

MINUTES OF THE
SUPREME COURT ADVISORY COMMITTEE
SEPTEMBER 19-20, 1997

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock a.m. on Friday, September 19, 1997, pursuant to call of the Chair.

Friday, September 19, 1997

The 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, Professor Alex Albright, Pamela Stanton Baron, Hon. Scott Brister, Professor Elaine A. Carlson, Professor William V. Dorsaneo III, Charles F. Herring, Tommy Jacks, John H. Marks, Jr., Russell H. McMains, Robert Meadows, Richard R. Orsinger, Honorable David Peebles, Paula Sweeney and Stephen Yelenosky.

Ex-Officio Members Present: Carl Hamilton, David B. Jackson, Doris Lange, Mark K. Sales, Bonnie Wolbrueck and Paul Womack.

Members Absent: Alejandro Acosta, Jr., Charles L. Babcock, David J. Beck, Honorable Ann T. Cochran, Honorable Sarah B. Duncan, Michael T. Gallagher, Anne L. Gardner, Honorable Clarence A. Guittard, Michael A. Hatchell, Donald M. Hunt, Franklin Jones, Jr., David E. Keltner, Joseph Latting, Thomas S. Leatherbury, Honorable F. Scott McCown, Anne McNamara, David L. Perry, Anthony J. Sadberry, and Stephen D. Susman.

Ex-Officio Members Absent: Honorable William J. Cornelius, Paul N. Gold, W. Kenneth Law, and Honorable Paul Heath Till.

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

Chairman Soules brought the meeting to order.

Professor Alex Albright presented the report on the two remaining issues on venue The first being the concern about fraudulent joinder of parties and claims that would establish venue in a case and secondly how to allow the trial judge to determine the fraudulent joinder issues so that it would not affect the venue determine or that the judge could reconsider or take that into account in the venue determination.

The Subcommittee proposed going with the language in paragraph (8), Subsequently Joined Defendants, Reconsideration of Motions and not have the language in paragraph (d)(1) that reads "provided that on motion of any party or on the court's initiative the trial court may defer the hearing on the motion to transfer and conduct other

proceedings in the case without prejudice to any party's venue rights." Discussion followed.

Chairman Soules indicated the scope of the discussion is where the judge has a revelation or something new and important comes up and the judge decides that he or she will reconsider and whether or not the committee wants this to be the policy or not. Discussion continued.

Justice Enoch stopped by and expressed his thanks to the committee.

Chairman Soules called for a vote to get a consensus on how many feel that the rule should provide that there be neither a motion or a hearing to reconsider venue once it's been determined +except for the addition of parties. There were seven members in favor of this provision. There were five members that felt there should be reconsideration of venue through the trial process.

Chairman Soules called for another vote. The vote was eight (8) to five (5) in favor of reconsideration.

Chairman Soules instructed everyone to vote and took another vote. The vote was eleven (11) to five (5) in favor of reconsideration.

Rusty McMains asked if the motion to transfer for convenience was embraced within the motion to transfer. Discussion followed. Rusty suggested transfer of venue for inconvenience be an exception to the reconsideration. Discussion continued.

A vote was taken on whether or not to include the ground of inconvenient venue in the reconsideration. Fourteen members felt it should not be included with no members voting that it should be included.

Professor Dorsaneo brought up for discussion the issue of not having interlocutory appeal on venue rulings. Discussion followed.

Chairman Soules brought up for discussion the language contained in (d) Improper or Inconvenient Venue, (1) Purpose; Due Order Requirements.

Professor Dorsaneo proposed "other proceedings not involving an adjudication of the merits in this case, without prejudice to any party's venue rights..." Discussion continued.

Chairman Soules indicated there are three positions: (1) maintaining the waiver status of the law we have right now; (2) nondispositive, motions not adjudicated over merits, and (3) permit any proceedings without wavier.

Discussion continued.

A vote was taken and by a vote of 11 to 3 the committee voted for no change in the current rule . Chairman Soules indicated that last sentence on the top of page 3 will be rewritten to be the current rule and reconsideration will be left in.

A brief discussion was had regarding paragraph (7) Discovery Practice.

Gilbert Low presented the report of the Subcommittee on the Rules of Evidence.

Mr. Low brought up for discussion Rule 503 and advised that the subcommittee recommended no change. Discussion followed. A vote was taken and by a vote of six (6) to three (3) the Committee voted in favor of the subcommittee's recommendation for no change.

Mr. Low brought up for discussion Rule 702, Testimony by Experts. Mr. Low advised the subcommittee favored not making changes to the rule but because they felt the Court wanted one they drafted something. Mr. Sales reported on the position of the State Bar Committee on Evidence. Justice Hecht presented the Court's views. Discussion followed.

A vote was taken and by a vote of 11 to 2 the committee voted for no change.

Justice Abbott stopped by and expressed his thanks to the committee.

Professor Dorsaneo brought up for discussion proposed new Rule 7, Citation; Other Writs and Processes. A discussion was had regarding "general appearance", "default judgment", "general denial". Chairman Soules proposed adding after "general appearance" the language "without waiver of the defendant's rights under the due order of pleadings rule." Professor Dorsaneo proposed taking the sentence out. Discussion continued.

Professor Dorsaneo proposed instead of saying "presumed to have entered a general appearance" say the defendant need not be served with citation and add "may defend by filing a responsive pleading within 20 days after the mandate is filed in the trial court." Discussion continued.

Chairman Soules proposed "shall be deemed to have filed a general denial 30 days after the mandate issues." Discussion continued.

Professor Albright proposed doing the same as was done for motion to quash, that the party is deemed served on _____ (pick a date), the date the mandate is issued, then they have to respond in

20/30 days following that day. Discussion continued.

Chairman Soules obtained a consensus that the defendant has got to be protected both following a successful motion to quash and a remand from appeal from a subsequent default judgment for failing to file an answer.

Chairman Soules asked for a consensus of who felt that the defendant who successfully moved to quash or successfully reverses a judgment because he was not served should have the opportunity to file Rule 25 due order of pleadings pleadings. Discussion followed. By a vote of 6 to 5 the committee voted that the Rule 25 due order of pleadings pleadings should be available.

Richard Orsinger asked to address the issue of a default judgment that's reversed on a motion for new trial and then appeal. The proposal failed for lack of a motion.

Chairman Soules called for a vote of those who felt that the time to file Rule 25 due order of pleadings pleadings should be limited. The committee voted there should be a time limit. There will be a time limit after the motion to quash is granted and the appeal trigger will be the issuance of the mandate or order quashing citation. The committee voted that the time limit should be 30 days. Thirty days after the triggering events, if nothing if filed, it's deemed a general denial.

Professor Dorsaneo brought up for discussion proposed new Rule 38, Derivative Pleadings. There being no opposition Rule 38 was approved.

Professor Dorsaneo brought up for discussion proposed new Rule 41, Substitution of Parties. There being no opposition Rule 41 was approved.

Professor Dorsaneo brought up for discussion proposed new Rule 72, Order of Trial. There being no opposition Rule 72 was approved.

Professor Dorsaneo brought up for discussion proposed new Rule 73, Subpoena. There being no opposition Rule 73 was approved.

Professor Dorsaneo brought up for discussion proposed new Rule 85, Deliberations. There being no opposition Rule 85 was approved.

Professor Dorsaneo brought up for discussion proposed new Rule 102(f), Partial New Trial. Chairman Soules proposed deleting the word "only" in the sentence "...the judge may grant a new trial only as to that part..." There being no opposition Rule 102(f) was approved. Chairman Soules asked that it be conformed to TRAP 44.1(b).

Professor Dorsaneo brought up for discussion the concern of Donald Hunt that proposed new Rule 104(e)(8), Premature Filing was inconsistent with TRAP 27. Discussion followed. The committee voted to leave 104(e)(8) as previously approved.

Professor Dorsaneo brought up for discussion proposed new Rule 105(a), Definition and 105(b), Duration. There being no opposition Rule 105(a) and (b) were approved.

Professor Dorsaneo brought up for discussion proposed new Rule 130, May Appear by Attorney; Lead Counsel; Number of Counsel Heard; Attorney to Show Authority. There being no opposition Rule 130 was approved.

Professor Dorsaneo brought up for discussion proposed new Rule 132, Withdrawal of Attorney. There being no opposition Rule 132 was approved.

Professor Dorsaneo brought up for discussion proposed new Rule 133, Agreement of Parties or Counsel. There being no opposition Rule 133 was approved.

Professor Dorsaneo brought up for discussion proposed new Rule 144, Sealing Court Records. There being no opposition Rule 144 was approved.

Professor Dorsaneo explained why current Rules 133, 136, 137, 138, 139, 147, 148 should be repealed.

Professor Dorsaneo provided an overview of proposed new Rules 146-151, regarding costs. Discussion followed regarding same.

Professor Dorsaneo brought up for discussion the changes to proposed new Rule 146, Liability for Costs. A discussion was had regarding the language "The removal of a case by appeal shall not prevent the issuance of an execution for costs." Professor Dorsaneo recommended leaving the sentence out. Buddy Low seconded the recommendation. Discussion continued. Chairman Soules proposed changing the last sentence to read "Collection of costs shall not be affected by absence of jurisdiction of the court."

Richard Orsinger requested that the recommendation to delete Rule 138 - Costs for New Trial, be discussed. Discussion followed. A vote was taken and by a vote of 13 to 2 the committee voted to repeal Rule 138.

Richard Orsinger requested that the recommendation to delete Rule 133, Costs of Motion, be discussed. A vote was taken and by a vote of 12 to 1 the committee voted to repeal Rule 133.

Professor Dorsaneo brought up for discussion proposed new Rule 147, Security for Costs. There being no opposition Rule 147 was

approved.

Professor Dorsaneo brought up for discussion proposed new Rule 148, Affidavit of Indigency. There being no opposition Rule 148 was approved.

Professor Dorsaneo brought up for discussion proposed new Rule 149, Substitution of Parties. Chairman Soules proposed combining paragraphs (a) and (b). Professor Dorsaneo proposed "except for good cause to be stated on the record." Chairman Soules proposed "except the court may for good cause." Discussion followed. Judge Peeples commented that the judge should have discretion to tax costs against the party who really lost the case. Discussion continued.

Chairman Soules restated the proposed rule change as follows. Combine (a) and (b), take out the words "where otherwise provided" at the end of (a) and pick up with (b) "the successful party to a suit..." Discussion continued. Discussion was had regarding having a Federal Rule 68. Discussion continued.

Chairman Soules recommended that there be no Rule 150, Taxable Costs. Buddy Low seconded the recommendation. There being no objection Rule 150 was rejected.

Buddy Low made a motion to combine paragraphs (a) and (b) in Rule 149. Discussion followed.

Chairman Soules read the proposed combined paragraphs as follows "A successful party to a suit shall recover of his adversary all costs incurred therein except where otherwise provided by law or these rules. A vote was taken and by a vote of five to one the paragraphs will not be combined.

Professor Dorsaneo brought up for discussion Rule 151, Collection of Costs after Judgment. Chairman Soules advised that "court" in the second line needs to be changed to "peace." Discussion continued. Chairman Soules proposed changing the rule to read as follows "When costs have been adjudged against a party and are not paid by that party..." and "This rule should not apply to executors when costs are adjudged against the estate..." Discussion continued. Chairman Soules proposed the following language "upon demand of any person to whom such costs are due" instead of "a party."

Chairman Soules read the proposed language of the second sentence as follows: "This rule shall not apply to executors, administrators, or guardians, in their individual capacity where costs are adjudged against them as representatives of an estate of a deceased person or ward." Discussion followed.

Chairman Soules proposed deleting the second sentence.

Discussion continued. A vote was taken and by a vote of 3 to 1 the sentence was deleted.

Chairman Soules read into the record all changes to proposed New Rule 151. There being no opposition the rule was approved.

John Marks proposed changing the title to Rule 71 from "Good Cause Standard" to "Sufficient Cause Standard". There being no opposition the proposal was approved.

Richard Orsinger presented the report on the proposed changes to TRCP 140-144 to conform to the new appellate rules.

Professor Albright pointed out that in paragraph (c) of Rule 150, "the judge" should be changed to "the court." David Jackson questioned why the language regarding a written report was changed to not require the report to be written. Discussion followed.

Judge Peeples proposed changing the title from "Work" to "Work of Court Reporter." Discussion followed. David Jackson proposed changing it to "Workload Status." Judge Peeples proposed "Status Reports." Chairman Soules advised that the TRAP rules says "Court Reporter's Work." Paula Sweeney seconded the suggestion.

Richard Orsinger advised that paragraph (c) of Rule 142 was new. Discussion followed.

There being no opposition, Rules 140-144 as modified, were approved by the Committee.

Carl Hamilton presented the report on Rule 177b, Compelling Appearance of Parties and Production of Documents and Things. Discussion followed. Chairman Soules proposed changing the third line to read "attorney requesting the appearance, documents, or tangible things may serve notice a reasonable time before the trial or evidentiary hearing on the party's attorney." Discussion continued.

Carl Hamilton proposed adding language that would say the lawyer served has the same rights to complain about the notice that they would if the party was served with the subpoena. Discussion continued.

A discussion was had regarding taking out the subpoena range and putting in a reasonable time before.

Chairman Soules proposed changing the language in the third line to read "Attorney requesting appearance, documents, or tangible things may in lieu of a subpoena serve notice..." There being no opposition the language "in lieu of a subpoena" was approved.

Chairman Soules called for a vote on the rule with that modification. The committee voted 8 to 1 against the proposed changes to the rule. Richard Orsinger proposed putting in reasonable notice language and voting again. Discussion followed.

Chairman Soules called for a vote of those who would change their previous vote if the proposed rule was changed to add whatever they wanted to add. Eight members would not change their previous vote, two members would.

Carl Hamilton presented the report on Rule 173, Guardian Ad Litem. Discussion followed. Judge Peeples, Paula Sweeney and Judge Brister expressed their opinion that this is an enormous issue and cannot be dealt with in the time left.

Chairman Soules proposed changing the rule as follows: "The court shall appoint a guardian ad litem for such a person and prescribe the duties of the guardian ad litem and shall allow him a reasonable fee for his prescribed services to be taxed as part of the costs." Discussion continued.

Chairman Soules called for a vote on Rule 173 as proposed by the Court Rules Committee. Discussion continued. A vote was taken and by a vote of 9 to 3 the proposed change was rejected.

Professor Albright presented the report of the Subcommittee on the Proposed Discovery Rules with regard to the third supplemental agenda. Professor Albright advised that the letters contained in the third supplemental agenda are either criticizing or supporting the proposed discovery rule changes and do not contain any new requests for rules changes.

Carl Hamilton presented the report on Rules 226a and 281. Discussion followed. Richard Orsinger proposed the language be part of an order of the Supreme Court and not part of the rule. Discussion continued. John Marks made a motion to table until the task force is finished with its work. Judge Brister seconded the motion. A vote was taken and by a vote of 5 to 3 the proposed changes were tabled.

Professor Elaine Carlson presented the report on TRCP 79b, Peremptory Challenges. Discussion followed. Richard Orsinger proposed changing in the second paragraph the term "transcript" to "clerk's record" or "part of the record." Discussion continued.

Mr. Orsinger inquired whether "proffered explanations can be tested through cross-examination" meant unsworn cross examination. Discussion continued. Chairman Soules proposed "cross-examination under oath." Discussion continued.

Chairman Soules advised he was going to call for a consensus on deleting "unsworn" and saying "statements of counsel may be

offered" and whether or not to put "under oath" at the end of cross-examination.

Richard Orsinger proposed changing "waives the right to make additional peremptory challenges" to "A party determined to have improperly exercised a peremptory challenge forfeits that peremptory challenge."

Mr. Orsinger inquired why we were requiring that the ruling be written on the strike list instead of orally in court. Discussion followed. Chairman Soules proposed "The trial court is to return to the clerk the list of prospective jurors reflecting the sustained objections...". Discussion continued.

Chairman Soules proposed taking paragraph (c) off. Discussion followed. Robert Meadows proposed changing the first sentence to say "The trial court shall notify the clerk of the court's ruling. With that information the clerk shall call the first 12 in district court and the first 6 in county court." Discussion continued.

Chairman Soules proposed taking out the first sentence of paragraph (c) and putting the word "properly" before both "stricken's." Discussion continued.

Judge Brister voiced concern about the language in (b) about "before the jurors' names are announced." Discussion followed.

Chairman Soules proposed the following language "After the parties make their peremptory challenges, upon request any party may, outside the hearing of the panel and before the jurors' names are announced, review all parties' peremptory challenges and object to another party's improper exercise of peremptory challenges." Discussion followed.

Chairman Soules proposed the following language "After the parties make their peremptory challenges and present them to the court, upon request..."

A discussion was had on whether or not to take out the word "unsworn" from "Unsworn statements of counsel". A vote was taken and by a vote of 7 to 0 "unsworn" stays in.

Chairman Soules called for a vote on whether to add "under oath" after "cross-examination". By a vote of 8 to one "under oath" was not added.

Richard Orsinger made a motion to put "unsworn" before "cross-examination." Discussion followed. A vote was taken and by a vote of 5 to 2 "unsworn" was not added.

Chairman Soules advised that there being no opposition the last sentence of the paragraph will read "A party determined to

have improperly exercised peremptory challenge forfeits that peremptory challenge and waives any right to make any additional peremptory challenges." Further discussion ensued. Professor Carlson proposed "make a replacement peremptory challenge." Discussion continued.

Richard Orsinger proposed deleting the word "counsel" from "Counsel's voir dire notes are privilege...". Discussion followed. A vote was taken and by a vote of 7 to 2 "counsel" was taken out.

Chairman Soules called for a vote on Rule 79 as modified. By a vote of 10 to 0, Rule 79 was approved.

Paula Sweeney advised she would not be at Saturday's meeting but wanted it put on the record she opposed the offer of judgment idea. A discussion was had whether or not to address the offer of judgment issue. Chairman Soules indicated he wanted to put the concept on the record and then take a preemptive vote on whether there is any interest in such a rule.

Richard Orsinger presented the report on proposed new Rule 170, Offer of Judgment. Discussion followed. A vote was taken and by a vote of 8 to 3 the committee voted not to have a offer of judgment rule.

The meeting adjourned until 8:30 a.m. on Saturday.

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock a.m. on Saturday, September 20, 1997, pursuant to call of the Chair.

Saturday, September 20, 1997

The 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, Professor Alex Albright, Charles L. Babcock, Pamela Stanton Baron, Hon. Scott Brister, Professor Elaine A. Carlson, Gilbert I. Low, John H. Marks, Jr., Russell H. McMains, Robert Meadows, Richard R. Orsinger, and Stephen Yelenosky.

Ex-Officio Members Present: Carl Hamilton, David B. Jackson, and Doris Lange.

Members Absent: Alejandro Acosta, Jr., David J. Beck, Honorable Ann T. Cochran, Professor William V. Dorsaneo III, Honorable Sarah B. Duncan, Michael T. Gallagher, Anne L. Gardner, Honorable Clarence A. Guittard, Michael A. Hatchell, Charles F. Herring, Jr., Donald M. Hunt, Tommy Jacks, Franklin Jones, Jr., David E. Keltner, Joseph Latting, Thomas S. Leatherbury, Honorable F. Scott McCown, Anne McNamara, Hon. David Peeples, David L. Perry,

Anthony J. Sadberry, Stephen D. Susman and Paula Sweeney.

Ex-Officio Members Absent: Honorable William J. Cornelius, Paul N. Gold, W. Kenneth Law, Mark K. Sales, Honorable Paul Heath Till, Bonnie Wolbrueck and Hon. Paul Womack.

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

Chairman Soules brought the meeting to order.

Chief Justice Phillips stopped by and expressed his thanks to the committee.

Carl Hamilton presented the report on TRCP 4, Computation of Time and Rule 21, Filing and Serving Pleadings and Motions. Discussion followed. Chairman Soules advised the issue was whether to change Rule 6 passed previously. The motion failed for lack of a second. Discussion continued.

Chairman Soules advised that the Committee is going to make the change the Court Rules Committee proposed to Rule 4 and not recommend the five days. Discussion continued.

Robert Meadows asked for a clarification of which order you apply Rule 21a, whether it comes first or add it to the end. Discussion continued.

Carl Hamilton presented the report on Rule 166d, Disclosure Upon Written Request. Discussion followed. Chairman Soules advised that the proposed change will be submitted through Mr. Orsinger to the Family Law Council.

Chairman Soules advised that the attorney general opinion does not invalidate Rule 143a. The Committee voted to preserve Rule 143a.

Chairman Soules presented the request from Allen E. Smith regarding proposed changes to Rule 166a. The committee voted to take no action on this request.

Chairman Soules presented the report on the problem raised in Matter of R.S.C., 940 S.W.2d 750 (Tex. App. - El Paso 1997). The committee voted to refer this matter to Professor Robert O. Dawson.

Chairman Soules presented the report on the problem raised in Lipshy Motorcars v. Sovereign Associates, 944 S.W.2d 68 (Tex. App. - Dallas 1997). Lee Parsley indicated that the new appellate rules say that the court may assess sanctions if the appeal is frivolous in both the Supreme Court and the court of appeals which fixed this problem.

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Richard Orsinger presented the report of the Family Law Council regarding Expert Witness Reports. Discussion followed. Mr. Orsinger proposed changing the language in (b) to read "any other party may, within 14 days of service of a copy of a verified report or amended verified report." Discussion continued. A vote was taken and by a vote of 6 to 5 the proposed rule failed.

Richard Orsinger made a motion that part (a), subject to rewrite, be made a hearsay exception under Rule 803 for Title 1 family law cases. Discussion followed. A vote was taken and by a vote of 10 to 1 the motion failed.

Chairman Soules thanked the members of the committee for four years of hard work and adjourned the meeting.