MINUTES OF THE

SUPREME COURT ADVISORY COMMITTEE

NOVEMBER 19 - 20, 1993

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock on Friday, November 19, 1993, pursuant to call of the Chairman.

Friday, November 19, 1993:

Supreme Court of Texas Justice, and Liaison to the Supreme Court Advisory Committee, Justice Nathan L. Hecht was present.

Members present: Chair Luther H. Soules III, Alejandro Acosta, Jr., Professor Alexandra W. Albright, Charles L. Babcock, Pamela Stanton Baron, Pat Beard, David J. Beck, Honorable Scott A. Brister, Professor Elaine Carlson, Honorable Ann Tyrrell Cochran, John E. Collins, Tom Davis, Professor William V. Dorsaneo III, Sarah B. Duncan, J. Hadley Edgar, Kenneth D. Fuller, Michael T. Gallager, Anne L. Gardner, Honorable Clarence A. Guittard, Michael A. Hatchell, Charles F. Herring, Jr., Tommy Jacks, Franklin Jones, Jr., Joseph Latting, Gilbert I. Low, Honorable F. Scott McCown, Russell H. McMains, Robert E. Meadows, Harriet E. Miers, Richard R. Orsinger, Honorable David Peeples, David L. Perry, Dan R. Price, Anthony J. Sadberry, Sam D. Sparks, Stephen D. Susman, Paula Sweeney, Harry L. Tindall, and Stephen Yelenosky.

Ex Officio Members present: Doak Bishop, Honorable Sam Houston Clinton, J. Shelby Sharpe, David B. Jackson, Doris Lange, Honorable Austin McCloud, Thomas C. Riney, Honorable Paul Heath Till, Bonnie Wolbrueck.

Members absent: Gilbert T. Adams, Frank Branson, Honorable Solomon Casseb, Vester Hughes, Donald Hunt, David Keltner, Thomas Leatherbury, John Marks, Steve McConnico, Charles Morris, John O'Quinn, Tom Ragland, Harry Reasoner, Honorable Raul Rivera, and Broadus Spivey.

Ex Officio Members absent: Paul Gold, Honorable Bob Thomas.

Others present: Chief Justice Thomas Phillips, Lee Parsley (Supreme Court Staff Attorney), Holly Duderstadt (Soules & Wallace).

First item discussed was Task Force on Sanctions proposal regarding Rule 215, sanctions for discovery abuse.

Task force work introduced by Chuck Herring, who chaired the Task Force. The Task Force drafted and presented for consideration

[illegible] other
[illegible] al hearing
[illegible] and [illegible]
[illegible]
[illegible] material
[illegible] procedural
[illegible] (America)
[illegible] agents,
[illegible] as
[illegible] king of

[illegible] the rules in
[illegible] the whole
[illegible] litigation"
[illegible] The
[illegible] motion for
[illegible] red the Court
[illegible] works. There

[illegible] of the
[illegible] s from each
[illegible] money for

[illegible] cases (96-
[illegible] cases
[illegible]
[illegible]
[illegible] motions and

[illegible] much of the
[illegible] ritten its one
[illegible] compliance with
[illegible] nsensus was that
[illegible] adoption of a
[illegible] the
[illegible] actions rather

[illegible] The [illegible] has a standing
[illegible] either the
[illegible] report was
[illegible] ally in that

[illegible] rcement of
[illegible] put down on

a proposed Rule 166d. The rule proposes the following, among other things: eliminated *sua sponte* sanctions; requiring an oral hearing (waivable); requiring a conference between attorneys and a certificate of conference; making a party, lawyer or law firm subject to sanctions; distinguishing between "substantial" sanctions and "non-substantial" sanctions, and providing procedural safeguards for substantial sanctions (based on *Transamerica*); allowing the trial judge to assess a range of punishments, including an award of attorney fees and costs, a monetary award as punishment, CLE, *pro bono*, community service, striking of pleadings, and others.

It was suggested by one of the trial judges that the rules no longer allow sanctions for discovery abuse because the "whole approach was a mistake" which was causing "satellite litigation" and resulting in an inequitable outcome in many cases. The proponent preferred a return to a motion to compel/motion for contempt practice. The proponent also requested the Court experiment with various sanctions rules to see what works. There was other sentiment for experimentation.

J. Hecht said that it was hard to measure the success of the various experiments because both good and bad stories from each test group would no doubt surface and there was no known money for a study to determine which method truly worked the best.

There was a general agreement that most sanctions cases (90-95%) involved small infractions and the ruling in most such cases was a motion to compel plus an award which represented reimbursement for the trouble of getting sanctions. There was general agreement that there are too many sanctions motions and that they are a burden on the system.

There was some sentiment against the old motion to compel/motion for contempt practice because it gives litigants one free trip to the courthouse and does not enforce compliance with discovery as readily. In addition, the general consensus was that discovery responses had been more timely since the adoption of a sanctions rule. In addition, the consensus was that the practitioner sometimes needs to go directly to sanctions rather than a motion to compel.

There was a comment that one judge in Texas has a standing rule that if you bring a sanctions motion in his court, either the movant or respondent was going to get sanctioned. The report was that this cut down on sanctions motions substantially in that court.

One of the trial judges commented that strict enforcement of rule that lawyers try to work out the problem helps cut down on

motions. The judge proposes that the rule require that the attorneys talk to each other, not just send a fax.

The Committee voted on the issue of whether some sanctions rule was necessary. It was near unanimous that some sanctions rule was necessary.

As the discussion proceeded, sentiment developed for a two rule approach: one for dealing with the 90% which are relatively minor problems and the other dealing with the 10% which are egregious. The Committee clearly does not want a rule which makes it easier to get sanctions.

Some members of the Committee expressed concern that the motion to compel practice is not in the proposed rule. The proposed rule is entitled "Discovery Violations" and, arguably, the thrust of rule is sanctions. The members of the Task Force argue that the proposed rule has two parts -- substantial and non-substantial -- and that the motion to compel is a part of the non-substantial.

Several members commented that the sanctions practice personalizes litigation to the detriment of the system and the litigants in that it angers lawyers and makes settlement more difficult to achieve.

One member questioned whether the proposed rule allows the non-moving party to get sanctions for a frivolous motion for sanctions. Answer: Rule 13 allows recovery. There was some sentiment that the requirements of Rule 13 are too stringent and that the discovery sanctions rule should contain a provision for sanctions on the movant. The benefit is that the requirements need not be as stringent as Rule 13 and the provision would be on the mind of the movant when he/she filed the sanctions motion.

Initially, there was general agreement that the movant should be awarded reimbursement for a motion to compel.

A motion was made that the committee adopt the concept of writing separate and distinct rules on compelling discovery and sanctions. The motion carried heavily.

There followed a discussion regarding the "substantially justified" standard of the proposed rule. The rule says that the party who does not fully respond to discovery will not be punished for a discovery violation if their position was "substantially justified." Some members prefer a standard based on whether the failure to respond was in good faith, whether or not it was substantially justified under the law.

In the end the Committee stayed with the substantially justified standard because one of the trial judges said that he didn't really think the standard was of great importance in that a trial judge could articulate the necessary standard in any case.

The question then arose of whether the movant will be reimbursed for the expenditure of attorneys fees and costs for motion to compel or if the movant will be reimbursed for all consequential damages resulting from the action which required the motion to compel.

One of the members offered that the losing party always pay the fees and expenses of the prevailing party. Another member suggested that no money change hands for motion to compel.

The Committee voted by a large majority that the movant at least recover attorney fees and costs in a motion to compel.

There was a suggestion that the rule allow the trial judge the discretion to award the fees and expenses at the end of the case. The rationale was that the parties would become less contentious if they did not know the outcome of their discovery dispute. This received little substantive comment.

The Committee voted unanimously for permitting the trial judge on some standard to award attorney's fees for reasonable expenses on a motion to compel discovery.

After more debate, the Committee reconsidered the prior vote regarding award of fees and expenses and the vote ended in a tie, 18 to 18.

Upon returning from lunch, the Committee voted again on the question of award of fees and expenses. There was still no clear consensus, and after more debate, the matter was sent to sub-committee.

The next question was whether the movant could go directly to sanctions or must they get a motion to compel first. The consensus appeared to be that can go directly to sanctions in the most egregious cases, but that the rule should make it difficult to go to sanctions. This will be addressed by the sub-committee.

The debate then turned to whether inquiring into the attorney/client relationship was advisable. The proposed rule requires that the trial judge inquire whether it was the attorney or client whose actions caused the need for sanctions. There was a good deal of sentiment that it unnecessarily intrudes into the attorney/client relationship and that the Court was incorrect in requiring that inquiry in *Transamerica*. There was some question if due process requires that the client be informed that he/she needs

to hire another attorney just for the sanctions hearing and whether *Miranda* warnings were required.

Some members of the Committee suggested that all sanctions be against the client because the attorney is merely an agent of the client. They argue that this is generally the rule. For example, if the attorney fails to file a suit before the statute of limitations runs, the client is stuck with that failure. The client must seek his/her remedy against the attorney.

On the other hand, there was sentiment that it would be perceived by the public as another example of attorneys exempting themselves from the laws applicable to everyone else; that it would lower the ability of trial judge to discourage abusive conduct; and that it would force the client to hire yet another attorney and go through yet another proceeding to get compensated.

There was a question whether including the law firm violates the Limited Liability Partnership or Professional Corporation acts. The Task Force said it was aimed at the firm who participates in the sanctionable conduct directly, and did not intend to impose vicarious liability.

A motion was made that the discovery sanctions would only be visited upon the client and not the attorney or law firm. The Committee voted very definitely against the motion.

A question was raised whether the rule precluded mandamus relief. The Task Force said that it was not intended to do so, but there was argument that the proposed rule cut-off mandamus inadvertently. The sub-committee will address that issue.

There was strong sentiment against ordering CLE, *pro bono*, and community works. The argument was that it was demeaning to the profession and was not related to the wrongful conduct. The proponents said that it sometimes is appropriate and that some attorneys prefer CLE to a fine. There was a suggestion that it be like probation -- the sanctioned party could pay the fine or work it off, at their discretion. This proposal received little serious debate.

Some members of the committee wanted to both eliminate the reference to CLE, *pro bono* and community service from the rule and specifically prohibit those things in the comment to the rule.

A motion was made to prohibit conduct that is set forth in 3(h) requiring community service, pro bono legal services, continuing legal education or other services. The Committee voted 22 against and 10 for taking this out.

The sub-committee was commanded to go forth and create a new rule.

The Committee then turned to the report presented by the Task Force on Rules Relating to the Jury Charge. Judge Ann Tyrrell Cochran presented the report to the Committee. Judge Cochran explained that the Task Force had considered, but rejected after having received comment from trial judges, an objection only system. The system was rejected because many trial judges do not have the time or resources to prepare a charge without any tender from the attorneys.

On the other hand, the Task Force recognized that many appellate courts were avoiding ruling on the merits of cases because of waiver caused by a failure to properly tender or object to the court's charge. The Task Force sought to simplify the procedure for presenting error. Thus, the Task Force recommended tender by a party only if it was a question, definition or instruction which was supported by that party's pleadings and it was omitted from the court's proposed charge.

If tender is required, it need only give the trial court "reasonable guidance" as to the correct submission. Under the proposed rule, if the tender is wrong, it is up to the other party to object to the tender, but that party need not tender a correct question, definition or instruction. The objection preserves error. If the objection is sustained, the party tendering has preserved error if the tender gave the trial judge reasonable guidance for fashioning a correct charge.

The rule is supposed to make it easier to get appellate review of the merits, but should not make it any easier to get a reversal.

There was some sentiment that the old requirement that the tender be in "substantially correct" form be adopted. In response, it was argued that this standard has been applied too harshly by the appellate courts and has resulted in waiver in many cases. They argued that "substantially correct" has been interpreted to mean "perfect." Purpose is to allow review on the merits instead of having litigants lose on a technicality. The reasonable guidance language was taken from *State Department of Highways and Public Transp. v. Payne*.

Several members of the Committee commented that the old system was unfair in that one party was forced to do the other party's work. The old rule requires that the party objecting to a definition or instruction must tender a definition or instruction in substantially correct form to replace the objectionable one. Failure to tender a definition or instruction in substantially correct form could result in waiver of the objection, even if the

definition or instruction was related to issued on which the opponent had the burden.

Other members of the Committee complained that it didn't seem right that a party could object to the charge, but not tell the judge how to fix it. The Task Force members explained that the rule requires that the objecting party state distinctly their objection and the ground for the objection. If a definition or instruction is omitted, the objection is that a part of the charge is omitted. If an element of a cause of action is omitted, the objection is that the element was omitted. By making these objections, the court is sufficiently apprised as to how to fix the problem, but the party objecting preserves error without having to tender and possibly waive error by tendering a question, definition or instruction that is not is substantially correct form.

The Committee expressed a desire to include a comment regarding "reasonable guidance" to try to prevent the appellate courts from making the definition "hyper-technical."

The Task Force did not address juror note taking in the proposed rule and there was no sentiment for including the issue in the new rules.

There was a suggestion that the Court allow the trial courts to experiment with giving the jury a "preliminary charge" to look at during trial. There was little discussion except that this might be a comment on the evidence.

Members of the Task Force informed the Committee that there are no appellate consequences to the trial judge requiring the parties submit a proposed charge at the pretrial conference.

There was a question inquiring whether parties could waive the reading of the charge to the jury. The answer was that it is waivable, like most anything else, but that a provision specifically allowing waiving reading was not included in the charge.

There was a question whether the Task Force had given any thought to allowing a charge to the jury in Justice court. Current rules specifically prohibit it. Members of the task force admitted that no thought had been given to that issue. The matter was referred to the sub-committee.

The Task Force stated that proposed Rule 272(1)(a) is not intended to change the law regarding trial by consent.

Proposed Rule 272(1)(a) provides that if a party has the <u>burden to plead</u> a matter, that party is entitled to a question, definition, or instruction on that matter only if that party does

in fact plead the matter. This reference to the burden to plead substitutes for the reference to the burden of persuasion in the old rule and is in response where the burden shifts, as in fiduciary litigation.

One member suggested deleting the word "factual" in proposed Rule 272(2)(a). Consensus was that questions of law might be given the jury if the word "factual" were deleted.

Several members of the Committee suggested changing "whenever feasible" in proposed Rule 272(2)(b) to "where desirable" or "practical" or some other similar term or phrase. Their argument was that it is almost always feasible to submit in broad form, but it is not fair or just in some cases.

One member of the Committee noted that some of the proposed rules referred to "submitting" the questions to the jury while other rules referred to "giving" the questions to the jury. That member suggested that all the rules be changed to use the word "submit" instead of "give". There was no opposition.

The Committee agreed, without opposition, to change the word "court" to the word "judge" throughout the proposed jury charge rules.

In response to a question by one of the members of the Committee, the Task Force members confirmed that there was an intent to modify *Payne* by the new provisions in proposed Rule 274(2). *Payne* allowed the tender to preserve error without need for an objection. The proposed rule requires, in the case of an omitted item, both a tender which gives reasonable guidance to the judge and an objection if the item is not submitted to the jury.

The Committee voted almost unanimously to adopt the "reasonable guidance" standard over the "substantially correct" standard.

The Committee agreed, without opposition, to change "No party may . . . " to "A party may not . . ." in the first sentence of Rule 274(2).

The Committee agreed, without opposition, to change "in open court . . ." to "on the record . . ." in Rule 274(4).

There was substantial debate on whether to remove any reference to inferential rebuttal questions from proposed Rules, specifically from Rule 272(2)(e). Proponents of the deletion argued that the reference to inferential rebuttals are a vestige of the past which no longer have meaning; that new rules should take out all the old historic references such as this and include explanatory comments regarding the change; that no one really knows

what an inferential rebuttal question is anyway; and that the an inferential rebuttal question is not compatible with broad form submission.

The argument to the contrary was that some judge will submit inferential rebuttal questions if this specific prohibition in not in the rule as the judge would take the deletion of this provision as a change in the law. They did not think a comment was sufficient.

Another member moved to add language to Rule 274(2)(b) saying that the prohibition on inferential rebuttal questions was not intended to prohibit disjunctive submissions. This proposal eventually failed because Committee members were afraid that inferential rebuttal questions would start popping up as disjunctive submissions. (As an example, "Do you find that the accident was caused by A or B or that is was unavoidable.") This was considered to be an improper submission of an inferential rebuttal question through disjunctive submission.

The meeting was adjourned until 8:30 o'clock a.m. on Saturday, November 20, 1993.

Saturday, November 20, 1993:

Supreme Court of Texas Justice, and Liaison to the Supreme Court Advisory Committee, Justice Nathan L. Hecht was present.

Members present: Chair Luther H. Soules III, Alejandro Acosta, Jr., Professor Alexandra W. Albright, Charles L. Babcock, Pamela Stanton Baron, Pat Beard, David J. Beck, Honorable Scott A. Brister, Professor Elaine Carlson, John E. Collins, Professor William V. Dorsaneo III, Sarah B. Duncan, J. Hadley Edgar, Kenneth D. Fuller, Michael T. Gallager, Anne L. Gardner, Honorable Clarence A. Guittard, Michael A. Hatchell, Charles F. Herring, Jr., Tommy Jacks, Joseph Latting, Thomas Leatherbury, Gilbert I. Low, Honorable F. Scott McCown, Russell H. McMains, Robert E. Meadows, Harriet E. Miers, Charles Morris, John O'Quinn, Richard R. Orsinger, Honorable David Peeples, Anthony J. Sadberry, Sam D. Sparks, Stephen D. Susman, Paula Sweeney, Harry L. Tindall, and Stephen Yelenosky.

Ex Officio Members present: Doak Bishop, J. Shelby Sharpe, David B. Jackson, Doris Lange, Chief Justice Austin McCloud, Thomas C. Riney, Honorable Paul Heath Till, Bonnie Wolbrueck.

Members absent: Gilbert T. Adams, Frank Branson, Honorable Solomon Casseb, Honorable Ann Tyrrell Cochran, Tom Davis, Vester Hughes, Donald Hunt, David Keltner, John Marks, Steve McConnico, David L. Perry, Dan R. Price, Tom Ragland, Harry Reasoner, Honorable Raul Rivera, and Broadus Spivey.

Ex Officio Members absent: Honorable Sam Houston Clinton, Paul Gold, Honorable Bob Thomas.

Others present: Justice John Cornyn, Lee Parsley (Supreme Court Staff Attorney), Holly Duderstadt (Soules & Wallace).

The discussion on the Jury Charge Task Force report was continued.

It was also suggested that inferential rebuttal prohibition be stated in the positive rather than the negative; *i.e.*, including a new Rule 274(3)(c) stating "an inferential rebuttal matter should be included only as a definition or question" and deleting Rule 274(2)(e). There was little opposition to proposal to include a new sentence, but Committee members did not want to delete the prohibition on inferential rebuttal questions. The Committee voted the house with three against.

There was a suggestion that inferential rebuttal instructions should be banned as well, under the theory that if we can't justify them in a question, how can we justify them in an instruction. It was further argued that inferential rebuttal instructions are a comment on the evidence. (As an example, giving a definition of sole proximate cause singles out one piece of evidence.)

The sentiment was that Committee should not eliminate inferential rebuttal instructions without studying fully the ramifications.

One member commented that appeals courts leave to the discretion of the trial court the construction of the charge and that leaving a prohibition of inferential rebuttal questions in the rule takes the matter out of the discretion of the trial judge.

Eventually, the Committee voted 23 to 12 to leave both the inferential rebuttal question and the and disjunctive submission provisions in the rule as written by Task Force.

One member wanted a new provision providing that "advisory questions shall not be submitted." The comment of the member was that advisory questions (such as how to divide the property in a divorce case and hours of visitation in a custody case) are a problem in family law. It was noted, however, that the *Texas Family Code* specifically allows them. *See* TEX. FAM. CODE § 11.13.

A motion was made by Harry Tindall to add a paragraph 272(2)(f) that would say "Advisory questions shall not be permitted." The Committee voted 16 to 9 against.

On the suggestion of one member, the Committee revisit the "whenever feasible" standard. That member claimed that broad form questions sometimes do not allow the preservation of error because the court of appeals cannot determine on which issue the jury decided the case. The proponent of this change claimed that it deprives people of a constitutional right of appellate review.

The counter argument was that TRAP 81(b) takes care of the problem and that the trial judge has the ability to ask several broad form questions so that the questions are not that broad.

The Committee voted on retaining "whenever feasible" standard and the members overwhelmingly supported the standard.

A member of the Committee moved to have standards of review clarified. The member stated that abuse of discretion was the proper standard for reviewing the structure of the charge, but *de novo* review was the proper standard for complaints regarding errors of law in the charge. Other members wanted to see proposal in writing and have sub-committee review it before adopting the proposal. The Committee voted 16 to 10 to refer this matter to sub-committee.

The Committee agreed, without opposition, to keep the instructions to jury as a Miscellaneous Order of the Court instead of making it a rule of civil procedure.

A motion was made that language be added to Part 1, Number 5 of 226a to the effect "If a question is asked of the whole panel or part of a panel that requires an answer from you," and so forth, "please raise your hands, keep it raised up". There was no opposition.

There was no opposition to rearranging Part 2 of 226a so that the judge can give the jury the oath before or after the instructions.

There was no opposition to reinstating the language regarding attorneys not meddling by questioning jurors.

The Committee reviewed Rule 274(5) regarding timing for raising factual sufficiency and legal sufficiency complaints. The perceived problem was that the proposed rule changes the law regarding preserving error on these points. The Task Force stated that the goal was to make attorneys stop objecting to factual sufficiency at the charge conference, because that is a matter properly raised in a motion for new trial (or possible other post trial motions).

It was proposed that the rule set out specifically that legal sufficiency points can be raised in a motion for directed verdict,

motion to disregard, motion for judgment n.o.v., or in the objections to the charge; and that the rule state that factual sufficiency points can only be made in a motion for new trial. This proposal drew objections that list may not be fully inclusive and that the Committee should not try to make it fully inclusive (*i.e.*, motion for remittitur can raise factual insufficiency as could a motion to correct, modify or reform).

The Committee agreed unanimously to delete "for the first time" and insert "before or" in the first sentence of Rule 274(5) so that the rule says that a legal sufficiency point can be brought before or after the charge; and to delete "must" and insert "may only be" in the second sentence of that rule, to make certain that factual sufficiency points are brought only after verdict.

Suggest that comment say that we are not adopting the federal practice here by deleting "for the first time"

Committee then turned to a presentation by William V. Dorsaneo regarding the proposed re-write of the *Texas Rules of Civil Procedure*. The draft of the proposal was circulated.

There was a discussion of the numbering system to be used to allow for expansion or deletion of rules in the future. One member suggested that a decimal system be used. The Task Force stated that the current draft was based on organization of Federal Rules.

There was debate on whether a revision - both substantive and structural - is needed.

The Committee voted unanimous to go forward with both substantive and structural changes to rules.

The meeting was adjourned.