MINUTES OF THE
SUPREME COURT ADVISORY COMMITTEE
NOVEMBER 17-18, 1995

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock on Friday, November 18, 1995, pursuant to call of the Chair.

Friday, November 18, 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, Alejandro Acosta, Jr., Charles L. Babcock, Pamela Stanton Baron, Honorable Scott A. Brister, Prof. Elaine A. Carlson, Professor William V. Dorsaneo III, Hon. Sarah B. Duncan, Anne L. Gardner, Hon. Clarence A. Guittard, Charles F. Herring, Jr., David E. Keltner, Gilbert I. Low, Hon. F. Scott McCown, Russell H. McMains, Robert E. Meadows, Harriett E. Miers, Richard R. Orsinger, David L. Perry, Stephen D. Susman, and Stephen Yelenosky.

Ex-officio Members present: David B. Jackson, Doris Lange, W. Kenneth Law, Michael Prince, Hon. Paul Heath Till and Bonnie Wolbrueck.

Members absent: Professor Alex Albright, David J. Beck, Ann T. Cochran, Michael T. Gallagher, Michael A. Hatchell, Donald M. Hunt, Tommy Jacks, Franklin Jones, Jr., Joe Latting, Thomas S. Leatherbury, John Marks, Jr., Anne McNamara, Hon. David Peeples, Anthony J. Sadberry and Paula Sweeney.

Ex-Officio Members absent: Hon. Sam Houston Clinton, Hon. William Cornelius, O.C. Hamilton, Jr. and Paul N. Gold.

Others present: Lee Parsley (Supreme Court Staff Attorney).

Chairman Soules brought the meeting to order.

Stephen Yelenosky presented the report on TRCP 145, Affidavit of Indigency. Discussion followed. When a lawyer who takes an IOLTA referral on a pro bono basis, he does not have to contend with a contest of the affidavit of inability. A vote was taken and 16 agreed.

Judge McCown interrupted the vote to ask a question -- could a compromise be worked out that the attorneys' IOLTA certificate creates a presumption without going so far as to say that there could never be a contest.

Chairman Soules indicated the consensus of this Committee is no contest of any kind.

Justice Guittard proposed that this standard should be incorporated into TRAP 45 and in the general rules if adopted. A short discussion was had regarding the appellate aspect of this rule.

Mr. Yelenosky attempts to address some of Judge McCown's concerns. Mr. Yelenosky moves for the adoption of Rule 145 as changed. Chip Babcock seconded the motion. By a vote of 16 to 2, the rule is approved.

Professor Dorsaneo presented the report on TRCP 296 - 331.

Professor Dorsaneo explained the changes to Rule 296, Request for Findings of Facts and Conclusions of Law, and moved for the adoption. Justice Guittard seconded the motion. Discussion followed.

Professor Dorsaneo proposed adding the words "except as provided in Rule 279" after the sentence that begins "trial of an issue of fact to a jury." Discussion continued.

Chairman Soules proposed the first sentence to say "in any case tried in the district or county court a party in a case ..."

Richard Orsinger proposed as a possible fix to Judge Brister's concern the language "findings of fact on an ultimate issue tried by the judge." Discussion continued.

Professor Dorsaneo again suggested that "except as provided in Rule 279" would fix Rusty's problem. Discussion continued.

David Perry indicates Rule 279 speaks to independent grounds for recovery or defense -- maybe that language could be used.

Professor Dorsaneo suggested the words "except as provided in Rule 279" to fix Rusty's first problem. Discussion continued.

Rusty McMains indicated that "ultimate issue" comes closer to fixing the problem than anything. Professor Dorsaneo indicates using the word "ultimate" would clarify the second problem raised by Judge Brister.

Professor Dorsaneo asked if it would be acceptable to develop language that makes it clear that you do not, when a judge makes a deemed finding or more likely when the judge does not make a deemed finding, go back to the trial court and order for there to be an expressed finding. Discussion continued.

Chairman Soules indicated we don't want the judge, after the trial is over, trying independent grounds of recovery or defense. Discussion continued.

David Perry inquired isn't the intent of this particular rule to deal with a situation where you intend to have an independent ground of recovery or defense tried non-jury to the court and have other things tried to the jury. Rusty McMains indicates that that is correct.

David Perry proposed instead of using the old language about any case tried without a jury, substitute language that any independent ground of recovery or defense that is tried to the court without a jury then triggers this procedure. Discussion continued.

Professor Dorsaneo proposed after the sentence that says "trial of an issue" (assuming that David Perry's suggestion doesn't work) saying "except in the case of a deemed finding as provided in Rule 279." Discussion continued.

Chairman Soules called for a consensus on the rule. Rule 296 is to cover circumstances not embraced by 279 and never to address the circumstances that are addressed in 279. There being no opposition, that is the consensus of the Committee.

Chairman Soules indicates the rule should read "in a case tried on the merits in a district or county court in which an issue of fact was actually tried by the judge on the merits."

David Perry suggested leaving in "tried without a jury." Richard Orsinger proposed "ultimate issues of fact".

Chairman Soules read the proposed language "one or more ultimate issues of fact were actually tried on the merits." Discussion continued.

Richard Orsinger proposed deleting the word "actually." Discussion continued.

Mr. Orsinger proposed deleting the words "on the merits" as unnecessary if you use the word "ultimate" before "issues." Discussion continued.

Chairman Soules read the proposed rule as follows: "In any case tried on the merits in a district or county court in which one or more ultimate issues of fact were tried by the judge." Discussion continued.

Chairman Soules inquired whether we should say "trial of an ultimate issue of fact to a jury in the same case does not excuse the judge from making findings of fact ..." Richard Orsinger indicates it would be better not to use the word "ultimate." Discussion continued.

Chairman Soules sets out the proposed language as follows: "Trial of an issue of fact to a jury in the same case does not excuse the judge from making findings of fact on ultimate issues tried on the merits by the judge." Discussion continued.

Justice Duncan commented they're trying to embed too many concepts and too many rules into a couple of sentences. It is clear we are not in any way trying to effect a case where a ground of recovery or defense has been waived or a finding deemed under 279. She thinks it ought to say: (a) In a case tried without a jury; (b) In a case where certain issues are tried both to the jury and other issues are tried to the court, here is what you get; in a summary judgment here is what you get. If you are entitled under (a), (b), and (c) to make a request for findings, here is how you do it. Discussion followed.

Justice Guittard proposed the following language be added to the rule: "This rule does not effect deemed findings of fact as provided by Rule 279." Discussion continued regarding the rule.

Professor Dorsaneo proposed the following language: "A party in a case in which an ultimate issue of fact was tried on the merits may request the judge to state in writing findings of fact and conclusions of law. The trial of an issue of fact to a jury in the same case does not excuse the judge from making findings of fact on an ultimate issue tried on the merits by the judge, unless the ground to which the issue is referable has been waived or an amended element is deemed found as provided in Rule 279." Discussion continued.

Richard Orsinger read David's proposed language as follows: "In any case (a) tried to the court without a jury, (b) tried to a jury in which specific ultimate issues of fact are tried to the court by agreement, or (c) tried to a jury in which specific ultimate issues of fact by law must be tried to the court," then close parenthesis and lead into the rule. Discussion followed.

A discussion was had regarding the venue issues. Justice Guittard suggested after its all said about what is included. Let's have a sentence that says what is not included. Discussion continued.

Richard Orsinger brought up the issue as to what ultimate issues are and what they are not. Rusty McMains proposed putting something in the rule that says any issue that you are entitled to try or submit to a jury is an ultimate issue. Discussion followed.

Richard Orsinger proposed the following language: "For purposes of this rule, an ultimate issue is an issue that would be submitted to a jury in a jury trial." There being no opposition that language is approved.

Chairman Soules inquired if there is any problem with deleting in the third line from the bottom and then in the second "in accordance with Texas Rule of Civil Procedure 21a"?

Professor Dorsaneo and Scott Brister proposed deleting the whole sentence. There being no opposition the following language will be stricken from the rule: "The party making the request shall serve it on all other parties in accordance with Texas Rule of Civil Procedure 21a."

Professor Dorsaneo requested a vote on deleting the last sentence which says "A request for findings of fact is not proper and has no effect with respect to an appeal of a summary judgment." Professor Dorsaneo commented there should be a vote on whether such a concept should be Texas procedural law or not.

Professor Dorsaneo then suggested just deleting the last half of the sentence. Discussion followed.

Richard Orsinger proposed the following language: "A request for findings of fact is not proper with respect to a summary judgment." Discussion continued.

Chairman Soules proposed deleting only "an appeal of." Discussion continued.

Justice Duncan indicated they needed to discuss whether there should or shouldn't be an effect, should a request for findings of fact and conclusions of law extend to the appellate time table for summary judgment. Discussion continued.

Judge Scott Brister made a motion to leave it like it is. Rusty McMains seconded the motion. Discussion continued.

Mike Prince inquired whether that means the sentence as written including the insertion "and conclusions of law" after "findings of fact."

Chairman Soules proposed putting a common after "proper." Discussion followed regarding same. Chairman Soules also proposed putting a comma before "a summary judgment." A vote was taken on the last sentence as modified and by a vote of 13 to 1 the rule passed.

Professor Dorsaneo explained the changes to Rule 297, Filing, Findings of Fact and Conclusions of Law. Discussion followed.

Justice Guittard proposed changing the language to "The judge's duty and authority to file timely requested findings ..." Discussion continued.

Professor Dorsaneo restated his motion to take the entire sentence out. The motion was seconded by Richard Orsinger. By a vote of 12 to 2 the sentence will be deleted.

Professor Dorsaneo explained the changes to Rule 298, Additional or Amended Findings of Fact and Conclusions of Law.

Chairman Soules proposed deleting the sentence regarding service.

Rusty McMains brings up a discussion regarding the language that requires the judge to cause a copy to be mailed to each party. A discussion followed.

Chairman Soules calls for a vote on Rule 297 with the last sentence deleted. The rule was approved unanimously.

Chairman Soules called for a vote on Rule 298 with the last sentence of the first paragraph deleted. There being no opposition, the changes were approved unanimously.

A vote was taken on the proposed changes to 299, Omitted Findings. There being no opposition, the changes were approved unanimously.

Rule 299a, Findings of Fact to be Separately Filed and Not Recited in a Judgment, was brought up for discussion. There being no opposition the changes were approved.

Professor Dorsaneo explained the changes to Rule 300, Judgments, Decrees, and Orders. Discussion followed.

Judge McCown proposed the following language: "A judgment is rendered when the judge orally announces it on the record or, if not so announced, when a judgment is signed by the judge." Discussion followed.

Judge McCown inquired why it has to be tied to a place, why not just say "on the record." Discussion continued.

Richard Orsinger wanted to know whether "on the record" means with the court reporter present and taking notes. Discussion continued. A vote was taken on the first sentence the way it is written and by a vote of the house to one it was approved.

Professor Dorsaneo indicated the next two sentences are less controversial and moved for their adoption. Discussion followed.

Richard Orsinger advises he has a problem with the last sentence if it means special exceptions. Discussion followed.

Professor Dorsaneo explained the thought of the Committee on expanding the rule to include decrees and other orders.

Justice Guittard proposed "that finally disposes of." Discussion continued. David Keltner proposed taking "orders" out of the rule. Discussion continued. Justice Duncan proposed putting "disposing of claims or defenses" into the title. Discussion continued regarding paragraph (1) of the rule.

Chairman Soules inquired if a judgment, decree, or order disposes of a claim or a defense, what's wrong with requiring it to be made in open court or signed, written down and signed. That takes care of (a). And to deal with the "final" issue, why don't we define "final judgment" as it is in the cases and say "a final judgment is a judgment that disposes of all parties and claims" and then say "only one final judgment shall be rendered in the cause." Discussion followed.

Rusty McMains expressed his opinion that we should not be talking about decrees and orders in the title. Secondly, the only thing that we need to define is "final judgment." He does not think we should be defining exclusively into the term judgment things that have no relevance to the issue of a final judgment. It is his opinion that unless we are going to re-write all of the rules, that all we need to do is be defining "final judgment" in this section of the rules. Discussion continued.

Chairman Soules indicated that 300(a) is talking about rendition; it's not talking about signing and entry. What we're saying in 300(a) is that when a judge disposes of a claim or defense that it should be done in open court or by signed paper. Orsinger points out that his problem is when we start trying to define the word "judgment." Discussion followed regarding same.

Professor Dorsaneo proposed deleting the last sentence. Discussion continued. Professor Dorsaneo and Justice Guittard propose deleting "or an order" from the last sentence and saying "a decree or an order that disposes of a claim or defense. Discussion continued.

David Keltner proposed having language that defines what an order is. Discussion followed. Discussion continued regarding the definition of "final judgment."

Chairman Soules indicated assuming the final judgment problem is taken care of (a) is okay the way it is. We're going to define final judgment, leaving judgment to include any judgment, decree, or order that disposes of a claim or defense, going through the rest of the rules to change them to refer to final judgment.

A vote was taken on Rule 300(a) as written and with the fix as discussed and by a vote of 9 to 2, the rule passed as written. A

discussion was had on how they are going to define "final judgment."

Professor Dorsaneo explained the changes to Rule 300(b) Form and Substance: General. Discussion followed.

Professor Dorsaneo proposed changing the second sentence to say "the final judgment shall conform to the pleadings, the nature of the case proved, the jury's verdict, and the judge's findings of fact."

Professor Dorsaneo also proposed saying "a judgment or order shall contain the names of the parties specified on relief." Discussion followed.

Anne Gardner expressed the opinion that it would be better to stay with the original concept of a judgment after a trial on the merits. She suggested sticking with the exact language we have in the current rules. Discussion followed.

Chairman Soules proposed the following language: "The judge of the court shall conduct the form of the pleadings and the nature of the case proved, the jury's verdict, or the judge's findings of fact unless the judgment is rendered as a matter of law." Discussion continued.

Justice Duncan commented if the concern is that all judgments, orders and decrees should conform to the pleadings, put in the following language: "shall conform to the pleadings" in the first sentence and restrict the second sentence to trial. Discussion continued.

Justice Guittard commented if you're going to put in a requirement about after a trial, you need to put it in (a) rather than (b), has to do with what a judgment should contain. Discussion continued. Justice Guittard proposed if we want to define "judgment" take the last sentence of (a) and put it before all of the rest and then say "a judgment is rendered when signed by the judge." Discussion continued.

Richard Orsinger proposed adding a new paragraph (c) called "Requisites of a judgment. In cases in which disputed facts were resolved ..."

Chairman Soules indicated that this needs to go back to Subcommittee and requests Professor Dorsaneo to tell us what he needs to give him direction. Chairman Soules indicated we should go all the way through the 300 series and provide Professor Dorsaneo with guidance conceptually where needed to continue the work.

Professor Dorsaneo explains the changes to paragraph (c), Form and Substance: Specific.

Professor Dorsaneo brought up the discussion regarding 308(a), In Suits Affecting the Parent-Child Relationship. The Subcommittee recommended that this rule be repealed. Discussion followed. There being no opposition, Rule 308a is repealed.

Professor Dorsaneo indicated that Rule 307, Exceptions, Etc. has been recommended to be repealed. Discussion followed. There being no objection, Rule 307 is repealed.

Professor Dorsaneo made a motion to repeal Rule 311. On Appeal from Probate Court. There being no objection, Rule 311 is repealed.

Professor Dorsaneo advises that his Subcommittee proposed moving Rule 312, On Appeal from Justice Court, to Judge Till's Subcommittee. Judge Till agrees to accept this rule and indicated it needs to be in the 500 series.

Professor Dorsaneo explained the changes that were made to Rule 301, Motions Before and After Judgment.

Professor Dorsaneo's Subcommittee proposed using the more modern procedural language which means changing our terminology to "judgment as a matter of law" rather than "judgment non obstante veredicto." Discussion followed.

Justice Duncan proposed adding language at the end of paragraph 2 as follows: "unless the movant waived application of controlling law by failing to preserve error in the court's charge." Discussion continued.

Professor Dorsaneo continued to explain the changes to Rule 301. The proposal that's been made is that we should clarify the timing for motions for judgment n.o.v. when they are made after judgment and in a more complicated way that's what we are trying to do and if the committee wants to direct us to just simply do that, we should start discussing that. Discussion followed.

Professor Dorsaneo brought up the topic regarding the time tables. Discussion followed.

David Keltner proposed that all post-trial motions preserving error should be filed in 30 days. That would be motion to modify, motion for new trial, and whatever after the judgment is entered. All of those ought to extend the time period for pursuing the appeal. Suggested taking j.n.o.v. out of the practice; if we leave it in, it should be only for that time period when we are asking the judge before judgment is entered to do something. Suggested extending the appellate time period for any post-trial filed motion

which would be deemed overruled if the judge doesn't act on it. A motion to modify would have to be within 30 days and it would not have to be ruled upon. Suggested having a time period that you have a deemed overruling because it is difficult to get trial judges to hear and enter orders on motions to modify. Suggested it ought to be either party that can file a motion to modify. Also suggested that you can amend your motion within the 30 day time period. Discussion followed.

Chairman Soules restated what he thinks Keltner's proposal is. From signing a judgment, going out 30 days, all motions that are going to preserve error must be filed, whatever they are called. They can be freeing amended within the 30 days regardless of the trial court's ruling in the other. And then after the 30 days they don't preserve error, they are just appeals to the trial court. You can file as many motions for new trial as you want to within 30 days so you don't have to amend or renew or do anything. And then all of those motions that are filed in the 30 day period are deemed overruled by operation of law at the same time motion for new trial is now deemed overruled unless ruled upon earlier. Discussion followed.

Justice Guittard proposed taking a vote on two separate questions. Number 1 is whether or not all effective motions as far as appeal is concerned have to be filed within 30 days to preserve appellate points.

By a vote of 16 to 1, the answer is yes.

Question number 2 is motions filed, even if overruled, do not preclude further filings during a 30 day period. A vote was taken and by a vote of 14 to 1, the proposition is approved. Discussion continued.

Chairman Soules stated the proposition as follows: everything that gets filed within 30 days, if not ruled upon sooner, is deemed overruled as a matter of law, as are today motions for new trial. There being no opposition that proposition is approved.

Professor Dorsaneo indicates we need to redraft the motion to modify and the motion for judgment as a matter of law to take care of the problems raised. Discussion continued regarding same.

A discussion was had regarding motions to vacate. Justice Guittard indicated if we use the term "vacate" in the rules, we ought to define it.

Chairman Soules called for a consensus vote on what motions we are going to have, new trial, for judgment, disregard jury findings, and to modify judgment. Those are going to be the four things that embrace all post-verdict complaints that preserve error. There being no opposition, that was approved.

Justice Guittard indicated that we need to address the filing before the verdict. Justice Guittard feels we ought to have different provisions for motions filed before verdict and after verdict. Discussion followed.

Justice Guittard raised a question regarding Rule 302(a)(11), When a Case Has Been Dismissed for Want of Prosecution. All the other subdivisions in that paragraph have to do with whether certain grounds exist for a new trial, he doesn't think we intend to say that a new trial may be granted whenever the case has been dismissed for want of prosecution.

Justice Guittard proposed the following language: "When a case has been dismissed for want of prosecution and good cause exists for restatement..." Discussion followed.

Professor Dorsaneo proposed taking paragraph (11) out. Chairman Soules proposed if (11) is retained it ought to simply say: "Pursuant to Rule 165a." A vote was taken and there being no opposition, paragraph (11) is deleted.

Richard Orsinger pointed out that we are going to have to take out (c)(3) then because (c)(4) is dismissal for want of prosecution. There being no opposition that subparagraph will be deleted.

Professor Dorsaneo asks for guidance on Rules 302 and 303 on the assumption they were dealt with at the last meeting. Rule 303 is the analog to Appellate Rule 52. No one sees any reason for a variation so the language should be verbatim.

Rusty McMains pointed out that both this rule and Rule 52, to the extent we are expanding the nomenclature on post-judgment motions that are presumptively overruled without an express order that that needs to be in both preservation rules.

Richard Orsinger indicated the four motions that were voted on are presumptively overruled by the 75th day if they are not ruled on expressly. In his view, the 75th day should apply only to the post-judgment motions and the prejudgment motion should be impliedly overruled if at all by the signing of the judgment that's contrary to those motions and not by the passage of time. Discussion followed.

Professor Dorsaneo brought up a discussion regarding Rule 304, Timetables. Richard Orsinger proposed broadening the concept that the signing of the judgment inferentially overrules a motion to enter any other version of the judgment. At the entering of a contrary judgment inferentially overrules all of those motions as of the time the judgment is signed. Discussion followed.

A discussion was had regarding prematurely filed motions. Richard Orsinger wanted to keep the prematurely filed concept but only apply it to ones that should be after the judgment. Discussion continued.

Chairman Soules indicated the intention is to take certain filings and have them overruled by the trial court's judgment assuming they have been filed before the judgment is signed. But by their nature of having been filed, they should be appellate predicates at that moment and don't extend the plenary power of the court. However, if we call those a prematurely filed post-judgment motion then they are going to extend the plenary power which we don't want to do so we are going to keep the prematurely filed rule restricted to motions for new trial.

Rusty McMains brought up a problem regarding our current rule dealing with request for findings. Discussion followed.

Richard Orsinger proposed eliminating this rule and sticking the prematurely filed motion for new trial as a paragraph under the motion for new trial rule and the prematurely filed request for findings under the request for findings rule. There was no disagreement to that.

A discussion was held regarding what was inconsistent and what is not. Chairman Soules proposed saying it was deemed presented and overruled so that you have your complaint. If it was granted, you don't have a complaint because it went away. Nobody has a disagreement with the approach that as a consequence of the trial court signing the judgment it just overrules the previous motions.

Richard Orsinger brought up the discussion regarding the situation where you file a motion to disregard after the judgment is signed because we haven't provided for it to be overruled by operation of anything now. Discussion followed.

Justice Duncan expressed the opinion that she would be in favor of saying if you file it before judgment and a judgment is then entered if you want the same relief, you have got to file it again after judgment.

A discussion was had regarding why a motion for judgment or a motion to disregard filed prior to judgment should not extend the court's plenary power.

Chairman Soules proposed extending the court's plenary power from 30 to 75 days. Discussion continued.

Chairman Soules proposed saying that no prejudgment filing extends the trial court's plenary power. It doesn't affect preservation of error. The appellate timetable still operates, but the plenary jurisdiction doesn't change.

Justice Guittard proposed leaving the rule just like it's been in 306c and restrict it to motions for new trial and request for findings. Discussion followed.

Pam Baron suggested that we not have two different start dates for the appellate process depending on whether you have filed something postjudgment. Discussion followed.

Chairman Soules comments that where we are now is that no prejudgment motion will extend the trial court's plenary power, which seems to be fair because after judgment if nobody asks him to do anything within 30 days his plenary jurisdiction ends. And if they do ask him to do something within those 30 days then he needs more time to do it. So you extend the plenary power to give him time to do it. And then those motions filed prior to judgment would nonetheless preserve error. There is no consequence in terms of failing to preserve error as a result of having filed them early. With regard to the appellate timetable, Pam's suggestion is to put the appellate timetable on a 90 day fuse instead of a 30 day fuse. Discussion continued.

Justice Guittard proposed referring this back to the subcommittee. Discussion continued.

Chairman Soules advised that what is on the table is that all motions filed prior to judgment are deemed overruled at the time of judgment; that the motion for new trial prematurely filed prior to judgment will preserve the error; findings of fact or conclusions will operate however they operate; that no motion filed prior to judgment will extend the court's plenary power. If the court's plenary power is to be extended, it's to be extended by a motion filed after judgment and on or before the 30th day following judgment in which event the court needs time to consider it so plenary power is extended; and that no motion filed prior to judgment extends the appellate timetable. To extend the appellate timetable that requires something filed after judgment on or before the 30th day. A vote was taken and by a vote of 13 to 2, the proposition was approved.

Professor Dorsaneo brings up for discussion Rule 304, paragraph (c), Motion for New Trial, (5) which deals with the writ of error problem. Discussion followed. (6) was also discussed.

Justice Duncan proposed advising the Supreme Court that in the event the court decides not to eliminate the 6 months writ of error appeal, the committee recommends that it be in the form of a motion for new trial filed within 6 months of judgment rather than a writ of appeal. Discussion followed.

Chairman Soules called for a vote of those in favor of (5) in the event that the Supreme Court wants to continue some relief for

a 6 month period to a defaulted party. By a vote of 15 to 1 the proposition passed.

Professor Dorsaneo provided an explanation of the proposed changes to Rule 330, Rules of Practice and Procedure in Certain District Courts. Discussion followed.

Steve Susman presented the report on TRCP 166-209.

The meeting was adjourned until Saturday morning.

The Advisory Committee of the Supreme Court of Texas convened at 8:00 o'clock on Saturday, November 19, 1995, pursuant to call of the Chair.

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, Charles L. Babcock, Pamela Stanton Baron, Honorable Scott A. Brister, Prof. Elaine A. Carlson, Hon. Sarah B. Duncan, Hon. Clarence A. Guittard, Gilbert I. Low, John H. Marks, Jr., Russell H. McMains, Robert E. Meadows, Harriett E. Miers, Richard R. Orsinger, Anthony J. Sadberry, Stephen D. Susman, and Paula Sweeney.

Ex-officio Members present: Michael Prince, Hon. Paul Heath Till and Bonnie Wolbrueck.

Members absent: Alejandro Acosta, Jr., Professor Alex Albright, David J. Beck, Ann T. Cochran, Professor William V. Dorsaneo, Michael T. Gallagher, Anne L. Gardner, Michael A. Hatchell, Charles F. Herring, Jr., Donald M. Hunt, Tommy Jacks, Franklin Jones, Jr., David E. Keltner, Joe Latting, Thomas S. Leatherbury, Hon. F. Scott McCown, Anne McNamara, Hon. David Peeples, David L. Perry and Stephen Yelenosky.

Ex-Officio Members absent: Hon. Sam Houston Clinton, Hon. William Cornelius, W. Kenneth Law, O.C. Hamilton, Jr., Paul N. Gold, David B. Jackson and Doris Lange.

Others present: Lee Parsley (Supreme Court Staff Attorney).

Chairman Soules brought the meeting to order.

Chairman Soules indicated there needs to be final approval of the sanction rules. A discussion was had on what language could be used in place of "conduct meriting sanctions." A decision was made to change "meriting" to "warranting." There being no dissent, with those changes, the report will be forwarded to the Supreme Court with our recommendation for adoption.

Richard Orsinger presented the report on TRCP 15-165a.

Professor Dorsaneo explains the changes to Rule 47, Claims for Relief. Discussion followed.

Harriett Miers proposed the following language for (a) "A short statement of the legal and factual basis of each cause of action to give fair notice." Richard Orsinger commented you would want to say "sufficient."

Justice Guittard inquired whether we wanted to use "cause of action" instead of "claim." Discussion followed.

Justice Guittard proposed "A short statement of each claim sufficient to give fair notice." Paula Sweeney comments that the word "factual" is going to cause a problem. Discussion continued.

Richard Orsinger made a motion for the adoption of Rule 47. Mike Prince seconded the motion. Justice Duncan would like to vote on whether a majority of the committee thinks we should move towards a more particularized pleading as exist in federal court or not. Discussion followed.

Chairman Soules inquires if what we are trying to get at is whether we want to put something in the rule that articulates that facts have to be pled in pleadings. The concern is if we do that and there are not any facts, we may not be able to get a jury question. Discussion continued.

A discussion was had regarding substituting the contention interrogatories language that says "provided that contention interrogatories may only request another party to state the legal theories and to describe in general the factual basis for the claims or defenses of that party."

Richard Orsinger made a motion to change the proposed language to match the discovery rule language. Richard Orsinger read the proposal as follows: "A short statement of the causes of action, stating the legal theories and describing in general the factual basis for the claims sufficient to give fair notice." Chip Babcock seconded the motion. Discussion continued. A vote was taken and by a vote of 17 to one, the motion carried.

Professor Dorsaneo made a motion that the same concept be included in the special exception rule. There being no objection that will be done.

Richard Orsinger proposed changing in paragraph (a) "cause of action" to "Claim." There being no opposition that will be done.

Richard Orsinger commented that it should be recognized that when we move this over to Rule 90 or 91 it's going to apply to both defenses and claims whereas here it only applies to claims. Discussion followed.

Chairman Soules called for a vote that so long as we preserve the general denial practice is there any opposition to having this same standard apply to defensive pleadings. Discussion followed. There being no opposition that will be put wherever appropriate. Therefore, it would be the standard for ruling on special exceptions, alleging claims, alleging affirmative defenses to counterclaims. Discussion continued.

Professor Dorsaneo brought up the discussion regarding the comments.

Scott Brister made a motion to amend the last paragraph of the rule to be "relief in the alternative or of several different types may be demanded. Upon special exception, the court shall require the pleader to plead more specifically any constitutional, statutory, or regulatory provision upon which a claim is founded in the maximum amount of damages claimed." Discussion followed.

Judge Scott Brister proposed it also be changed like this in Rule 45. Discussion continued.

Richard Orsinger advised there is an item in the disposition table regarding concern about unliquidated damages without a dollar amount being manipulated in order to get jurisdiction in a county court and then amend when you get damages in excess of their jurisdictional limit. There is also a question regarding the fact that since you can't plead in your initial pleadings what damages you're seeking, how are you going to know tier they're in. Discussion followed.

Richard Orsinger proposed "In all claims for unliquidated damages exceeding $50,000.00, only the statement that ...." Professor Dorsaneo seconded the motion. There being no opposition, that will be done.

Chairman Soules reads the approved language as follows: "In all claims for unliquidated damages more than $50,000.00, only the statement that the damages are within the jurisdictional limits of the court."

Discussion was had on whether or not to keep the comments.

Chairman Soules asks if there is a problem with putting the standard in Rule 45 now that we've decided what the standard is. Nobody had a problem with that.

Professor Dorsaneo presented the report on Rule 90, Waiver of Defects in Pleading. Discussion followed.

Richard Orsinger suggested that the subcommittee come back with revised Rule 91 that defines what the proper role of the special exception is, including the fact that it's not a general

demurrer and then put that in front of 90 which is when they're waived or they're not heard and perhaps even consider making this a motion rather than a pleading because technically the exceptions are considered part of pleadings. Discussion continued.

Richard Orsinger brought up the discussion regarding the second problem with Rule 90 regarding should it only be the person who seeks to reverse that is waived or should we say that anybody waives. Even for purposes of the charge conference, you've waived it. A cut off time at which all pleadings defects are waived by all parties.

Chairman Soules inquired should there be a cut off time at which all pleadings defects are waived by all parties. A vote was taken and by a vote of 14 to 1 that proposition was approved.

Buddy Low brought up the discussion on what the difference is between "defect" and "failure to plead."

Justice Guittard brought up the discussion regarding the fact this proposal introduces the concept of fair notice. Discussion followed.

Richard Orsinger addressed the problem that this waiver concept doesn't preclude you from saying that the pleadings don't plead a certain claim. He doesn't see why you're precluded from arguing that at the charge conference. Discussion followed.

Chairman Soules indicated that in the charge rules we differentiate between the failure to plead an element of a cause of action and the failure to plead a ground. Can't we just move those same concepts into here so that we define that you're not waiving the absence of a pleading of a ground. Discussion continued.

Chairman Soules suggested that we put in there that there's no waiver if no ground of an element of an independent ground of recovery or defense is pled. Discussion continued.

Buddy Low indicated he wants a definition of what "defect in pleading" means. Discussion continued.

John Marks proposed adding language to Rule 47 that would read something like "any pleading which does not give fair notice as required by this rule shall not form the basis for recovery ..." Discussion followed.

Richard Orsinger indicated we need to differentiate the waiver concept about failure to state any cause of action at all from other pleading defects. Discussion continued.

Chairman Soules proposed "the failure to plead a cause of action on which recovery may be based is not waived." Discussion followed.

Buddy Low proposed the following language: "Special exceptions when appropriate have to be filed in many days." Discussion continued.

Chairman Soules commented we're not intending that a failure to make a special exception waives the assertion of a new cause of action or defense. Discussion continued.

Chairman Soules proposed the following language: "Every defect or omission, either of form or substance, in pleading a claim or defense asserted in the cause," so that it assumes the claim or defense is asserted in the cause, but there's a defect or omission in the form or substance. Discussion continued.

Professor Carlson inquired aren't we really talking about the omission to fully state a claim?

Chairman Soules proposed the following language: "every defect or omission, either in form or substance, in stating a claim or defense asserted in the cause."

Professor Dorsaneo proposed saying "every pleading defect."

Justice Guittard proposed adding to the language previously discussed the following sentence: "No waiver applies with respect to a ground of recovery or defense, no element of which has been alleged." Discussion continued.

Chairman Soules indicated that what we're talking about is what happens if you do not file special exceptions. Discussion continued.

Chairman Soules inquired whether we want to express that the groundless cause of action is not waived. Groundless meaning non-existent. Discussion followed.

Anne Gardner brought up a discussion regarding the issue of whether a jury question regarding whether the damages resulted from the occurrence in question was necessarily referable to any particular cause of action. Discussion followed.

Chairman Soules asked if we want the waived defect to only apply to the stating of the claim or defense or should it extend to damages as well. Discussion continued.

Justice Guittard proposed the following language: "No waiver occurs with respect to a ground of recovery or defense not cognizable in law."

Richard Orsinger brought up the discussion regarding Rule 63 which has to do with the deadline for amending pleadings. Richard Orsinger asked for a vote on the proposal on default judgment language in paragraph 3. Discussion followed.

Chairman Soules proposed "provided that this rule shall not apply to any party against whom a default judgment is rendered. Fair notice to a defaulted party has not been given by the allegations as a whole."

Justice Guittard proposed starting a new sentence that says "this rule does not apply when a judgment has been rendered by default if reasonable notice is given by the pleading as a whole." Discussion followed.

Richard Orsinger reiterated what the subcommittee meant for this rule to say which is the idea that you waive certain complaints if they're not raised and ruled on by a certain time, doesn't apply when you are defaulted and you have adequate notice or fair notice in the pleadings. Discussion continued.

Richard Orsinger proposed language something to the effect that "except as to pleading substitute service pleadings, a default judgment may be supported by pleadings which are sufficient to give fair notice." Discussion followed.

David Perry suggested taking out the sentence that gives special consideration to people who allow default judgments to be taken against them. Discussion continued.

Chairman Soules indicates the proposition is that a defaulted party will be charged with waiver of pleading defects when the pleading does not give fair notice of the claim. A vote was taken and the proposition was unanimously approved.

Chairman Soules indicated that the last vote was not term properly; the vote should have been on how many feel that a defaulted party should be charged with waiver of pleading defects if the pleading gives a defaulted party fair notice of the claim. Discussion followed.

Chairman Soules posed the question should we restrict this waiver to pleading defects or omissions in form or substance in stating a claim or defense asserted in the cause? A vote was taken and by a vote of 9 to 3 the vote is in favor of the restriction.

The meeting was adjourned.