

MINUTES OF THE
SUPREME COURT ADVISORY COMMITTEE

NOVEMBER 18-19, 1994

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock a.m. on Friday, November 18, 1994, pursuant to call of the Chairman.

Friday, November 18

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, Alexandra Albright, Pamela Stanton Baron, Honorable Scott A. Brister, Professor Elaine A. Carlson, Professor William Dorsaneo III, Honorable Sarah B. Duncan, Michael T. Gallagher, Anne L. Gardner, Honorable Clarence A. Guittard, Michael A. Hatchell, Charles F. Herring, Jr., Donald M. Hunt, Russell H. McMains, Anne McNamara, Harriet E. Miers, Richard R. Orsinger, Honorable David Peeples, Anthony J. Sadberry, Paula Sweeney, Stephen Yelenosky

Members Absent: Alejandro Acosta, Jr., Charles L. Babcock, David J. Beck, Ann Tyrrell Cochran, Tommy Jacks, Franklin Jones, Jr., David E. Keltner, Joseph Latting, Thomas S. Leatherbury, Gilbert I. Low, John H. Marks, Jr., Honorable F. Scott McCown, Robert E. Meadows, David L. Perry, Stephen D. Susman,

Ex-Officio Members Present: Justice Nathan L. Hecht, Honorable Sam Houston Clinton, Honorable William J. Cornelius, W. Kenneth Law, David B. Jackson, Doris Lange, Bonnie Wolbrueck.

Ex-Officio Members Absent: Doyle Curry, Paul N. Gold, Thomas C. Riney, Honorable Paul Heath Till.

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

Mr. Soules recognized Judge Guittard for a report on the appellate rules. Judge Guittard referred the committee to TRAP 7. The subcommittee moved the attorney in charge provision from TRAP 4(b), where it had been previously approved by the Committee, to TRAP 7(a). Mr. Soules suggested the subcommittee review TRCP 8 which provides that the attorney whose signature first appears is the attorney in charge because the rule as proposed by the subcommittee could allow two or more attorneys to be the attorney in charge. Judge Guittard agreed that "whose signature first appears on" should be substituted for "who signed" in the second sentence. With the change, the rule was APPROVED WITHOUT OPPOSITION.

Judge Guittard referred the committee to TRAP 40(a)(2). The subcommittee has inserted a subdivision (5) requiring a statement in the notice of appeal that it is an accelerated appeal. APPROVED WITHOUT OPPOSITION.

Judge Guittard referred the committee to TRAP 44(a) and asked Judge Clinton for comment. Judge Clinton said that he had not had time to review the proposal and debate was postponed on the proposal.

Judge Guittard referred the committee to TRAP 57 - the docketing statement. Judge Guittard moved that it be limited to civil cases and adopted. Judge Cornelius stated that he thought a docketing statement was useful in criminal cases as well. VOTE: paragraphs (a) - (d) APPROVED WITHOUT OPPOSITION FOR CIVIL CASES. Subcommittee will draft an additional paragraph (c) to be applicable to criminal cases.

Judge Guittard referred the committee to TRAP 87. The subcommittee has suggested that the requirement that the clerk of the trial court send an acknowledgment to the clerk of the appellate court of the receipt of the mandate and the date the mandate was carried out be deleted. Judge Guittard asked Mr. Law and Judge Clinton to review the proposal and comment on it at a later time.

Judge Guittard referred the committee to TRAP 100. The subcommittee proposal adds "to the trial court's final judgment" to make clear that a party can file a motion for rehearing even if the party did not file a brief. APPROVED WITHOUT OPPOSITION.

Judge Guittard then referred the committee to the proposed revisions of the Texas Rules of Civil Procedure, specifically TRCP 296. The proposal is to make clear that a request for findings of fact is not proper after the granting of summary judgment. A request for findings of fact is appropriate only after a trial before the court. Ms. Gardner asked how the proposal squares with TRAP 42 (accelerated appeals of interlocutory orders). Ms. Duncan asked if findings of fact were appropriate after a sanctions order. Mr. Soules recommend the deletion of "is proper only after a plenary trial before a judge without a jury and". Judge Guittard agreed to the deletion. Mr. Soules asked what the phrase "determined in response to a motion for summary judgment" meant. A discussion followed. Ms. Duncan asked how the rule applies if the trial judge makes preliminary findings of fact, such as finding that something is or is not summary judgment proof. Mr. Soules said that findings of fact may, in some circumstances, be appropriate after a jury trial and the clause which he proposed for elimination would not allow a request in that circumstance to extend the appellate timetable. Mr. Soules further inquired why the rules didn't allow a party to request findings of fact after a summary judgment to extend the appellate timetable. Judge Guittard stated that the rules should not allow a meaningless act to extend the timetable. Mr. Orsinger suggested eliminating the two track timetable to cure the problem. Ms. Duncan stated that finality would be extended 75 to 90 days if that was done. More discussion followed. Judge Guittard concluded that the

subcommittee had not considered many of these issues and should review the matter further.

VOTE: Should request for findings of fact and motions for new trial extend the appellate timetable: favor - 6; oppose - 7. Mr. Orsinger suggested the question should be phrased differently. VOTE: should timely filed requests for findings for fact have the same effect on the appellate timetable and the courts plenary power as a motion for new trial: favor - 12; oppose - 0. More discussion followed. Mr. Soules referred the matter back to subcommittee for more work.

Judge Guittard referred the committee to TRCP 297. The proposal makes clear that the court's authority to enter findings of fact is not affected by the expiration of the court's plenary power so long as the court does not change the judgment. Discussion followed. Judge Brister suggested the trial judge be required to answer a charge just like a jury and that the request for findings of fact practice be eliminated. Ms. Gardner suggested that findings should be submitted to the judge prior to judgment rather than after judgment. Mr. Orsinger stated that the practice must not be that we require objections to findings of fact submitted before judgment to preserve error. Mr. Orsinger further stated that the subcommittee should not limit findings of fact to ultimate issues as family law cases need findings on characterization and valuation of specific property. Mr. Soules recommitted the matter to subcommittee and suggested the appellate group work with Ms. Sweeney's subcommittee.

Judge Guittard referred the committee to TRCP 298. The proposal extends from 10 days to 20 days the time to file a request for additional findings. APPROVED WITHOUT OPPOSITION.

Judge Guittard referred the committee to TRCP 627. The proposal is to strike "or in arrest of judgment or motion to vacate." Mr. Law stated that the Supreme Court had occasionally ordered the court of appeals to vacate a judgment, so the motion to vacate might have some use. Judge Guittard agreed to leave "motion to vacate." Deletion of "or in arrest of judgment" APPROVED WITHOUT OPPOSITION.

Judge Guittard referred the committee to TRCP 634. Proposed rule is to make clear that forced satisfaction of judgment is stopped whenever supersedeas bond is filed. Mr. McMains stated that the use of "proceeding" was problematic in that proceeding suggested a court proceeding and some actions to satisfy judgments are not a court proceeding, such as filing lien. Mr. Orsinger stated that TRCP 634 arguably applies only to "execution" and not to turnover or garnishment because it is under the "execution" subdivision of the TRCP. Mr. Soules suggested "shall suspend all further acts to enforce or satisfy the judgment against the party who posted the supersedeas bond."

Mr. Orsinger stated that the writ of supersedeas was designed to stop the collection writ, but not to stop all enforcement mechanisms. Mr. Soules charged the

subcommittee with drafting rule to address all enforcement mechanisms and to be placed at an appropriate place in the rules. Ms. Duncan suggested that the Legislature and Supreme Court need to create one set of rules regarding collection of judgments.

Judge Guittard referred the committee to TRCP 657-677, the garnishment rules. Judge Guittard recognized Ms. Duncan to explain the proposals. Professor Dorsaneo suggested adding "post-judgment" to the last sentence of TRCP 657.

Mr. Soules inquired whether the committee wanted to change the rule that the judgment creditor could get a writ of garnishment immediately, rather than waiting for a final judgment. Ms. Duncan argued that the immediate writ of garnishment ties up the debtor's money and effectively puts the debtor out of business, or at the very least, makes it hard for the debtor to supersede. Ms. Duncan suggested that the writ of garnishment should issue immediately only on the same showing as a writ of execution can issue immediately under current rules. Discussion followed about the showing required by TRCP 628 to get immediate execution. Mr. Orsinger suggested that TRCP 634 be revised to make it clear that writ of garnishment dissolves immediately upon filing of supersedeas bond.

VOTE: should judgment creditor be able to get a writ of garnishment on the time the judgment is signed or at the time execution is available (subject to TRCP 628): at time of judgment - 6; when execution available - 9.

Mr. Soules recessed the meeting for lunch.

Mr. Soules reconvened the meeting and recognized Professor Dorsaneo. Professor Dorsaneo proposed that garnishment be allowed at anytime after the judgment is signed until time a supersedeas bond is filed. VOTE: at time execution is available - 0; time judgment is signed but only until supersedeas bond is filed - all voters.

Mr. Soules recognized Judge Clinton for his comments on TRAP 44. First, Judge Clinton said that TRAP 41(b) should make some reference to TRAP 44. Second, in criminal cases, the transcript is forwarded to the court of appeals without any request by a party; therefore, the new rule needs to be revised to follow the old rule with regard to a request for a statement of facts but not a transcript. Some discussion followed. Judge Guittard agreed that the subcommittee should withdraw the proposal altogether.

Judge Clinton then addressed the proposed amendments to TRAP 87. He said that the Court of Criminal Appeals wanted to know when its mandate had been carried out. Mr. Soules suggested, and Judge Guittard agreed, to withdraw the proposed amendments.

Judge Guittard referred the committee to proposed TRCP 264b setting standards for electronic recording of court proceedings. Mr. Gallagher expressed concern about

whether electronic recording, and asked how conferences at the bench were recorded. Judge Brister said that he was "opposed to almost everything in the rule" and he stated his specific objections. Discussion followed.

Judge Guittard referred the committee to the other rules which have proposed amendments to accommodate electronic recording. TRAP 50 provides that if the parties do not get a sufficient record, they may get a new trial. TRAP 53(j) defines the statement of facts in cases electronically recorded. TRAP 74(h) sets out briefing requirements, including the requirement of an appendix. TRAP 53(d) takes care of the *Englander* problem.

Ms. Barron asked if the appendix had to be served on all parties. Mr. McMains suggested that parties file only one appendix with the brief and that the other parties would have to go to the clerks office and get a copy. Mr. Yelonoski asked who would pay the cost of preparing the appendix if the party did not have the ability to pay.

Ms. Duncan stated that the parties will have to check the other parties appendix against the tapes to make sure it is accurate. Judge Brister said that parties are not likely to intentionally file an inaccurate appendix because the tape is available and would prove the inaccuracy - and sanctions could be imposed. This has not been a problem in practice.

Judge Clinton said that the Court of Criminal Appeals had authorized electronic recording in the past but had a bad experience - they had to reverse a conviction and a sentence of death and send the case back for a retrial because the statement of facts was inaudible. He said the Court was unlikely to authorize any further use of electronic recording and the rules should apply only to civil cases.

VOTE: Should the rules require a copy of the appendix to be served on all parties: serve copies - 4; file only one and not serve - house.

Professor Dorsaneo, in response to Judge Brister's earlier remarks, suggested TRCP 264b(1) provide that the equipment have at least four tracks, but that the requirement that if have sufficient tracks to record everyone who might talk be deleted. This proposal was apparently approved without opposition.

Judge Brister suggested paragraphs (a) and (b) of TRCP 264a be consolidated. This proposal was accepted by Judge Guittard.

Mr. Soules asked Judge Brister to draft a proposal on providing a statement of facts or appendix to a party not able to pay the costs.

Professor Dorsaneo referred the committee to TRAP 16. The committee briefly discussed whether a court which assumed jurisdiction should automatically return the

case to the court which should have jurisdiction or whether the court which should have jurisdiction should certify its availability to the court assuming jurisdiction. VOTE: automatic return - 9; await certificate of availability - 0.

Professor Dorsaneo referred the committee to TRAP 56(c). When should the record be filed? Professor Dorsaneo suggests 90 days rather than 120 days. APPROVED WITHOUT OPPOSITION.

Professor Dorsaneo referred the committee to TRAP 60. Amendments APPROVED WITHOUT OPPOSITION.

Professor Dorsaneo referred the committee to TRAP 74(d). Judge Clinton stated that the rules should provide that the State be called the State and the Defendant be called either the appellant or appellee. APPROVED WITHOUT OPPOSITION (with a correction by Judge Clinton).

Professor Dorsaneo referred the committee to TRAP 13. Proposes to use "fee" rather than "deposit or fee." APPROVED WITHOUT OPPOSITION.

Professor Dorsaneo referred the committee to TRAP 40(a)(3) and proposes that "on all parties to the trial court's final judgment" be inserted. Both 40(a)(3) and (a)(5) now refer to service on all parties to the trial courts final judgment, but in accelerated appeals, there is no final judgment. Language needs to be added to clarify; possibly require service on "all parties to the proceedings in the court below."

Professor Dorsaneo referred the committee to TRAP 42(a)(3). Proposal is to allow time for filing notice of appeal in accelerated appeals to be extended in accordance with TRAP 41(a)(2). APPROVED WITHOUT OPPOSITION.

Judge Guittard and Professor Dorsaneo then referred the committee to the agenda, beginning on page 983 and the Report handed out by Professor Dorsaneo.

Page 984 -- letter from Michael Northrup regarding extending appellate timetable by filing a motion to modify. Proposal has been adopted by the subcommittee. (The Report has a mistake in that it says findings of fact shall be filed within sixty days when in fact the period is ninety days.)

Page 985 -- letter from Michael Northrup regarding court reporter sending exhibits to the court of appeals. Committee agreed that "and transmitted by the official reporter to the clerk of the appellate court" should be added to the second sentence of TRAP 53(l). In addition, the committee agreed that TRAP 53(l) should be further amended to make clear that the person in possession of an original exhibit not in the possession of the clerk should send that exhibit directly to the clerk of the court of appeals.

Page 1016 -- letter from Judge Nye - same as page 985.

Page 989 -- 991 were all submitted by Professor Carlson. Professor Carlson is satisfied that all have been addressed by the subcommittee. If she has further comments, she will provide them to the subcommittee.

Page 993 - 994 -- letter from Judge Nye regarding fax filing rule. The subcommittee does not recommend any action.

Page 994 -- letter from Judge Nye regarding bankruptcy rule. The subcommittee currently has a bankruptcy rule under consideration. The committee debated whether the entire appeal should automatically abate on the filing of bankruptcy by one party, and whether the appellate timetables are reset when the case is reinstated. No action was taken and the subcommittee will work further on the matter.

Page 994 -- letter from Judge Nye regarding appeals by the state. Judge Clinton said the problem is adequately addressed by Code of Criminal Procedure §44.01 and there is no need for a rule.

Page 995 -- letter from Katherine Kinser regarding sanctions in the appellate courts. Subcommittee does not have a proposal. Problem is addressed in part in TRAP 84 and 182. Sanctions subcommittee may want to consider it further.

Page 997 -- letter from Frank Evans regarding mandamus and other extraordinary proceedings. Subcommittee recommends no action.

Page 997 -- letter from Frank Evans regarding unpublished opinions. Ms. Duncan suggested putting all opinions on Westlaw and citing them. Mr. Soules said that the committee has debated this issue in the past and he preferred to defer the discussion. No further action is required.

Page 998 -- letter from Judge Nye regarding supplemental transcript in criminal cases. Judge Clinton said that the supplemental transcript serves its purpose and the rule should not be changed. Subcommittee will take no further action. (The reference in the rule should be to TRAP 55, not TRAP 45.)

Page 999 -- letter from Charles Spain regarding certificate of mailing. Subcommittee does not recommend any action.

Page 1001 -- letter from Charles Spain regarding the mailbox rule. The committee has adopted a proposal which meets the issue.

Page 1004 -- letter from Thomas Leatherbury regarding sealing records. Subcommittee is considering a proposal and will report back to the committee.

Page 1007 -- letter from Michol O'Connor regarding holidays. The committee has adopted the proposal.

Page 1011 -- letter from James Paulsen regarding finding date party receives notice of judgment. Subcommittee has made a proposal to be considered later by committee.

Page 1014 -- letter from Richard Countiss regarding adopting federal rule for transmitting record to court of appeals. Committee has already considered the proposal.

Page 1016 -- letter from Judge Nye regarding who files exhibits in the court of appeals. Committee has already considered the proposal and adopted amendments to the rules.

Page 1017 -- letter from Judge Nye regarding correcting rules to delete reference to Supreme Judicial Districts. Proposal already adopted by subcommittee and is part of their report.

Page 1018 -- letter from Judge Nye regarding filing record. Committee has adopted a proposal which addresses the issue.

Page 1019 -- letter from Judge Nye regarding power of nearest appellate court acting when court with jurisdiction not available. Committee has adopted a proposal which addresses the issue.

Page 1020 -- letter from Charles Spain regarding a certificate of conference on motions. Subcommittee does not recommend any action.

Page 1022 -- letter from Charles Spain inquiring whether amicus must appear pro hoc vice. Subcommittee does not recommend any action.

Page 1025A -- letter from Richard Countiss regarding amicus briefs by special interests. Subcommittee does not recommend the action suggested. The rules already require that all papers, including amicus briefs, be served.

Page 1027 -- letter from Brian Sanford regarding whether a contest to an affidavit of inability must be verified. Committee has already adopted a change to TRAP 45(e).

Page 1029 -- letter from Michol O'Connor regarding request for findings of fact extending appellate timetable. Committee has adopted this proposal in TRAP 40(a)(4).

Page 1032 -- letter from Michol O'Connor regarding request for findings of fact extending time to file formal bill of exceptions. Subcommittee has adopted this proposal

in TRAP 52(c)(11) or proposed TRCP 321(g)(11) and will present the rules to the committee at a later meeting.

Page 1035 -- letter from Judge Nye suggesting changes in several subparts of TRAP 40(a)(3). Subcommittee has adopted suggestions in part.

Page 1035 -- letter from Judge Nye questioning conflict between the Code of Criminal Procedure §44.02 and TRAP 40(b)(1). Judge Clinton opined that the problem had been corrected by the opinions of the Court of Criminal Appeals and no rule change was needed.

Page 1036 -- Mr. Soules stated that there was a typographical error in the first sentence of TRAP 41(c) which needed correction.

Page 1037 -- letter from Judge Nye suggesting amendment to TRAP 41(a)(2). Subcommittee recommends no action.

Page 1038 -- letter from Judge Nye regarding motion for extension of time to file perfecting instrument or record. Adopted by committee as it appears in cumulative report.

Page 1039 -- letter from Judge Nye regarding appellate court modifying decision after judgment. Professor Dorsaneo noted that the report recommended changing "decision" to "judgment" but that after some thought, he preferred no such change. Mr. Orsinger asked if subcommittee had considered defining the plenary power of the appellate courts and whether a court could modify its judgment outside plenary period. Professor Dorsaneo said the subcommittee intended to work on the plenary power issue.

Page 1040 -- letter from Judge Nye regarding when a notice of appeal should be filed under TRAP 44. Committee has already adopted an amendment to address the problem.

Page 1041 -- letter from Sarah Duncan regarding advance payment for transcript and statement of facts. Judge Guittard noted that the proposals adopted by the committee require payment or an arrangement to pay. Mr. Yelonoski stated that it was not clear that the court reporter must prepare a statement of facts if paid and that arrangement to pay could be construed to be "I'll pay you later" which might trigger a requirement to prepare the statement of facts. Judge Guittard agreed that some revisions might be appropriate.

Page 1043 -- letter from Judge Nye regarding amendment to TRAP 51(c) to require advance payment to trial court clerk for preparation of transcript. Committee has already adopted this proposal.

Page 1044 -- letter from Peter Brewer regarding leave of court to deposit certain kinds of securities for bonds. Ms. Duncan stated that the current rule puts the burden on the clerk to approve all sorts of securities and that the proliferation of securities has made it almost impossible for the clerk to know what they are approving. Mr. Soules stated that the clerks could easily identify T-bills, but Ms. Duncan opined that some securities now appeared to be T-bills when they are not. Mr. Orsinger and Ms. Duncan suggested requiring leave of court for anything other than cash. Moved inserting ", with leave of court," after "cash or."

VOTE: ADOPTED UNANIMOUSLY

Page 1046 -- letter from Justice Hecht suggesting transcript be composed of original papers. This suggestion was previously approved by the subcommittee but rejected by the full committee.

Page 1047 -- letter from Judge Osborn regarding designation of matter to be included in the transcript. Committee has approved revisions to TRAP 51(a), but not the specific revision suggested.

Page 1051 -- letter from Judge Nye suggesting revision to TRAP 51(c) regarding which court should make and keep a duplicate of the transcript. Committee has approved revisions to TRAP 51(c) which incorporate suggestion.

Page 1052 -- letter from Mr. Soules regarding revisions to TRAP 52(a) for preservation of error. Subcommittee has this matter under consideration. Cumulative report proposes new TRCP 321.

Page 1053 -- letter from Judge O'Connor regarding extending appellate deadlines by filing request for findings of fact. The committee has already approved some revisions which correct the problem. In addition, the subcommittee will continue to work on the trial court rules in accordance with the discussion of the committee.

Ms. Wolbrueck stated that the clerks need to know when the notice of appeal is filed so they know when to prepare the transcript. Ms. Duncan stated that the appellant should also file a request for a statement of facts with or before filing the notice of appeal. Professor Dorsaneo stated that the clerk of the appellate court is to refer the matter to the appellate court for "an appropriate order" when the clerk does not timely file a transcript, but that it is not clear what an appropriate order may be.

Page 1059 -- letter from Judge Cohen suggesting the reporter have a duty to file a statement of facts. The committee has already adopted rule to impose a duty on payment or arrangement to pay the reporter's fee.

Page 1061 -- letter from Judge Cohen suggesting rule to allow appellate court to refer issues to the trial court where a finding of fact is required. This matter is under consideration by the subcommittee.

Page 1062 -- letter from Judge Nye suggesting amendment to TRAP 54(c) to require a statement reasonably explaining a delay in requesting the transcript. Subcommittee does not recommend any action.

Page 1065 -- letter from Charles Spain regarding deletion of "supreme judicial district." This proposal has been adopted.

Page 1069 -- letter from Judge Nye suggesting change to TRAP 57(b) to allow clerk to add additional counsel. This proposal has been adopted as part of TRAP 7.

Page 1070 -- letter from Judge Nye suggesting TRAP 61 be amended to provide for disposition of all papers after appeal final. The subcommittee has the matter under consideration.

Page 1070 -- letter from Judge Nye regarding affidavit to support motion for extension of time to file transcript. Subcommittee does not recommend adoption as the need for this motion has been eliminated by other rules changes.

Page 1072 -- letter suggesting typeface be specified for briefs. This matter has been previously debated by the committee and requirements of briefs have been added to TRAP 4.

Page 1074 -- letter suggesting rules state a standard of review for points of error. Subcommittee does not recommend adoption.

Page 1076 -- letter from Ben Taylor suggesting requirement to list the address of the parties be deleted from TRAP 74(a). The committee has adopted revisions to TRAP 74(a) which dispense with giving the address of parties represented by counsel.

Page 1078 -- letter from Judge Nye suggesting change in TRAP 74 to delete reference to supreme judicial district. This has been adopted by the committee. Second suggestion by Judge Nye to limit size of briefs for both civil and criminal cases. The committee disapproved this suggestion.

Page 1079 -- letter from Judge Nye suggesting the request for oral argument appear on the "front right-hand corner" of the brief cover. The committee debated the matter briefly and VOTED to require the request for oral argument appear somewhere on the cover. Second suggestion was to add "and criminal" to TRAP 75(f) to allow the court to advance criminal cases without argument. The committee has adopted this proposal.

The meeting was adjourned until Saturday, November 19, 1994 at 8:00 o'clock a.m.

Saturday, November 19, 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, Alexandra Albright, Pamela Stanton Baron, David J. Beck, Honorable Scott A. Brister, Professor Elaine A. Carlson, Professor William Dorsaneo III, Sarah B. Duncan, Honorable Clarence A. Guittard, Michael A. Hatchell, John H. Marks, Jr., Russell H. McMains, Anne McNamara, Harriet E. Miers, Richard Orsinger, Honorable David Peeples, Luther H. Soules III, Stephen D. Susman, Paula Sweeney, and Stephen Yelenosky.

Members Absent: Alejandro Acosta, Jr., Charles L. Babcock, Ann T. Cochran, Michael T. Gallagher, Anne L. Gardner, Charles F. Herring, Donald M. Hunt, Tommy Jacks, Franklin Jones, Jr., David E. Keltner, Joseph Latting, Thomas S. Leatherbury, Gilbert I. Low, Honorable F. Scott McCown, Robert E. Meadows, David L. Perry and Anthony J. Sadberry.

Ex-Officio Members Present: Justice Nathan L. Hecht, Honorable Sam Houston Clinton, Honorable William J. Cornelius, Paul Gold, David B. Jackson, Doris Lange, and Bonnie Wolbrueck.

Ex-Officio Members Absent: Doyle Curry, W. Kenneth Law, Thomas C. Riney and Hon. Paul Heath Till.

Also present: Lee Parsley, Supreme Court Staff Attorney, Holly Duderstadt, Denise Smith.

The meeting was called to order by Mr. Soules, who called on Judge Guittard to finish his report.

Page 1081 -- letter from Charles Spain regarding use of "concur" and "dissent" in TRAP 79 and 90 when referring to a decision. The subcommittee does not recommend adoption.

Page 1083 -- letter from Charles Spain regarding motion for rehearing or motion for reconsideration. Subcommittee does not recommend adoption.

Page 1088 -- letter from Professor Edgar asking why the rule for the courts of appeals and the supreme court is different regarding amount of sanctions. Subcommittee does not recommend adoption; the distinction between the two was intentional.

Page 1089 -- letter from Professor Edgar regarding difference between TRAP 84 and 182 on "way of awarding damages for delay." Subcommittee does not recommend adoption.

Page 1090 -- letter from Charles Spain suggesting changing to 50 days the time when the clerk of the court of appeal should issue the mandate. Mr. Hatchell said that it really was not a problem and did not need to be revised. No further action will be taken.

Page 1092 -- letter from Judge Nye suggesting the time for issuing mandate be increased. The subcommittee has this under consideration. Second suggestion that court of appeals not be able to vacate or modify a judgment after the mandate issues. This proposal was disapproved.

Page 1093 -- letter from Judge Nye asking whether it is necessary for the trial clerk to acknowledge receipt of the mandate. Subcommittee had matter under consideration but decided to drop it from their agenda after discussion by the committee.

Page 1094 -- letter from Judge Nye suggesting appendix should apply to both civil and criminal cases, and reference should be to appellant and appellee and not to State. Letter further suggests that the thickness of the transcript should be stated in the transcript order. Judge Clinton stated that the transcript order probably should be the same for civil and criminal cases, but that the Court of Criminal Appeals preferred that 8 1/2 x 14 paper be used and that the transcript be bound at the top. It was suggested that a volume of the transcript contain no more than 200 sheets, which could actually be 400 numbered pages if copied on two sides. Some debate followed. Mr. Soules suggested that the whole matter was not worth a dispute with the Court of Criminal Appeals.

Page 1098 -- letter from Charles Spain asking if rules should allow the court of appeals to order an opinion published after time for filing application for writ of error. Subcommittee does not recommend action.

Page 1100 -- letter from Charles Spain asking "what is an unpublished opinion?" The committee adopts "opinion not designated for publication" to replace "unpublished opinion" in TRAP 90(i).

Page 1104 -- letter from Gloria Jackson complaining about unpublished opinions that did not comply with "existing law." Subcommittee is of the opinion that no action should be taken because there does not appear to be a cure for the problem.

Page 1106 -- letter from Fred Fick pointing out that a writ of habeas corpus must issue to obtain jurisdiction over the relator, but with mandamus the writ is not issued until the case is decided. Judge Guittard stated that the matter had been corrected in the

proposed TRAP 120. Judge Clinton asked how the court obtained jurisdiction over the party if the writ were not initially issued. Judge Cornelius said his court conditionally issued the writ. Judge Clinton stated that he believed the requirement of a writ was contained in the constitution.

Page 1112 -- letter from Justice Hecht pointing out that the court usually does not grant leave to file the petition for writ of mandamus to grant temporary relief and suggesting a change to TRAP 121(d) to comply with the procedure. The committee has adopted changes to TRAP 120 which eliminate the problem.

Page 1114 -- letter from Professor Edgar asking why six copies of the briefs are to be filed in the courts of appeals but only three copies of the mandamus motion and petition. Subcommittee finds that the difference was intentional and the committee has already adopted changes to TRAP 4 regarding numbers of copies to be filed.

Page 1116 -- letter from John Holloway asking about typeface and page conventions. The committee has discussed the matter and adopted revisions to TRAP 4.

Page 1118 -- letter from John Adams regarding colors for brief covers. Subcommittee considered a proposal to specify colors and rejected it. Ms. Baron noted that the rule requires all briefs be bound when some are really too short to bind. Ms. Baron also inquired if the rule should require spiral binding.

Page 1120 -- letter from Justice Hecht regarding time for oral argument. Subcommittee notes that this suggestion preceded the last amendments to the rules and the change has already been made to TRAP 172.

Page 1122 -- letter from Sarah Duncan regarding changing heading on TRAP 120 to make clear it applies to civil cases. Subcommittee does not recommend adoption.

Page 1125 -- letter from Charles Spain suggesting a "carry forward" rule to allow Supreme Court and courts of appeals to bring cases forward from preceding term. Subcommittee will work further on this matter.

Supplement page 440 -- prior report of appellate committee. No action needed.

Supplement page 449 -- letter from Mr. Soules asking subcommittee to consider rule change in light of holding in *Borden v. Guerra*. Subcommittee has drafted a proposal which has not yet been presented to the committee.

Supplement page 451 -- letter from Charles Spain regarding use of word "file" when a document is presented for filing. Subcommittee does not recommend adoption.

Supplement page 453 -- letter from Lee Parsley suggesting use of private carriers to file documents. Subcommittee and the committee reviewed matter and rejected.

Supplement page 455 -- letter from Charles Spain suggesting sending notices by interoffice mail to attorney general. Ms. Baron stated that it would actually allow the attorney general to get the item faster. Subcommittee will consider further.

Supplement page 460 -- letter from W.H. Moore suggesting requiring notice of appeal when bond filed. Subcommittee recommends no further action as the revisions to TRAP 40(a) have already addressed the issue.

Supplement page 463 -- letter from Alan Rich suggesting clarification on whether a request for findings extends the appellate timetable in summary judgment cases. Matter was discussed in detail earlier. The subcommittee will reconsider matter and present a proposal to the committee.

Supplement page 465 -- letter from Charles Spain suggesting having motion for new trial overruled by operation of law after 60 days. The subcommittee does not recommend adoption.

Supplement page 467 and 469 -- letters from James Farris & Ronald Davis asking that the writ of error to court of appeals be retained. The committee has already voted for the elimination of that appeal and will not revisit the issue as no new arguments were presented.

Supplement page 471 -- letter suggesting rule in *Click v. Tyra* be changed by rule amendment. Amendments to TRAP 40 and 51 have been approved by the committee which address the issue.

Supplement page 475 -- letter from Mr. Soules suggesting TRAP 47 be revised in accordance with *Laird v. King*. Subcommittee is waiting on action by the Supreme Court on the application for writ of error. Ms. Carlson said that she thought the writ had been denied. Judge Guittard said the Subcommittee would review the matter if the writ has been denied.

Supplement page 481 -- letter from Justice Hecht suggesting clarification of rule of whether an order overruling a motion for directed verdict had to be recited in the judgment or an order. Subcommittee has adopted a draft of TRCP 301 which addresses the issue, but it has not yet been presented to the committee.

Supplement page 487 -- letter from Justice Hecht suggesting incorporation of electronic statement of facts rules into TRAP. Subcommittee made a proposal which was discussed by the committee earlier.

Supplement page 592 -- letter from Charles Spain asking whether Supreme Court really intended courts of appeals to send notice to all parties of all preliminary matters. Mr. Soules answered "yes."

Supplement page 597 -- letter from Charles Spain suggesting parties to appeal be required to file a docketing statement. The committee adopted a docketing statement rule earlier.

Supplement page 598 -- letter from Council of Chief Judges suggesting rules allow criminal cases to be advanced without oral argument. This has been approved by the committee.

Judge Guittard stated that there were other matters which needed further work. Mr. Soules suggested the subcommittee deal with those matters and make a further report to the committee. Ms. Baron stated that the new administrative procedure for license revocation allows an appeal straight to the court of appeals from the administrative tribunal and the subcommittee may need to see if rules will accommodate that appeal.

Mr. Soules stated that the appellate subcommittee needed to work with Ms. Sweeney's and Mr. Sadberry's subcommittees on the trial court rules.

Mr. Soules called on David Beck to report on the work of his subcommittee on TRCP 15 - 165.

Mr. Beck handed out a report of his subcommittee on TRCP 15 - 165 and referred the committee to the first volume of the Agenda.

Page 113a -- letter regarding inability to achieve recusal under TRCP 18a within 10 days of trial. The subcommittee suggests a "good cause" exception to the 10 day rule. Judge Brister explained that recusal was often used to delay trials and often based on an unfavorable ruling by the trial judge. He does not want a good cause exception. Mr. Susman suggested merely modifying the rule to allow recusal if new information is discovered within 10 days before trial. Mr. Soules opined that what the trial judge orders cannot be grounds for recusal and the rule should so state. Mr. Yelonoski stated that although not grounds, the order could be evidence of prejudice justifying recusal. Debate followed. Judge Brister stated that rule should make clear that a motion based on a ruling is improper and need not be referred to another judge for consideration. More discussion followed. The subcommittee will review the matter and report again to the committee.

The next issue is the signing of minutes (TRCP 20). Subcommittee suggests abolishing the requirement unless someone sees a need for it. Abolition of rule APPROVED WITHOUT OPPOSITION.

The next issue concerns serving parties rather than counsel under TRCP 21 and 21a. Subcommittee recommends clarifying rule to require service on the attorney in charge and not on a represented party. Mr. Yelonoski suggested that the requirement should be stated in one rule and not repeated thereafter. Mr. McMains stated that the proposal should not attempt to change TRCP 306a under which either the attorney or the party can get notice of a judgment. Subcommittee will draft proposal.

The next proposal is to require listing of attorneys and the parties they represent in the certificate of service. Ms. Sweeney stated that this was a "make work" item and a problem in big cases. Mr. Gold stated that some attorneys serve by multiple means, but do not show the means of service on the certificate of service. VOTE: not require names, addresses, etc. - 4; require all information - 7. The subcommittee will discuss it further and present a recommendation.

The next issue is service by courier after 5:00 p.m. - is it served that day or the next business day? Subcommittee suggests service is effective the next business day. Mr. Soules then asked if faxes sent after 5:00 p.m. should be considered served the next business day as well. Mr. Orsinger asked why service by fax got an extra three days at all - shouldn't it follow the hand delivery provisions. Professor stated the he preferred the elimination of the three day rule altogether - if the periods prescribed by rule are too short, lets make them longer. VOTE: UNANIMOUS that hand delivery after 5:00 is deemed delivered the next business day.

Debate followed regarding whether use of faxes for service should be encouraged by rule. Ms. McNamara stated that the use of the fax was actually cheaper for the client (so long a law firms don't try to use it as a profit center in contravention to the ABA guidelines) and should be encouraged.

Mr. Soules stated that TRCP 21 should not be referenced in TRCP 4; only TRCP 21a. AGREED, NO OBJECTION.

Committee returned to the debate regarding service by fax. VOTE: three extra days for fax service - 10; oppose - 5.

Mr. Soules suggested the new after 5:00 p.m. rule not apply to faxes. Ms. Albright asked: when is it served by fax - when sent or when received? Mr. Orsinger stated that the transmission was simultaneous. VOTE: for purposes of the after 5:00 rule, is the fax served when sent or received? UNANIMOUS IN FAVOR OF WHEN RECEIVED.

More debate followed. Professor Dorsaneo opined that this was "way over engineered and designed to fail." Mr. Beck restated the proposition: if you receive a fax after 5:00 p.m., was it served on the next business day like hand delivery? Yes - 11; No - 4.

Justice Hecht asked about the sentiment of committee for the proposal that there should be no service by fax. By approximately 7 to 4, no service by fax was preferred.

Next issue - should a state agency be allowed to use regular mail. UNANIMOUS AGREEMENT THAT RULE SHOULD NOT BE CHANGED.

Next issue - TRCP 23. Subcommittee does not see a problem and does not recommend a change. APPROVED WITHOUT OPPOSITION.

Next issue - TRCP 40a (page 169). Subcommittee does not recommend any change in rule. Ms. Albright stated that the problem was more complex than the letter implied and that Professor Dorsaneo's case-book points out the problem. Mr. Dorsaneo stated that the complexity really involves TRCP 51(a). Professor Dorsaneo will provide the subcommittee with some information on the problem.

Next issue - TRCP 47 (page 173). What happens if a party pleads an amount in controversy in excess of jurisdictional limit. Rule has always been that the court can't enter judgment for an amount in excess of jurisdiction except increase due solely to the passage of time. Subcommittee does not recommend a change.

Professor Dorsaneo suggested "other" should be deleted from TRCP 47(c).

Next issue is amending pleadings under TRCP 63. How close to trial should a party be able to amend freely? Ms. Sweeney said this debate should await discovery proposals. Professor Dorsaneo stated that the subcommittee should consider summary judgment practice when reviewing the rule. Mr. Soules stated that he believed *Greenhalgh* should be used to determine when an amendment is appropriate, instead of a good cause standard. The matter is tabled until discovery revisions complete.

Next issue - TRCP 64. Should parties be able to supplement and not merely reply to the last pleading of the other side. Professor Dorsaneo noted that trial amendments are not limited to replying to the other side. Discussion followed about whether rule should allow a party to simply attach as an exhibit a prior pleading. VOTE: Should TRCP 64 be amended to allow for amendment/supplementation of pleading without having to restate the entire pleading? Favor - 7; oppose - 8. VOTE: should a party be able to incorporate a prior pleading by attaching it to a new pleading: Favor - 14; oppose - 0.

Meeting adjourned.