MINUTES OF THE
SUPREME COURT ADVISORY COMMITTEE
JULY 21-22, 1995

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock on Friday, July 21, 1995, pursuant to call of the Chair.

Friday, July 21, 1995:

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

Members present: Luther H. Soules, III, Prof. Alexandra W. Albright, Pamela Stanton Baron, Honorable Scott A. Brister, Prof. Elaine A. Carlson., Honorable Sarah B. Duncan, Anne L. Gardner, Hon. Clarence A. Guittard, Michael A. Hatchell, Charles F. Herring, Jr., Donald M. Hunt, David E. Keltner, Joseph Latting, John J. Marks, Jr., Honorable F. Scott McCown, Russell H. McMains, Anne McNamara, Robert E. Meadows, Hon. David Peeples, Dan Price, Stephen D. Susman, and Stephen Yelenosky.

Ex-officio Members present: Hon. William Cornelius, Carl Hamilton, David B. Jackson, Doris Lange, Michael Prince, Hon. Paul Heath Till and Bonnie Wolbrueck

Members absent: Alejandro Acosta, Jr., Charles L. Babcock, David J. Beck, Ann T. Cochran, Prof. William Dorsaneo, Michael T. Gallagher, Tommy Jacks, Franklin Jones, Jr., Thomas S. Leatherbury, Gilbert I. Low, Harriett Miers, Richard R. Orsinger, David Perry, Anthony J. Sadberry and Paula Sweeney.

Ex-Officio Members absent: Hon. Sam Houston Clinton and Paul Gold.

Others present: Lee Parsley (Supreme Court Staff Attorney) and Holly H. Duderstadt (Soules & Wallace).

Chairman Soules brought the meeting to order.

Steve Susman presented the Discovery Subcommittee Report.

Rule 1, Discovery Limitations, was brought up for discussion. Professor Alex Albright advised that she, Scott McCown and Lee Parsley met with several family lawyers to discuss the discovery rule changes. Scott McCown advised that the meeting was with an official delegation from the family law council that asked to meet with us because of Richard Orsinger's concerns that he had shared with them.

Rule 1, Paragraph 1, Suits Containing Claims Seeking $50,000 or Less, Paragraph (a), Applicability, was brought up for discussion. Professor Alex Albright explains the changes in the rule as rewritten. Professor Albright moved for the adopted of the changes to Rule 1(1)(a). Steve Susman seconded the motion. Discussion followed.

Professor Albright proposed deleting the second sentence "no amendment bringing the amount of recovery above $50,000 shall be allowed at such time as to unduly prejudice the opposing party and in no event later than thirty days". A vote was taken and by a vote of nine (9) to seven (7) the sentence stays in .

Discussion followed regarding what to do to keep this rule from conflicting with Rule 63. Professor Albright proposed the language to read as follows: "No amendment bringing the amount of recovery above $50,000 shall be allowed later than thirty (30) days before trial. The next sentence would read "if by claim, amendment, or supplement allowed pursuant to Rule 63..." Discussion followed.

Chairman Soules proposed leaving Rule 1 the way it is and deal with this in Rule 63 because it is an exception to Rule 63. There was no objection. Steve Susman and Professor Albright indicated that the "unduly prejudice" language needs to come out. Chairman Soules indicated that the proposed amendment is to take out the second sentence "at such time as to unduly prejudice the opposing party and in no event later than ..." striking the word "before" and making the sentence to read "no amendment bringing the amount of recovery above $50,000 shall be allowed within thirty (30) days prior to trial". A vote was taken and by a vote of ten (10) to one (1) the changes were approved.

Discussion continued regarding the conflict with Rule 63. Steve Susman proposed that the rule read as follows "if in any suit the plaintiff's pleadings affirmatively seeks only monetary recovery of $50,000 or less, excluding costs, prejudgment interest and attorney fees, discovery shall be limited as provided in this section, unless governed by a discovery control plan. If by a claim, amendment, or supplement any party seeks relief other than the monetary recovery in excess of $50,000, excluding costs, prejudgment interest and attorneys fees, this section shall no longer apply to the suit. No amendment bringing the amount of recovery above $50,000 shall be allowed within thirty (30) days before trial." Discussion followed.

Judge Scott McCown brought up a question regarding the last sentence. Discussion continued.

A vote was taken on Rule 1 as a whole, as modified, and by a vote of thirteen (13) to one (1) Rule 1 was approved.

Rule 2, Modifications of Discovery Procedures and Limitations; Conference Required, was brought up for discussion. Steve Susman provided an explanation of Rule 2. Discussion followed.

A vote was taken on Rule 2 and by a vote of fourteen (14) to one (1) Rule 2 was passed.

Rule 3, Permissible Discovery: Forms and Scope, was brought up for discussion. Steve Susman provided the subcommittee's responses to Judge Brister's comments. Judge Brister provided his response to those comments. Discussion followed.

A discussion was had regarding the difference between written discovery and other discovery and what the definition should be. Chairman Soules proposed "written discovery as used elsewhere in these rules means all discovery except oral depositions." Discussion followed.

Judge Brister proposed that the last sentence of Rule 3(2), Scope of Discovery, (c), Persons with Knowledge of Relevant Facts, be deleted. A vote was taken and by a vote eight (8) to the house the sentence stays in.

Judge Brister proposed in subparagraph (g), Settlement Agreements, that "any settlement agreement" be replaced with "any relevant settlement agreement or part thereof". Discussion followed. Charles Herring seconded the motion.

A vote was had on section (g) of Rule 3 and the changes were unanimously approved.

Judge Brister proposed adding a definition of expert witness and consulting expert in Rule 3(e), Expert Witnesses. Discussion followed. Chairman Soules indicated that Judge Brister's proposal is that they move the definitions from Rule 10 and Rule 4 to Rule 3. The motion failed for lack of a second.

Rusty McMains brought up a concern regarding 3(2)(e) regarding expert witnesses where it refers you to Rule 10. Steve Susman advised it was the subcommittee's intent that you look to the expert rules not to these rules regarding experts. Discussion followed.

Chuck Herring brought up a question on paragraph 3(2)(h), Witness Statements, questioning the language "a lawyers notes taken during a conversation...". Professor Albright proposed deleting the words "a lawyers." Judge Scott McCown seconded the motion. A vote was taken on Alex Albright's motion and by a vote of twelve (12) to two (2) the motion carried.

John Marks moved the deletion of paragraph (h) altogether and replace it with the existing rule. Ann Gardner seconded the motion. A vote was taken and by a vote of eleven (11) to three (3) the motion failed.

A vote was taken on Rule 3 with the understanding that we are going to come back and define what is not written discovery, make that specific in paragraph (1) and with the change in Paragraph 3(2)(g) and 3(2)(h). By a vote of fourteen (14) to one (1) Rule 3 was approved.

Rule 4, Privileges and Work Product, was brought up for discussion. Judge Scott McCown made a motion to substitute Rule 4 in the materials that were sent in response to the subcommittee's report. Professor Albright and David Keltner seconded the motion. Judge David Peeples proposed that in paragraph (2)(f)(7) the work "attorney" should be inserted before "work product" on the second line. Discussion was had regarding Rule 4 in general.

Chairman Soules proposed in Paragraph (2)(7), Texas Rule of Evidence 503(d) "if the circumstances are such that there is an exception to attorney client privilege".

Justice Duncan proposed changing in paragraph (7) "work product is discoverable" to "related attorney work product is discoverable". Discussion continued. The committee will look at Rule 4 again once it has been redrafted.

Rule 5, Response to Written Discovery Request; Supplementation and Amendment, was brought up for discussion. Discussion followed regarding whether or not depositions have to be supplemented. The committee had voted before that testimony in depositions not expressing expert opinions of fact witnesses is not to be supplemented at all. Other discovery must be supplemented. A vote was taken on whether or not to stick with the prior vote. By a vote of fifteen (15) to one (1) the previous vote stands. Discussion continued regarding Rule 5.

Judge Brister proposed changing the twenty day period on page 2, line 5, to "forty-eight (48) hours or at such time as agreed by the parties". Judge Brister's motion failed for a lack of a second.

Steve Susman made a motion to change it to ten (10) days. Joe Latting seconded the motion. Discussion followed. A vote was taken and by a vote of ten (10) to one (1) the motion carried.

Judge Guittard brought up a question regarding supplementations not needing to be verified. Discussion followed. Carl Hamilton brought up a question regarding the ten day period. Discussion followed. Rusty McMains brought up a question regarding the fact that if supplementation occurs after the expiration of the discovery period there is an automatic right of reopening discovery by the party to which the supplementation is directed. Discussion followed. Professor Carlson proposed changing "opposing party" to "party or parties to the amendment or supplementation is directed." Chuck Herring seconded the motion. A vote was taken and the motion carried unanimously.

Chairman Soules brought up the issue in the last sentence regarding the reopening side is allowed five hours of deposition time in addition to that provided in Rule 1. If its a defendant who supplements and a co-defendant reopens, does only the defense side get to have additional discovery or do the plaintiffs get some additional discovery. Discussion follows.

Professor Albright proposed an amendment where the party or parties to whom the amendment or supplement is directed may reopen discovery and then allow both sides five hours of deposition time. Discussion followed.

Ann Gardner proposed substituting "adversely affected" for "opposing". Discussion followed.

Steve Susman proposed going back to the words "an opposing party". Judge Scott McCown seconded the motion. A vote was taken and by a vote of eight (8) to six (6) the motion carried. Chairman Soules reads the sentence into the record as follows "if the amendment, supplement, or document production occurs after any applicable discovery period an opposing party may reopen discovery. The party must respond to reopen discovery served under this rule the day before trial or within ten (10) days after the date of service, whichever is earlier, ..." Steve Susman moved for the passage of Rule 5. A vote was taken and by a vote of twelve (12) to five (5) Rule 5 carried.

Rule 6, Effect on Trial for Failure to Provide Timely Discovery, was brought up for discussion. Steve Susman explains the changes that were made to the rule. Judge Brister provides his comments to the rule and discussion followed. Steve Susman moved for the adoption of the rule that the Subcommittee has presented and has been approved by a large majority at previous meetings. Discussion continued regarding Judge Brister's comments. Judge Brister made a motion to approve his substituted Rule 6 for the subcommittee's rule. John Marks seconded the motion. A vote was taken and by a vote of ten (10) to eight (8) the motion carried.

Judge McCown moved that we send both versions to the Supreme Court. Judge Brister seconded the motion. Chairman Soules indicates that we will submit Judge Brister's version as the vote of the committee and the alternate.

Discussion continued regarding the specifics of Rule 6. Judge Guittard made a motion to substitute "postpone" for "continue" and substituting "continuance" with the word "postponement". Judge Guittard's motion failed for lack of a second.

Judge Cornelius made a motion to add the following language "the trial court may in its discretion find that lack of surprise or prejudice to the opposing party is good cause for allowing the evidence or for denying exclusion. Steve Susman seconded the motion. Discussion followed.

David Keltner proposed saying that the trial judge in his or her discretion could allow the admission of the evidence upon a showing that it did not prejudice or surprise the other side. Judge Cornelius accepts the recommendation. Discussion continued. Chairman Soules proposed the following "1. Exclusion or Continuance. Unless the court makes a finding of good cause or a finding that there is no undue surprise or undue prejudice to the opposing party..." Justice Cornelius moved for the adoption of the language. Steve Susman seconded the motion.

Professor Albright proposed the following instead "Unless the court makes a finding that there was good cause for the failure to timely disclose or a finding that there was no undue surprise" and then go on with Chairman Soules' language.

Professor Albright also proposed putting that entire sentence at the end rather than at the beginning. Judge Cornelius accepted the amendment. Professor Albright read the language into the record as follows "A party who fails to make or supplement a discovery response in a timely manner shall not be entitled to present that evidence that the party was under a duty to provide or to offer the testimony of a witness other than a named party who has not been properly designated, unless the court makes a finding that there was good cause for the failure to timely disclose, or that the failure does not unduly surprise or prejudice the other party."

Judge Guittard proposed using "unfairly" instead of "unduly". Professor Albright and Steve Susman agree that "unfairly" is better. Chairman Soules proposed dropping the words "failure to disclose" and say "failure". Discussion followed.

Chairman Soules reads the rule into the record as follows "1. Exclusion or Continuance. A party who fails to make or supplement a discovery response in a timely manner shall not be entitled to present evidence that the party was under a duty to provide or to offer the testimony of a witness other than a named party who has not been properly designated, unless the court makes a finding that there was good cause for the failure or a finding that the failure caused no unfair surprise or unfair prejudice to the opposing party." Professor Albright proposed "does not unfairly surprise or prejudice." Chairman Soules proposed "or unfairly prejudice" and continuing "the burden of establishing the finding is upon the party offering the evidence or witness and the record must support the finding." Discussion followed.

A vote was taken and Rule 6, Paragraph 1, was approved unanimously.

The subcommittee withdrew their Rule 6 and substitutes the rule just voted on.

Paragraph 2, Costs and Expenses, was brought up for discussion. Judge Brister provides his comments regarding same. Discussion followed. Judge McCown recommended dropping paragraph (2) and referring it to the sanctions subcommittee to resolve. There being no opposition paragraph (2) will go to the sanctions subcommittee.

Chairman Soules indicates that the motion is to delete paragraph (2), delete the title of paragraph (1) and go with the subcommittee's title. A vote was taken and the motion was approved unanimously.

Rule 7, Presentation of Privileges and Objections to Written Discovery, was brought up for discussion. Steve Susman explained the changes to the rule. Discussion followed. John Marks moved for the deletion of the last two sentences of Rule 7, Paragraph 1. The motion is seconded by Ann Gardner. Discussion followed. John Marks amended his motion to delete just the last sentence of Rule 7, Paragraph 1. Ann

Gardner seconded the motion. Discussion continued. A vote was taken on the motion to delete the last sentence and by a vote of twelve (12) to five (5) the motion failed.

Judge Guittard proposed an amendment to second sentence of subdivision 2(a) as follows: "if a party claims a privilege with respect to information requested, the party may withhold". Professor Albright proposed "if a party claims that materials or information responsive to a request for privileged, the party shall withhold the privilege materials or information from the response." Judge Scott Brister made a motion to combine the fourth paragraph of Rule 7 with Rule 8. The motion failed for lack of a second. Steve Susman moved for adoption of Rule 7. Judge Scott McCown seconded the motion. A vote was taken and by a vote of thirteen (13) to two (2) Rule 7 was approved.

Rule 8, Protective Orders, was brought up for discussion. Steve Susman proposed inserting on the third line "a party may move for such an order only when an objection pursuant to Rule 7 is not appropriate". A vote was taken and by a vote of fourteen (14) to zero (0) Rule 8 was approved.

Rule 9, Standard Requests for Disclosure, was brought up for discussion. Steve Susman advises that Judge Brister suggested dropping paragraphs 2(g) and 2(h). Judge Brister summarized what those are. Discussion followed. Chairman Soules advised that the motion is to delete the last paragraph on the first page of Rule 9. The motion failed for lack of a second. Judge Brister proposed deleting paragraph 2(h). Discussion followed. The discovery subcommittee agrees to delete paragraph 2(h) of Rule 9. Steve Susman moved for the adoption of Rule 9. Don Hunt advised that there are situations in the rule where the title has been reversed, sometimes it says "request for standard disclosure" and sometimes it says "standard requests for disclosure". Susman advised the subcommittee prefers "standard requests".

Judge Duncan brought up a question on subparagraph (4) regarding time and place of production. Discussion followed. A vote was taken on Rule 9 and by a vote of fifteen (15) to zero (0) Rule 9 was approved.

Rule 10, Expert Witnesses, was brought up for discussion. Judge Brister provided explanations of his comments and problems with Rule 10. Judge Brister made a motion to combine paragraphs 2 and 3. Mike Prince seconded the motion. Discussion followed.

Chairman Soules indicated that he doesn't think 10(3) ought to be in Rule 9. After you get their identities if you want anything further you ought to have to move over to Rule 10. Discussion followed.

Judge Brister again makes a motion to combine paragraphs (2) and (3). Mike Prince seconded the motion. Discussion followed. A vote was taken on Judge Brister's motion and by a vote of seven (7) to four (4) Judge Brister's motion carried.

Judge Brister made a motion to delete the last sentence of paragraph 5 of Rule 10. Mike Prince seconded the motion. Discussion followed. A vote was taken and by a vote of ten (10) to zero (0) the deletion of the last sentence was approved.

Chairman Soules indicated that in Rule 9 you need to delete the reference to paragraph 10(3) and only refer to paragraph 10(2).

Chairman Soules proposed that in paragraph 3, response, the deletion of the words "unless the time to serve a request is extended in the request or by agreement or court order." He also proposed in the first sentence to start with the words "a party served with." After the word "citation" add "except that responses pertaining to expert witnesses shall be made in accordance with Rule 10".

Steve Susman made a motion to use Judge McCown's draft on Rule 10(3), Response, and that it be worded as follows: "A party served with a standard request pertaining to expert witnesses shall make its response the earlier of seventy-five (75) days before the end of any applicable discovery period or seventy-five (75) days before trial..." Discussion followed.

Steve Susman moved for the reconsideration of the subcommittee's draft of Rule 10 in lieu of Judge Brister's treating all those things on the same timetable. The motion was seconded by Judge McCown. Discussion followed. The motion was made and seconded to go back to the subcommittee's version. A vote was taken and by a vote of eleven (11) to five (5) we go back to the committee's proposal.

Chairman Soules requested to revisit Rule 9(3), Response. He proposed the first sentence to read "a party served with a standard request for disclosure shall file and serve a written response making the requested disclosures within thirty (30) days after service of the request, fifty (50) days if the request accompanied citation, except that responses pertaining to expert witnesses shall be made in accordance with Rule 10. The subcommittee accepted the proposal. Chairman Soules advised we will have to put 10(2) and 10(3) back into paragraph (h).

Discussion continued regarding Rule 10. Professor Albright confirmed that we are still taking out the last sentence of paragraph (5) of Rule 10. Chairman Soules indicates we need to address Rusty McMain's question regarding Rule 10, paragraph (1), the last sentence "if the expert has personal knowledge of the relevant facts..." Chairman Soules proposed deleting "personal". Discussion followed.

Judge Guittard proposed changing the last sentence of subdivision (1) of Rule 10 to read "if an expert has personal knowledge of relevant facts or other information not acquired by trial preparation. Discussion followed.

Rusty McMains brought up the issue regarding the drop dead dates. Discussion followed. Chairman Soules proposed striking "on which you have the burden". Carl Hamilton brought up the issue of taking the oral deposition of an expert on one of the two

dates that are given. Discussion followed. Mr. Hamilton advised that it looks like you designate the two dates and those are the only two dates that you can depose those experts. Judge Scott McCown proposes putting "two suggested dates". There being no opposition that change will be made.

Scott Brister brought up a question on (3)(b) regarding experts not retained or employed or otherwise in the control.

Subject to the work that David Keltner and his group are going to do on paragraph one, a vote was taken on Rule 10 and by a vote of fifteen (15) to two (2) Rule 10 was approved.

Rule 11, Request for Production and Inspection, was brought up for discussion. The subcommittee moved for the adoption of this rule. David Keltner seconded the motion. A vote was taken and Rule 11 was approved unanimously.

Rule 12, Interrogatories to Parties, was brought up for discussion. The Subcommittee moved for the approval of same. There being no opposition Rule 12 was approved unanimously.

Rule 13, Request for Admissions, was brought up for discussion. Discussion followed. Scott McCown moved for the adoption of Rule 13. A vote was taken and Rule 13 was approved unanimously.

Rule 14, Depositions Upon Oral Examination, was brought up for discussion. Judge Brister comments they need to reinsert the definition of who can attend the deposition. Discussion followed. Judge Brister moved that we put the language back in. Chairman Soules proposed using Judge Brister's version of Rule 14(2)(b). There being no opposition the motion carried. Carl Hamilton brought up the discussion regarding the argument over whether nor not invoking the rule applies to depositions. Discussion followed. Judge Brister proposed in Rule 14(2)(d) to change the first phrase to say "a party may in the notice request production". The subcommittee accepts the amendment. A vote was taken on Rule 14 as amended, there being no opposition, Rule 14 was unanimously approved.

Rule 15, Examination, Objection, and Conduct During Oral Depositions, was brought up for discussion. The motion was made to drop the third and fourth sentences of Rule 15(3) that deal with conferences between deponents and their attorneys. Discussion followed. Chairman Soules indicated that the motion on the floor is Judge Brister's proposal to delete the third and fourth sentences from paragraph 3. Joe Latting seconded the motion. A vote was taken and the motion failed by a vote of ten (10) to eleven (11).

Judge Brister moved that in paragraph 4 the first sentence be deleted and substitute the last sentence in its place. Discussion followed. John Marks seconded the

motion. Discussion continued. A vote was taken and by a vote of ten to ten the motion failed.

A vote was taken on Rule 15 and by a vote of twelve (12) to six (6) Rule 15 passed.

Rule 18, Nonstenographic Recording, was brought up for discussion. Judge Brister explained what his proposed changes are. Judge Brister proposed substituting his Rule 18 for the subcommittee's rule 18. Mike Prince seconded the motion. The subcommittee accepted the motion, the only change being that it requires you to get the whole thing transcribed instead of just a portion. Discussion followed. John Marks proposed a provision that makes the other side pay for the deposition if they weren't the ones the hired the court reporter in the first place but then decided they wanted a copy of the transcript. Discussion followed. John Marks restated his motion as follows "that in the event that a nonstenographic recording is made at a deposition by notice by a party that if the other party brings the court reporter to the deposition and has the deposition done by a stenographic reporter, if the noticing party wants to use that deposition that you paid for then the noticing party has to pay the entire cost for the taking of the deposition up front not as a court cost thing but has to pay the lawyer for doing it if he is going to use it. Carl Hamilton seconded the motion. Discussion followed.

Carl Hamilton proposed an amendment to the motion that it include that the transcribed deposition by the court reporter is not discoverable by the side. That amendment is acceptable to John Marks. Discussion continued. A vote was taken on Carl Hamilton's amendment and by a vote of fifteen (15) to two (2) the motion failed.

Professor Albright made a motion to substitute the current nonstenographic recording rule for the subcommittee's rule. David Jackson seconded the motion. John Marks indicated that if they do that he will withdraw his motion. Discussion continued.

John Marks moved for the substitution of current Rule 202 for the subcommittee's rule. Judge Brister indicated he is happy to vote on that motion first. A vote was taken and the motion failed by a vote of ten (10) to ten (10). A vote was taken on Judge Brister's version versus the subcommittee's version and by a vote of thirteen (13) to six (6) we will use Judge Brister's Rule 18.

A vote was taken on John Marks motion to amend regarding paying for the transcript. The motion failed by a vote of ten (10) to three (3).

Mike Hatchell proposed the elimination from either version the words "or for summary judgment, at the time other evidence must be filed with the court." Discussion followed. Scott Brister proposed instead the language "the complete transcript must be filed." Mike Hatchell accepted the amendment. Discussion followed.

There was a motion made and seconded that the requirement for a certified court reporter to make the transcript be deleted so that anybody can make a transcript and use it. Discussion followed.

A vote was taken on eliminating the requirement that the transcripts of a non-stenographic deposition be done by a certified court reporter by a vote of twelve to ten. Transcripts must be prepared by a certified court reporter as written in Rule 18.

Judge Till made a motion to reconsider and that Rule 202 be left as is. Discussion followed. A vote was taken on Judge Till's motion and by a vote of nine (9) to thirteen (13) the subcommittee's draft prevails. Professor Albright proposed adopting the regular deposition rules where the court reporter sends a notice to everybody asking if they need a copy and then sends the original to the opposing attorney who then has to make it available to everybody again. Everyone agreed with this proposal.

Rule 17, Deposition upon Written Question, was brought up for discussion. A vote was taken and Rule 17 was approved unanimously.

Rule 16, Signing, Certification, and Use of Depositions, was brought up for discussion. Judge Brister explains why the rules were renumbered. There being no opposition the reorganization was unanimously approved.

Discussion continued on Rule 18. Judge Brister proposed adding to paragraph (2)(5) that the court reporter is to certify the amount of time used by each party at the deposition. There was no opposition. The amendment was unanimously approved.

Judge Brister proposed in Paragraph (5) the deletion of the words "thirty days if the deposition was recorded by nonstenographic means". There being no opposition the amendment was unanimously approved.

Judge Brister proposed that in paragraph (6) deleting the following language "(1) if that party has an interest similar to that of any party present or represented at the taking of the deposition or who had reasonable notice thereof". Discussion followed. Steve Susman moved for the adoption of Judge Brister's proposal for Rule 16(6). Mike Prince seconded the motion. Discussion continued. Chairman Soules read the proposed amendment to a portion of paragraph (6) as follows: "A deposition is admissible against a party joint after the deposition was taken (1) if admissible under TRE 804(b)(1); or (2) if the party ...". A vote was taken and there being no opposition the amendment was approved unanimously.

A vote was taken on Paragraph (6) as a whole. There being no opposition paragraph (6) was approved unanimously.

Discussion continued regarding paragraph (6). A vote was taken on Rule 16 as now constituted on the record. There being no opposition Rule 16 was approved unanimously.

Steve Susman brought up the issue of depositions taken in different proceedings and proposed adding the following sentence "depositions taken in different proceedings may be used subject to the provisions in the Texas Rules of Evidence. A vote was taken and the amendment was unanimously approved.

Rule 21, Compelling Production from Non-Party, was brought up for discussion. Scott Brister explained his suggestion to eliminate Rule 21 and combine it with Rule 24. Discussion followed. Alex Albright suggested going through Rule 24 step by step because Rule 21 is just a vehicle we can deal with depending on what we do with Rule 24.

Rule 24, Subpoena, was brought up for discussion. Professor Albright explained the changes in section (1). Discussion followed. A discussion was had regarding paragraph (2), service and David Perry's suggestion that when the witness is a party that service be upon the party's attorney instead of upon the witness. Discussion followed regarding that issue. There being no motion and no second on David Perry's suggestion it is off the table.

Paragraph (3), Protection of Nonparty Subject to Subpoenas, was brought up for discussion. Professor Albright explained this section of the rule. Discussion followed. Scott McCown proposed in the third line instead of saying "also" saying "first", delete the last sentence and not require the non-party to do anything. Judge McCown also proposed at the end of the first sentence adding "shall first serve a copy of the subpoena upon the non party to whom the records pertain, or if the nonparty is represented by an attorney, upon the attorney unless excused by court order." Discussion followed.

Judge McCown proposed adding the following language "Nothing in this rule authorizes a court by subpoena or order to compel production of records made confidential by law." Discussion continued.

John Marks proposed appointing a subcommittee to look at this rule. Judge Brister seconded the motion. Stephen Yelenosky disagreed. Explains why. Judge Till proposed in paragraph (c) changing the language to read "the clerk of the district, county or justice court". Discussion continued regarding Rule 24(3)(e) in general.

Steve Susman made a motion for the adoption of Rule 24 as drafted without section (e). Scott McCown seconded the motion.

Stephen Yelenosky made a motion for a very short rule on medical records.

Chairman Soules reads the proposal as follows: making the change Judge Till suggested in 1(c), deleting David Perry's suggestion, and deleting 3(e).

Carl Hamilton brought up the fact that changing Rule 1(c) is a substantive change. Current rules do not authorize the clerks of the justice courts to issue subpoenas. Discussion followed.

A vote was taken on Rule 24 without subparagraph (3). By a vote of ten (10) to eight (8) Rule 24 passed.

Rule 21, Compelling Production from Nonparty, was brought up for discussion. Steve Susman explains Rule 21. Judge Brister proposed that this Rule can be eliminated by two sentences in Rule 24. Judge Brister provided specifics. Discussion followed. Steve Susman moved for the adoption of Rule 21. Pam Baron moved for the requirement of the language of Rule 24, Part 3 be included in the subpoena so that non-parties who are nonlawyers have a chance to figure out what they are suppose to do. Steve Susman seconded the motion. Chairman Soules explains Pam Baron's motion is that Rule 24(3) and 24(4) be put on the subpoena to the nonparty and that there should be something in Rule 24 that says it should be on the subpoena. Doris Lange proposed having it on all subpoenas so you don't have to have different kinds. Discussion continued. A vote was taken on Pam Baron's motion and by a vote of fifteen (15) to one (1) the motion carried. Scott Brister moved to combine Rule 21 into Rule 24. A vote was taken and the motion failed by a vote of eight (8) to four (4).

A vote was taken on Rule 21 and Rule 21 was approved unanimously.

The meeting was adjourned by the Chairman.

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock on Saturday, July 22, 1995, pursuant to call of the Chair.

Saturday, July 22, 1995:

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

Members present: Luther H. Soules, III, Prof. Alexandra W. Albright, Pamela Stanton Baron, Honorable Scott A. Brister, Prof. Elaine A. Carlson., Honorable Sarah B. Duncan, Michael T. Gallagher, Anne L. Gardner, Hon. Clarence A. Guittard, Michael A. Hatchell, Charles F. Herring, Jr., Donald M. Hunt, David E. Keltner, Joseph Latting, John J. Marks, Jr., Honorable F. Scott McCown, Russell H. McMains, Anne McNamara, Robert E. Meadows, Hon. David Peeples, Stephen D. Susman, and Stephen Yelenosky.

Ex-officio Members present: Hon. William Cornelius, Carl Hamilton, David B. Jackson, Doris Lange, Michael Prince, Hon. Paul Heath Till and Bonnie Wolbrueck

Members absent: Alejandro Acosta, Jr., Charles L. Babcock, David J. Beck, Ann T. Cochran, Prof. William Dorsaneo, Tommy Jacks, Franklin Jones, Jr., Thomas S. Leatherbury, Gilbert I. Low, Harriett Miers, Richard R. Orsinger, David Perry, Anthony J. Sadberry and Paula Sweeney.

Ex-Officio Members absent: Hon. Sam Houston Clinton and Paul Gold.

Others present: Lee Parsley (Supreme Court Staff Attorney) and Holly H. Duderstadt (Soules & Wallace).

Chairman Soules brought the meeting to order.

Rule 22, Physical and Mental Examinations, was brought up for discussion. Judge McCown provided an explanation of the rule. Discussion followed. Judge McCown moved for the adoption of the subcommittee's rule. Rusty McMains seconded the motion. Discussion continued.

A vote was taken on retaining the motion and order practice. By a vote of thirteen (13) to (4) the motion and order practice was approved.

John Marks moved for the deletion of the last sentence of the first paragraph. Joe Latting seconded the motion. Discussion followed.

Judge Scott McCOwn proposed deleting "as an expert who will testify" and instead say "identified a psychologist whose opinions may be offered into evidence." Mike Gallagher proposed adding "or records" after "whose opinions." Discussion followed.

A vote was taken on John Marks' motion to delete the last sentence and by a vote of sixteen (16) to (5) the motion failed.

Steve Susman seconded Scott McCown's motion. Judge McCown restated his motion without Mike Gallagher's proposed addition of "records". Joe Latting seconded the motion. Discussion followed.

Judge David Peeples made a motion to use Judge Brister's language which is as follows: "Examination by a psychologist may be requested only when the party responding to the motion has identified a psychologist or psychologist's records that may be used at trial." Joe Latting seconded the motion. Discussion followed.

A vote was taken on the motion and by a vote of eighteen (18) to three (3) the language was approved.

A vote was taken on Rule 22 as a whole and by a vote of twenty-two (22) to zero (0), Rule 22 was approved.

Rule 25, Medical Records, was brought up for discussion. Stephen Yelenosky explained the rule. Discussion followed. Joe Latting proposed deleting "that are in the possession of a party" in the second line. Discussion followed. Chairman Soules made a motion to table. Judge Scott Brister seconded the motion. A vote was taken and by a vote of fourteen (14) to two (2) the rule was tabled until the next meeting.

Rule 23, Motion for Entry Upon Property, was brought up for discussion. Steve Susman moved for the adoption of Rule 23. A vote was taken and by a vote of thirteen (13) to two (2) Rule 23 was approved.

Rule 166, Pretrial Conference, was brought up for discussion. The subcommittee recommended no change. A vote was taken and leaving Rule 166 the way it is was unanimously approved.

Rule 63, Amendments and Response Pleadings, was brought up for discussion. Steve Susman explained the rule. Discussion followed.

Judge Guittard brought up an issue on Rule 166 and proposed adding "reference to mediation or other method of nonbinding alternative dispute resolution." There being no opposition that language will be added as paragraph (p).

Discussion continued regarding Rule 63. Professor Albright withdrew her proposal for Rule 63 and proposed working from the subcommittee's version. She proposed deleting "no later than 60 days before the end of the applicable discovery period or five days after receipt of the notice of the first trial setting, whichever is later."

Professor Albright also proposed deleting "or five days after receipt of notice of the first trial setting, whichever is later." Discussion followed.

Mike Gallagher proposed that the date for the cutoff for pleadings be ten days after the completion of the Defendant's experts. Discussion continued.

Judge Scott McCown made a motion to leave Rule 63 in its current form and adding the following language at the end of the rule "Surprise includes insufficient time to complete discovery made necessary by the amendment. If the Court finds that the amendment would leave insufficient time to complete the discovery, the court may allow the amendment and extend the discovery time." Steve Susman seconded the motion.

Don Hunt made a motion to change the expert designation dates from 74/45 to 90/60. Professor Albright seconded the motion. Carl Hamilton proposed plaintiff's ought to designate 60 days after the beginning of the discovery period and then give the defendant 60 days after that. Discussion followed.

John Marks made a motion to do 60 days after the beginning of the discovery period. Carl Hamilton seconded the motion.

Chairman Soules tabled Rule 63 until later in the day.

Rule 3, Permissible Discovery; Forms and Scope, was brought up for clean up and for a definition of "written discovery". Professor Albright proposed leaving Rule 3(1) as is. "Written Discovery as used elsewhere in these rules means standard request for disclosure, request for production of documents and tangible things, interrogatories to a

party and request for admissions." Discussion followed. There being no motion to change the rule it stays as is.

David Keltner raised the expert witness issue in 3(2)(e). Mr. Keltner passed out proposed language. Professor Albright seconded the proposed language. Discussion followed.

Chairman Soules proposed changing the language in the fourth line from "who will not be called to testify" to "not a testifying expert" and on the next sentence delete the language after "opinions are not discoverable." Discussion followed.

Professor Albright proposed referring to the privilege rule. Discussion followed. Judge Scott McCown proposed "Pursuant to Rule 4(2)(c), a consulting expert's identity, mental impressions, and opinions are not discoverable. David Peeples proposed adding "or otherwise." Discussion followed.

Chairman Soules proposed putting a period after "not discoverable." Discussion continued.

Chairman Soules proposed "When a person who is a testifying or consulting expert has acquired knowledge of relevant facts not in preparation for trial or in anticipation of litigation, the identify, location, and a brief statement of the person's connection with the case are discoverable as a person with knowledge of relevant facts. Discussion followed.

David Keltner proposed we put the same language in 3(2)(c), Persons with Knowledge of Relevant Facts." Discussion continued.

Professor Albright proposed the following language "When a consulting expert whose knowledge of relevant facts was acquired only in preparation for trial or in anticipation of litigation, that expert is not a person with knowledge or relevant facts under 32. The facts known by an expert not acquired in preparation for trial or in anticipation of litigation are discoverable." Discussion continued.

John Marks proposed "Nothing herein shall require the consulting expert to give opinions..."

Justice Duncan proposed "A testifying or consultant expert who has acquired knowledge of relevant facts not in preparation for trial or in anticipation of litigation is a person with knowledge of relevant facts and subject to discovery in accordance with Rule 3(c) and these rules only as to the knowledge and facts not acquired by the expert in preparation for trial or in anticipation of litigation." Joe Latting seconded the motion. Discussion continued.

Professor Albright reads the proposal for 3(2)(e)(3) into the records as follows: "Expert Witness with Knowledge of Relevant Facts. An expert who has acquired

knowledge of relevant facts not in anticipation of litigation or preparation for trial is a person with knowledge of relevant facts and is subject to discovery in accordance with Rule 3(c) and these rules only as to those facts." Steve Susman seconded the motion.

A vote was taken and this new language for Rule 3(2)(e)(3) was approved unanimously.

Discussion continued regarding the language "in preparation for trial" and "anticipation for litigation."

Rule 4, Privileges and Work Product, was brought up for discussion. Judge Scott McCown provided an explanation of the rule and moves for the adoption of new Rule 4. Steve Susman seconded the motion.

Judge Guittard proposed changing "a judge may not" to "a judge shall not" in paragraph b(1) and b(2).

Discussion continued regarding Rule 4. Joe Latting suggested modifying paragraph (4) to make it clear that that was for other than attorney mental processes. Discussion continued.

Discussion was had regarding the difference between the last sentence of (3) and paragraph (4). Judge McCown suggested deleting the last sentence of paragraph (3). Discussion continued. Judge McCown suggested either taking out the last sentence of (3) and have only (4) or delete (4) entirely and leave the last sentence in (3). Professor Albright explains the importance of Paragraph (4). Discussion continued.

Chairman Soules proposed adding "not otherwise discoverable" to the end of (4). Discussion continued.

Justice Sarah Duncan brought up concerns regarding 2(a). The definition of work product needs to be expanded. Scott McCown proposed saying "work product is anything made or prepared in anticipation of litigation or for trial." Discussion followed.

Chairman Soules proposed "Work product is any communication made or material prepared or any mental impressions, opinions, conclusions, and legal theories." This language should be put in 2(a) as well.

Professor Albright proposed "made, prepared, or developed." Discussion continued.

John Marks made a motion to add the language Chairman Soules proposed. Justice Sarah Duncan seconded the motion. Discussion continued.

Chairman Soules proposed "Work product is an attorney's mental impressions, opinions, conclusions and legal theories and anything made or prepared in anticipation

of litigation or for trial for a party or a party's representative, including a party's attorney". Discussion continued.

Justice Sarah Duncan withdrew her second and offers an alternative.

John Marks' motion failed for the lack of a second.

Justice Duncan's alternative is "Work product is: (1) an attorney's mental impressions, opinions, conclusions, and legal theories developed in anticipation of or for trial; and (2) any communication made or material prepared by" then continue with the present content of subdivision (a). David Peeples seconded the motion. A vote was taken resulting in a ten to ten tie vote.

Judge McCown proposed "Work product is anything made or prepared in anticipation of litigation or for trial by or for a party or a party's representative." Steve Susman and Joe Latting seconded the motion. Discussion followed.

A vote was taken on Scott McCown's proposal and by a vote of twelve (12) to eleven (11) the motion failed.

Scott McCown proposed the following "Work product is any communication made or material prepared or mental processes developed in anticipation of the litigation or for trial. Steve Susman seconded the motion. Discussion continued.

Chairman Soules proposed "mental impressions" instead of "mental processes." David Keltner seconded the motion.

A vote was taken on Scott McCown's motion and the motion was unanimously approved.

Steve Susman moved for the adoption of Rule 4 with the changes made. A vote was taken and there being no opposition Rule 4 was approved unanimously.

A discussion was had regarding the dates for the expert to be deposed. The language in Rule 4(b)(1) "discoverable under Rule 10" needs to be changed to "discoverable under Rules 3, 9 and 10."

Chairman Soules brought up for discussion of requiring that the dates for the expert deposition be within 30 days. Steve Susman proposed changing Rule 10(3)(a)(4) to "at least two dates, within the next 30 days, upon which..."

A discussion was had on Rule 7, Presentation of Privileges and Objections to Written Discovery, regarding if there was no hearing and no ruling on the objection or withholding statement were you safe in proceeding without responding to the request.

Chairman Soules proposed "The failure of a party to obtain a ruling prior to trial on any objection to discovery or motion does not waive the motion or waive the objection." Professor Albright proposed putting that language after the first sentence of (3) and instead of saying "protective order" say "objection or privilege". Discussion followed.

Professor Albright reads the Rule 7(3) into the record. "Any party may at any reasonable time request a hearing on an objection or privilege asserted in accordance with this rule. The failure of a party to obtain a ruling prior to trial on any objection or privilege asserted in accordance with this rule does not waive such objection or privilege". A vote was taken and there being no objection the language was approved.

Bonnie Wolbrueck requested the committee's consideration that interrogatories not be filed with the clerk. Discussion followed. Bonnie Wolbrueck made a motion that interrogatories and responses not be filed with the district clerk. Doris Lange seconded the motion. Discussion followed. A vote was taken and by a vote of sixteen (16) to three (3) the motion failed.

Don Hunt made a motion to change experts rule from 75/45 to 90/60 and submitting Alex's version of Rule 63 with 30 days. Steve Susman seconded the motion. A vote was taken and by a vote of eleven (11) to nine (9) the motion passed.

Mike Gallagher moved for reconsideration on Rule 63. Discussion followed. David Keltner also wants a reconsideration.

Judge McCown proposed sending the Discovery Rules to the Court but advising the Court that Rule 63 is still being considered. Scott McCown made a motion for reconsideration. David Peeples seconded the motion.

A vote was taken on reconsidering Don Hunt's motion. By a vote of fifteen (15) to three (3) Hunt's motion will be reconsidered.

Scott McCown moved the approval of the discovery package, that we take Alex's Rule 63 as amended by Don Hunt, to tie it all together but with a letter to the Court that the amendments of pleadings needs further work and the 90/60. Discovery followed.

Steve Susman proposed if we are going to punt on the amendment rule that we leave the discovery rules exactly like they are and let the people working on the amendment rule get a rule that will accommodate a later designation of experts. Discussion continued.

Scott McCown restated his motion. Mike Prince seconded the motion.

Chairman Soules indicated the motion is to change Rule 10(3)(b) and 10(2)(b) so that affirmative relief experts are designated 90 days before the end of the discovery period, to provide for opposing experts at 60 days and that Alex's version of Rule 63, changed from 60 days to 30 days, be sent with the discovery package to the Supreme

Court as a tentative concept from this committee as to what the pleadings amendment will look like.

A vote was taken on Scott McCown's motion and by a vote of eighteen (18) to three (3) the motion carried.

Scott McCown moved we send the discovery rules to the Supreme Court with our recommendations. Mike Prince seconded the motion.

Professor Albright made a motion to change Rule 3(2)(h), Witness Statements, to read "A witness statement regardless of when made is discoverable unless privileged under a privilege other than work product." Discussion followed. Alex Albright withdrew his motion.

David Keltner proposed a new paragraph (7) to Rule 15, Examination, Objection and Conduct During Oral Depositions" that would say "Any party may at any reasonable time request a hearing on an objection or privilege asserted in accordance with this rule. The party seeking to avoid discovery shall present any evidence necessary to support the objection or claim of privilege either by testimony at the hearing. If a judge determines that an in camera review of some or all the requested discovery is necessary to rule on the objection to the privilege, the objecting party shall cause answers to deposition to be made in camera or to be made in an affidavit to be produced to the judge in camera to be sealed in the event the claim of privilege is sustained."

There being no opposition the language was approved.

Discussion continued regarding this issue.

David Keltner proposed putting a ruling paragraph in here similar to paragraph (4) which would be Rule 15, paragraph (8).

A vote was taken on the discovery package as a whole, Rules 1 - 24 with the appendix of Rule 63 in its conceptual form. By a vote of seventeen (17) to six (6) the discovery rules will be sent to the Supreme Court of Texas.

Joe Latting and Chuck Herring presented the report of the Sanctions Subcommittee. A discussion was had regarding the due diligence issue.

A discussion was had regarding what direction the court should take before September 1st.

Joe Latting recommended that the Court leave Rule 13 on the books pending passage of a new rule 13. Mike Prince seconded the motion. There being no opposition this recommendation was approved .

Professor Albright moved for the adoption of Rule 13 as drafted. Discussion followed. Professor Albright withdrew her motion.

Joe Latting presented a report on Rule 166d. Discussion followed.

The meeting was adjourned.