

MINUTES OF THE
SUPREME COURT ADVISORY COMMITTEE
MAY 26-27, 1989

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock a.m. on Friday, May 26, 1989, pursuant to call of the Chairman.

Friday, May 26, 1989:

Members present: Chair Luther H. Soules III, Justice Nathan L. Hecht, Honorable Sam Houston Clinton, Mike A. Hatchell, Kenneth D. Fuller, Vester T. Hughes, Jr., Honorable Raul Rivera, John M. O'Quinn, Buddy Low, Anthony J. Sadberry, Honorable Stan Pemberton, Professor Elaine Carlson, Chuck Herring, Tom Ragland, John E. Collins, Charles Morris, Tom Davis, Steve McConnico, Russell McMains, Gilbert Adams, Professor J. Hadley Edgar, Franklin Jones, Jr., Thomas Black, David Beck, Pat Beard, Professor William Dorsaneo III, Newell H. Blakely, and Broadus A. Spivey. Also present were Chief Justice Thomas R. Phillips, Honorable Ted Robertson, Sarah B. Duncan, and Holly J. Halfacre.

Members absent: Frank L. Branson, Honorable Solomon Casseb, Jr., Chief Justice Austin McCloud, Harry M. Reasoner, Justice Linda B. Thomas, Harry L. Tindall, Sam D. Sparks, and Sam Sparks.

Discussion was had regarding SB 874 and the adverse effect it may have on Supreme Court of Texas rule making, if it is constitutional. Committee members resolved unanimously to urge the Governor to veto the bill.

A request for amendment to TRAP 687(e) was reported on, motion was made and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

Professor Elaine Carlson reported on substantial progress of the Texas Pattern Local Rules project.

A request for amendment to TRAP 680 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court not promulgate the requested amendment.

A discussion was had regarding changing TRAP 133 n.r.e. designations to "d.r.d." discretionary review denied. The Committee voted unanimously not to recommend that the Supreme Court promulgate the requested amendment.

A report was given by Ken Fuller on Special Family Law Project regarding purging of child abuse allegations that are not proven and sealing of records. The Committee voted to table this matter for future reconsideration when better public information is available for subcommittee to study.

A report was given by David Beck on Code of Judicial Conduct, Canon 5e regarding using an active judge as arbitrator in case not in his court and regarding settlement discussion in cases pending in his court. Mr. Beck's committee recommended no change. The Committee voted not to change Canon 5e, but to make an addition to Rule 166 to permit judges to "encourage" settlement at pretrial conferences.

A subcommittee report on the Rules of Civil Evidence was given by Professor Newell Blakely. A request for amendment to TRCE 705 was made to preclude expert testimony on underlying facts during direct examination. An additional proposal was made orally by Professor Blakely to change to TRCE 705. Motion was made to reject both proposals because the trial court already has power to limit expert testimony under TRCE 403, the Committee voted unanimously to recommend that the Supreme Court not promulgate the requested amendment.

A request for amendment to TRCE 902(12) was reported on, motion was made, and the committee voted 9 to 12 to recommend that the Supreme Court not promulgate the requested amendment.

A request to repeal TRCP 184 and 184a due to redundancy with Texas Rules of Evidence 202 and 203, was reported on, motion was made and the committee voted 12 to 11 to recommend that the Supreme Court repeal TRCP 184 and 184a.

A request for amendment to TRCE 604 cross referencing Texas Rule of Civil Procedure 183 was reported on. Motion was made to table and assigned to Dorsaneo to work on and report tomorrow.

A request for amendment to Civil Practice and Remedies Code Sec. 18.031 was reported on, motion was made, and the committee voted not to recommend that the Supreme Court promulgate the requested amendment.

Discussion was had regarding TRCE 614 on who may be present at deposition Dorsaneo suggested revision to Rule 166b(5)(b) TRCP to say who may be present. The committee voted to recommend the changes shown on page 00046. The remaining changes tabled until tomorrow.

A request for amendment to TRCE 703 was reported on, motion was made to table and make consistent with TRCP 166b, and the committee voted to table and take up later with the report on Rule 166 to TRCP.

A report on Rules of Appellate Procedure was made by Rusty McMains.

A request for amendment to TRAP 4b was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRAP 5a was reported on. Motion was made and the Committee unanimously voted for leaving the reference to Article 4591 in the rule. Motion was made and the committee unanimously voted to recommend all other changes be recommended that the Supreme Court promulgate the suggested amendment. Rusty McMains to consider Federal Rule 6a and counterparts for inclusion.

A request for amendment to TRAP 40 was reported on, motion was made and the committee unanimously voted to table.

A request for amendment to TRAP 79 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRAP 84 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court not promulgate the requested amendment.

A request for amendment to TRAP 184(b) was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court not promulgate the requested amendment.

A request for amendment to TRAP 90 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court not promulgate the requested amendment.

Request was made for discussion regarding publication of cases under Rule 90 and whether the Supreme Court should order unpublished opinions published when writ of error granted at end of agenda.

Discussion was had as to whether to include rules of professionalism in the TRCP or Texas Disciplinary Rules of Professional Conduct. The committee voted to recommend inclusion of the rules in the Disciplinary Rules of Professional Conduct.

A request for amendment to TRAP 100 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRAP 121 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court not promulgate the requested amendment.

A request for amendment to TRAP 123 was reported on, motion was made, and the committee voted 12 to 10 to recommend that the Supreme Court not promulgate the requested amendment.

A request for amendment to TRAP 130 was reported on, motion was made, and the committee voted unanimously to table for written suggestions.

A request for amendment to TRAP 136 was reported on, motion was made, and a majority of the committee voted to recommend that the Supreme Court not promulgate the requested amendment.

A request for amendment to TRAP 190 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

Handout given on requested changes made by Sarah B. Duncan to Rules of Appellate Procedure that were omitted from the agenda.

Motion was made and the committee voted unanimously to recommend that the Supreme Court promulgate the following requested amendments: Rule 1; Rule 4; Rule 17; Rule 20; Rule 41; Rule 43; Rule 47; Rule 56; Rule 57; Rule 59; Rule 72; Rule 90; Rule 91; Rule 130; Rule 133; Rule 134; Rule 135; heading change to Section 10; Rule 160; heading changes to Section Twelve, Thirteen, Fourteen, and Eighteen.

Rule 82a tabled until tomorrow.

A request for amendment to TRCP 3a was reported on, motion was made, and the committee voted unanimously to table until tomorrow.

A request for amendment to TRCP 5 was reported on, motion was made, and the committee voted unanimously to table for report from Professor Dorsaneo and Professor Edgar tomorrow.

A request for amendment to TRCP 21a was reported on, motion was made, and the committee voted 11 to 7 to recommend that the Supreme Court promulgate the requested amendment. The committee discussed a three day extension when notice sent by telecopier. Motion was made and the committee voted 9 to 6 to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 72 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

Discussion had regarding putting notice under one rule - should be a special project. A committee is to be appointed.

A request for amendment to TRCP 73 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 26 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 305 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 87 was reported on, motion was made to table until tomorrow.

A request for amendment to TRCP 106 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 107 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 120a was reported on, motion was made, and the committee voted 5 to 11 to recommend that the Supreme Court not promulgate the requested amendment. Nonetheless, Justice Hecht requested a proposal be made at the next meeting on burden of proof and proof by affidavits.

A request for amendment to TRCP 145(1) was reported on. A discussion was had regarding compensation for court reporter on indigent appeals. TRCP 145(1) provides for costs to be paid by other party. A motion was made and the committee voted unanimously to recommend that the Supreme Court not promulgate the requested amendment.

A request for amendment to TRCP 216 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 223 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 239 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

Meeting adjourned by Chairman Soules until 8:30 o'clock a.m. tomorrow.

Saturday, May 27, 1989

Meeting called to order by Luther H. Soules III, Chairman.

Members present: Chair Luther H. Soules III, Justice Nathan L. Hecht, Mike A. Hatchell, Kenneth D. Fuller, Vester T. Hughes, Jr., Honorable Raul Rivera, John M. O'Quinn, Anthony J. Sadberry, Professor Elaine Carlson, Chuck Herring, Tom Ragland, John E. Collins, Charles Morris, Tom Davis, Russell McMains, Gilbert Adams, Professor J. Hadley Edgar, David Beck, Professor William Dorsaneo III, Newell H. Blakely, Gilbert I. Low and Broadus A. Spivey. Also present were Chief Justice Thomas R. Phillips, Honorable Ted Robertson, Sarah B. Duncan, and Holly J. Halfacre.

Members absent: Frank L. Branson, Honorable Solomon Casseb, Jr., Chief Justice Austin McCloud, Harry M. Reasoner, Justice Linda B. Thomas, Harry L. Tindall, Sam D. Sparks, Honorable Sam Houston Clinton, Honorable Stanton Pemberton, Steve McConnico, Franklin Jones, Jr., Thomas Black, Pat Beard, and Sam Sparks.

Justice Nathan Hecht had oral requests for TRCP changes as follows:

In TRAP 5c delete reference to TRCP 317. A motion was made and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

In TRAP 74 delete the words "Supreme Judicial". Also delete reference to "Supreme Judicial" in Criminal Case Appendix. Holly Halfacre to do search for any other references to "Supreme Judicial". A motion was made and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRAP 172 was made by Justice Hecht changing time limits for oral argument in the Supreme Court from 30 minutes to 25 minutes and 15 minutes to 10 minutes. A motion was made and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

Subcommittee Report by J. Hadley Edgar on Rules 216 - 314.

A motion was made and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment by adding the following language to TRCP 245: "A request for trial setting constitutes a representation that the requesting party reasonably and in good faith expects to be ready for trial by the date requested, but no additional representation concerning the completion of pre-trial proceedings or current readiness for trial shall be required in order to obtain a trial setting in a contested case."

A request for amendment to TRCP 248 was reported on, motion was made, and the committee voted 6 to 4 to recommend that the Supreme Court not promulgate the requested amendment.

A request for amendment to TRCP 254 was reported on. This is a legislative continuance problem. No action needed by this

committee. A motion was made, and the committee voted unanimously not to recommend that the Supreme Court promulgate the requested amendment.

A request to repeal TRCP 260 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 269 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 278 was reported on, after a lengthy discussion motion was made, and the committee voted unanimously to request further study of TRCP 278 by the committee.

A request for amendment to TRCP 279 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court not promulgate the requested amendment.

A request for amendment to TRCP 295 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court not promulgate the requested amendment.

A request for amendment to TRCP 296 was reported on, motion was made, and the committee voted 11 to 5 to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 298 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment. Professor Elaine Carlson, Professor J. Hadley Edgar and Michael Hatchell were assigned to review Rule 298 regarding possible changes to 41(a)(1) and 54(a) to be reported on at the next meeting.

Discussion had regarding making changes to TRCP 200 to list in notice who will be attending. Add same language to TRCP 208 and put comment referencing Rules 200 and 208 at the end of 614.

A motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment to TRCP 166 by adding the following sentence "(g) The Settlement of the Case. To aid such consideration, the court may encourage settlement".

A request for amendment to TRCP 166b(e), 166b(2)(e)(1), 166b(2)(e)(2) and 166b(3)(b) was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 166b(c) and (d) was reported on, motion was made, and the committee voted unanimously to

recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 166b(4) was reported on, motion was made, and the committee voted by majority to recommend that the Supreme Court not promulgate the requested amendment.

A request for amendment to TRCP 167a was reported on, motion was made, and the committee voted by majority to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 168 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 169 was reported on, motion was made to approve certain changes, and the committee voted unanimously to recommend that the Supreme Court promulgate portions of the requested amendment.

A request for amendment to TRCP 201 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 206 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court not promulgate the requested amendment.

A request for amendment to TRCP 208 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 215 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 166a was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 87 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A subcommittee Report on TRCP 781 was given by Professor Elaine Carlson. Motion was made and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A subcommittee Report on TRCP 523-591 was given by Anthony Sadberry.

A request for amendment to TRCP 534 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 13 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court not promulgate the requested amendment.

A request for amendment to TRCP 18b was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court not promulgate the requested amendment.

A request for amendment to TRCP 329b was reported on, motion was made, and the committee voted unanimously to table same for assignment to a special subcommittee for comprehensive review and revision where necessary.

Upon request of Justice Hecht, a new committee was created to study and make recommendations regarding TRCP 330, on multi district complex litigation. Professor Elaine Carlson, Charles Herring and Tom Davis volunteered to be on committee. A Chair will be named and additional members will be appointed.

A request for amendment to TRCP 604 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 183 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to Rule 15a was reviewed, motion was made and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRAP 40 was reported on and assigned for further study to the Standing Subcommittee on Rules of Appellate Procedure.

Michael Hatchell was named Co-chair of the Standing Subcommittee on Rules of Appellate Procedure.

A request for amendment to TRAP 47 was reported on and assigned to Professor Elaine Carlson as Chair of a special subcommittee for a report at the next meeting.

A request for amendment to Rule 49 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court not promulgate the requested amendment.

A request for amendment to TRAP 130a was reported on and assigned to the Subcommittee on Rules of Appellate Procedure for further study and report at next meeting.

A request for amendment to TRAP 5 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 201(5) was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

A request for amendment to TRCP 771 was reported on, motion was made, and the committee voted unanimously to recommend that the Supreme Court promulgate the requested amendment.

Meeting adjourned.