Soules then called for discussion regarding the Supreme Court's proposal to limit briefs to appellate courts to 30 pages, double-spaced, typed or equivalent, on 8½" x 11" paper, exclusive of index and table of cases with the provision that the party may petition the Court to permit additional briefing. After discussion, it was the consensus of the Committee that the Federal Rule of Procedure 28g regarding page limitation is more workable. Mr. McMains and Professor Dorsaneo volunteered to draft a proposed rule regarding same for discussion by the Committee at its next meeting.

Mr. Soules then requested the consensus of the Committee regarding the question of whether all points of error raised in the Court of Appeals and not addressed by that court and its opinion are to be considered overruled as a matter of law. After discussion, 1 member felt the points should be considered overruled if the Court of Appeals doesn't address them and 7 members felt they should not. Mr. Reasoner felt the Court should develop some nonmechanical rule so that the Supreme Court would have discretion on whether to remand or not. Justice Wallace will report to the Supreme Court on the Committee's suggestions.

Mr. Blakely took the floor with his report regarding the transfer of certain Rules of Civil Procedure 176-185 into the Rules of Evidence. He pointed out that the Committee approved the recommendation to repeal Rules 184 and 184a in its March

meeting, so his subcommittee has not considered them at all. His subcommittee decided unanimously to keep Rules 176-180 as they are. With regard to Rules 181 and 182, 4 members were for status quo and 2 were for moving them to Rule 610b as additional subsections. The Committee voted 4-2, to allow Rule 182a to remain where it was, with the suggestion from the dissenting members that it could be moved into the Rules of Evidence as the last sentence in the dead man statute. The subcommittee voted 4-2 to allow Rule 183 to remain where it was, with the suggestion from the dissenting members that it could be made the last sentence of Rule of Evidence 604. With this in mind, Mr. Blakely then moved that no changes be made and Judge Tunks seconded the motion. Mr. Soules suggested that Rule of Civil Procedure 182 be adjusted to conform to the Rules of Evidence and that Mr. Blakely's subcommittee be charged with making the adjustment to Rule of Civil Procedure 182 and to put cross-references in the Rules of Civil Procedure where they would be appropriate. Mr. Blakely incorporated this suggestion into his motion, Judge Tunks again seconded, and the Committee unanimously approved.

Mr. Blakely agreed to add language to the effect that "The trial court may instruct the jury on the effect of Rule 601b pursuant to Texas Rule of Civil Procedure 182a" to Rule 601b and he will write a letter to Justice Wallace, with a copy to Chairman Soules, requesting this addition.

Professor Edgar then took up the Supreme Court Order relating to retention and disposition of deposition transcripts and depositions upon written questions. After discussion, it was the consensus of the committee that the order will be rewritten to allow that the clerk would mail a notice to the attorney of record, or that attorney's successor, that a deposition transcript would be available for that attorney to come take them or they will be disposed of by the clerk in 30 days, with the exception that in cases where there is citation by publication, the deposition transcripts would be disposed of in 2 years. Judge Thomas will also use this philosophy in re-writing her rule on the disposition of exhibits.

The meeting adjourned at 1:30 p.m.