MINUTES OF THE

SUPREME COURT ADVISORY COMMITTEE

JANUARY 21-22, 1994

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock a.m. on Friday, January 21, 1994, pursuant to call of the Chairman.

Friday, January 21, 1994:

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

Members present: Chair Luther H. Soules III, Alejandro Acosta, Jr., Professor Alexandra Albright, Charles L. Babcock, Pamela Stanton Baron, David J. Beck, Honorable Scott A. Brister, Honorable Ann Tyrrell Cochran, Professor William V. Dorsaneo III, Sarah B. Duncan, Anne L. Gardner, Honorable Clarance A. Guittard, Michael A. Hatchell, Charles F. Herring, Jr., Tommy Jacks, Joseph Latting, Thomas S. Leatherbury, Gilbert I. Low, Honorable F. Scott McCown, Russell H. McMains, Robert E. Meadows, Harriett E. Miers, Richard R. Orsinger, Honorable David Peeples, Stephen D. Susman, and Stephen Yelenosky.

Ex-Officio Members Present: Paul N. Gold, David B. Jackson, Honorable Doris Lange, Honorable Austin McCloud, Honorable Paul Heath Till, Honorable Bonnie Wolbrueck.

Members absent: Professor Elaine Carlson, Michael T. Gallagher, Donald M. Hunt, Franklin Jones, Jr., David E. Keltner, John H. Marks, Jr., David L. Perry, Dan R. Price, Anthony J. Sadberry and Paula Sweeney.

Ex Officio Members absent: Honorable Sam Houston Clinton, J. Shelby Sharpe, Thomas C. Riney.

Also present: Chief Justice Thomas Phillips, Lee Parsley, Holly Duderstadt, Denice Smith for Mike Gallagher and Carl Hamilton for J. Shelby Sharpe.

Chairman Soules called on Joe Latting to present the sub-committee recommendation for a new discovery sanctions rule.

Mr. Latting distributed to the Committee two versions of the proposed rule. The first was the sub-committee recommendation, the second was the minority report authored by Tommy Jacks.

Mr. Latting and Mr. Herring explained that the sub-committee changed the Task Force draft in the following particulars. The title was changed to make clear that the rule encompassed more than

sanctions. The certificate of conference requirement was made more "substantial." A comment regarding mandamus was added. A comment to "discourage . . . young lawyers" from filing sanctions motions was also added. The standard was changed from "substantially justified" to "reasonably justified" which the sub-committee viewed as a lower standard. The intent was to make clear that a person is not sanctioned for a reasonable discovery dispute - the person is not sanctioned simply because he/she was on the losing side. The phrase "in writing" was added to the reprimand sanction and (3)(h) was deleted from Task Force proposal.

It was explained that the majority of the sub-committee did not want to take away the discretion of the trial judge to sanction, and the majority believed the minority report takes away that discretion. The majority viewed the minority proposal as too restrictive on the trial judge and as requiring that the aggrieved party make two trips to the courthouse to get relief.

Mr. Herring said that the issue was whether the SCAC wanted a two step process or not because that was the only significant difference between the two proposals. The availability of large sanctions is not much different between the two drafts.

Mr. Jacks explained the minority report. He believed the SCAC had evidenced an opinion at the November meeting that attorneys were wasting too much time and energy on the sanctions practice and wanted the rule divided between misconduct and bona fide discovery disputes. Majority proposal is mere "tinkering" with the Task Force proposal and does not reflect the desires of the SCAC.

Minority report does not allow the imposition of attorney fees in bona fide discovery disputes. Amount of expenses awarded subject to the ability of the party to pay.

Judge McCown opined that General Motors would always get to pay the sanction and that the "poor old plaintiff" would never have to pay, which seems unfair.

Mr. Jacks accepts criticism as valid. Rule allows the court to go directly to sanctions if discovery abuse cannot be corrected by a court order, such as destruction of evidence, or in the case of repeated violations.

Mr. Latting inquired if repeated violations applied to one case, or a general pattern of discovery abuse in all cases by that party.

Mr. Jacks says it could be read either way, but was intended to be limited to one case. Minority rule requires that motion clearly state that sanctions are sought and must be supported by affidavit.

Discussion ensued regarding particular facts and how proposals would apply to each set of facts. Agreed that the minority proposal would make obsolete the $250.00 award of fees.

Judge Brister suggests that a recurring problem is that discovery is not answered at all. He thinks there must be some ability to threaten sanctions to get answers.

General agreement that both proposals would allow an order compelling responses without an oral hearing, but there is nothing to prevent a hearing.

Discussion again ensues regarding the "unreasonably burdensome" language of minority report. Suggested that it will spawn satellite litigation regarding what is "unreasonably burdensome" for any particular party. Proposed to simply pick a number and put it in the rule.

General discontent with picking a number. Amounts to price fixing in sanctions practice. General agreement that the modest award of attorney fees are seldom collected.

Judge McCown argues that there is no need for a resources test in the rule because trial judges apply a test intuitively and putting a test in the rule does not improve the outcome but increases the cost because of satellite litigation over resources.

Discussion of requiring that the loser in any sanctions or discovery motion have to pay attorney fees. Opposed as the loser may in fact be the winner in some cases.

Steve Susman suggests that the proposals are too wordy, and the more words the more litigation. Wants a rule that says that if the position of a party is not reasonably justified, sanctions are imposed - as easy as that.

Mr. Soules inquires didn't the Committee, in the November meeting, vote to include sanctions for filing a frivolous sanctions motion. Agreed that it was proposed but never voted on.

Mr. Susman suggests we stop tinkering with all this. Sanctions are declining anyway. Make rule match recent Supreme Court decisions and go on. Judge Brister suggests that Task Force proposal did just that.

Thomas Leatherbury suggests that the "private reprimand" of the proposed rule is inconsistent with TRCP 76a. How can it be private? General agreement. Suggest that the rule be changed to "Reprimanding the offender." Courts don't do anything private.

Justice Hecht comments he is in sympathy with Mr. Jacks proposal, but we want to express fundamentals in the rule and not

particulars. Standard to set aside a default judgment has 3 elements and only one sentence. This rule has 2 pages for less effect than a default judgment. Basic principals are being obscured.

Further discussion of the "unreasonably burdensome in relation to the resources of that party . . ." language. Suggestion that the amount be set at $1,000.00. Again, argued that this "fixes a price."

Sarah Duncan suggests that motion to compel be on written submission only. Argued that there is a cost to the system to allow everyone to go to court for an oral hearing.

Joe Latting moves adoption of subcommittee report with change in (3)(a) to strike anything after "offender" and with editorial changes on back page. Second by Mr. Herring.

Mr. Jacks moves to amend motion to substitute minority report part (2) for majority report part (2), and that part (2)(c)(1) of minority report be amended to say "unreasonably burdensome" and no more. Judge McCown seconds.

Mr. Latting will not accept amendment. He will agree to two specific proposals - that the motion state specifically the sanctionable conduct and that it be verified.

Buddy Lowe comments that the proposed rule does not address depositions, where old TRCP 215 does. Lets not kill something by ignoring it. Chuck Herring - see appendix D, E & F of Task Force proposal for disposition of all these kinds of matters. They are to be put in the specific rules. Mr. Soules indicates it was a policy decision in 1984 to include all sanctions in one rule, including exclusion of witnesses and deeming admissions. The proposed rule would change that policy.

Professor Dorsaneo says requiring more sworn pleadings is a step backwards. General agreement. Justice Hecht said "You can hold them in contempt - why do you want the DA to indict them?"

The Committee voted 10 to 4 against having a motion for sanctions sworn.

The Committee voted unanimously in favor of dropping the words "in fact or law" from paragraph 166d(2).

A discussion was had regarding the terms "substantially justified", "reasonably justified" and "groundless" in proposed 166d(2). There was a discussion about why the subcommittee did not keep "substantially justified" which is from FRCP 15 and has been widely interpreted. There was another suggestion that "groundless" from TRCP 13 be the standard. The response was that "reasonably

justified" is a lower standard than "substantially justified" and that "groundless" is a de novo right/wrong test which is inappropriate. The Committee voted that the standard should be "reasonably justified".

Rusty McMains asked do we have the burden to plead and prove it was reasonably justified?

There was a consensus of the Committee that no pleading or proof is necessarily required.

Further discussion of reasonably justified standard. Mr. Soules suggests that the sentence in paragraph (2) be split as shown on page 2 of draft. The suggestion was unopposed.

Discussion of when an award is "substantial" which would require an oral hearing. Again, suggested that a number be inserted in rule. Again, that is opposed by many. Suggested that all hearings be oral to take care of problem. Suggested that the trial judge will simply hold a hearing any time a party claims an award was substantial.

Justice Hecht says fundamental idea that it is wrong to take money without giving the person an ability to speak, if more than incidental amount.

Richard Orsinger asks isn't this a judgment to be collected after final judgment? If so, how is the party precluded access to the court? A money judgment should not preclude access.

Mr. Lowe favors giving trial judge more discretion about the sanction and when it should be collected. (Can't give them a "handbook on how to mount the bench . . . or how to go to the bathroom.")

Mr. Soules recesses for lunch.

Meeting reconvened by Mr. Soules.

Mr. Soules comments if we leave "substantial" in the rule, we have another place to litigate. Suggests we drop "substantial" from the rule and only get to *TransAmerica* when we preclude access to the court.

Mr. McMains tends to think we need to have the safeguards of *TransAmerican* without it precluding access.

Judge McCown suggests we delete sentence referring to TRCP 21 and 21a in proposed rule as unnecessary.

A discussion was had that in the last sentence of 166d(1)(a) the sentence "without the necessity of court intevention" would be deleted from the Committee's draft.

There was no opposition to deleting the sentence "Motions or responses made under this rule shall be filed and served in accordance with Rules 21 and 21a".

Professor Dorsaneo moves to put a $500.00 standard into the rule and remove the word "substantial."

A vote was taken on changing the word "substantial" in paragraph 166d(2) to "not to exceed $500.00" and failed 10 to 4.

Mr. McMains says the court needs a number if we decide to go with a number rather than "substantial."

The committee voted on the amount of money as follows: $500 - 11 for; $800 - 1 for; $1000 - 6 for; $1500 - 1 for.

Then the Committee voted on $500 v. $1000 as follows: $500 - 13; $1000 - 7 for.

A discussion was had on whether to add at the end of paragraph 166d(1)(a) some language about notice of affidavits identical to Rule 120a. Mr. Orsinger made a motion that 7 day notice be required if motion supported by affidavit (referring to special appearance practice under 120a). Judge Scott Brister says its just another trap for the unwary. Judge McCown suggests that affidavit is hearsay if rules of evidence apply to a sanctions hearing, and is therefor inadmissible. Need to decide if rules of evidence apply.

More discussion of affidavit requirement generally.

The Committee voted 11 to 8 that there should be a seven day rule for affidavits.

Mr. McMains raised the question whether (1)(b)(i) means that all items must be submitted with the motion (i.e. filed with motion) or at time motion is argued? Mr. Susman suggests taking out "submitted with the motion." Mr. Latting accepts amendment. There was no opposition to deleting the words "submitted with the motion" after the word "affidavit" in paragraph 166d(1)(b)(i).

Further discussion of affidavit requirement and 7 day notice requirement. Questions regarding notice requirement if there is no oral hearing and whether live testimony will be available at the hearing. Justice Hecht says we're going the wrong way; institutionalizing all this makes it a bigger rule than it is. Mr. Soules suggests see *Millwrights Local* on using an affidavit.

Ms. Duncan is of the opinion that if you are subject to a substantial amount of sanctions, you ought to be able to cross examine witnesses. Mr. Orsinger thinks affidavit is important to put records in evidence through a custodian.

Judge Brister asks are we going to have jury trials for sanctions?

Justice Hecht comments why do all this here an not in TRCP 13 which simply says "notice and hearing."

Mr. Soules made a motion to change "the Court shall base its decision" to "the Court may base its decision" in paragraph 166d(1)(b). There was no opposition to this change.

Judge Cochran asked why you require an affidavit for a small problem; you just increase attorney time to prepare affidavit which the attorney will then try to tack onto the sanction.

A motion was made to reconsider the seven (7) day rule. The motion failed 10 to 4.

After more discussion, Judge McCown moves to take out entire sentence [3d sentence of (1)(b)]. The committee voted 10 for and 10 against adopting paragraph 166d(1)(a) (b) and (c) as written.

Discussion continued. Justice Hecht comments it must be discretionary with trial judge. Sometimes sanction is so sever that you must have evidentiary hearing, sometimes not. Prefers "on notice and hearing" and use that term everywhere in rules. Susman agrees that sanctions should not be treated differently.

Mr. Herring says ABA rules require "fair notice and opportunity to be heard" and include a note regarding the kind of hearing.

The Committee voted 15 to 4 to remove the last sentence of 166d(1)(b). The Committee is split evenly with this last sentence in.

The Committee voted again on whether to remove the last sentence of 166d(1)(b) resulting in a vote of 14 to 8.

The Committee voted 18 to 3 to accept paragraph 166d(1) as it has been amended by the Committee's action.

The Committee now returns to Jacks motion to amend Latting's motion regarding substitution of paragraph (2). (Recall that "unreasonably burdensome in relation to the party's resources" is amended to be "unreasonably burdensome."

The Committee voted 13 to 11 to substitute the paragraph 2 contained in Tommy Jack's draft for the paragraph 2 in the Subcommittee's draft.

Luke Soules made a motion to change "enter" to "make" in the third line of paragraph (3). The Committee voted 18 to 0 in favor of the change.

Discussion of paragraph (4). Discussion of when sanctions are to be payable. Judge McCown likes to make small sanctions payable immediately. Judge Cochran say that if small fines are paid immediately, the attorney stays up all night trying to get even via another sanctions motion and if payment date is missed, there are more problems and hearings.

Discussion of whether (4) is backwards in light of *Braden*. Mr. Herring moves that language from *Braden* be substituted for sub-committee draft.

A suggestion was made that there will be two hearings - the first will impose the sanction and the second will determine if the sanction is unreasonably burdensome. Judge McCown says it won't really be a problem - not really a question very often.

Mr. Latting moves to leave the question of whether sanction is payable immediately and how to comply with *Braden* with the trial court and have nothing in rule. The Commitee voted 11 to 1 in favor of allowing the Court discretion when to award the monetary award and that language consistent with Braden be adopted.

The discussion turned to paragraph (5). Ms. Duncan suggests "An order under this rule shall be subject to review on appeal." Debate ensued on this sentence. Suggested that this sentence suggests interlocutory appeal.

Judge Brister queries if a Mother Hubbard clause of final order expunges a sanctions order. Professor Dorsaneo says that all orders which precede the final order are part of the final judgment.

Judge McCown suggests deletion of paragraph (5) as it is an order like any other order.

Discussion ensues regarding appealability of sanctions against a non-party. Mr. Orsinger suggests making it final as in TRCP 76a.

Discussion ensues regarding superseding sanctions order pending appeal.

Professor Albright suggests that mandamus would take care of supersedeas problem. Judge Guittard advocates deletion of paragraph (5); says TRAP 43(d) takes care of supersedeas problem;

and mandamus will take care of extreme cases. Mr. Soules says TRAP 43 does not take care of supersedeas problem.

Ms. Duncan says mandamus is too uncertain and wants a certification process so that mandamus elements no longer need be distorted.

Professor Dorsaneo suggests making all awards part of final judgment.

Mr. McMains comments that case law says that failure to pay can be taken into account for cumulative sanctions/conduct - so you could still suffer consequences. In addition, supersedeas money is not recoverable.

Justice Hecht suggests that rules could provide that no supersedeas is required for these things and the award would be stayed during appeal.

Motion to accept paragraph (5) as written. Motion to delete paragraph (5); second.

Discussion of whether paying a sanction would waive your right to appeal, as paying a judgment without resistance waives right to appeal. Judge Cochran suggests that a judgment is just a finding of liability where this is an order to pay. Thus, there is a difference.

The Committee voted 11 to 8 to take paragraph (5) out.

Professor Dorsaneo suggests paragraph (5) read: "An order under this rule is subject to review from the final judgment by any party or person aggrieved by the order."

Discussion about which court would review a sanctions order of a non-party living in another county. Consensus that subcommittee should review this problem.

The Committee voted on Professor Dorsaneo's proposal for picking up language in 215 and adding Judge Brister's language. The vote was the House against one.

A discussion ensued regarding the consensus of the committee regarding sanctions against a party who files a groundless or frivilous motion.

Judge Cochran announced that the Jury Charge subcommittee had not completed its work.

Judge Guittard gave a progress report of the revisions to TRAP. Will propose that bond requirement be deleted in favor of a notice of appeal; clerk and court reporter will be responsible for

filing the record; abolish six month writ of error to court of appeals but allow an appeal in the normal fashion within six months by any party who did not participate at trial; relax point of error practice in favor of a statement of issues; delete motion for rehearing in court of appeals; judges not be named in original proceedings, but real party will be named.

The meeting was adjourned until 8:30 o'clock on Saturday, January 22, 1994.

Saturday, January 22, 1994:

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

Members present: Chair Luther H. Soules III, Alejandro Acosta, Jr., Professor Alexandra Albright, Charles L. Babcock, Pamela Stanton Baron, David J. Beck, Honorable Scott A. Brister, Honorable Ann Tyrell Cochran, Professor William V. Dorsaneo III, Sarah B. Duncan, Anne L. Gardner, Honorable Clarance A. Guittard, Michael A. Hatchell, Charles F. Herring, Jr., Tommy Jacks, David Keltner, Joseph Latting, Gilbert I. Low, Honorable F. Scott McCown, Russell H. McMains, Robert E. Meadows, Harriett E. Miers, Richard R. Orsinger, Dan R. Price, Stephen D. Susman, and Stephen Yelenosky.

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

Members absent: Professor Elaine Carlson, Michael T. Gallagher, Donald M. Hunt, Franklin Jones, Jr., Thomas S. Leatherbury, John H. Marks, Jr., Honorable David Peeples, David L. Perry, Anthony J. Sadberry and Paula Sweeney.

Ex Officio Members absent: Paul Gold, J. Shelby Sharpe, Thomas C. Riney.

Also present: Lee Parsley (Supreme Court Staff Attorney), Holly Duderstadt (Soules & Wallace), Denice Smith for Mike Gallagher and Carl Hamilton for J. Shelby Sharpe.

Discussion continued regarding proposed 166d. Will refer 166d to the subcommittee to make sure sanctions go both ways. Discussion was had regarding the first comment on page 3. Latting thinks it is "hectoring and preachy" and doesn't know what the "unintended consequences" are and recommends deletion. The Committee voted unanimously to omit the comment that reads "Parties and counsel should exercise caution before filing motions for sanctions, which may have serious, unintended consequences. Thus, a litigant should file a motion for sanctions only after exhausting other reasonable measures to resolve pretrial disputes".

Mr. Orsinger comment regarding removal of affidavit provision yesterday was a major change in rules - there needs to be a comment.

Mr. Soules says "we've blown a hole in discovery" with this decision.

Mr. Latting moves to reconsider deletion of affidavit provision. Some discussion and entire matter left to subcommittee for consideration.

David Keltner gives report on Discovery Task Force work. Consensus on everything but limits to discovery. Proposal will include limited mandatory discovery done by letter rather than interrogatory. Will include person with knowledge of relevant facts, identity of experts, subject matter of expert testimony (generally), statement of current names of parties, copies of instruments on which suit is based. Have 60 days to provide information. Cannot object to these.

Radical change in expert witness rules. No requirement that party provide the report of an expert. Limit interrogatories as to what you can ask for from the experts. Remainder done by deposition.

Propose to eliminate witness statement privilege.

As regards written discovery, work product and attorney/client privilege are deemed not requested by interrogatories, unless the specific words are used. Thus, no obligation to object.

Will be a duty to respond, which does not currently exist.

Any objection will certify that there is a good faith belief in law and fact that objection is proper. Can make supplemental objections.

Supplementation. 30 day rule now 60 days. Absolute duty to supplement 60 days out plus periodic supplementation.

Exclusionary rule. Keep it but anyone already deposed could not be excluded and records custodians could not be excluded.

Broke down on limits to discovery. Suggested that asking for clarification is not discovery. Could limit discovery in cases where $40,000 or less in damages was sought.

Justice Hecht comments on need for limiting discovery. General discussion on limiting discovery and the ramifications. Suggestions for a "rocket docket" and to eliminate discovery altogether. Discussion of relationship between pleadings and discovery and other matters related to discovery.

Mr. Soules suggests, as topic for debate, allowing parties to ask which exhibits and witnesses will be used at trial and eliminate work product exception as regards these matters.

Mr. Orsinger would like to provide that parties send discovery on floppy disk. Wants to shift burden to party requesting discovery rather than party having to comply. Doesn't want rules to interfere with a person preparing case in last 30 days if that is what they wish.

Judge Guittard says for ordinary cases, have arbitrary limits; for exceptional cases, make application for more discovery.

Mr. Latting suggests requiring person to provide, before trial, persons to be called as witnesses, a statement of their expected testimony, a list of exhibits and statement as to what they will prove, and give all this to the jury.

Mr. Soules suggests objecting to exhibits out of presence of jury prior to trial to get out of the way.

Judge Cochran comments must narrow pleadings before discovery; case usually consists of one or two issues. Soules - discovery on issues is significant change in Texas; we discover based on subject matter now.

Mr. Orsinger suggests a mediator to meet with attorneys to work out issues early in process - paid for by parties. Would replace, in part, trial judge involvement.

Mr. Orsinger favors standard interrogatories and requests for production in family law cases and will bring a draft to SCAC.

The meeting was adjourned.