MINUTES OF THE
SUPREME COURT ADVISORY COMMITTEE
NOVEMBER 22-23, 1996

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock on Friday, November 22, 1996, pursuant to call of the Chair.

Friday, November 22, 1996:

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, David J. Beck, Honorable Scott A. Brister, Prof. Elaine A. Carlson, Prof. William V. Dorsaneo III, Sarah B. Duncan, Michael T. Gallagher, Anne L. Gardner, Honorable Clarence A. Guittard, Tommy Jacks, Joseph Latting, Gilbert I. Low, Russell H. McMains, Anne McNamara, Robert E. Meadows, Richard R. Orsinger, Honorable David Peeples, David L. Perry, Paula Sweeney, and Stephen Yelenosky.

Ex-officio Members present: Justice Nathan L. Hecht, Hon Sam. Houston Clinton, Paul N. Gold, Doris Lange, Mark Sales and Bonnie Wolbrueck.

Members absent: Alejandro Acosta, Jr., Hon. Ann T. Cochran, Michael A. Hatchell, Charles F. Herring, Jr., Donald M. Hunt, Franklin Jones, Jr., David E. Keltner, Thomas S. Leatherbury, John H. Marks, Jr., Hon. F. Scott McCown, Anthony J. Sadberry and Stephen D. Susman.

Ex-Officio Members absent: Hon. Willliam Cornelius, O.C. Hamilton, David B. Jackson, 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 report on the status of approval of the appellate, jury charge, sanction and discovery rules.

Judge Clinton provided a report on the progress of the court of criminal appeals on the appellate rules.

Justice Hecht provided some background on what the court would like regarding the summary judgment rule.

Justice Hecht advised that even though the committee members terms officially end on the 31st of December, all terms will be

extended until the work of the committee is finished. A discussion was had regarding the schedule for the meetings in 1997. Buddy Low presented the report for the Subcommittee on the Rules of Civil Evidence. Mr. Low explained the changes that were made pursuant to the vote of the committee to various evidence rules at the September meeting.

Mr. Low explained the changes that were made to Rule 606, Competency of Juror as a Witness. There being no opposition, the proposed changes to Rule 606 were approved.

Mr. Low continued explaining the action of the committee at the September meeting.

Mr. Low brought up for discussion Rule 1009, Translation of Foreign Language Documents. Discussion followed. A vote was taken and by a vote of 16 to 0, the rule was approved.

Mr. Low brought up for discussion proposed changes to Rule 509 and advised that the subcommittee recommended no change. A vote was taken and there being no opposition, the subcommittee's recommendation was approved.

Richard Orsinger presented the report regarding Texas Rule of Civil Procedure 117a. Discussion followed.

Mr. Low presented the report on the unified rules of civil and criminal evidence. A vote was taken and by a vote of 19 to one, the unified rules were approved.

Richard Orsinger continued presenting the report on Rule 117a. The subcommittee recommended amending Rule 117a(3) by striking the language after "citation shall be published in the English language" all the way through where it picks up "service of the citation may be by posting a copy at the courthouse..." Justice Guittard seconded the motion, discussion followed, a vote was taken, and by a vote of 9 to 11, the motion failed. A vote was taken on the proposal provided by the law firm of Heard, Goggan, Blair & Williams and by a vote of 19 to 1 the proposal was approved.

Professor Alex Albright presented the report on Rule 166a, Summary Judgment. She began by giving a summary of where the committee is on the rule and what has taken place previously, and the votes taken by the committee. Judge Scott Brister indicated that the vote a year ago was that we have three proposals. One was to do nothing. Two was to go straight to Celotex. And three was to do something in between where for a while it's the same rule and then it shifts to Celotex. Professor Albright indicated that the votes between the three possibilities of 166a were 10 to leave it the same, 9 for Celotex, and 7 for the compromise. Then a vote was taken and between Celotex and the compromise, it was 8 for Celotex

and 18 for the compromise. The vote between the compromise and leave it the same it was 14 for the compromise and 10 for the same. Discussion followed.

Justice Duncan proposed the following reimbursement section that would say "if a motion made under the subsection (i) is denied, the trial court may require the movant to reimburse the non-movant for the cost incurred by it in responding to the motion, including the non-movant's reasonable and necessary attorney's fees. If the trial court also finds the movant knew or should have known the motion lacked merit, the trial court must require reimbursement."

Discussion continued regarding the proposed changes to Rule 166a.

Professor Dorsaneo proposed the following language "demonstrating the absence of evidence raising a genuine of material fact specifying that there is no evidence to support one or more specified elements of claims or defenses on which an adverse party would have the burden of proof at trial. The respondent has the burden to produce evidence."

Discussion continued regarding changes to Rule 166a.

Tommy Jacks made a motion that current Rule 166a not be changed at all. Paula Sweeney seconded the motion.

Mr. Jacks also made a motion for the adoption of a rule that incorporates the following elements. (1) say nine months instead of "adequate time for discovery" and have an opportunity for the non-moving party to make the objection that there still needs to be more discovery before the court considers it; (2) incorporate the first two sentences of Judge Peeples paragraph (i), except adding the elements (a) that it has to be sworn to by the lawyer that there is no evidence to support the critical elements; and (b) that the lawyer has to go further and say that neither he nor his client is aware of any evidence that would support it; (3) incorporate Justice Duncan's language that puts the cost shifting burden on the moving party who either knew the motion wasn't well grounded or certainly should have known; (4) with regard to the burden issue, delete the phrase "any evidence admissible at trial" and the phrase "objections to the admissibility of the evidence" retaining the current language "such facts that would be admissible in evidence." Paul Gold proposed amending the 9-months to be at least a year. Tommy Jacks accepted the proposed amendment.

Chairman Soules indicated that the motion has been made and seconded that there be no change to 166a. Chairman Soules advised that Justice Hecht had requested that the court receive a roll call vote on this motion. Discussion continued regarding the problems some of the members have with voting on this motion. Tommy Jacks

advised that when he said don't change the current rule he didn't mean don't change the burden issue of the current rule. He didn't mean to foreclose any discussion of any other change to Rule 166a.

Chairman Soules indicated the motion has been made to make no change at all to 166a relative to burden on the parties, movant and respondent. A roll call vote was taken on the motion. The vote was 11 to 10 that there should be some change in the burden.

Tommy Jacks' second motion was brought up for discussion. Item No. 1 has to deal with the 12 months as adequate time for discovery and then they change to something more burdensome on the respondent, having a bright line date. Discussion followed.

Tommy Jacks amended his motion to say if there is a discovery period, either because the Supreme Court has adopted rules that say there is or because there is a court order which establishes it in that case, he would say the completion of the discovery period is the time in that case when this new type of summary judgment motion could first be filed. If there is no applicable discovery period then it's upon a date which the court determines to be a date which has allowed for adequate discovery. Discussion continued.

Paul Gold proposed amending Rule 166a to state that the court may or shall set a deadline or a time by which the burden of proof in a summary judgment proceeding will shift in that particular case. Discussion continued.

Justice Guittard proposed changing the language in the second sentence on draft 1, subdivision (b) as follows: "A party may move for summary judgment, and summary judgment may be granted on a matter on which the respondent has the burden of proof based on a certificate by counsel that after a diligent investigation in counsel's professional opinion, there is no evidence to prove one or more essential elements of the respondent's claim or defense."

Justice Guittard also proposed amending subdivision (g) to read "cannot for a reason stated present by affidavit facts essential to justify his opposition or that respondent has not had sufficient time for discovery." Discussion continued.

Tommy Jacks restated his motion which was to say if there is a discovery period, it's at the end of the discovery period when this motion with its attached burdens or lack thereof could be discovered by the court. Otherwise, it would be a date set by the court, but the parties need to know when it is that this new set of rules does or doesn't apply. David Beck seconded the motion. Discussion continued.

Chairman Soules indicated the motion as he understood it is that the summary judgment practice would not be changed as far as the burden is concerned until the end of a discovery period or a

date set by the court for changing the burden. that there would be some available remedies of additional discovery where necessary. Discussion continued.

Steve Yelenosky proposed the following language: "At the close of any discovery period or if there is no discovery period, a date set by the court to allow adequate discovery." Discussion continued.

A vote was taken and by a vote of 15 to 5, Tommy Jacks' Issue # 1 was approved.

Chairman Soules indicated that Issue # 2 was that accompanying the motion for summary judgment there would be some verification by the attorney that there is no evidence to support the respondent's case or the respondent's side of the issue and that somebody or everybody knows of no such evidence. Discussion follows.

Chairman Soules asked if there was any sentiment that a lawyer should make an affidavit in a legal sufficiency sort of a motion for summary judgment or any other as to the merits of the motion. There was one member in favor. Discussion continued.

Justice Duncan proposed having a certificate from the lawyer that says: "I, or a person under my direction and control at my instruction, have reviewed the discovery in this case, and in my professional opinion there is no direct evidence or reasonable inference of" whatever the essential element is and then the language "and to my knowledge, there is no evidence available to prove that essential element." Discussion continued.

Tommy Jacks proposed: "After reviewing the evidence and after having made reasonable diligent inquiry with my client ...." Discussion continued.

Tommy Jacks requested that his motion be put on hold on this particular point and go to the next point which is a related point. The next point is the idea that in the event a party has abused the process that there is a cost-shifting sanction that applies. Discussion followed.

Chairman Soules restated that the motion is based on some standard not yet articulated, a movant files a motion that triggers a summary judgment practice where it's just the raw motion, not supported by something they contend is conclusive proof, thereby putting on the respondent the burden to essentially marshall their evidence and show their case in order to stay in court; but if the movant stays in court, the cost gets shifted to the movant. Discussion continued.

Tommy Jacks proposed amending his motion. The rule should include a feature in which the lawyer who is filing this no

evidence motion for summary judgment certifies that the lawyer has (a) reviewed the discovery; (b) having done so has found no evidence to support this element. The rule should include the first two sentences of Judge Peeples paragraph (i) which says they have to list which elements they are attacking. The rule would also include that after reasonable inquiry, the lawyer is aware of no evidence responsive to any outstanding discovery request that would support it. The rule should also leave the discretion to the trial judge that if the trial judge denies a no evidence motion, the trial judge may award costs including the attorney's fees associated with the defense. Discussion followed.

Chairman Soules called for a vote on those who believe that the lawyer could file a lawyer certificate, that a no evidence motion for summary judgment based on legally insufficient evidence should be accompanied by an attorney certificate to the general effect, without trying to be comprehensive, that the lawyer has reviewed the discovery, there is no evidence in the discovery of particular elements which are identified, and that there is no other evidence outside this discovery. By a vote of 10 to 7, the motion failed.

Judge David Peeples requested that the language "after reasonable inquiry I'm not aware of any evidence" be put back in. Chairman Soules took another vote after adding the language back in. The motion failed by a vote of 10 to 8.

Chairman Soules indicated the next topic was the cost shifting. Tommy Jacks indicated the language will be essentially that in Rule 10. Discussion followed. A vote was taken and by a vote of 12 to 10 the cost shifting motion failed.

Chairman Soules indicated the next part of Mr. Jacks' motion to be discussed had to do with the phrase "facts as would be admissible in the evidence." Discussion followed.

Judge David Peeples made a motion that the attorney making the certificate would say "I have reviewed the discovery in this case and there is no evidence to support element A" and leave out the "after reasonable inquiry" part. Tommy Jacks seconded the motion. Chip Babcock made a friendly amendment to add the language "in the professional opinion of the lawyer." The amended was accepted by Judge Peeples. A vote as taken and by a vote of 17 to 1 the motion was passed.

Judge David Peeples made a motion that the court be given the discretion to assess reasonable attorney's fees against the unsuccessful movant incurred in defending the motion. Mike Gallagher seconded the motion. A vote was taken and by a vote of 13 to 3 the motion passed.

Judge Peeples made a motion for leaving the rule the way it is and tacking on something at the end that deals with Celotex. The motion was seconded by Richard Orsinger, Justice Sarah Duncan, Mike Gallagher, and Richard Orsinger. A vote was taken and there being no opposition, the motion was approved.

Judge Peeples brought up for discussion the problem with admissible evidence language which is in the next to last sentence of the rule. Discussion followed. Tommy Jacks made a motion to approve the language in draft 1 which says: "The respondent shall have the burden to provide evidence showing that there is a genuine issue of material facts to avoid summary judgment." Professor Dorsaneo proposed "evidence that's admissible at trial in an admissible form." Discussion followed.

Chairman Soules restated the motion is that the trigger is pulled and then the respondent shall have the burden to provide evidence showing that there is a genuine issue of material fact to avoid summary judgment. A vote was taken and by a vote of 12 to 3 the motion was approved. Judge David Peeples requested someone to explain the reason for opposing the motion. Discussion followed.

Justice Duncan indicated she would like a rule requiring a response; and if the motion or the proof is legally insufficient, the non-movant ought to point that out to the trial judge. The response should point out any deficiencies in the motion or the supporting proof. Justice Duncan also felt there ought to be a date upon which the pleadings close, then a motion for summary judgment can be intelligently prepared. Discussion followed. Anne Gardner seconded Justice Duncan's motion.

Chairman Soules called for a vote on the part of Justice Duncan's motion that said if you don't specifically contest, you waive. Justice Duncan indicated there was no second. Chairman Soules advised the motion fails for lack of a second.

Justice Duncan restated the second part of her motion; there ought to be a date upon which the pleadings close and a motion for summary judgment can be prepared and filed. Discussion followed. Anne Gardner seconded the motion. Ms. Gardner read the language from the Court Rules Committee which said "Amendment to pleadings within seven days of the date of the hearing or thereafter may be made only with leave of court and for good cause shown." Discussion continued.

Judge Brister proposed using the language in Judge Peeples' draft in paragraph (c) with the amendment that it say "with written leave of court." Discussion continued.

Justice Guittard proposed "express leave of court." Discussion continued.

Chairman Soules brought up a problem with the language "upon a showing of good cause" which is a big change in the burden to amend pleadings. David Peeples proposed taking out the "good cause" language. Discussion continued.

Tommy Jacks proposed "except with leave of court expressly granted." Discussion continued.

Richard Orsinger proposed "reflected in the record." Discussion continued.

Tommy Jacks proposed "amendment pleadings may not be filed within seven days of the hearing except with written leave of court." Judge David Peeples accepted the amendment. Judge David Peeples made a motion to accept that language. Tommy Jacks seconded the motion.

Justice Duncan requested a discussion on the "written" part.

Chairman Soules indicated the motion is that the language would read "amended pleadings may not be filed within seven days of the hearing except with written leave of court." Discussion followed.

Justice Duncan proposed the following language "amended pleadings may not be filed within seven days of the hearing, except with leave of court. Leave of court will not be presumed." Discussion continued. Professor Dorsaneo proposed "which may not be presumed." Discussion continued.

Tommy Jacks proposed the language "leave of court for the filing of any pleadings within seven days of the hearing may not be presumed on appeal." Discussion continued.

Richard Orsinger commented it would be much wiser to say "reflected in the record" than to have rules that talk about presumptions that don't apply during the appellate process. The discussion continued.

Chairman Soules called for a vote on the language "leave of court to amend pleadings within seven days of the hearing shall not be presumed on appeal." The motion was made for this language and seconded by Judge Scott Brister. By a vote of 13 in favor and none opposed, the language was approved. Judge Peeples indicated he would work on a new draft and have it available for discussion in tomorrow morning's session.

Richard Orsinger and Professor Dorsaneo presented the report on Section 1 of the rules. The draft represented a consolidation of existing Rules 1, 2, 3, and 3a. Rule 3, Construction of Rules, is proposed for repeal.

Professor Dorsaneo continued giving the report on the consolidation of these rules. There being no opposition to Rules 1 and 2 as proposed by the subcommittee, they are unanimously approved.

Professor Dorsaneo presented the report on Section 3, Pleadings and Motions. Professor Dorsaneo explained the changes to Rule 20, Pleadings Allowed; Separate Pleas and Motions. Richard Orsinger moved for the adoption of the proposal. Buddy Low and Joe Latting seconded the motion. There being no opposition, Rule 20 is approved.

Professor Dorsaneo explained the changes to Rule 21, General Rules of Pleading, (a) Claims for Relief. Discussion followed. There being no opposition to Rule 21(a) the rule was approved.

Professor Dorsaneo explained the changes to Rule 21(b), Special Exceptions and (c) Defenses. Discussion followed. Richard Orsinger proposed putting (b) after (c) so that it would be Claims, Defenses, and then Special Exceptions. Discussion followed. Richard Orsinger proposed that (c) become new (e). Discussion continued. There being no opposition, that was approved. Discussion was had regarding Rule 21(c), Defenses. There being no opposition subparagraph (1) In General and (2) General Denial were approved.

Professor Dorsaneo brought up for discussion (3) Specific Denials. Discussion followed. Justice Duncan inquired as to why failure of consideration and want of consideration are in the affirmative defense rule. Discussion followed. Justice Guittard proposed the following language: "The following defenses may be raised only by specific denial, including such supporting particulars as are peculiarly within the plaintiff's knowledge:". Discussion continued. Justice Duncan proposed tracking Willis on any provision tolling or suspending the statute of limitations. Discussion continued. Justice Guittard proposed using "suspend" instead of "tolling." Discussion continued.

Chairman Soules called for a vote on Rule 21(c), Defenses. There being no objection the rule was approved.

Professor Dorsaneo explained (c) Pleading to be Plain and Concise; Consistency and new paragraph (d) Construction of Pleadings. There being no opposition, those rules were also approved. The meeting was adjourned until Saturday morning.

The Advisory Committee of the Supreme Court of Texas convened at 8:00 o'clock on Saturday, November 23, 1996, pursuant to call of the chair.

Saturday, July 20, 1996

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, Pamela Stanton Baron, Honorable Scott A. Brister, Prof. Elaine A. Carlson, Sarah B. Duncan, Michael T. Gallagher, Honorable Clarence A. Guittard, Tommy Jacks, Joseph Latting, Gilbert I. Low, Russell H. McMains, Anne McNamara, Robert E. Meadows, Richard R. Orsinger, Honorable David Peeples, Luther H. Soules III, Paula Sweeney, and Stephen Yelenosky.

Ex-officio Members present: Justice Nathan L. Hecht, Doris Lange, and Bonnie Wolbrueck.

Members absent: Alejandro Acosta, Jr., Charles L. Babcock, David J. Beck, Hon. Ann T. Cochran, Prof. William Dorsaneo III, Anne L. Gardner, Michael A. Hatchell, Charles F. Herring, Jr., Donald M. Hunt, Franklin Jones, Jr., David E. Keltner, Thomas S. Leatherbury, John H. Marks, Jr., Hon. F. Scott McCown, David L. Perry, Anthony J. Sadberry, and Stephen D. Susman.

Ex-Officio Members absent: Hon. Sam Houston Clinton, Hon. Willliam Cornelius, Paul N. Gold, O.C. Hamilton, David B. Jackson, W. Kenneth Law, Mark Sales, and Hon. Paul Heath Till.

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

Chairman Soules brought the meeting to order.

Judge David Peeples presented the report on the re-draft of Rule 166a. Discussion followed.

Justice Guittard moved for an amendment regarding the attorney certificate to say that in the attorney's professional opinion neither the discovery nor the attorney's investigation of the facts reveals evidence to support the specified elements. Discussion followed.

Joe Latting brought up for discussion whether or not there was a need for a statement about against whom attorney's fees might be assessed, under the rules would the judge have the authority to assess them against the party or only against the lawyer. Discussion followed.

Judge Brister made a motion to put in a "groundless and brought in bad faith" standard into paragraph (i) and that the motion is subject to sanctions under Chapter 10.

Tommy Jacks proposed language that Justice Duncan drafted which would be after the phrase "if a motion under this paragraph is denied," insert the language "and the court finds that the

motion was objectively unreasonable at the time it was filed." Buddy Low seconded the motion. Discussion followed.

A vote was taken, and by a vote of 12 to 4, the language will go in the rule.

Chairman Soules proposed the following language: "In addition to the other procedures available under paragraphs (a) and (b), by further compliance with this paragraph (i), a movant may seek a summary judgment on the ground that the respondent has no evidence of one or more essential elements of a claim or defense without presenting any summary judgment evidence to support the motion on such ground." Discussion followed. Tommy Jacks made a motion to approve the language. Buddy Low seconded the motion. A vote was taken and there being no opposition, the language was approved unanimously. Discussion continued regarding the language. Richard Orsinger proposed that the last sentence ought to say "If a motion or a part of a motion ...." Discussion continued.

Tommy Jacks proposed inserting after the (2) and before the words "a date set" the following: "if no definite discovery period has been prescribed, a date set by the court which allows adequate time for discovery." Discussion followed. Chairman Soules suggested "if there is no applicable discovery period." Paula Sweeney seconded Tommy Jacks' motion. Discussion continued.

Chairman Soules called for a vote on the language "if there is no applicable discovery period" after paragraph (2) in the second line. There being no opposition, that language was approved.

Discussion continued regarding the sanctions issue. Joe Latting made a motion that the sanctions can be against "either or" the attorney or the client. Discussion continued. Richard Orsinger brought up a discussion regarding the conflict problem that would create with your client. Discussion continued.

Tommy Jacks suggested taking a straw vote to find out whether it should be (a) the lawyer only, (b) the party only, (c) either or depending on the circumstances, or (d) silent. Chairman Soules asked for a show of hands of those who think we should leave the rule silent on whether the sanction is imposed against the lawyer or the party or both. There were 13 members in favor of that option.

A vote was taken on those who felt we should address that issue with express words in the rule. There were two members in favor of that. Therefore, by a vote of 13 to 2, the rule will not express against whom the sanction may be imposed, whether the lawyer, the party, or otherwise.

Tommy Jacks proposed changing the sentence that begins "the motion shall identify the discovery that has been completed ..." to

read "a motion filed under this paragraph shall identify ..." Discussion followed. David Peeples seconded the motion and by a vote of 13 to 0, the motion passed.

Tommy Jacks proposed changing the word "non-movant" to "respondent." There being no opposition, that was approved.

Paula Sweeney, on behalf of Paul Gold, proposed adding language to provide that the standard of appellate review for overturning or for reviewing one of the summary judgments shall be the scintilla of evidence rule, not using the phrase "no evidence." Chairman Soules indicated the proposed language should read "the court shall grant the motion unless respondent produces more than a scintilla of evidence raising a genuine issue of material fact." This language would go in the next to the last sentence. Rusty McMains seconded the motion. Discussion followed. A vote was taken and by a vote of 13 to 4, the motion failed.

Discussion continued regarding paragraph (i).

Professor Carlson inquired whether in the second to the last sentence, where it talks about the non-movant producing evidence, whether we are talking about competent summary judgment proof as provided under paragraph (c) of this rule, that we are not talking about necessarily evidence admissible at trial. Tommy Jacks indicates that's what the comment says in the last paragraph. Mr. Jacks suggested that the last sentence of the comment be broadened by saying the existing rules continue to govern the general requirements of motions for summary judgment, including what constitutes appropriate summary judgment evidence. Buddy Low seconded the motion. There being no dissent, the language was approved.

Professor Carlson brought up for discussion whether the movant's attorney has to be the movant's attorney-in-charge. Discussion followed.

Justice Duncan proposed changing the language in the fourth line of the comment to read "the motion must be specific in challenging the evidentiary support for an element of a claim or defense." Tommy Jacks seconded the motion. There being no objection the language was passed.

David Peeples advised he would redraft Rule 166a and fax it by noon on Monday for people to take a look at it and have a final to Chairman Soules by Wednesday.

Professor Alex Albright brought up for discussion a change to paragraph (e) of Rule 166a. Professor Albright proposed changing the paragraph to make it clear that the judge can determine what facts actually are established as a matter of law and can direct the trial accordingly, but the standard is the legal sufficiency of

the evidence and not without substantial controversy. Anne Gardner seconded the motion. Discussion followed. A vote was taken, there being no opposition, the amendment passed.

Rusty McMains brought up for discussion a concern regarding the language in paragraph (i) that reads "the court shall grant the motion unless ...." Discussion followed. Rusty McMains made a motion to substitute the word "should" instead of "shall." Paula Sweeney seconded the motion. Discussion continued. Richard Orsinger proposed language that would say except where otherwise provided by law, the refusal or the denial of a motion for summary judgment is not subject to the mandamus review.

A vote was taken on the motion and by a vote of 8 to 5, the motion failed.

Richard Orsinger made a motion to add a separate proviso after the appeal proviso saying that except as otherwise provided by law the denial of a motion for summary judgment is not subject to mandamus review. Buddy Low seconded the motion. Discussion followed. A vote was taken and by a vote of 7 to 4, the motion passed. Chairman Soules indicated the language will be a new paragraph (j).

Justice Guittard brought up for discussion his concern regarding the language that says "A ground for summary judgment not expressly presented in a motion or a response shall not be considered." Justice Guittard proposed inserting "or for denial of the summary judgment." Discussion followed. Chairman Soules inquired whether anyone felt there was a need to change the language, there being no one that felt that way there would be no change.

Bonnie Wolbrueck presented the Clerk's Committee Report. Discussion followed. There being no opposition, the report was approved in its entirety.

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

Mr. Orsinger brought up for discussion the proposal from Kim Spain regarding Rule 156 being consistent in using the words "non-jury" or "nonjury." The subcommittee recommended that the word be "non-jury" throughout the rules. There being no objection, that was approved.

Mr. Orsinger brought up for discussion the proposed changes to Rule 165 that the notice of dismissal of a suit for want of prosecution should be pushed out far enough in advance to permit someone to request a trial setting which in a non-jury matter requires 45-days notice for your initial trial setting. The proposal was to mandate that it be more than 45-days. The

subcommittee felt that it ought to require 60-days notice of docketing a case on the dismissal docket which would then permit someone to set it for trial. Discussion followed. Chairman Soules requested that the proposed language be prepared and redlined and brought back for the committee to review.

Richard Orsinger brought up for discussion the proposal by Professor Hadley Edgar regarding Rule 165 that the word "judgment" should be replaced by the words "order of dismissal" in the first sentence of the last paragraph. There being no objection, the change was approved.

Richard Orsinger brought up for discussion his letter regarding amendments to Rules 45-47 to make parties plead constitutional, statutory, or regulatory provisions relied upon. Mr. Orsinger indicated that this had already been taken care of by the provisions to the pleadings rules.

Richard Orsinger brought up for discussion the proposal from Wendell Loomis regarding Rule 87(2). Mr. Loomis indicated there was a conflict as to who has the burden of proof when one party appears to have the burden to show venue as proper in another county while the other party has the burden to show that venue is maintainable in the target county. Mr. Orsinger indicated that this issue would be resolved in the revisions to the venue rules. Richard Orsinger suggested tabling this proposal until we take a look at venue.

Mr. Orsinger brought up for discussion the letter from Justice Hecht regarding Rule 162 wherein he asked after a verdict is returned in first phase of bifurcated trial can plaintiff non-suit his entire case before resting in the second phase of the trial. Mr. Orsinger indicated that this issue will be taken up in the materials which are being prepared by Professor Dorsaneo.

Mr. Orsinger brought up for discussion the letter from Jim Parker regarding Rule 18a. Richard Orsinger indicated that the rules regarding recusal are being worked on and that this specific proposal will be looked at at that time. Chairman Soules requested that Mr. Orsinger bring to the next meeting a redlined version of Rule 18a and 18b. A discussion was had regarding the changes to Rule 18a.

Richard Orsinger brought up for discussion the proposals by Justice Guittard regarding having proposed general rules instead of having both trial and appellate rules that are on the same grounds. The subcommittee recommended not doing that at this time. There being no opposition, no change will be made.

Mr. Orsinger brought up for discussion the proposal by Charles Spain regarding Rule 21a. Mr. Spain indicated that when constitutionality of a statute, rule, or ordinance is questioned,

you must notify the attorney general, city attorney, or other appropriate person or else constitutional challenge is waived. Discussion followed. Richard Orsinger requested that this matter be postponed and resolved at the next meeting.

Mr. Orsinger brought up for discussion the letter from Jim Parker regarding Rule 21a suggesting that fax transmissions should be effective when the last page is sent. Mr. Orsinger indicated that the committee had already addressed this issue and had voted on saying that service on a lawyer is effective at the time of the first page. Mr. Orsinger proposed that we be consistent and go with the first page. There being no objection, that will be done.

Richard Orsinger brought up for discussion the letter from Justice Guittard about a unified rule to replace Rule 21a. Richard Orsinger advised the subcommittee's position is to make the rules consistent but not combine them. Mr. Orsinger indicated that his subcommittee will undertake in each of the rules where Justice Guittard has suggested a unified rule that they will compare the appellate rule to the trial rule and then come back with recommendations on conformity.

Richard Orsinger brought up for discussion the proposal by the State Bar of Texas Rules Committee to amend Rule 63 regarding the deadline for amending pleadings would be 30 days prior to trial not the current 7 days prior to trial. The subcommittee's position was to wait for the discovery rules before dealing with this issue.

Mr. Orsinger indicated that pages 68 - 83 of the second supplemental agenda deal with the proposal by Justice Guittard to have general rules. The subcommittee will evaluate and conform the rules.

Richard Orsinger brought up for discussion the proposal by Court Television that Rule 76a be amended to allow audio/video cameras in the courtrooms. Mr. Orsinger indicated at a previous meeting the committee voted not to have uniform rules but to have a rule that said you can't have media unless everyone agrees. Mr. Orsinger indicated that Chip Babcock was drafting a rule to handle this issue. Discussion followed. Chairman Soules indicated that the discussion on 76a is on the record and if the record was dispositive it has been disposed of unless its reoffered.

Richard Orsinger brought up for discussion the proposal by Susan Fortney regarding amending Rule 86. Richard Orsinger indicated this proposal will be postponed until the venue rules have been drafted and discussed.

Richard Orsinger brought up for discussion a proposal from the State Bar of Texas Rules Committee regarding amending Rule 90 to say exceptions to pleadings must be heard at a reasonable time but

not less than 30 days prior to trial. Mr. Orsinger indicated this should be postponed pending determination on the discovery rules.

Mr. Orsinger brought up for discussion a letter from Larry Gollaher regarding Rule 103. Mr. Gollaher advised he had heard of instances where private process servers serve citation, interview the defendant, and obtain admissions against interest and was listed by plaintiff as a witness. Mr. Orsinger indicated that the subcommittee felt that this wasn't something that can be effectively prohibited by a rule. There being no objection, there will be no change.

Mr. Orsinger brought up for discussion the proposal by Earl Bullock to amend Rule 145 to permit clerks to contest affidavits of inability. Mr. Orsinger indicated that our new Rule 145 permits county clerks to do so. Mr. Orsinger indicated that the comments and proposals regarding Rule 145a submitted by Justice Guittard were considered in drafting the new Rule 145.

Mr. Orsinger brought up for discussion the proposal by Richard Worsham to amend Rule 165a to say that the merits of the case should be considered before it is put on the dismissal docket and subsequently dismissed. The subcommittee recommended no change. There being no opposition, there will be no change.

Paula Sweeney presented the subcommittee's report on Rules 216 through 299a.

Ms. Sweeney brought up for discussion the recommendation from Steve Tyler regarding Rule 232, recommending Batson be codified to establish the procedure for making a Batson challenge. Ms. Sweeney advised that a task force had been appointed by Justice Cornyn to address this issue among other jury issues. The subcommittee recommended there be no change in response to this request until such time the committee is requested to address this issue.

Judge Peeples presented a report on Judge Bill Coker's suggestion that Rule 241 be repealed because it, along with Rule 243, creates a dichotomy in the law regarding liquidated and unliquidated damages in default judgments. The subcommittee recommended no change in response to Judge Coker.

Judge David Peeples presented a report regarding Judge David Evans' letter wherein he indicated he would like to have Rule 243 changed so that once the answer date has come and gone and there's no answer filed, the judge can take affidavit testimony and people don't have to show up live. Discussion followed. Judge David Peeples proposed tabling this for the next meeting to give people time to think about it.

Paula Sweeney advised that the proposals regarding Rules 221 through 226 have not been discussed and should be put on the agenda for the January meeting.

Judge David Peeples brought up for discussion the proposal submitted by John Chapin regarding Rule 290 through 295 to change the words "judgment n.o.v." to "judgment as a matter of law." The subcommittee recommended no change. Chairman Soules indicated that this issue had been addressed in Rule 300.

Justice Guittard asked Lee Parsley and Justice Hecht what had been done regarding the proposal by Shelby Sharpe concerning frivolous appeals. Justice Hecht responded to the inquiry.

Chairman Soules presented the subcommittee report on Rules 527 through 734.

Mr. Soules brought up for discussion the proposed amendments to Rule 539 submitted by the Court Rules Committee to prevent JP courts to hold trial sooner than 45 days after setting is required by Rule 245. There being no objection, the rule will be amended to give reasonable trial notice in the justice trial courts rather than 45 days.

Chairman Soules brought up for discussion the proposed amendments to Rule 680 from James H. Holmes to add language to require certificate of reasonable effort to contact adverse party or counsel for party prior to obtaining a temporary restraining order or temporary injunction without notice. The subcommittee recommended no change to the rule.

A brief discussion was had regarding Judge Till's Task Force work product regarding the justice court rules.

Discussion continued regarding Mr. Holmes' recommendation regarding Rule 680.

A vote was taken and by a vote of the house to one there will be no change.

Chairman Soules brought up for discussion the proposal by Dick Brown to amend Rule 684 to allow cash deposit in lieu of bond for temporary injunction or temporary restraining order. The subcommittee felt that this problem has been taken care of in Rule 14c. Discussion followed. The committee voted unanimously for no further change to this rule.

Chairman Soules brought up for discussion proposed changes to Rule 634. Chairman Soules advised that a vote of the full committee on January 20th approved a change to 634 to say "the filing and approval of a supersedeas bond immediately suspends

commencement or enforcement of any proceedings or official action to enforce the judgment by execution, garnishment, or otherwise."

Chairman Soules advised that Rules 657 through 677 were approved at the January 1995 meeting.

Paula Sweeney proposed tabling all requests for changes to the Justice Court Rules and referring them to the Justice Court Rules Task Force.

Chairman Soules brought up for discussion the letter from Judge Tom Lawrence wherein he proposed resending Rules 523-591 as separate rules for the Justice Court and relocate them to the General Rules Section. One of the problems of leaving 573-591 unchanged is Rule 523 defies precise interpretation. Discussion followed. Lee Parsley advised that the Task Force is dealing with this issue therefore this committee will make no change.

Chairman Soules brought up for discussion the proposal by Judge Hawkins to amend Rule 525 to determine whether the Justice Court pleadings should be oral or written. Judge Hawkins indicated with minor exceptions justice court rules should be the same as county and district court rules. Discussion followed.

Mr. Yelenosky made a motion to defer any consideration of the justice court rules until receipt of the Task Force report. Alex Albright seconded the motion. Chairman Soules advised that according to the motion Rules 525, 528, 534, 536, 542, 544, and 574a would be postponed to a later time.

Chairman Soules brought up for discussion the amendment to Rule 662 proposed by the Court Rules Committee. The proposed amendment to the rule would allow "or authorized person" to deliver a writ. There being no opposition, the proposed amendment was approved.

Chairman Soules brought up for discussion the proposed amendment by the Court Rules Committee to amend Rule 663 to allow the "sheriff, constable or authorized person" to execute and return a writ of garnishment. There being no objection that amendment was approved.

Chairman Soules brought up for discussion the amendment to Rule 688 proposed by the Court Rules Committee to add "deliver the same to the sheriff, or constable of the county of the residence of the person enjoined, or shall deliver such writ to an authorized person." There being no objection the amendment was approved.

Chairman Soules brought up for discussion the proposed amendments to Rule 689 submitted by the Court Rules Committee regarding the same issue, there being no objection, the proposed amendments to 689 were approved. Doris Lange made the comment that

by letting another person serve these, the clerk will not be able to answer any questions the attorney or defendant may have with regard to the writs. Discussion followed.

Chairman Soules brought up for discussion the letter received by Harry Moore regarding amending Rule 696, 698, and 708 to specify that replevy bonds are to be in the amount the court estimates will fairly protect the adverse parties' interests and likewise if a combination sequestration and replevy bond is tendered by the plaintiff. Discussion followed. The subcommittee recommended no change. There being no opposition, the subcommittee's recommendation was approved.

Chairman Soules brought up for discussion the proposal by Jeffrey Mahl to amend Rule 523 to make reference to small claims courts. The subcommittee recommended no change. Discussion followed. There being no opposition, there will be no change to Rule 523.

Chairman Soules advised that Rules 571 through 573 will be postponed pending the Justice Court Task Force Report.

Bonnie Wolbrueck brought up a concern regarding issuing writs and whether you are able to issue more than one writ of execution at the same time. Ms. Wolbrueck indicated that this was not clear in the rules. Chairman Soules requested that Ms. Wolbrueck prepare a change to the rule and bring it back to the full committee.

Chairman Soules advised that the reference to Rule 609(d) submitted by Kleberg County is in the wrong place; it should be an evidence rule so that will be referred to Buddy Low's committee.

Chairman Soules advised that the letters submitted regarding Rules 525, 534, 546, 554, 556, 568, and 574(a) along with the miscellaneous justice court rules letters will all be postponed without reference to the merits pending consideration of the Task Force Report.

The meeting was adjourned.