MINUTES OF THE

SUPREME COURT ADVISORY COMMITTEE

MARCH 18 - 19, 1994

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock a.m. on Friday, March 18, 1994, pursuant to call of the Chairman.

Friday, March 21, 1994:

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

Members present: Chair Luther H. Soules III, Alejandro Acosta, Jr., Professor Alexandra Albright, Charles L. Babcock, Pamela Stanton Baron, Honorable Scott A. Brister, Professor Elaine Carlson, Professor William V. Dorsaneo III, Sarah B. Duncan, Honorable Clarance A. Guittard, Michael A. Hatchell, Charles F. Herring, Jr., Joseph Latting, Gilbert I. Low, John Marks, Russell H. McMains, Harriett E. Miers, Richard R. Orsinger, Anthony J. Sadberry, Stephen D. Susman, Paula Sweeney and Stephen Yelenosky.

Ex-Officio Members Present: Honorable Sam Houston Clinton, David B. Jackson, Doris Lange, Honorable Paul Heath Till, Bonnie Wolbrueck.

Members absent: David J. Beck, Honorable Ann T. Cochran, Michael T. Gallagher, Anne Gardner, Donald M. Hunt, Tommy Jacks, Franklin Jones, Jr., David E. Keltner, Thomas S. Leatherbury, Honorable F. Scott McCown, Robert E. Meadows, Honorable David Peeples, and David L. Perry.

Ex Officio Members absent: Paul Gold and Thomas C. Riney.

Also present: Lee Parsley, Supreme Court Staff Attorney, and Carl Hamilton.

Chairman Soules asked for comments on the minutes from the November, 1993 and January, 1994, meetings. Mr. Susman said that he found the minutes "incomprehensible" and asked that someone be appointed to take the minutes at future meetings. Mr. Soules agreed to have the minutes revised and they will be presented at the next meeting. Mr. Orsinger volunteered to take the minutes of the meeting.

Agenda. Chair Soules established the following Agenda:

(1) Appellate Rules;

(2) Discovery; and

(3) Discovery Sanctions.

Appellate Rules. Appellate Rules Subcommittee Chair Professor William Dorsaneo deferred to Justice Clarence Guittard for the presentation of changes to the Rules of Appellate Procedure. Justice Guittard is the Chair of the Rules Committee for the Appellate Practice & Advocacy Section of the State Bar of Texas, which has been working on rules changes for several years. [Justice Guittard's Section Committee will be called the "Subcommittee".]

Justice Guittard presented a Subcommittee Report of proposed rule changes, with some written commentary. Justice Guittard stated that the Appellate Practice & Advocacy Section Committee was not responsible for commentary. The Committee voted on proposed rule changes, but Justice Guittard wrote the commentaries. The changes are both significant and minor.

This is not a complete report. The Committee's proposals for change to the TEX. R. CIV. P. will be brought later.

There is an error in the Subcommittee Report. Rule 46 has not been adopted by the Subcommittee. (Page 44) - strike it out.

Major Proposals. (1) Abolish the cost bond as a method of perfecting an appeal. Require payment of costs in advance (except for pauper's oath). (2) Preparing the appellate record: the trial court clerk and the official court reporter will be responsible, not the lawyers. Extensions will be between the court of appeals, the trial court court clerk, and the official court reporter.

Justice Guittard then took up Rule changes, one-by-one.

Rule 1. The proposed amendment to Texas Rules of Appellate Procedure [TRAP] 1(b) - no dismissal for failure to comply with the local rules. *Unanimously approved.*

Rule 2. The proposed amendment to TRAP 2(b) - appellate court may suspend rules other than deadline for perfecting the appeal in civil matters. Capitalize "N" in "nothing" in last sentence. *Unanimously approved.*

Rule 4. The proposed amendment to TRAP 4(a) - extending the requirement that legal documents contain the signature and other information regarding counsel - *Unanimously approved.* The proposed amendment to TRAP 4(b) - regarding lead counsel was returned to Committee to be conformed to TRCP 8.

The Advisory Committee voted on permitting a party to specify 2 attorneys to receive copies of things filed. *For - 12; Against*

Voted on what type of punishment should imposed for failing to serve second attorney. *Committee decided that no action would be taken as to punishment.*

Prof. Dorsaneo explained proposed changes to other rules.

The proposed amendment to TRAP 4(c) - clerk has 20 days to receive items by U.S. Mail--used to be 10 days. Reference to "writ of error" eliminated because that procedure is being eliminated. Discussion of federal statute that U.S. Mail has monopoly for non-urgent mail.

One of the trial court clerk's in attendance stated that it is an extra burden on the clerk to keep envelopes. Discussed permitting regulated carrier delivery to substitute for U.S. Mail. Why can't we use motions for extension if you can't get to post office? *Consensus vote: Permitting late delivery by other than U.S. Mail - 11; Limited to U.S. Mail only - 10.*

Ten-day additional period should be clarified as to when it starts. "Him" or "her"? "Tardily" will be changed. Justice Hecht proposed removing reference to TEX. R. CIV. P. 301 or 329b. Pamela Baron proposed making TEX. R. CIV. P. 5 conform to this. *The Subcommittee will reform Tex. R. Civ. P. 5 to match the new appellate rule. Leave it optional with Justice whether or not to accept filing of documents.*

All appellate rules will be made gender neutral.

If clerk doesn't receive item within 20 days, then you have 10 more days to prove mailing.

Mr. Soules moved that TRAP 4(c) be sent back to Subcommittee to correlate with the 15-day period for filing motions to extend.

The proposed amendment to TRAP 4(d) - regarding the number of copies of documents to be filed - *Unanimously approved.*

Sarah Duncan discussed TRAP 4(e), regarding font size, etc.

Judge Clinton said that the Court of Criminal Appeals uses 8-1/2 x 14 size paper. Most briefs they receive wouldn't comply with the formatting requirements contained in the proposed rule. Also, recycled paper is not white. It's gray. *Voted 10 to 4 that the details on a brief (i.e. font size, etc.) be omitted. Won't get so specific in the Rules.* The Chair said that the Advisory Committee may be too involved in details of these changes.

TRAP 4(f) - who gets copies? Justice Guittard proposed the need to consider jointly with TRAP 40. Originally, an appeal bond

specified appellees. But the Supreme Court changed that rule to make bond payable to clerk. Avoids requirement of specifying appellees. Do we want to require appellant to specify appellees in a notice of appeal?

[The Advisory Committee considered TRAP 4(f) and TRAP 40 together.]

The proposed amendment to TRAP 40 - notice of appeal would be the method of perfecting an appeal.

Justice Guittard and Prof. Dorsaneo stated if you're going to require payment of costs for statement of facts and transcript, why have a bond? Go with a notice of appeal.

Russell McMains asked under the new rule, would the appellant pay trial costs, too? Bond now covers costs in trial court. We would be doing away with that security. Prof. Dorsaneo stated that $1,000 in too little anyway.

Justice Guittard stated that a bond now secures trial costs as well as costs of appeal. Committee considered appellee being able to move for posting security for costs in trial court. See new TRAP 46 and TRAP 53 - fees of court reporter.

A better way is to start an appeal with notice of appeal than to have all these security devices.

Bonnie Wolbrueck stated that as a clerk, they like the idea of a notice and prepayment of transcript. Clerks want to be paid. They get "odd ball" cost bonds. In 5 out of 7 bonds received in one day recently, the principal did not sign the bond. Often signatures are not legible.

Continued discussion of TRAP 40. Question: Should you name the appellees? Right now, the clerk can be named on a bond, so bonds don't have to designate appellees. In *Futerfas v. Park Towers*, 707 S.W.2d 149 (Tex.App.--Dallas 1986, writ ref'd n.r.e.), the court of appeals held that a party not identified in a cost bond or appellant's brief as an appellee is not an appellee.

Justice Guittard presented Memorandum of Law No. 1, "Identification of Parties to the Appeal," which was included in the materials he handed out.

Mike Hatchell stated a notice of appeal must be served very early on. He has one case with 3,000 opposing parties. You might be forced to be over-inclusive. What if someone requests sanctions for including people in notice that are later dropped? *Colley* reversed as to a non-appealing party because the non-appealing party was inextricably intertwined, so you can't assume that the appellant's decision on who to include always controls what parties

have a stake in the appeal.

Rusty McMains asked what if something happens in the court of appeals that affects who the appellant wants to involve. Does the appellant's giving of notice limit the court of appeals in what it can do to parties? What if you limit the scope of the appeal, and later add a new appellee?

Pamela Baron stated to be safe, appellants will list all appellees. That will defeat purpose of rule change.

Sarah Duncan asked what if you include everybody and those who should not have been named seek sanctions?

Mike Hatchell, Rusty McMains, and Sarah Duncan opposed requirement of listing appellees.

[BREAK - 11:10 A.M.]

Vote. Question: Scrap cost bond and go with notice? *Unanimously approved.* Question: Who wants notice to affect parties and who doesn't want notice to have any effect beyond what cost bond now has? *Vote was 3 versus 8.* Subcommittee's suggestion was rejected. Subcommittee will change TRAP 40 to eliminate requirement that appellant name appellees.

TRAP 40a - Cross-Appeals. The proposed change requires notice to be given to cross-appellees, similar to the proposed change to TRAP 40. Prof. Dorsaneo asked if appellant files notice of limitation of appeal, and appellee posts a bond, does appellee have to request record and statement of facts?

Justice Hecht stated there were 3 approaches:

(1) If you don't like the judgment, takes steps to perfect complaint;

(2) If one guy opens door, everybody can go in; and

(3) Under some circumstances, yes and no.

Go with (1) or (2).

Vote. Question: Should there be an period of time after the appeal is filed to "opt in?" *No one voted for this proposal.*

Rusty McMains stated under present Rules, if one bond is filed, then all parties are appellants. This Rule would change practice radically. Anybody can be the appellant. Prof. Dorsaneo stated he saw it as "everybody is an appellee who can raise complaints related to the appellant." Anybody who files an appeal bond can file an appellant's brief. Justice Hecht asked what about

non-appealing parties? Fine as between appellant and appellee, but don't non-appellants need to know if someone is appealing as to them? Prof. Dorsaneo stated either simplify cross-appeals or eliminate them. Mr. McMains stated the trial court's judgment is not immutable, it can be changed by court of appeals. Why do anything unless someone changes the judgment and it hurts you?

Buddy Low stated if you want cross-appeal, have deadline of 20 days after appellant gives notice. If you want to complain of judgment, give notice of appeal or cross-appeal. Otherwise, you can only brief in support of the judgment.

Vote: *Voted 6 in favor of having cross-appeals and 9 against having cross-appeals.*

Ms. Duncan proposed including only first sentence in TRAP 40a, which says that an appellee can raise cross-points without perfecting appeal as against the appellant, unless the appellant limits the appeal under TRAP 40(a)(5). No notice would be required. Just require cross-point to be included in appellee's brief. *Voted 13 pro and 6 con. Rest of the proposed rule is deleted.*

Rule 12. Court Reporters. The proposed change would make the appellate court responsible to see that the court reporter timely files the statement of facts. An equivalent change is proposed for monitoring the trial court clerk's filing of the transcript in the court of appeals. See proposed new TRAP 51(c).

The proposed change to TRAP 51, regarding the transcript on appeal, provides that the trial court clerk will send the original documents constituting the transcript to the appellate court. Now, copies are sent to the appellate court, and the originals remain with the trial court clerk. Bonnie Wolbrueck stated that the trial court court clerk will still need to keep the judgment. [It will always be in the minutes]. Family law modifications, etc. will require the judgment. Title companies come in all the time to look at documents. The time in preparing a transcript is in selecting the documents, not copying. They must reintegrate the file after the record is sent back down. Lots of trouble.

TRAP 56 describes duties of appellate court clerk, both as to the statement of facts and as to the transcript, once they are filed in the court of appeals.

When media are appealing a sealing order under TRCP 76a, or a temporary injunction appeal or other interlocutory appeal is brought, how would you handle original documents vs. copies?

Advisory Committee voted unanimously to leave the original papers making up the transcript in the trial court clerk's office, and to send only copies.

TRAP 45. Writ of Error Appeal. The new Rule 41(a)(3) states that notice of appeal within 6 months replaces writ of error appeal practice. Mr. McMains asked can you present error not preserved? Justice Guittard proposed writing a separate preservation rule that states so. Don't maintain this odd procedure. McMains proposed that the Committee abolish the 6 month appeal. Shelby Sharpe proposed that the Committee leave as is. Prof. Dorsaneo stated he doesn't like writ of error practice because of the extra time.

Vote. Abolish the 6 month review (whether writ of error or 6 month appeal)? *Voted 11 to eliminate and 7 to keep as is.*

Prof. Dorsaneo proposed that the Committee forego discussion of TRAP 52, regarding preservation of appellate complaints.

TRAP 53 - statement of facts. Discussed *Englander v. Kennedy*, and presumption that any portion of the statement of facts not brought forward on appeal supports trial court's judgment. If only part of the statement of facts is designated pursuant to TRAP 53(d), who pays cost of appellee's designation? The proposed new rule would overrule *Schafer v. Conner*, 813 S.W.2d 154 (Tex. 1991), which said that partial statement of facts cannot be used if appellant challenges sufficiency of the evidence, except in criminal appeals as to guilt.

Mr. McMains stated lawyers taking referred appeals find things in record that trial lawyers didn't think of.

Vote. Question: Adopt Rule 53(d) (regarding partial statement of facts) with some provision for allocating costs if appellee designates additional matters for inclusion? *Voted pro 9 and 5 con.*

Voted unanimously that if appellee designates additional portions of record, it will be at appellant's cost, subject to appellate court taxing costs against appellee if material requested by appellee was unnecessary.

TRAP 74(d) - issue practice versus point of error practice.

Point of error. Who erred, in what respect, why was the court wrong? Point of error cannot be abstract statements of legal issues. Object of new approach is to escape bad caselaw regarding poorly worded points of error. This would be like the federal practice.

Mr. McMains stated that taking points of error away makes it harder to figure out whether the complaint affects you, in multi-party cases. Points of error make it clear what ruling is attacked so you can evaluate impact on your client.

Vote. Question: Adopt changes to Rule 74(a) and (d)? These

would permit a statement of issues presented, while still permitting the use of points of error. *Unanimously adopted.* The Advisory Committee also voted to change the title and first line of (a), so that it will read: "Identities of All Parties and Counsel to the Trial Court's Final Judgment. A complete list of the names of all parties to the trial court's final judgment . . . ."

The proposed change to TRAP 74(k) would permit the appellant to file a 25-page brief in reply to the appellee's brief. It was noted that if appellant can file a 25-page reply brief, then there is an uneven number of pages, with appellant getting 75 and appellee getting 50 pages. Soules commented that part of function of supplemental brief is to update caselaw since briefs filed. Usually 7 days before oral submission. You lose that if you require supplemental brief within so many days of the appellee's brief. Sharpe commented it is good to have time limit. You can update later with supplemental brief.

Proposed Rule 74(g) (regarding praying for relief only against those named as parties the appeal) is withdrawn, consistent with the Advisory Committee's rejection of the requirement to name all appellees in an earlier vote.

Vote. *The Committee unanimously adopted* the proposed changes to TRAP 74(e), 74(f), and 74(k).

[BREAK - 3:31 P.M.]

Proposed Rule 74(l) *unanimously accepted without opposition.* This proposed change says that a motion to extend time to file brief can be filed before or after the brief is due.

Proposed Rule 74(m) *unanimously accepted without opposition.* This would permit the appellate court to order that the case be re-briefed.

Prof. Dorsaneo proposed that the Subcommittee modify TRAP 74(o) to make clear what we're talking about.

Richard Orsinger will draft a new proposed Rule 74 subdivision for the April 8, 1994 Subcommittee meeting, pertaining to statement of facts to be included in brief.

Proposed change to TRAP 74(f) (to permit submission of criminal case without oral argument) *unanimously adopted.*

TRAP 84 *unanimously adopted.* (Permitting sanctions for mandamus sought for delay).

TRAP 101 - long discussion regarding eliminating motion for rehearing as jurisdictional prerequisite for Supreme Court's jurisdiction.

Should subcommittee go back and work on eliminating necessity for motion for rehearing? *Voted 13 for to 3 against.*

Mr. McMains commented that if you take motion for rehearing away as predicate for error, it effectively expands jurisdiction of Supreme Court.

The Advisory Committee voted unanimously that Justice Guittard's Subcommittee should bring back two alternatives: (1) no motion for rehearing allowed; and (2) motion for rehearing can be filed but is not required.

TRAP 45(c) - *The Advisory Committee voted unanimously that there will not be any requirements that a contest of affidavit of inability to give security for costs of appeal be sworn.*

TRAP 45(a) - Steve Yelonosky asked what about somebody that can pay some but not all of the costs? Now they must swear that they can't pay any. Subcommittee will fix problem so affidavit will say to what extent can't pay costs. Make consistent with TEX. R. CIV. P. 145. Need to conform TEX. R. CIV. P. 145 to TRAP 45.

TRAP 121(a)(2) - dropping judge's name as respondent in a mandamus proceeding. *The Committee voted 10 in favor and 5 opposed.*

TRAP 11 - Should court reporters or district clerks keep exhibits? TEX. R. CIV. P. 75, 75a, 75b. *The Committee voted unanimously to leave exhibits in custody of the clerks,* who have larger offices and storage spaces.

TRAP 12(a) - *The Committee adopted unanimously the language making the clerk of the appellate court responsible for seeing that the statement of facts is timely filed.*

TRAP 18(a) - *The Committee voted unanimously that the clerk of the court of appeals would monitor the timeliness of the filing of the record.*

TRAP 51(d) - Original exhibits to be sent up by clerk. Copies to be sent by court reporter.

Subcommittee will clarify how copies are forwarded. Ordinarily, copies go up unless court orders original to go up. *The Committee voted 12 to 2 that originals, if ordered by the court, will be sent up by clerk of court, and not court reporter.*

Vote: *The Committee voted 15 to 1 that court reporter makes copies of exhibits and sends them up unless court asks for originals.*

The Committee will rewrite TRAP 12 to clarify that official

court reporter is responsible for substitute reporter and predecessor official reporter.

Mandamus and Prohibition. Pam Baron commented that under TEX. R. APP. P. 121, more guidance is needed. Records are a mess.

Baron made suggestions, not considered by Justice Guittard's Subcommittee:

TRAP 121(a)(2)(E) - Petition and brief should be combined. Vote: *Unanimously adopted.*

TRAP 74 or TRAP 131 - Brief for writ of mandamus should track briefing rules in the court your in. Not point of error, but issues presented. Vote: *Unanimously adopted.*

TRAP 121(c) and (e) - (c) = Court may request that Respondent to reply to the motion. Vote: *Unanimously adopted.*

Discussion: TRAP 121(d) - temporary relief should be able to be granted even before motion for leave to file is granted.

Justice Guittard and Judge Clinton suggested that you can't give relief unless you grant the motion for leave.

Question: Should appellate court be able to grant emergency relief only when leave has been granted? *One (1) voted "aye."*

Question: Should appellate court be able to grant emergency relief without having to grant motion for leave to file? *Ten (10) voted "aye."*

Comment. Under the Government Code § 21.001, authority of appellate court to grant stay is implicit.

Proposal. Require immediate service of any request for temporary relief.

Proposal. Justice Hecht wants TRAP 121(a)(2)(c) to require a complete record on the issues presented.

Proposal. In the Supreme Court, file court of appeals' orders and opinions in original proceedings.

Vote: In Supreme Court - entire record (1); order and opinion of court of appeals (8); and no change (0).

Proposal. Committee should avoid requiring a divider between each page in the transcript, as now required by Austin Court of Appeals. No vote was taken.

[RECESS - 5:50 P.M.]

Saturday, March 19, 1994

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, Professor Alexandra Albright, Pamela Stanton Baron, Professor Elaine Carlson, Sarah B. Duncan, Honorable Clarence A. Guittard, Michael A. Hatchell, Charles F. Herring, Jr., David E. Keltner, Joseph Latting, Gilbert I. Low, John Marks, Honorable F. Scott McCown, Russell H. McMains, Harriet E. Miers, Richard R. Orsinger, Stephen D. Susman, and Stephen Yelenosky.

Ex-Officio Members Present: David B. Jackson.

Members absent: Alejandro Acosta, Jr., Charles L. Babcock, David J. Beck, Honorable Scott A. Brister, Honorable Ann T. Cochran, Professor William V. Dorsaneo, Michael T. Gallagher, Anne Gardner, Donald M. Hunt, Tommy Jacks, Franklin Jones, Jr., Thomas S. Leatherbury, Robert E. Meadows, Honorable David Peeples, David L. Perry, Anthony J. Sadberry and Paula Sweeney.

Ex Officio Members absent: Honorable Sam Houston Clinton, Paul Gold, Doris Lange, Thomas C. Riney, Honorable Paul Heath Till and Bonnie Wolbrueck.

Also present: Lee Parsley, Supreme Court Staff Attorney.

Soules: we will try to finish sanctions next time.

Joe Latting commented regarding TRAP 166. Borrowed some innocuous language from federal rules. Address issue of what kind of hearing should be held. Procedure employed may vary. We still need to decide what judges can consider by way of evidence. Can court consider arguments of counsel? It happens all the time. Should we even cover it in the rules? If attorney makes unsworn representations, can you cross-examine that attorney?

Recommendation. We need to see where discovery committee is going before finalizing discovery sanctions rule.

Mr. Soules commented that we've previously voted 13-10 to redraft sanctions rule.

Mr. Sharpe stated that the State Bar Court Rules Committee is doing a rewrite on Rule 13. They will meet the first Saturday in April. In addition, they are rewriting Rule 215. Rule 13 will not apply to discovery. Will have 2-tiered approach. First motion to compel and then sanctions. Will send draft to Joe Latting.

Mr. Soules commented that this Committee will take final action on discovery sanctions next time (May meeting). The Supreme Court wants some work product.

Mr. Soules commented that this Committee is very happy to have input from the State Bar Court Rules Committee.

Mr. Latting nominated Pamela Baron to draft the new sanctions language along the line of Tommy Jacks' proposal, adopted at the last meeting.

Discovery Subcommittee. Subcommittee report given by Steve Susman. Can't count on micro-management by courts or goodwill of counsel (*a la Dondi* cooperation) to solve discovery problems. Trial judges who are elected sometimes not too forceful. These are tentative proposals, just to get Advisory Committee's opinion.

Committee proposes a window of time when discovery can take place. Six months. Has nothing to do with date of trial. We must break the connection between discovery and trial. If discovery is open until trial, it is expensive. TRCP 168(a) - interrogatory - 30 questions, but no limit on number of sets. Can send 30 sets of one interrogatory each.

Interrogatory requiring other side to marshall its evidence is bad. Should be able to use interrogatories to determine contentions. Better than summary judgment motion or special exceptions, that take court time. See TRCP 168(d).

When identifying a document, must give sufficient detail to permit interrogating party to locate and identify the document.

TRCP 200 - Maximum of 50 hour deposition time, not including cross-examination. Limiting number of depositions not as good. Better to limit number of hours and let lawyers divide it up. Lawyers won't send associates out to depose everyone.

No objections can be made during deposition. Can only advise client of privilege. Conference room should be like a courtroom.

Don't need expert report and deposition both. Two experts come out of your 50-hour allotment. If a side designates more than 2 experts, add 6 hours of deposition time per additional expert.

Subcommittee will look at document production and supplementation.

Mr. Susman asked if it was okay to limit amount of time for depositions. Should we go back to case-by-case, with judicial involvement?

No one opposed to limiting discovery. No one opposed to

restricting forms of discovery.

Mr. McMains discussed 6 month period for initial limits. Things may happen after 6 months. Things will happen. Law may change. Assume written discovery subsequent to 6 months is okay.

Mr. Latting enthusiastically support that approach. Can get 95% of information within these limits.

Buddy Low stated may need tight reign on written discovery.

Mr. Susman stated there must be some provision for discovery between close of windows and trial.

Mr. McCown commented that case can be reopened by agreement or court order. Go with tight window and get supplementation worked out. This works out with ADR. When window closes, good time to do ADR, while waiting for trial.

David Keltner stated that the task force didn't limit production of documents. Not so sure "good cause" should be standard. Perhaps go to different standard.

Mr. Soules questioned why have any standard at all?

Mr. Susman stated the need to have a standard. We want a burden on the party seeking exception. Can include commentary on what constitutes a good reason. If you can't get the case ready in 6 months, send it to another lawyer.

Alex Albright stated we have not yet discussed pre-trial orders. Maybe a case needs a pre-trial order, instead of going back for exception after exception.

Mr. Soules questioned whether this could be changed by local rules. Today trial courts have standing pre-trial orders, despite fact that TRCP 166 says it can be done only on a case-by-case basis.

Mr. Sharpe stated the Subcommittee will have to rewrite TRCP 166. He went to a national conference of State Bar Presidents. These types of efforts have either been done or is being done right now, across America.

Harriet Miers questioned was there a discussion in Subcommittee of classification effort? People on this Committee tend to be involved in larger cases. Federal system uses complex litigation designation. Fifty hours may be too much for smaller cases.

As regards depositions, will witnesses pause unnecessarily? Answers will get long if time is used to measure. Why no limit on

sets of interrogatories?

Mr. Susman stated that a party could submit 2 or 3 interrogatories; take a deposition and send 2 or 3 more interrogatories.

As to classifying cases - should it be as to the amount in controversy? Do trial judges classify cases? Start with outside limits then put in sub-limits. System works without judicial intervention.

If people are slow in answering on depositions, videotape it and show it to jury or court.

Mr. Keltner stated that the Discovery Task Force had classification for smaller cases. Decided to table that proposal - try this and if this works, then come back later.

John Marks commented it was a terrific idea. Same concern regarding non-responsive witness. Has trouble with idea that lawyer could be sanctioned if he doesn't use the experts he's designated.

Judge McCown commented the proposal doesn't require that Judge tax costs. Judge McCown doesn't want witnesses called just to avoid sanctions. Also, Judge has discretion to permit presentation of bad conduct to the jury.

Mr. Sharpe: can modify rules by agreement of counsel.

Mr. Susman stated no one has said this is pig-headed approach.

Mr. Yelonosky stated lawyers may not police themselves in smaller cases.

Mr. Sharpe stated: go to court if you want lower number of total hours.

Ms. Miers commented the Subcommittee should think about getting input from entities or lawyers that deal with smaller cases.

Mr. Low stated don't go to Judge each time. Do it under TRCP 166. Don't put "good cause" in there. Also, you can't sell this to the Bar. You've got to force it on the Bar. Lucius Bunton told him that some lawyers and clients get on rocket docket with no discovery, just trial by ambush.

Justice Guittard stated you should continue to be required to object to leading questions and non-responsive answers at the depo. Otherwise the opposing party will sandbag.

Mr. Susman stated the Subcommittee said you can "lay behind the log."

Judge McCown commented the reason for objection to form is to permit to cure. When lawyer leads, it's his fault. When witness is non-responsive, then why exclude it at trial? Lawyer could have asked right question.

If you allow objections to responsiveness in depositions, it causes fights.

Prof. Albright stated if you are worried about forms of questions and answers-can reask questions later, in a second deposition. Discovery depositions versus use at trial depositions.

Mr. Soules questioned what if lawyer asks same questions over and over again?

Mr. Latting commented only right to protect client from abuse is to get a protective order.

Mr. Soules commented should be able to interrupt deposition for protective order.

Mr. Latting stated he doesn't like lawyers to be able to lay behind the log and object later.

Mr. Low stated the problem is speaking objections.

Mr. McMains commented that's classic sandbagging. Subtract objection time.

Mr. Marks stated limit objections to just state the objection.

Prof. Carlson asked for clarification as to 50 hours per side.

Mr. Susman stated per side or per party? We considered them. Left interrogatory way they were. Depositions are per side.

Mr. Soules stated interrogatories can only be used against party answering interrogatory.

Mr. Susman stated Subcommittee can live with objections during depositions.

Mr. Keltner stated other than depositions, it's per party. On depositions, it is per side. Comes from *Patterson Dental* on jury strikes. This discovery decision will be made up front. How can you know alignment that early in the case? It's filed one way and then changes as case goes on.

Justice Guittard stated that leading and responsiveness does

not affect competency of evidence.

Justice Hecht commented take dynamic of deposition. You can rephrase or stand on it. You make a decision that you will stand on your question at some point.

Justice Hecht: very heartened to hear of the spirit of these discussions and this work. There will be some resistance in Bar, but public is relying on us. They'll pinch some. We don't want to cramp justice, while containing costs. TRCP 166(c).

Prof. Carlson mentioned Rule 11.

Judge McCown stated it was unnecessary to do so.

[RECESS - 10:32 A.M.]

TRCP 166c(f) - no objection to parties using rule by agreement. TRCP 166c(a) - Latting: "good reason" as standard. No objection. Will apply.

Prof. Albright commented that TRCP 233 (regarding alignment of parties for jury strikes) is a difficult decision. We're getting into that mess. We don't want all defendants to have 200 hours to the plaintiff's 50 hours in a case.

Mr. Keltner commented don't make wholesale referral to Rule 233. Feds use rule like this. Don't make decision by witness or by deposition. Otherwise, we'll be back before court.

Mr. Susman stated maybe divide between plaintiffs and defendants and let antagonism be a basis for judge making exceptions.

Mr. Marks stated give each party 50 hours unless a Rule 233 determination is made of alignment.

Mr. Sharpe stated quite often on defense side, one defendant will be going against a third defendant in a serious way. A party should not be penalized by whose on what side of docket.

Mr. Soules commented now we're debating the default rule.

Mr. Marks stated defendants' collectively need more than an individual plaintiff.

Vote. *Unanimously voted that plaintiffs and defendants will have aggregate limitations on all of them.*

Vote. *Committee voted that additional deposition time be given for cross-claims, for defendants to discover these issues.*

It will go back to Subcommittee for rewrite.

Mike Hatchell commented that default rule should be simple. How about stair-stepping depending on numbers of parties. If two defendants, then x number of hours; if more than two defendants, then higher number of hours.

Prof. Albright stated we need a default allocation per defendant.

Mr. Soules proposed to allocate equally among parties to a side, as a default. *Voted unanimously.* Mr. Soules proposed limit to hours on record and limit to number of depositions. *Voted unanimously.*

Mr. Soules commented on the 6-month cutoff. What if pleadings are amended or new defendant is added?

Mr. Orsinger proposed requiring the court's permission to amend after the 6-month period.

Mr. Soules stated go to pleadings rule if you want.

Mr. Marks stated there then should be a grace period before any party can set case for trial?

Mr. Susman questioned should we let documents be examined without starting discovery clock? Shouldn't be waiting period?

Mr. Keltner commented that the grace period would permit parties to work out discovery. Stay as close to 6 months.

Sarah Duncan stated that the 30-day grace period is for mandatory disclosure of documents during that period. Shouldn't we limit that period to look at documents?

There is no general feeling of introducing mandated discovery into the rules.

Mr. Marks commented that we don't want to be put to trial during the 6 month period.

Judge McCown stated we're saying 6 months is outside; most cases should not last 6-7 months.

Rule 168 - dropping number of sets of interrogatories but retaining fixed number of questions.

Mr. Latting proposed to keep two sets of interrogatories as a norm.

Mr. Keltner stated that it wouldn't work with mandatory

disclosure. Should be able to ask few questions. Do answering with protecting witnesses. Toward trial date, force listing of witnesses.

Mr. Sharpe stated that the Rules Revision Committee has proposed mandatory disclosure. These discovery tools can be used for additional stuff.

Mr. Soules questioned whether there should be 30 default questions? *Voted unanimously in favor of 30.*

Vote. Limit number of sets of interrogatories: Four said "yes" - ten said "no." Majority reflects sets of interrogatories should not be limited.

Mr. Marks asked what if I send interrogatories 5 days before end of discovery period? Also, problem of orphaned documents. Who prepared, and when? *Voted unanimously to encourage use of interrogatories to identify documents. Be precise about defining it.*

Mr. Sharpe proposed that we have witnesses verifying supplemental discovery. *Voted unanimously to keep current rules on client signing interrogatory answers.*

Mr. Soules commented on supplementing in one place without having to go back to look through each deposition.

Mr. Keltner stated that in mandatory disclosure of witnesses, you don't have to be under oath.

Someone noted that an interrogatory that you want to use at trial as evidence, needs to be sworn. Also, how do you supplement a deposition?

Mr. Soules stated that the Committee will look at supplementation generally.

Mr. Susman discussed contention interrogatories.

Mr. Keltner said they make the other side do your work for you. This proposal allows limited use of it but doesn't make other side do your work.

Mr. Orsinger commented that using contention interrogatories with preclusive effect (i.e., trial court keeps out evidence not included in answer to interrogatory) will cause lawyers to over-prepare their case.

Mr. Marks questioned what good are contention interrogatories?

Mr. Soules stated don't mix interrogatories regarding persons

with knowledge of relevant facts with contention interrogatories.

Mr. Soules stated that purpose of contention interrogatories was to identify claims, in lieu of special exceptions.

Prof. Albright stated that fair notice request for pleadings is a low standard. Contention interrogatories is to get more specific information.

Judge McCown stated you must be able to flush out theory of case, in either pleadings or discovery.

Sarah Duncan stated that fair notice is too low a standard.

Vote. Solve the problem by altering rules relating to pleadings = Ten. Vote. Solve problem by altering rules relating to discovery = Three. Vote. Abolish contention interrogatories altogether = Three to abolish - ten to keep alive.

Mr. Susman stated he'll poll Committee with sample contention interrogatories.

Mr. Orsinger asked members to differentiate use of interrogatory to state theory of case from interrogatory asking party to marshall evidence. Also, Subcommittee needs to address problem of multiple parties sending multiple sets of interrogatories. Two defendants send 60 interrogatories. Four plaintiffs send 120 interrogatories.

Mr. Keltner stated that courts are reluctant to move toward more specific pleadings. Need to keep it alive in discovery. Very limited contention interrogatories.

Mr. Sharpe suggested dealing with it in pleadings. Next step is mandatory disclosure. Then contention interrogatories. Get rid of interrogatories and require it in mandatory disclosure.

Mr. Susman asked if we could dispense with expert reports if we're going to depose experts.

Mr. Soules asked why is it a burden to have both reports and depositions available?

Mr. Keltner stated that a treating physician is an expert that I can't control. Cost of report is 5 times more expensive than a deposition.

Will meet in Capital Building next time.

The meeting was adjourned.