MINUTES OF THE

SUPREME COURT ADVISORY COMMITTEE

SEPTEMBER 16-17, 1994

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock a.m. on Friday, September 16, 1994, pursuant to call of the Chairman.

Friday, September 16, 1994:

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

Members present: Chair Luther H. Soules III, Prof. Alexandra W. Albright, Charles L. Babcock, Pamela Stanton Baron, Prof. Elaine A. Carlson, Prof. William V. Dorsaneo III, Sarah B. Duncan, Honorable Clarence A. Guittard, Michael A. Hatchell, Donald M. Hunt, Tommy Jacks, Joseph Latting, Gilbert I. Low, John H. Marks Jr., Honorable F. Scott McCown, Russell H. McMains, Anne McNamara, Robert E. Meadows, Harriet E. Miers, Richard R. Orsinger, David L. Perry, Anthony J. Sadberry, Stephen D. Susman, Paula Sweeney, and Stephen Yelenosky.

Members absent: Alejandro Acosta, Jr., David Beck, Honorable Scott A. Brister, Ann T. Cochran, Michael T. Gallagher, Anne L. Gardner, Charles F. Herring, Jr., Franklin Jones, Jr., David E. Keltner, Thomas S. Leatherbury, Honorable David Peeples.

Ex Officio Members present: Hon Sam Houston Clinton, Paul N. Gold, David B. Jackson, Kenneth Law, Hon. Paul Heath Till, and Hon. Bonnie Wolbrueck

Ex-Officio Members absent: Doyle Curry, Honorable William Cornelius, Doris Lange, Thomas C. Riney.

Others present: Lee Parsley, Supreme Court Staff Attorney, Denise Smith (with David Perry), Jim Parker, Mollie Anderson (with Mike Hatchell), Jeff Thompson (with Steve Susman), Diana Thompson (with Steve Susman), and Jim Parker.

Meeting called to order by Luther H. Soules, III.

Mr. Soules recognized Judge Guittard for a report by the appellate subcommittee. (The Committee had been provided the September 7, 1994, Cumulative Report of the Appellate Rules Committee and Judge Guittard referred to that report.) Judge Guittard referred the Committee to Rule 5(a). Mr. Orsinger queried why there was a three day extension for documents delivered by fax. Mr. Soules stated that the rule was ambiguous and suggested using TRCP 4. Professor Dorsaneo suggested deleting "other than a

Saturday, Sunday, or legal holiday" to eliminate the ambiguity. VOTE: UNANIMOUSLY APPROVED.

Judge Guittard referred the Committee to Rule 13(i) the subcommittee proposes to substitute "fee" for "deposit." Mr. Law stated that the clerks considered all payments to be fees since no payment is ever returned. Mr. Low stated that "deposit" had been in the rules for a long time and had a specific meaning and should not be deleted, and suggested using "deposit or fee." VOTE: UNANIMOUSLY APPROVED (using "deposit or fee").

Judge Guittard referred the Committee to Rule 16. The subcommittee proposal includes a new sentence requiring the court which assumed jurisdiction to send the case back to the court which should have jurisdiction. Mr. McMains suggested the alternative that the court which should have jurisdiction could certify its availability to the clerk of the court of appeals exercising jurisdiction. Mr. McMains also queried what happened if a motion for rehearing was filed. A discussion followed. VOTE: Leave rule as proposed - 8; add proviso allowing court assuming jurisdiction to hear motion for rehearing - 0; let court assuming jurisdiction to keep the case until availability certified by court which should have jurisdiction - 6.

Judge Guittard referred the Committee to Rule 19(d). The proposal dispenses with the oath by lawyers. Discussion followed. Mr. McMains stated that the proposal was ambiguous in that it was not clear that "not" applied to all three instances referenced in the proposed rule. VOTE: Favor proposal - 13; oppose proposal - 0. (with the understanding that subcommittee will fix the grammar).

Judge Guittard referred the Committee to Rule 20 requiring amicus curiae to disclose on whose behalf the brief is filed. Discussion followed. Professor Dorsaneo proposed that amicus "disclose any interest of the amicus or counsel for amicus and the source of any compensation of the amicus." VOTE: Favor Dorsaneo proposal - 9; oppose - 10. More discussion. Mr. Latting suggested taking out the disclose "any interest" language of the Dorsaneo proposal, but that disclosure of who compensated amicus is appropriate. VOTE: Favor Latting proposal - 11; oppose - 8.

Judge Guittard referred the Committee to Rules 54 and 56. Subcommittee suggests the repeal of Rule 54. Consideration of Rule 56 postponed briefly.

Judge Guittard referred the Committee to Rule 55. Mr. Orsinger pointed out that the proposal eliminates the distinction between supplementing transcript before or after submission. APPROVED WITHOUT OPPOSITION.

Judge Guittard referred the Committee to Rule 56. Under the proposal, the clerk of the court of appeals is to send a notice of the filing of the notice of appeal to all parties. Filing a record is not jurisdictional, but the case could be dismissed for want of

prosecution if no record filed. Ms. Duncan expressed concern about suggestion in proposed rule that clerk should not file the notice of appeal if there is a technical defect. Judge Guittard responded that the intent of the rule was to require the clerk to give notice of a defect and allow the party time to cure the defect. Professor Dorsaneo said that it is supposed to be a "friendly thing" and should not work to punish the appellant. Mr. Soules suggested that the clerk should docket the appeal when he/she receives the notice of appeal and file the notice of appeal; then the clerk should notify the party of any perceived defect. VOTE: UNANIMOUS TO RETURN TO COMMITTEE TO REVISE.

Ms. Duncan referred the Committee to Rule 56(c) regarding time within which clerk is to file the record. Ms. Duncan stated that the proposed 120 day time limit worked in some cases but not all. Subcommittee to review further.

VOTE: Rule 56 unanimously approved with "those changes."

Judge Guittard referred the Committee to Rule 57. He suggested that the two alternatives were to have the appellant file a docketing statement with the notice of appeal or to have the clerk mail a docketing statement to the appellant to be filed later. Mr. Soules inquired if the subcommittee intended the docketing statement to be jurisdictional. Judge Guittard and Professor Dorsaneo said "no." Ms. Duncan suggested a new paragraph (d) stating that "the docketing statement is not jurisdictional but is purely administrative."

Mr. Soules suggested adding to paragraph (a)(5) "or any other motion which would affect the time for perfecting appeal." Judge Guittard offered other language. Mr. Hatchell suggested paragraph (a)(5) should read "a motion filed pursuant to Rule ____" rather than referring to the specific motions. Mr. Hatchell also asked how the mail box rule applied to paragraph (a)(3). Judge Guittard offered language to address that problem.

VOTE: Rule 57 UNANIMOUSLY APPROVED (with the changes discussed).

Judge Guittard referred the Committee to Rule 130(c) regarding successive applications. RULE APPROVED WITHOUT OPPOSITION.

Judge Guittard referred the Committee to Rule 131. Proposed rule refers to "issues" or "points of error." This follows changes made to Rule 74 which were previously approved by the Committee. Discussion follows regarding paragraph (j) -- Intervention. Ms. Duncan opined that if everyone was a party to the appeal, there was no need for intervention. Professor Dorsaneo and Judge Guittard agreed that paragraph (j) should be deleted.

Professor Dorsaneo referred the Committee to Rule 100(a) and suggested that "any party to the trial court's final judgment" should be inserted in the first sentence. VOTE: Favor - 15; oppose - 0.

Ms. Baron referred the Committee to Rule 131(c) and stated that the example in the current rule was not helpful and should be deleted. APPROVED WITHOUT OPPOSITION.

Judge Guittard referred the Committee to Rule 137. Rule regarding filing reply brief would be the same as in the court of appeals. Ms. Baron asked why there was no suggested time for filing. Mr. Dorsaneo stated that the Supreme Court has not, in the past, cared when a reply brief is filed. The rule makes it clear that the appellant has a right to file a reply brief.

Discussion follows about how parties inform Court of new authority. Ms. Duncan suggests a rule patterned after Fed. R. App. P. 28(j) which allows the parties to file a letter updating authorities. Professor Dorsaneo states that the matter will be considered by the subcommittee. VOTE: Favor adoption of Rule 137 - 5; oppose - 0.

Mr. Soules queried about the 25 day time limit for court of appeals reply briefs (Rule 74(l)). Why is it different from Supreme Court rules. Ms. Baron responded that the court of appeals must hear the case and the Supreme Court may not grant the writ.

Judge Guittard referred the Committee to Rule 184. Explains that the changes are addressed to *Davis v. City of San Antonio*. VOTE: APPROVED UNANIMOUSLY.

Judge Guittard referred the Committee to the electronic recording rules contained in proposed TRCP 264, TRAP 19, 50, 53(j) and 74(h). The subcommittee does not have a recommendation regarding electronic recording. Judge McCown expressed concern about proposed TRCP 264(b)(2). He suggested the trial judge be able to hire the recorder as the relationship between the judge and the clerks is not always good. Mr. Hatchell responded that one of the reasons for electronic recording was to reduce costs by not hiring additional personnel; to allow the judge to employ a person other than a clerk already employed by the court would not achieve the goal. Mr. Perry suggested that recording should be allowed only on the agreement of the parties. Judge Clinton stated that the Court of Criminal Appeals does not like recorded statement of facts and that the rules need to apply to civil cases only. More discussion followed.

Judge Guittard stated that the subcommittee was not recommending electronic recording; just that electronic recording was being used by some courts and there was a need for rules to govern electronic recording. Professor Dorsaneo suggested that the "election" provisions of proposed Rule 264(b)(1) should be deleted in favor of "Any court authorized by law to make an electronic recording of a court proceeding. . ." Mr. Soules

announced that discussion of the appellate rules would end at noon. The Committee did not vote on electronic recording rules and the Committee broke for lunch.

Mr. Soules reconvened the Committee after the lunch break and recognized Mr. Susman for a report from the discovery subcommittee. Mr. Susman referred the Committee to a September 12, 1994, draft of the discovery subcommittee and the September 15, 1994, supplement to that draft.

Mr. Susman gave an overview of the proposed rules. Rule 1, the discovery period, has been amended so that the discovery period extends to 30 days before the first trial setting. Rule 2 is unchanged from prior drafts and provides that any matter related to discovery can be modified by court order or by agreement of the parties. Rule 3 specifies the forms of discovery - eight specified, with five identified as "written discovery." The general scope of discovery is the same as before. The disclosure of persons with knowledge of relevant facts has been expanded to require a brief statement of the person's connection with the case. All witness statements are discoverable unless privileged under the attorney-client privilege.

Rule 4 provides exemptions and privileges. Major revision is adoption of the federal work product rule (except that witness statements are not work product under proposed rule) which subsumes party communications privilege. Rule 5 includes a duty to respond to discovery and a duty to supplement. Rule distinguishes between supplementation and amendment. Pursuant to proposed rule 6, a court may exclude relevant evidence that was not timely disclosed only if the other party is surprised. Proposed Rule 7 addresses presentation of privileges and objections. It requires a statement in a response that items are being withheld. An objection is required only if there is a good faith basis for the objection at the time of the response. An objection does not preclude compliance to the extent compliance is reasonable.

Proposed Rule 8 provides for protective orders. The rule makes a protective order necessary only when an objection is not appropriate. Rule 9 provides for standard disclosure (not mandatory disclosure). Rule 10 provides the rule for disclosure of expert witnesses and the information they possess. It requires the plaintiff to disclose the identity of any expert and his/her information, upon proper request, not later than 60 days before close of the discovery period. Defendant must disclose the identity of any expert not later than 45 days before close of discovery. Rule 11 provides for production of documents. Time for making a responses is unchanged. Responding party must state when and where documents will be produced. Provisions regarding electronic data are new - must ask for it specifically and say in what form you want it.

Proposed Rule 12 provides for interrogatories. Allows a total of 30; no limit on the number of sets; allows contention interrogatories. Rule 13 provides for requests for admissions - no change from current rule. Rule 14 provides for oral depositions - requires reasonable notice. Rule 15 places time limitations on depositions. Limited to

50 hours per side, but it does not apply to third party witnesses or your own witnesses. Limited to 3 hours per deposition (save one) for fact witnesses and 6 hours for experts. Provides rule for conduct during deposition - no private conferences during deposition; statements which reflect the veracity of the witness may be played to the jury; objections limited to "object form," "object non-responsive," and "object leading."

Proposed Rule 16 provides for non-stenographic recording of depositions and for telephone depositions. Rule 17 is depositions on written questions and is not changed from current rule. Rule 18 is physical and mental examinations and is not changed from current rule. Rule 19 provides for entry upon land. The subcommittee adopted the recommendation of the discovery task force.

Rule 166, pretrial conference, is revised but not intended to deprive the trial judge of any authority the judge has under the current rule. Rule 63, amendments and responsive pleadings, allows amendments 60 days before end of discovery period without leave of court.

Mr. Susman directed the Committee to Rule 1 for discussion. The proposal is for the discovery period to start on commencement of the action and end thirty days before first trial setting. Ms. Sweeney stated that some counties set cases for trial without any input from the attorneys, so it is not a realistic setting. Discussion followed. Judge Till suggested that the JP courts be exempted from the window altogether. Some agreement that rules could provide that trial settings could not be set automatically and only after consultations with attorneys.

Mr. Susman suggested that a court couldn't set a case for trial unless it also set a discovery cut-off date; but resetting a case did not automatically extend that cut-off date. Mr. Yelenoski questioned if the window wouldn't be meaningless if the attorneys could extend it by agreement.

Justice Hecht suggested that there could be were three levels of discovery: a basic level under which all cases fall; a second level to which the parties could agree, but which could not be unlimited; and problem cases which required judge involvement. Mr. Low stated that the federal courts had a tracking system and that the parties always move to modify the track. Discussion followed. Mr. Soules suggested the window be 90 days for the first tier, nine months for the second, and as set by the judge for the third.

Mr. Jacks suggested that it be two tiered; first tier would be three months and if a party wants more, the party can either object and set a hearing or make an agreement with the other side. Mr. Babcock suggested accepting rule as written with a sentence which provides that the trial judge should set the case with an eye toward the nature of the case.

VOTE: Babcock proposal: favor - 9; oppose - 12.

VOTE: three tier - 90 days, nine months, or set by the judge: favor - 13; oppose - 10.[1]

Mr. McMains asked if the times began to run from the time the last answer was filed. Mr. Soules said "yes." Ms. Sweeney queried if a party could get to the end of the 90 days and then "kick it over" to the next tier. Mr. Soules said "yes" but that the court could take it away. Mr. Jacks stated that closing discovery in nine months in places where the case could not go to trial in two years was a problem. Mr. Gold agreed that he was "OK" with the three tier approach, but that he didn't like the time periods. Mr. Soules said that the committee had voted in favor of the specific time periods, but that the committee would have another chance to review the matter.

Mr. Susman suggested skipping to proposed Rule 3. Professor Dorsaneo asked if the subcommittee intended to allow for the discovery of all settlement agreements by paragraph (d)(2). Mr. Soules stated that the rules should force disclosure of witnesses if there were going to be limits on depositions - that it was "fundamentally unfair" to restrict discovery and not tell the other side which witnesses were important. Referred back to subcommittee for further consideration.

Mr. Soules queried what "connection with the case" means. Mr. Orsinger expressed concern about the discoverability of witness statements. Mr. Susman suggested that the rule could provide that witness statements could not be withheld as work product. Professor Albright stated that paragraph (e) should be deleted from Rule 3; and that witness statements should be defined in Rule 4(a). Professor Dorsaneo stated that it should be defined to be (among other things) made in anticipation of litigation and relevant to the lawsuit.

Mr. Susman referred the Committee to Rule 4. The proposal is to adopt the federal rule regarding work product, which combines the Texas rule for attorney work product and party communications. Professor Albright explained the proposal on behalf of the subcommittee. Much debate followed. Professor Dorsaneo stated that he would prefer that the committee do with party communications what it did with witness statements; and that the proposal was much broader than the current rule in Texas. Mr. Orsinger stated his concern that attorneys would be required to turn over their litigation file to a trial judge for review upon a showing of need and hardship. Mr. Gold disagreed and stated that "core" work product was not discoverable.

Ms. Duncan stated that the Texas rule and the federal rule start from an entirely different premise. Under the Texas rule, work product is not discoverable except witness statements; the federal rule starts by dividing between core and ordinary work product and the trial judge has to sort through the file to see which is which. Mr. Gold argued

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[1] It appeared that some members of the Committee believed the stated times were for illustration and that they were voting on the concept of the tiers and not on the actual times.

that the Texas Supreme Court had been slowly adopting the federal standard in recent years anyway. Further discussion. Justice Hecht queried why there was a difference in the proposed rule and the federal rule in the fourth line from the bottom in paragraph (a). Professor Albright agreed that the proposal should be changed.

The meeting was recesses until Saturday, September 17, 1994, at 8:00 a.m.

Saturday, September 17, 1994:

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

Members present: Chair Luther H. Soules III, Prof. Alexandra W. Albright, Charles L. Babcock, Pamela Stanton Baron, Prof. Elaine A. Carlson, Prof. William V. Dorsaneo III, Sarah B. Duncan, Honorable Clarence A. Guittard, Michael A. Hatchell, Donald M. Hunt, Tommy Jacks, Joseph Latting, John H. Marks Jr., Honorable F. Scott McCown, Russell H. McMains, Anne McNamara, Robert E. Meadows, Harriet E. Miers, Richard R. Orsinger, David L. Perry, Anthony J. Sadberry, Stephen D. Susman, Paula Sweeney and Stephen Yelenosky

Members absent: Alejandro Acosta, Jr., David Beck, Honorable Scott A. Brister, Ann T. Cochran, Michael T. Gallagher, Anne L. Gardner, Charles F. Herring, Franklin Jones, Jr., David E. Keltner, Thomas S. Leatherbury, Gilbert Low and Honorable David Peeples.

Ex-Officio Members present: Paul N. Gold, David B. Jackson, Honorable Paul Heath Till, and Honorable Bonnie Wolbrueck.

Ex-Officio Members Absent: Hon Sam Houston Clinton, Doyle Curry, Hon William Cornelius, Hon Doris Lange, and Thomas C. Riney.

Others present: Lee Parsley, Supreme Court Staff Attorney, Jim Parker, Jeff Thompson (with Steve Susman), and Diana Thompson (with Steve Susman).

The meeting was called to order by Mr. Soules, who recognized Mr. Susman.

Mr. Susman referred the committee to Rule 5, the duty to respond. Part 1 of the rule was UNANIMOUSLY ADOPTED.

Part 2 is the duty to supplement. Professor Dorsaneo stated that the rule conflicted with itself in that it says that if a party learns something during discovery, there is no requirement to later supplement and provide that information. On the other hand, the rule requires supplementation to take the form of the original. The conflict is that a party could simply supplement by writing a letter to the other side and since the other

side would then have learned the information, formal supplementation was not necessary. Mr. Susman agreed that it was a problem.

Discussion followed regarding whether supplements must be signed and sworn to by the client. Several members opposed that requirement.

Mr. Soules stated that he opposed the 60 day supplementation deadline. VOTE: 60 days - 1; 30 days - house.

Discussion turned to the distinctions between supplementation and amendment. Judge McCown observed that the subcommittee was attempting to cut down on the amount of supplementation because it is expensive. On the other hand, they did not want important evidence to not be timely disclosed. Mr. Latting stated that you couldn't really have full discovery and save money and that they had to chose one or the other. Mr. Perry agreed, but said that the task force had made a different proposal which did not require supplementation except on request of the other party, which could not happen more often than every 6 months.

Mr. Yelenoski (and others) stated that the difference between supplementation and amendment was a distinction without a difference - if the plaintiff just gets worse, it requires supplementation, but if there is a new diagnosis, it requires an amendment. Is that how it should work? Judge. McCown agreed and suggested the subcommittee consider the task force proposal.

Mr. Susman queried - what if I find critical papers; under the old rule I have to turn them over now, but under the task force proposal, I can sit on them. Is that fair? Mr. Soules stated that if it isn't right to sit on the documents, don't we need an ongoing duty to supplement? Debate continued.

Mr. Susman suggested requiring disclosure whenever the party learns something, but it can be done in any form, and the evidence will not be excluded unless the other side can prove surprise. Judge McCown suggested that supplementation be a duty that comes up every four months on the calendar. Professor Dorsaneo stated that he thinks "we made a mistake when we left the federal rule in `82." Mr. Susman said that he sensed that the committee favored informal supplementation and did not favor differentiating between amendment and supplementation. Subcommittee will review the matter further.

Mr. Susman referred the committee to Rule 6 and recognized Judge McCown. Judge McCown explained the proposal, which does not exclude relevant evidence unless the other party can show surprise. Mr. Latting suggested changing from "leaving" the party unprepared to "causing" the party to be unprepared.

Discussion continued regarding rule of exclusion. Some members expressed the opinion that it would make a continuance harder to get and that it would encourage the withholding of information in hopes of causing a continuance. Mr. Soules stated that the proposal places the burden on the non-offending party since that party has to prove surprise. Discussion about placing burden on offending party. Judge McCown said it was improper since that party would then be required to prove a negative (*i.e.* prove that the other guy wasn't surprised). Judge McCown offered amendments to the rule. Mr. Soules suggested using the request for production standard in the rule. Professor Dorsaneo stated that the rule allowed too much discretion in that trial judge could exclude evidence which truly was newly discovered.

VOTE: Favor rule with McCown amendments - 10; oppose - 11 (chair voting).

Mr. Susman suggested switching the burden to the offending party. Mr. Soules suggested "prejudiced in preparing for trial or conducting trial" instead of "unprepared for trial." McCown said the subcommittee purposefully did not use "prejudiced" because relevant and important evidence can prejudice the case in that it can change the outcome.

VOTE: Proposed Rule 6, except switch the burden to the offending party: favor - 19; oppose - 2.

Professor Dorsaneo stated that it will be difficult to carry the burden because the party will be forced to argue that it is not really important evidence, but it is important enough to be introduced at trial.

Mr. Susman referred the committee to Rule 7. Ms. Sweeney queried about the difference between not responding at all and responding in part - how does the attorney decide which way to go? Mr. Gold and others stated that it is difficult to draw the line, but the objecting party should at least come forward with what that party knows is appropriate.

Mr. Soules stated that he did not think the rule specifically prohibited the prophylactic objection. Discussion followed. Mr. Perry explained that under current practice, the responding party reads the request as broadly as possible, objects and doesn't produce anything; then after hearing, the party reads the order as narrowly as possible and produces as little as possible. This rule is intended to try to force the responding party to produce what reasonably should be produced and delineate the fight about the other matters. More discussion. Subcommittee will continue to work on the rule.

Mr. Susman referred the committee to Rule 8. Under the proposal, if a deposition notice is served with less than ten days notice, the filing of a motion for protective order will excuse compliance; if more than ten days notice, must file a motion for protective

order and get a hearing to avoid compliance. VOTE: UNANIMOUSLY APPROVED Ms. Sweeney - "We unanimously pretty much like this one!"

Mr. Susman suggested the committee skip Rule 9 as it would be controversial.

Mr. Susman referred the committee to Rule 10. Mr. Jacks stated that it was a problem to be required to designate experts while the discovery window is open when trial may be a year after the window closes - "Your window is stupid; with this it is outrageous!" Mr. Soules suggested the committee move to Rule 10(3). Mr. Jacks stated that the rule needed to differentiate between retained experts and those who are also fact witnesses. Mr. Susman stated that (b) and (e) should be changed depending on whether the expert is a fact witness or a hired gun.

Mr. Jacks inquired about the supplementation requirement for experts. Mr. Susman stated that the experts have a "continuing cough-up obligation." Discussion followed about provision in rule which allocated costs against parties for not calling experts. Mr. Latting said that it was "financially disadvantageous not to prolong trials" and was a bad idea. Judge McCown agreed that the subcommittee probably should delete the provision and see if there wasn't a better way to achieve the same objective.

The meeting was adjourned.