

MINUTES OF THE  
SUPREME COURT ADVISORY COMMITTEE  
March 7-8, 1997

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock on Friday, March 7, 1997, pursuant to call of the Chair.

Friday, March 7, 1997:

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

Members present: Professor Alexandra W. Albright, Charles L. Babcock, Pamela Stanton Baron, Honorable Scott A. Brister, Prof. Elaine A. Carlson, Prof. William V. Dorsaneo III, Honorable Sarah B. Duncan, Honorable Clarence A. Guittard, Michael A. Hatchell, Donald M. Hunt, Joseph Latting, Gilbert I. Low, John H. Marks, Jr., Russell H. McMains, Robert E. Meadows, Richard R. Orsinger, Luther H. Soules III, and Stephen Yelenosky.

Ex-officio Members present: Honorable William Cornelius, Paul N. Gold, Carl Hamilton, David B. Jackson, Doris Lange, Mark Sales, Bonnie Wolbrueck, and Paul Womack.

Members absent: Alejandro Acosta, Jr., David J. Beck, Hon. Ann T. Cochran, Michael T. Gallagher, Anne Gardner, Charles F. Herring, Jr., Tommy Jacks, Franklin Jones, Jr., David E. Keltner, Thomas S. Leatherbury, Hon. F. Scott McCown, Anne McNamara, Hon. David Peeples, David L. Perry, Anthony J. Sadberry, Stephen D. Susman, and Paula Sweeney.

Ex-Officio Members absent: W. Kenneth Law and Hon. Paul Heath Till.

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

Chairman Soules brought the meeting to order.

Justice Hecht provided a status report on the various projects that have been submitted to the Supreme Court.

Professor Dorsaneo inquired as to whether any thought had been given to looking at the government code provisions that deal with appellate procedure that need some adjustments here and there in order to match up with the new appellate rules.

Mark Sales presented his report as Chair of the State Bar Rules of Evidence Committee.

Buddy Low presented the report of the Subcommittee on the Texas Rules of Civil Evidence.

Mr. Low brought up for discussion the letter from Paul Gold regarding proposed changes to Rule 503. The Subcommittee's recommendation was to take no further action at this time.

Mr. Low brought up for discussion the letter from Lloyd Lunsford regarding proposed changes to Rule 902. The Subcommittee recommended no action be taken. There being no opposition, the Subcommittee's recommendation was accepted.

Mr. Low brought up for discussion the proposal from Allen Hector and Lloyd Lunsford requesting a new rule regarding proving necessity and reasonableness of medical bills. The Subcommittee recommended no action be taken. There being no opposition, the Subcommittee's recommendation was approved.

Mark Sales reported on what the State Bar of Texas Rules of Evidence Committee was doing regarding the Dupont v. Robinson issue.

Justice Hecht inquired as to what the status was of the Supreme Court receiving the evidence rules. Discussion followed. A discussion was had regarding a Dupont rule.

Buddy Low brought up for discussion the proposal by Judge Martin Chiuminatto, Jr. regarding proposed changes to Rule 609(d) of the Civil and Criminal Evidence Rules to make them consistent with Section 51.13(b) of the Family Code. The Subcommittee recommended adopting the proposed changes. Discussion followed. There being no objection, the Subcommittee's recommendation was approved.

Justice Hecht brought up for discussion the issue regarding court-appointed experts. Chairman Soules assigned Buddy Low and his committee to take a look at this issue and present a report at the next meeting. Discussion continued regarding this matter.

Professor Albright presented the report on Rule 86, Venue. Discussion followed. Chairman Soules called for a vote on whether or not there should be a separate subdivision of the rule to cover venue litigation as to late-added parties. By a vote of 13 to 1 there will be a separate subdivision. Discussion continued regarding the vote.

Professor Albright continued presenting the report on the venue rule. Discussion continued.

Justice Duncan proposed as an alternative to her re-draft of (10) is to leave the first part and retitile it "further motions and reconsiderations." The first sentence "prevents further motions

unless" and then the (a) and the (b) are the statutory non-waiver provisions and then end this subdivision right before the next (a), (b) and (c). Take out the word "if" and put a period after "transfer."

Discussion continued. Chairman Soules asked if there was a consensus that we at least permit the trial judge on his own motion or on a motion of a party to delay the hearing on motion to transfer venue, during which time the movant shall not be deemed to have waived the motion to transfer venue by participating in other proceedings. There being no opposition, Elaine Carlson will attempt to write the language. Chairman Soules requested that she also put in the language something to the effect that it cannot be amended.

Judge Scott Brister presented the report on Rule 18, Recusal or Disqualification of Judges. Discussion followed. Rusty McMains brought up questions regarding (4). Chairman Soules proposed leaving in the word "disputed." There being no opposition, Chairman Soules proposal was approved. Judge Brister continued presenting the report on Rule 18. Discussion continued. Chairman Soules called for a vote on Rule 18, there being no opposition, the rule was approved.

Joe Latting presented the report on a motion in limine rule. Discussion followed.

Chairman Soules puts on the record that everybody agrees that proposed Rule 18, subsection (a) and its subsections (1), (2), and (3), are four square on the constitutional disqualifications.

Discussion continued regarding the motion in limine rule. Joe Latting made a motion to adopt the proposed rule. Discussion continued. John Marks proposed changing (5) to say that no further objection to preserve error is necessary if the motion in limine is overruled. Discussion continued.

Judge Brister proposed something to the effect "but the court may make reviewable rulings pursuant to Rule 166, Pretrial Conference Orders." Discussion continued. Chairman Soules called for a vote on how many believed that a ruling on a motion in limine should preserve error in any circumstance. By a vote of 11 to 1, the Subcommittee voted no. John Marks asked for a vote on whether the motion in limine should preserve error on the overruling of a paragraph. A vote was taken and by a vote of 9 to 2, the motion was defeated. A vote was taken on the motion in limine rule as proposed by Joe Latting and by a vote of 10 in favor with none opposed, the Committee approved the rule. The rule will go back for edit and presentation at the next meeting for final vote.

Paul Gold presented his report on the conflict between TRCP 168 and TRCE 703. Discussion followed. Mark Sales indicated that

this is more of a TRCE 705 problem and explained why. Discussion continued. Chairman Soules asked Buddy Low's Committee to determine whether or not there should be a difference in the unified rules between civil and criminal in Rule 705.

Judge Scott Brister presented the report on Rule 174(b), Separate Trials. The discussion on Rule 174 was postponed while copies were made of the report.

David Jackson presented the report on Rule 188, Depositions in Foreign Jurisdictions. Discussion followed. Chairman Soules proposed the following language, "Whenever the deposition, written or oral, is to be taken of a person located in a sister state ...". Discussion continued. Buddy Low made a motion to put in a category which took care of doing this by agreement. Joe Latting and Chip Babcock seconded the motion. There being no objection, the motion was approved. Discussion continued regarding having language regarding a Rule 11 Agreement.

A discussion was had regarding whether the court reporter has to be with the witness or whether the court reporter can be with the rest of the parties. Chairman Soules advised that in the discovery rules the Committee has already passed language that says the witness has to be sworn by somebody authorized to administer oaths in the jurisdiction where the witness is situated but the court reporter can take the testimony wherever. Discussion continued regarding "agreement of the parties" language. Joe Latting proposed using the language "by agreement or order of the court." Discussion continued. Carl Hamilton brought up for discussion a problem with the language "on notice as provided in Rule (current Rule 200) before a person authorized to administer oaths and to take a deposition under the law of the place in which the deposition is taken or under the law of the State of Texas." Mr. Hamilton asked if this means that you get a choice? Discussion followed. Chairman Soules proposed changing the language to read, "a person authorized under the law."

Carl Hamilton brought up for discussion the change where letters rogatory can come from a clerk because historically they have been from one judge to another judge. Discussion followed. Chip Babcock proposed "by application of the clerk of the court or the court." Professor Dorsaneo proposed just saying, "the court."

Carl Hamilton brought up for discussion the language regarding the deposition being taken in another jurisdiction but under Texas Rules of Discovery regarding context, signature, and certificate of the officer. Discussion followed. Chairman Soules advised that the Subcommittee will continue to work on Rule 188 and bring it back to the next meeting for final approval.

Professor Alex Albright resumed presenting the report on the venue rules. Professor Albright suggested that Rule 86 be taken

back to Subcommittee, reconsider section 10 with that, and then bring it back to the Committee in May. Buddy Low suggested including language regarding "seeking or obtaining relief" because "participating" may be just sitting in on a deposition. Discussion continued regarding the venue rule. A discussion was had regarding whether or not paragraph 11 includes cross-plaintiffs and third party plaintiffs. Discussion followed. Rusty McMains brought up for discussion the issue of whether or not there should be any language in the rule prohibiting rehearing. Discussion followed. Chairman Soules inquired whether anybody objected to having a rule that said that where a plaintiff adds a new defendant, the new defendant can raise any challenge to venue that the new defendant wants to raise, the judge hears that, that also triggers the opportunity for the judge to reconsider, if the judge doesn't already have the power, to reconsider motions but the parties that have already had their shot at venue can't take a new shot themselves. Discussion followed.

Chairman Soules indicated that the issues were (a) when a new party is added, should that party be permitted to raise every venue challenge that that party could have raised if it had been the original defendant; (b) should the judge, if that sort of a motion is filed, be permitted to rehear or reconsider a previously filed motion of another defendant that's been overruled; and (c) should the judge be able to transfer the case as to the original defendant as well as the newly added defendant when only the newly added defendant challenges venue and the original defendant never did? Discussion followed.

Professor Albright advised that she has all the direction that she needs, she will re-write the rule, and bring it back to the next meeting.

Professor Albright presented her report on Rule 257, Motion to Change Venue for Unfair Form. Discussion followed. Chairman Soules suggested adding a remedy that's not in the statute by providing a 257 transfer of venue at any time and say so. Discussion continued. Chairman Soules suggested working in the language in the current rule (a) and (b) and maybe combine (c) and (d) of current Rule 257 or maybe just skip (c) altogether and say in (d) for other sufficient due process cause to be determined by the court. Discussion continued. Chairman Soules indicated the Subcommittee needed to decide whether it wants to burden the filing process with affidavits or does it want to let it trigger with the motion process. Discussion continued. Chairman Soules called for a vote on those who felt that this should be triggered by the filing of an unsworn motion without affidavits. There was one member in favor of that.

A vote was taken on how many felt that it should be by sworn motion without affidavits. There was one member in favor of that.

A vote was taken on how many felt it should be by unsworn motion with affidavits. There were ten members in favor of that.

A vote was taken on the number of affidavits required and the Committee voted on two.

Chairman Soules indicated that the affidavits have to be prima facie evidence supporting the grounds of the motion. A discussion was had whether or not the people providing the affidavits have to be residents of the county. Chairman Soules called for a vote on whether the affidavits must be by county residence and by a vote of 10 to 0, there will be no restriction on the source of the residence.

John Marks proposed not doing anything to the existing rule. Discussion followed. Chairman Soules called for a vote and by a vote of 9 to 2, Rule 257 will be rewritten.

Honorable Scott Brister presented the report on Rule 174, Separate Trials. Discussion followed. Chairman Soules called for a vote on whether or not to specify that prerequisite issues can be tried separately. There being no objection, that was approved.

The next issue discussed was whether or not it should be tried to the same jury or not the same jury. Discussion followed.

Professor Dorsaneo brought up for discussion the "prerequisite" issue. Discussion continued.

Discussion continued regarding the same jury or a different jury. Justice Guittard proposed adding to 174(b) the provision that's in the appellate rules that provides there is no separate trial of liability and unliquidated damages if liability is contested. Discussion continued. Judge Brister proposed changing Judge Guittard's suggestion to make this both a bifurcation and separate trial. You can order a bifurcation or a separate trial for any of these things except that you can't order a separate trial of unliquidated damages where liability is contested. Discussion continued.

Chairman Soules advised that we need to get on with the other Subcommittee reports so we will table Rule 174 until the next meeting.

Richard Orsinger advised the Committee that his Subcommittee is not ready to report on a rule similar to Federal Rule 68.

Richard Orsinger presented the report of the Subcommittee on Rules 15 through 165a.

Mr. Orsinger brought up for discussion the letter from Judge Scott McCown suggesting a special rule of evidence regarding grand

jury testimony. Judge McCown is concerned about whether 76a applies to grand jury testimony. Discussion followed. Chip Babcock made a motion to not change the rule. There being no disagreement, there will be no change to the rule.

Richard Orsinger brought up for discussion the issue about 165a that has to do with writing a rule to handle DWOPs that are part of an administrative procedure dismissing cases. Mr. Orsinger advised that the Subcommittee has not yet dealt with this issue.

Richard Orsinger brought up for discussion Hadley Edgar's proposal that in the DWOP rule the word "judgment" be substituted for "order of dismissal." Mr. Orsinger advised that the Committee dealt with this at the last meeting and agreed to go with "order of dismissal."

Mr. Orsinger brought up for discussion Bill Dorsaneo's concerns that (1) can a motion to reinstate be overruled by operation of law and should it be, and (2) what is the effect on plenary power. Richard Orsinger advised that David Beck had requested that the full Committee discuss whether presentment of a motion to reinstate should be required. Discussion followed. Richard Orsinger proposed adding a sentence that makes it clear that if there is no order overruling the motion, that a point is preserved when it's overruled by operation of law. Chairman Soules suggested changing the language that is "shall be deemed overruled by operation of law" to "shall be deemed to be a motion for new trial overruled by operation of law." Discussion continued.

Justice Duncan commented we need to distinguish between preservation at the point of error and establishing error. Richard Orsinger proposed saying something to the effect that "a motion shall be deemed overruled by the operation of law and the appellate point preserved ...". Discussion continued. Chairman Soules advised that Rule 165a would be worked on and brought back to the next meeting.

Mr. Orsinger advised that Justice Guittard's proposed general rules have not yet been addressed due to the fact they have not received a copy of the appellate rules, but that when they do a comparison will be made and he will report on that at the next meeting.

Mr. Orsinger brought up for discussion the proposal from Mr. Chapin regarding amending Rule 18 to conform to Federal Rule 63. The Subcommittee recommended no change. There being no disagreement, the Committee accepted the Subcommittee's recommendation.

Mr. Orsinger brought up for discussion the letter from Bill Willis regarding proposed changes to Rule 18a to change

"Administrative Judicial Districts" to "Administrative Judicial Regions." The Subcommittee recommended that that change be made. There being no objection the Subcommittee's recommendation was accepted.

Mr. Orsinger brought up for discussion the letter from Bill Coker regarding proposed changes to Rule 20. Mr. Orsinger advised that Rule 20 has already been repealed by the Supreme Court Advisory Committee.

Mr. Orsinger brought up for discussion the letter from John Chapin regarding proposed changes to Rule 21 to conform to Federal Rule 5(d). The Subcommittee recommended no change. There being no objection, the Subcommittee's recommendation was approved.

Mr. Orsinger brought up for discussion the letter from Bruce Pauley wherein he recommended amending Rule 21a to say that hand delivery after 5:00 p.m. be deemed served the following day. Mr. Orsinger advised that the Committee has already rejected this proposal.

Mr. Orsinger brought up for discussion the letter from Dalton Tomlin regarding amending Rule 21a. The Subcommittee recommended no change. There being no disagreement, the Committee accepted the Subcommittee's recommendation.

Mr. Orsinger brought up for discussion the letter from Alwin Pape regarding amending TRCP 21a to relieve government entities from having to send certified mail. Discussion followed. A vote was taken and by a vote of 8 to 4, certified mail will be retained.

A vote was taken and the Committee was unanimously opposed to government exemption of certified mail.

Mr. Orsinger brought up for discussion the letter from Howard Hastings regarding amendments to Rule 21a regarding serving notice on a party who is represented by an attorney and if you can't find the attorney you should be able to serve the last known address of the agent or attorney. The Subcommittee recommended no change. There being no opposition, the Committee accepted the Subcommittee's recommendation.

Mr. Orsinger brought up for discussion the letters from Scott Brann, Wendell Loomis, and Norman Kinzy regarding Rule 21a and advised that the problems have been taken care of by earlier changes to Rule 21a.

Richard Orsinger brought up for discussion the letter from Norman Kinzy wherein he suggested dropping the reference to Rule 21 from Rule 21b. The Subcommittee recommended adoption of the proposed change. There being no opposition, the Committee accepted that recommendation.



Mr. Orsinger brought up for discussion the letter from John Chapin regarding amending Rule 63 to conform to Federal Rule 15(c) involving Relation Back Doctrine for amended pleadings. The Subcommittee recommended no change other than the changes that have already been approved. There being no opposition, the Subcommittee's recommendation was accepted.

Mr. Orsinger brought up for discussion the letter from Paul Harris advising that he does not like TRCP 76a. The Subcommittee's recommendation is to not eliminate 76a unless the Supreme Court directs us to do so.

Mr. Orsinger advised that Judge Brister's proposal to drop 76a(2)(c) regarding unfiled discovery has been tabled pending the outcome of General Tire v. Kepple.

Mr. Orsinger brought up for discussion the letter from Gregory Enos regarding amending Rule 63 and 90 to ban smoking from hearings, trials, and depositions. The Subcommittee recommended no change. There being no opposition, the Subcommittee's recommendation was accepted.

Richard Orsinger brought up for discussion the letters from James Bonner of Austin Process, M.L. Withrow - President of Texas Process Servers Association, David Pyke, Rick Keeney of Professional Civil Process, regarding proposed changes to Rule 103 that would require the Secretary of State to certify private process servers state-wide. The Subcommittee recommended no change. There being no opposition, the Committee accepted the Subcommittee's recommendation.

Don Hunt brought up for discussion the submission by John Chapin wherein he suggested the adoption of a new rule that would compare to Federal Rule 52(c) and put it in Rule 296 or 297. The Subcommittee recommended no change. There being no opposition, the Committee accepted the Subcommittee's recommendation.

At this time the meeting was adjourned until 8:00 tomorrow morning.

The Supreme Court Advisory Committee of the Supreme Court of Texas convened at 8:00 a.m. on Saturday, March 8, 1997, pursuant to call of the Chair.

Saturday, March 8, 1997:

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

Members present: Charles L. Babcock, Honorable Scott A. Brister, Prof. William V. Dorsaneo III, Michael A. Hatchell, Donald M. Hunt, David E. Keltner, Joseph Latting, John H. Marks, Jr.,

Russell H. McMains, Robert E. Meadows, Richard R. Orsinger, Luther H. Soules III, and Stephen Yelenosky.

Ex-officio Members present: Honorable William Cornelius, Carl Hamilton, David B. Jackson, Doris Lange, and Bonnie Wolbrueck.

Members absent: Alejandro Acosta, Jr., Prof. Alexander Albright, Pamela Stanton Baron, David J. Beck, Prof. Elaine A. Carlson, Hon. Ann T. Cochran, Sarah B. Duncan, Michael T. Gallagher, Anne L. Gardner, Honorable Clarence Guittard, Charles F. Herring, Jr., Tommy Jacks, Franklin Jones, Jr., Thomas S. Leatherbury, Gilbert I. Low, Hon. F. Scott McCown, Anne McNamara, Hon. David Peeples, David L. Perry, Anthony J. Sadberry, Stephen D. Susman, and Paula Sweeney.

Ex-Officio Members absent: Paul Gold, W. Kenneth Law, Mark Sales, Hon. Paul Heath Till, and Paul Womack.

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

Chairman Soules brought the meeting to order.

Professor Dorsaneo presented his report on Section 3, Pleadings and Motions.

Mr. Dorsaneo brought up for discussion new Rule 26, Counterclaim and Cross-Claim (current Rule 11). The Subcommittee proposed retaining Rule 97, renumbered in this recodification except for the elimination of current subdivision (g). Discussion followed. The Committee accepted the Subcommittee's recommendation to delete (g).

Professor Dorsaneo brought up for discussion Rule 27, Third Party Practice (current Rule 38). Discussion followed. Joe Latting commented the Committee needs to address the question of whether we want to have a leave of court requirement at all or just say you can file a third party complaint subject to being stricken for the usual reasons. Discussion followed. Professor Dorsaneo indicated the choices are to leave it the way it is and let it be worked out by case law interpretations or take "leave of court" out of it altogether and leave it up to the judge and the remainder of the law, or we could have leave of court at the time. Discussion continued.

Joe Latting proposed taking the leave of court requirement out all together and leaving it up to the judge to balance these things as the suit required instead of trying to anticipate all the permutations that might occur and impose some arbitrary time limits. Discussion continued.

Joe Latting proposed changing the 30-day time limit to 90 days. Discussion continued. Richard Orsinger seconded Joe Latting's motion to change to 90 days after the starting date and have the starting date run from appearance day rather than the day the pleading is filed.

A vote was taken and by a vote of 8 to 3, the Committee adopted 90 days from appearance day. John Marks made a motion to add David's suggestion regarding joinder of new parties. Joe Latting seconded the motion. Chairman Soules called for a vote of those who think that the plaintiff should have to get leave of court to add plaintiffs. By a vote of 6 to 7, the plaintiff does not need to get leave. Discussion continued.

Chairman Soules called for a vote of those in favor of triggering a new 90-day period of free third party practice after the addition of a new plaintiff or an intervention. John Marks proposed that we vote first on whether or not there be a new free period after new parties are added and talk about the times separately. Chairman Soules called for a vote on a new period of free third party practice along the process of the case when any new plaintiff or intervention is added. By a vote of 8 to 4, there will be a new period. Chairman Soules called for a vote on the 90 days. The Committee voted 7 to 5 against 90 days in that context. A vote was taken on 45 days with one member in favor. A vote was taken on 30 days with ten members in favor.

A vote was taken on Rule 27 as amended, there being no opposition the Committee unanimously approved Rule 27.

Professor Dorsaneo brought up for discussion Rule 28, Amended Pleadings (current Rules 62, 63, 64, 65, 66, and 67). Professor Dorsaneo explained subdivision (a) and there being no objection, the Committee approved 28(a).

Professor Dorsaneo advised that the second unnumbered paragraph of 28(a) is current Rule 65 verbatim. There being no objection, the second paragraph of 28(a) was accepted by the Committee.

Professor Dorsaneo brought up for discussion subdivision (b) which is current Rule 63. Professor Dorsaneo advised that we had received several letters requesting the 7 days be expanded to 30 days. Discussion followed. Joe Latting brought up for discussion the problems that may cause for the summary judgment practice. Discussion continued. Richard Orsinger proposed disjoining the amending pleadings before summary judgment from a final trial and vote on them separately. Professor Dorsaneo proposed language "conventional trial rather than summary judgment." Discussion continued. Chairman Soules proposed having a 45-day setting on a summary judgment.

Chairman Soules called for a vote on whether the time should be the same regardless of what kind of trial it is. By a vote of 10 to 1, it should be the same.

Chairman Soules called for a vote of those in favor of a 45-day summary judgment rule just like other 45-day trial settings and 30 days for amended pleadings. Judge Brister requested discussion on this matter before a vote was taken. A vote was taken on the number of days. There were 7 members in favor of leaving it 7 days. There were 2 members in favor of 14 days, and there was one member in favor of 30 days.

Chairman Soules inquired whether anyone was interested in pursuing debate about whether we should have one period for amended pleadings for a conventional trial and a different period for summary judgment. Joe Latting and Richard Orsinger voiced interest. Chairman Soules advised that everyone was in agreement that summary judgment should be 7 days. Chairman Soules called for another vote on how many days for conventional trials. There were no votes for 7 days, 2 votes for 14 days, and three votes for 30 days. The discussion continued regarding splitting the amount of days between the two. Joe Latting made a motion to leave the pleading amendment rules the way they are. Chip Babcock seconded the motion. A vote was taken and by a vote of 9 to 3 it stays 7 days.

Professor Dorsaneo brought up for discussion the second paragraph of Rule 28(b) which is current Rule 64. A vote was taken and there being no opposition, Rule 28(b) was approved.

Professor Dorsaneo advised that 28(c) and 28(d) are verbatim of current Rules 66 and 67. Rusty McMains brought up for discussion the language in (b) that reads, "party amending must file a substitute pleadings or motion that is in entitled 'First Amended Complaint' or 'Second Amended Complaint.'" Stephen Yelenosky inquired whether or not these are examples and if so they need to indicate that they are. Discussion continued. Chairman Soules suggested stopping after the words "Third Amended Motion." A vote was taken on paragraph 28(c) and (d), there being no opposition, those were accepted.

Richard Orsinger advised that the issues raised in the letters from Hadley Edgar, Broadus Spivey, and Edgar Levine regarding Rule 90 and 91 have been addressed in the revisions to the Special Exceptions Rules. The only thing missing in the Special Exceptions Rules is the number of days you have to file your special exceptions. Chairman Soules advised he wanted to go ahead and get the number of days assuming that we don't have a discovery window. To start the debate, Chairman Soules brought up the following issues for discussion: (1) if a party can amend up to seven days prior to trial, how can we require special exceptions to be done earlier than that; (2) people that are serious about their special

exceptions are not going to wait that late to start getting the pleadings to where they are understandable, to find out what kind of discovery to do, and what kind of dispositive motions to make; and (3) if the defendant believes they know what the case is about from reading the plaintiff's pleadings but realizes there is some slippage and is only trying to get a strict construction of the pleadings as opposed to a broad construction of the pleadings and they are using special exceptions to make the pleadings strictly construed for purposes of trial, they could file a special exceptions after the last pleading and preserve error of a too-broad of a construction of pleading. Discussion followed. A vote was taken and the Committee voted to keep the present practice as it is.

Professor Dorsaneo proposed adding "a reasonable time before trial." Don Hunt seconded the motion, a vote was taken, and there being no opposition, that language was approved.

Professor Dorsaneo brought up for discussion Section 2, Commencement of Actions; Service of Process, Pleadings, Motions and Orders.

A discussion was had regarding the citation rules and whether or not they should be consolidated or should be left alone. Professor Dorsaneo will draft one general rule with the exceptions.

Carl Hamilton advised that the Court Rules Committee is in the process of drafting a change to the 3-day rule and making it 5 days instead and was wondering if there was any interest in this Committee doing the same thing. Discussion followed.

Professor Dorsaneo explained Rule 5, Commencement of Suit, which is current TRCP 22 and 6. There being no opposition to Rule 5, the rule was accepted by the Committee.

Professor Dorsaneo explained Rule 6, Time, which is current TRCP 4 and 5. There being no opposition, the Committee approved Rule 6 with the exception that (c) is to be conformed to the appellate rules.

Professor Dorsaneo brought up for discussion Rule 7, Issuance and Service of Process; Citation, which is current TRCP 15, 105, 161, 126, 99, 103, 178, 106, 107, 108, 108(a), 119, 118. Professor Dorsaneo proposed adding into Subdivision (a) the following language, "No process shall be issued or served on Sunday, provided that citation by publication published on Sunday shall be valid." Discussion followed. Professor Dorsaneo also proposed changing the title of Subdivision (a) to "Issuance and Form." Chairman Soules indicated that you also have to put the exception on injunction, attachment, garnishment, sequestration, or distress proceedings in there also. There being no opposition, that will be done.

Professor Dorsaneo advised that the rest of Rule 7 has already been approved.

Professor Dorsaneo advised that Rules 8 and 9 have already been approved.

Professor Dorsaneo brought up for discussion Rule 10, Service and Filing of Pleadings, Motions and Other Papers, which is current TRCP 21, 21a, and 21b. Discussion followed. There being no opposition, Rule 10(a) was approved.

Professor Dorsaneo advised that paragraph (b)(2), (3), (4), and (5) are identical to 21a. Paragraph (a) was modeled after the Federal rule. Discussion followed. Professor Dorsaneo advised that (b)(1) needs to be redrafted and requested that it be put back on the agenda. Other than (1) the remainder of Rule 10(b) was approved.

Professor Dorsaneo brought up for discussion Rule 10(f), Sanctions, current TRCP 21b. Professor Dorsaneo advised that it should be (c) instead of (f).

Professor Dorsaneo reported on what remained to be done to complete his project. A discussion was had regarding what to do with the JP rules. Chairman Soules advised that it is up to the Supreme Court to tell this Committee whether or not the JP rules need to be discussed.

David Jackson presented the report on Rule 188, Depositions in Foreign Jurisdictions. Discussion followed. Mr. Babcock pointed out an inconsistency between (a) and (c). The reference to the words "clerk of" need to be taken out of the sentence that reads "must be issued by the clerk of the court." Discussion continued regarding same.

Chairman Soules brought up a concern in (f) where it says, "so long as the terms of any applicable treaty or convention are met." Chairman Soules proposed deleting that language. Richard Orsinger and Professor Dorsaneo agreed. There being no opposition, that language was deleted. A vote was taken on Rule 188 and there being no opposition, it was unanimously approved by the Committee.

Bonnie Wolbrueck advised the Committee that the clerks have filed a couple of bills with the Legislature with regard to the jury fee in Rule 216 and regarding Rule 119a.

Chairman Soules presented Paula Sweeney's report on TRCP 216-295.

Chairman Soules brought up for discussion Judge Evans' letter regarding Rule 243. Judge Evans proposed adding the words "and causation." A vote was taken and the recommendation was rejected

by the Committee. Judge Evans also proposed inserting "either on the record in open court or by affidavit testimony submitted without further record." Discussion followed. Chairman Soules called for a vote of those who believe that a party should be able to prove damages in a default judgment case by affidavit. There being no objection, that was unanimously approved. John Marks brought up for discussion whether or not that is also in connection with situations where a jury has been demanded. Discussion followed.

Rusty McMains brought up for discussion a problem with the word "only" in the sentence "a party taking a default judgment in an unliquidated damages case may use only affidavit proof of damages." Discussion followed. John Marks proposed using the special appearance language on use of affidavits. Discussion continued. Chairman Soules advised that Professor Dorsaneo will incorporate this information into his drafting.

Chairman Soules brought up for discussion the letter from Professor Albright to Paula Sweeney regarding Rules 221-236 and advised that it has already been taken care of.

Chairman Soules brought up for discussion Professor Muldrow's comments regarding Rule 277 and the Subcommittee's intent to change 277 so that a general denial would no longer be a sufficient pleading to support submission of inferential rebuttals. Discussion followed. Chairman Soules proposed fixing it some place besides the charge rules, maybe the pleading rules. Discussion continued. A vote was taken on those who wanted to have the pleading rules specific that a party who is going to rely on inferential rebuttal instruction must plead the predicate for that instruction in their pleadings. There being no opposition, that concept was approved. Discussion continued regarding this issue.

Chairman Soules advised that Pat Hazel's input regarding amendments to 226, 226a, 236, and 271 through 279 have been taken into consideration in the jury charge rules that have been sent to the court. Chairman Soules also advised that the issues raised by Jim Parker have also been dealt with.

Robert Meadows made the comment that there needed to be something in the amendment rules to provide for a notice that would accompany an amended petition if there were additional plaintiffs included so it is not left to the defendant to plow through hundreds of names to find out if there are any newly added plaintiffs. Chairman Soules proposed making some requirement that there be a paragraph that specifically identifies any newly added plaintiffs. There being no disagreement, that language will be incorporated into the rules.

The meeting was adjourned.