

MINUTES OF THE  
SUPREME COURT ADVISORY COMMITTEE MEETING

May 15, 16, 17, 1986

The Advisory Committee of the Supreme Court of Texas met on May 15, 1986, pursuant to call of the Chairman.

Members of the Committee in attendance were Mr. Luther H. Soules III, Chairman, Mr. Gilbert Adams, Mr. Pat Beard, Professor Newell H. Blakely, Mr. Frank Branson, Honorable Solomon Casseb, Jr., Professor William V. Dorsaneo, III, Professor J.H. Edgar, Mr. Gilbert I. Lowe, Mr. Stephen E. McConnico, Mr. Russell H. McMains, Mr. Charles Morris, Mr. John M. O'Quinn, Mr. Sam Sparks, Mr. Sam D. Sparks, Mr. Broadus A. Spivey, Honorable Linda B. Thomas, Mr. Harry Tindall, Honorable Bert H. Tunks, Honorable James P. Wallace, and Honorable Allen D. Wood.

Upon motion by Harry Tindall, the minutes of the last meeting were unanimously approved.

In earlier discussions, the Committee voted unanimously to approve the changes suggested by Chairman Soules to Canon 3-C.

The Chairman then requested that Judge Casseb tender his opening remarks regarding the proposed Administrative Rules. Judge Casseb indicated that the draft that is now being circulated will be published in the June issue of the Texas Bar Journal and will be on the agenda for discussion at the State Bar Convention on June 18, 1986, in Houston.

Judge Casseb observed that there is a lot of opposition to the draft. Specific problems include the question of how to deal with cases already on the docket, courts that handle both criminal and civil cases, multi-county districts and allocations for instances where judges are on vacation. Judge Casseb has had written opposition to some commitments to reporting from district clerks.

Justice Wallace stated that he felt the Chief Justice intended that the Committee make sure that there was no conflict between the proposed rules and the current Rules of Civil Procedure.

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Judge Casseb motioned that a subcommittee consisting of Chairman Soules, Mr. McMains, Professor Dorsaneo, and Professor Edgar be appointed to deal with the harmonization of the Administrative Rules with the Rules of Civil Procedure, and Mr. Lowe seconded the motion.

Mr. Soules requested that anyone else who would like to volunteer to be on this subcommittee, other than those in the motion, raise their hand. There were no other volunteers.

Mr. Beard indicated that he felt lawyers should not have to look in two different places and have additional requirements in the rules because of the possibility of mistakes being made and suggested that the Committee make reference and incorporate the Rules of Civil Procedure where there are already procedures.

Mr. Soules stated that the Committee had an opportunity, as a whole, to look at the Administrative Rules in full text, in session, together and that if the Committee preferred they be studied in subcommittee, that would be its prerogative but it was his personal opinion that the Administrative Rules would not come before the Committee again.

By show of hands, the Committee voted that the meeting be adjourned and then re-convened at 1:00 p.m. and that, in the interim period of time, the subcommittee meet and study the Administrative Rules for conflict with the Rules of Civil Procedure. The philosophical aspects of the rules would then be discussed by the whole Committee. Two persons were opposed.

The subcommittee then convened, with members of the Committee not wishing to participate leaving the room.

The subcommittee decided to propose that the opening purpose paragraph of the Administrative Rules be numbered 1, and number the rest of the Rules consecutively after that.

Chairman Soules suggested that the subcommittee propose a Rule 11, that would state local rules shall not conflict with the Administrative Rules.

The subcommittee decided to propose that a rule allowing telephone conferences in lieu of hearings be encouraged.

Mr. McMains suggested that the Committee look at the attempt in the Administrative Rules to set timeframes, because of potential problems with scheduling of new and old cases.

The subcommittee identified certain conflicts between Administrative Rule 3-C and D and Rule 166 of the Rules of Civil Procedure. In particular, Rule 3-C4 conflicts with Rule 166-G. The 45-day provision conflicts with the 30-day provision in Rule 3-E concerning experts and other discovery under Rule 166-B.

There is a conflict between Rule of Civil Procedure 251 and Administrative Rule 4-H.

Mr. Tindall suggested that the language "domestic" "divorce" and "child custody" in Rule 4 be purged or modified.

The subcommittee decided to take up the issue of whether references to local rules should be omitted entirely from the Administrative Rules, particularly in Rule 4.

Professor Dorsaneo suggested cross-referencing Administrative Rule 5 with Rule of Civil Procedure 185.

The subcommittee agreed that the concept of a new "interruption docket" be discussed with the Committee.

The subcommittee saw no conflict with Administrative Rule 6 and Chairman Soules stated that the only place Administrative Rule 6 was mentioned was in Rule of Civil Procedure 18-A. Chairman Soules pointed out that in Rule of Civil Procedure 18-A, "district" should be changed to "region."

After discussion, the subcommittee decided that there were no conflicts between Administrative Rules 7 and 8 and the Rules of Civil Procedure.

The local rules section of Administrative Rule 9 was discussed.

After the whole Committee reconvened, the subcommittee reported on their findings.

It was agreed that the purpose paragraph be numbered 1 and that all other Rules then be numbered consecutively after that. The second sentence would say "It is intended that these rules be consistent with the Texas Rules of Civil Procedure. The Texas Rules of Civil Procedure shall govern in the event of conflict."

Chairman Soules assigned the question of where to insert a Rule regarding telephone hearings to Mr. Sam Sparks (El Paso); and deleting the reference to same from Rule 1 (purpose paragraph) of the Administrative Rules.

By show of hands, it was the consensus of the Committee that the phrases "within the periods of times listed" and "consistent with Texas Rules of Civil Procedure 1 and 2" be inserted within Administrative Rule 2. "Domestic actions" will be changed to "family law actions." It was suggested that a sentence also be added that states "That these time standards shall not apply to actions which are stayed, enjoined, abated or removed or in any other manner suspended from proceeding during the periods of any such suspension."

After considerable discussion, Chairman Soules asked how many were in favor of adding the language to Rule 3 that "cases pending would be deemed filed on the effective date of the rules" and that the "effective date of the rules be one year after they are promulgated by the Court to final form." By show of hands, 12 were in favor and 4 were opposed to the addition.

Mr. Tindall suggested that printed Rule 2 (what the Committee discussed as Rule 3) become Rule 6 and the rest of the Rules be numbered accordingly.

The language of Rule 3-C was changed to "within 30 days after the general appearance of the last defendant to appear." In C-3, the language would read "After the order was scheduled for the completion of discovery and preparation of the trial has been rendered."

After discussion, it was the general consensus that Rule 3-C should state "In the event additional persons become parties after the order for the schedule for the completion of discovery and preparation of trial has been rendered, then any party may, within 21 days from the day such additional persons make a general appearance, proposed changes in such schedule."

It was agreed that Rule 4 should read, in part, "As soon as reasonably practical after the time period for responding to a proposed plan has elapsed, the Court shall render and sign its written order, or if any additional parties are added, its amended order for completion and discovery, for preparation of trial and for trial setting. The clerk of the court shall immediately give notice by copy of the order to the parties or their attorneys of record by first class mail." It was the unanimous decision by the Committee that the Court should be required to deliver or mail an order.

Professor Edgar suggested changing the word "plan" in Rule 4 to "schedule." The Committee suggested that the wording change be adopted throughout the Administrative Rules.

Professor Edgar indicated that paragraph a in Rule 3 conflicts with Rule 245, dealing with the assignment of cases for trial generally, and that Rules 3, 4, and 5 should be inserted into the Rules of Civil Procedure. He suggested that the Court could abolish current Rule 245 and make Administrative Rules 3, 4 and 5 Subdivisions A, B and C of new Rule 245. "A party may request a scheduling hearing, which the Court shall hold within 10 days of the request." and was numbered (5) under section C.

Rule 3e(2) conflicts with Rule 166-b(5)(b) It was agreed to change 166-b to 45 days and this one to 30.

Mr. Branson motioned to delete Subdivision 3h entirely as it conflicts with Rules of Civil Procedure 251, 252 and 254. Mr.

Lowe seconded it. Two members were opposed. After further extensive discussion, by show of hands, the vote was 7 to 2 to delete it. An alternative, as suggested by Professor Edgar, would be "All motions for continuance of the trial dates shall be in writing and shall contain a statement by counsel that a copy has been mailed or delivered to the client. The motion shall comply with the applicable Texas Rules of Civil Procedure."

Mr. Soules reported on the changes made by the subcommittee: changed "family law" into "title", delete the provisions to local rules in F and G so that all family law matters are controlled by rule 4 and not by variance of various local rules.

In Rule 4c(3), the words "child custody" were changed to "conservatorship" C-3.

Under Rule 5b(3) "entry of judgment" was changed to "defer signing of judgment."

Under Rule 5c(2) the word "entry" was changed to "signing."

A statute reference for 200-A in Administrative Rule 7 will require revision whenever it is codified.

If Administrative Rule 8 is adopted, there will be a necessity for a change in Rule of Civil Procedure 18(d).

It is on record that the subcommittee has a question as to whether or not 8e applies to all budgeting in all courts or with just the budgeting for the Administrative Region.

In Rule 9, in the third line from the bottom, the subcommittee recommended deletion of the phrase "to be in effect."

The subcommittee recommended the following language for Rule 9c: "The local administrative judge will submit the local rules adopted by their courts to the presiding judge of the administrative region for review, comment and approval before they are furnished to the Supreme Court for approval pursuant to Tex R. Civ. P. 3-A."

The subcommittee recommended that the word "local" be inserted in the title of Rule 10 before the word "rules."

The subcommittee recommended that an "i" subparagraph that states "Local rules shall not conflict with these rules." be added to Rule 10.

The Chairman then opened the floor for philosophical discussions concerning the proposed Administrative Rules. Mr. Tindall talked about the disposition rates and family law matters and discussion ensued.

Mr. Branson moved that the Committee vote to reject Dean Friessen's proposal in toto and Mr. Lowe seconded it. By show of hands, nine members voted to reject the rules, one voted to approve them and two members, including Chairman Soules, abstained from voting.

The Committee met at 8:45 a.m. on Saturday, May 16, 1986, and the following members were in attendance: Mr. Luther H. Soules III, Chairman, Mr. Gilbert Adams, Mr. Pat Beard, Mr. David J. Beck, Professor Newell H. Blakely, Mr. Frank Branson, Professor J.H. Edgar, Mr. Gilbert I. Lowe, Mr. Stephen E. McConnico, Mr. Russell H. McMains, Mr. Charles Morris, Mr. Harold W. Nix, Mr. Sam Sparks, Mr. Sam D. Sparks, Mr. Broadus A. Spivey, Honorable Linda B. Thomas, Mr. Harry Tindall, Honorable Bert H. Tunks, Honorable James P. Wallace and Honorable Allen Wood.

The Chairman made opening remarks concerning the distress warrant rules and garnishment statutes and rules and ex parte receiverships and the Committee's rejection of the proposed Administrative Rules the day before. He also addressed the harmonization of the Criminal and Civil Appellate Rules of Texas. The appellate rules have been signed by both courts, have been promulgated, and will become effective on September 1, 1986.

Concerning Rule 18a, the Committee decided that the 215 series should be the span of sanctions. It was suggested that the standard should include "for the purpose of delay, without sufficient cause and resulting in delay", and that all three of those should be present. A vote was taken regarding the standard and the Committee voted in favor of same, with the exception of Judge Thomas, who voted against it. It was determined that the final rule should read "If a party files a motion to recuse under this rule and it is determined by the presiding judge or the judge designated by him at the hearing and on motion of the opposite party, that the motion to recuse is brought solely for the purpose of delay and without sufficient cause, the judge hearing the motion may, in the interest of justice, impose any sanction authorized by Rule 215-2(b)."

Sam Sparks (San Angelo) moved that 18a(h) not be recommended for adoption and Mr. Morris seconded. There was a unanimous vote that Sam Sparks' motion be turned down. After further discussion, Chairman Soules requested that the Committee go on and then come back to this rule.

NO After discussion, the Committee voted unanimously to reject 27a, b and c, recommended by the COAJ.

Professor Edgar moved to reject Rule 72 as presented by Jeremy Wicker. By show of hands it was unanimously rejected.

Mr. Beard moved that proposed Rule 99 be rejected. Chairman Soules changed it to read "When a petition is filed with the

clerk, the clerk shall promptly issue such citations as shall be requested by any party or its attorney. The clerk shall promptly deliver such citations to any persons designated by the requesting party or his attorney, or in the absence of such designation, the clerk shall deliver such citations according to the clerk's ordinary course of proceedings." On a show of hands, three members favored leaving "or his attorney" and six members were opposed. It was a unanimous view that the first sentence entitles a party to as many citations as that party wants to pay for against any given defendant. Rule 99 was then unanimously approved for recommendation for adoption as changed.

The Committee then discussed at length the proposals under Rule 103, 106, and 107. Mr. Sparks (El Paso) will take the comments of the Committee concerning these rules and will draft proposed rules in final form for the September meeting.

After a motion by Professor Edgar and a second by Mr. Sparks (El Paso), the Committee voted unanimously to reject Representative Patricia Hill's suggestion concerning Rule 107 NO

It was unanimously voted to delete the second sentence of Rule 142, and recommend for adoption on the remainder of the Rule. yes

The Committee then considered a proposed change to Rule 145 by the Gulf Coast Legal Foundation. After discussion, the Committee unanimously voted to recommend for adoption Rule 145 after striking "or appeal" on the first line of the paragraph and in paragraph 1 under "procedure" of the first line striking "or appeal", leaving the word "and" and striking the rest of that sentence and inserting the language from the present rule that says after the word "and" the words "perform all other services required of him, in the same manner"; then stopping after "docket the action" and picking up the old rule "issue process and perform all other services required of him in the same manner as if security had been given" and deleting the taxing against the defendants. Sam Sparks (El Paso) will study how this rule dovetails into the justice courts and will rewrite the rule using the above recommendations for consideration in September. Hold

The Committee voted unanimously to recommend for adoption the proposed change to Rule 162 and to redraft Rule 164, with "no order required" language in both Rules.

Mr. Morris moved that Rule 165a as proposed by Judge Nelson, be rejected, Mr. Sparks (San Angelo) seconded the motion and the Rule was unanimously rejected by show of hands. NO

Yes Rule 166b was unanimously approved.

Mr. Sparks (El Paso) moved for rejection of the COAJ's recommendation regarding Rule 166f and Mr. McConnico seconded it. The proposal was unanimously rejected by show of hands.

Chairman Soules suggested that the Committee attempt to write a rule permitting ruling on written motions if neither party asks for a hearing and also permit telephone hearings if either party asks for a hearing. By a show of hands, eight members were in favor and one member was opposed.

Chairman Soules suggested that Mr. Sparks (El Paso) send proposed Rule 188-A to Doak Bishop for his input and guidance.

The Committee voted unanimously to approve the changes suggested by John Wright to Rule 201, after re-editing by Mr. Sparks (El Paso) and Mr. Tindall.

With reference to the requests of Charlie Haworth, Harris Morgan and Tom Ragland regarding to Rule 204(4), the Committee voted unanimously by show of hands that its previous action would stand.

The suggestions for changes to Rule 205 by Charles Matthews and George Hickman were unanimously recommended for adoption.

Professor Newell Blakely moved that Rule 207, as drawn up by him, be recommended for adoption and Mr. Branson seconded the motion. The Committee approved the recommendation for adoption of Rules of Evidence 801 and 804 and Rule of Civil Procedure 207, with "an interest similar" being changed to "a similar motive to develop the testimony by direct, cross or indirect examination", by show of hands, twelve to one.

After discussion, it was decided that Tom Ragland's suggestion for a new Rule 209 be incorporated into an order for the Supreme Court to hand down regarding disposition of deposition transcripts. Professor Edgar will draft a proposed order and will report to the Committee with his findings at a later date.

It was unanimously voted to recommend the adoption of the addition of the sentence "The burden of establishing good cause is upon the offeror of the evidence and good cause must be shown in the record" to Rule 215-5.

Rule 215-2 was unanimously rejected by show of hands.

The proposed amendments to Rules 239a and 306a(3) submitted by Professor Jeremy Wicker, Charles M. Jordan and I. Nelson Heggen were unanimously rejected.

The suggested changes to Rule 169 were rejected unanimously by show of hands.

By show of hands, the Committee voted unanimously to recommend adoption of Rule 167(3) after the insertion of the phrase "If objection is made to a request or to a response,



either party may...", deletion of the second sentence, and retainage of the third and final sentence.

It was voted by the Committee that, under Rule 167, (5) will become (3), (3) will become (4) and (4) will become (5) and that the language of (3) will be "The original of such request or response shall be maintained by the party receiving same and shall be available for copying and inspection by other parties to the suit. A party serving a request under this rule shall not file such a request or response with the clerk of the court unless the Court upon motion and for good cause permits the same to be filed." The title of (3) will be "Custody of Originals by Parties." After discussion, it was voted, ten to one, that the originals be kept by the originating attorney. It was unanimously decided that new (4) shall read "Order. If objection is made to a request or to a response, either party may file a motion and seek relief pursuant to Rules 166b or 215.

The Committee reconvened on May 17, 1986. Those persons in attendance were Mr. Luther H. Soules III, Chairman, Mr. Gilbert Adams, Mr. Pat Beard, Mr. David J. Beck, Professor Newell H. Blakely, Mr. Frank Branson, Professor J.H. Edgar, Mr. Gilbert I. Lowe, Mr. Stephen E. McConnico, Mr. Russell H. McMains, Mr. Charles Morris, Mr. Harold W. Nix, Mr. Sam Sparks, Mr. Sam D. Sparks, Mr. Broadus A. Spivey, Honorable Linda B. Thomas, Mr. Harry Tindall, Honorable Bert H. Tunks, Honorable James P. Wallace, Honorable Allen Wood.

Chairman Soules turned the meeting over to Professor Edgar to enable him to report on his subcommittee's findings regarding proposed Rule 364-A. Professor Edgar stated that, after review, the subcommittee was of the opinion that a rule of this nature was desirable; that the philosophy of allowing the Court to, in certain cases, not require a supersedeas bond of the type now in effect was a desirable rule. Professor Edgar then opened the matter for discussion.

Mr. Branson opposed the Committee discussing proposed Rule 364-A at this time because he didn't think it appropriate considering the high percentage of members of the Committee who have involvement with the outcome of the Pennzoil v. Texaco litigation.

Chairman Soules, an attorney of record for Pennzoil, and Judge Woods withdrew from the discussion and left the room. Other committee members remained to further consider the proposed rule.

After considerable discussion, Mr. Adams moved that proposed Rule 364-A be rejected and Mr. Beard seconded. Mr. Beck and Mr. McMains abstained. Chairman Soules and Judge Woods remained out of the room. The motion passed, eight to four.

Chairman Soules returned to the room and resumed the chair.

Chairman Soules then directed comments to the Committee regarding Administrative Rules 3, 4, and 5, and their possible placement into the Rules of Civil Procedure should be addressed by the Committee.

After discussion, the Chairman asked the Committee if the Court would be better informed if public hearings were held around the State rather than the one hearing in Houston. The Committee recommends hearings around the State.

The Committee unanimously voted in favor of proposed Rule of Civil Procedure 8. Judge Thomas will rewrite the rule in clear language and present it to the Committee for final approval in September.

The Committee unanimously voted in favor of proposed Rule 10, subject to rewriting by Judge Thomas' committee in conformance with the Committee's comments.

It was moved by Mr. Sparks (El Paso) that proposed Rule 10-A be rejected, with a second from Mr. Beard. The Committee, by show of hands, unanimously rejected proposed Rule 10-A.

Mr. Beard moved to reject proposed Rule 10-B and Mr. Sparks (El Paso) seconded. By show of hands, the Committee voted unanimously to reject proposed Rule 10-B.

The Committee voted unanimously to adopt the proposed changes to Rule 3-A as stated on page 103 of the meeting booklet.

Mr. Branson moved and Judge Thomas seconded that Bruce Pauley's proposed amendment to Rule 13 be rejected. The Committee voted unanimously to reject same.

Rule 14c was rejected by a show of hands, eight to four.

Professor Blakely addressed the Committee regarding 3737-h. He suggested to the Committee that it recommend to the Supreme Court that the legislature has attended to Mr. Beckworth's concerns and take whatever action it feels necessary regarding that. His suggestion was seconded by Professor Edgar and the Committee unanimously voted to reject the suggestion by Mr. Beckworth because it feels the Legislature has handled the problem.

Proposed Rule 366a was rejected on a show of hands, eight to four.

Mr. Beard moved that the Committee recommend for adoption the amendments to Rules 503, 657 and 621-A, Mr. McConnico

seconded the motion, and the Committee voted unanimously to recommend same.

Mr. Beard moved that Jay Vogelson's proposed new Rule 37 be rejected and Professor Edgar seconded. By show of hands, the Committee unanimously rejected proposed new Rule 37.

John Pace's recommendations concerning Rules 621-A and 627 were rejected unanimously.

The Committee voted to change the time period in Rule 680 to a 14 day time period by show of hands, five to three. All other suggestions from Judge William Martin regarding Rule 680 were unanimously rejected. Rule 683 was unanimously rejected.

David Keltner's proposed change to Rule 685 was unanimously rejected.

Rule 696 was unanimously adopted.

The meeting of the Supreme Court Advisory Committee was adjourned at 12:30 on May 17, 1986. The Committee will next meet on September 12, 1986, from 8:30 a.m. to 5:30 p.m. and on September 13, 1986, from 8:30 a.m. to 1:00 p.m.

