MINUTES OF THE
SUPREME COURT ADVISORY COMMITTEE
MAY 19-20, 1995

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock on Friday, May 19, 1995, pursuant to call of the Chair.

Friday, May 19, 1995:

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

Members present: Luther H. Soules, III, Alejandro Acosta, Jr., Prof. Alexandra W. Albright, Charles L. Babcock, Pamela Stanton Baron, Honorable Scott A. Brister, Prof. Elaine A. Carlson., Hon. Ann T. Cochran, Prof. William V. Dorsaneo III, Honorable Sarah B. Duncan, Michael T. Gallagher, Michael A. Hatchell, Charles F. Herring, Jr., Donald M. Hunt, Tommy Jacks, David E. Keltner, Joseph Latting, Gilbert I. Low, Honorable F. Scott McCown, Russell H. McMains, Robert E. Meadows, Harriett E. Miers, Richard R. Orsinger, Hon. David Peeples, Stephen D. Susman, and Stephen Yelenosky.

Ex-officio Members present: Paul Gold, Carl Hamilton, David B. Jackson, Doris Lange, and Bonnie Wolbrueck

Members absent: David J. Beck, Anne Gardner, Hon. Clarence Guittard, Franklin Jones, Jr., Thomas S. Leatherbury, John J. Marks, Jr., Anne McNamara, David Perry, Anthony J. Sadberry and Paula Sweeney.

Ex-Officio Members absent: Hon. Sam Houston Clinton, Hon. William J. Cornelius, W. Kenneth Law, Thomas C. Riney, 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.

The final jury charge rules report was brought up for discussion and approval.

Judge David Peeples proposed changing the word "upon" to "by" in Rule 272, subparagraph (2)(b), Broad Form Submission. Judge Peeples also proposed a change to Rule 226a, Instructions to Jury Panel and Jury. Under part 4 - Jury Release, Judge Peeples proposed changing the language that reads "the judge shall give the jury the following oral written instructions..." to the following "after accepting the verdict the judge shall give the jury the following instructions and then release them." Richard Orsinger seconded the motion. There being no opposition that change will be made.

Discussion followed regarding the removal of the language "so help you God" from Rules 226, Oath to Jury Panel, and Rule 236, Juror's Oath. A vote was taken on whether "so help you God" should be stricken from the oaths. By a vote of fourteen (14) to nine (9) the language stays in.

Minor problems and details regarding the proposed rules were brought to the attention of the Chairman and the corrections were made accordingly.

Rusty McMains raised a question regarding the language "by the party's pleading" in Rule 272(1)(a), Standards for the Jury Charge. Rusty questions whether there was discussion regarding eliminating the word "written". A vote was taken regarding whether or not it was meant to mean written pleading. Eight votes indicate that is what is meant. They will reinsert the word "written" before pleading.

Professor Albright brought up a question on Rule 272, Standards for the Jury Charge", subdivision (d), Disjunctive Submission. Professor Albright proposed deleting the last sentence of the rule and replacing "a proper disjunctive question that submits the defendant's theory of the case as an alternative to the plaintiff's theory is not an impermissible inference rebuttal submission." Discussion followed.

Professor Dorsaneo recommends we disregard the entire paragraph because it is not helpful, in lieu of that he seconds Alex Albright's motion. Discussion followed with input from various members as to how to change different words from one thing to another to clean up the sentence.

Chairman Soules again reads what the proposed rule is: "a proper disjunctive question that submits a defensive theory as an alternative to a claimant's theory is not an impermissible inferential rebuttal submission." A vote was taken and the proposed change carried by a vote of twelve (12) in favor and three (3) opposed.

Carl Hamilton indicates that this sentence contradicts what is in (e), if it is going to be in there it should go in (e). A vote was taken on whether to move the sentence to (e) or leave it where it is. On a vote of ten (10) to two (2) it stays where it is.

Donald Hunt requests a clarification as to the intent of the committee with regard to paragraphs (1) and (2) of Rule 274, Preservation of Appellant Complaint. Discussion followed. A vote was taken, and the vote of the committee was twenty (20) to one (1) to recommend these rules for promulgation by the Supreme Court of Texas.

Buddy Low brought up a problem in Rule 279, Omissions from the Charge. In the fourth line the language "of which that are" is bad grammar. Discussion followed as to how to change it. Justice Duncan reads the proposed new language as follows: "Any independent ground of recovery or defense that is not conclusively established under the evidence and all elements of which are not referable to any other ground...". This change

will also be submitted to the Supreme Court of Texas.

Joe Latting reported on what the legislature did on sanctions.

A report from the Subcommittee on TRCP 1 -14 was given by Alejandro Acosta, Jr.

Rule 4, Computation of Time, was brought up for discussion. The subcommittee recommends that the reference to Rule 21a be deleted. The subcommittee added language from proposed TRAP 5(a) regarding a closed or inaccessible clerk's office. The subcommittee recommends that the rule contain a general rule for filed papers similar to TRAP 4 as reported out of the appellate rule subcommittee that would contain the provisions of at least TRCP 4, 5, 21, 57, 74, and 75.

A discussion was had regarding deleting the reference to Rule 21a. There being no opposition that change is adopted.

A discussion was had regarding the language about the clerk's office being closed and inaccessible. Buddy Low proposed adding the following language "filing as defined by the rules herein". Professor Alex Albright moved that these two sentences be deleted here and in the appellate rules. Motion fails for lack of a second.

Chairman Soules inquires whether it is the consensus of the committee that we would have this rule here and that any means of filing that is authorized by the rules would get extended until the next day when the clerk's office is open. Everyone agrees that is what we are trying to accomplish. The rule will be rewritten to do that.

A discussion followed regarding the method of proof of closing or inaccessibility of the clerk's office.

A vote was taken of those who are in favor of Rule 4 as presented by the subcommittee on page 4. By a vote of thirteen (13) to eight (8) the subcommittee's proposal is approved for recommendation to the Supreme Court. Justice Duncan would like to vote on the subcommittee's recommendation of parallel to TRAP 4 that gets 5, 4, 21 and 21a all in the same place and organized. The subcommittee on TRCP 1 -14 will be happy to draft such a rule.

Rule 5, Enlargement of Time, was brought up for discussion. The changes recommended by the subcommittee are to make TRCP 5 to be consistent with TRAP 4(b). Discussion followed.

A vote was had on how many feel we should as an accommodation to the clerk's suggest to the Supreme Court a comment to this rule that says that this rule doesn't require the clerk's to keep the wrapper, or something to that effect. The vote was

sixteen (16) in favor and seven (7) opposed.

A vote was taken on Rule 5 as proposed by the subcommittee with the comment. By a vote of twelve (12) to three (3) Rule 5 was approved.

Rule 6, Suits Commenced on Sunday, was brought up for discussion. It is the subcommittee's recommendation that rule be deleted. Discussion followed.

A vote was taken on repealing Rule 6. By a vote of eleven (11) to five (5) it will be recommended no change to Rule 6 as it currently exists.

A rule regarding a no smoking policy was brought up for discussion. The subcommittee proposed the rule as written on page 5. A vote was taken and by a vote of three (3) to thirteen (13) the recommendation fails.

Rule 7, Representation by An Attorney, was brought up for discussion. The subcommittee proposed combining Rules 7, 8, 10 an 12 into one rule regarding representation by an attorney, motion to show authority and withdrawal of attorney. Discussion followed.

Professor Dorsaneo objects to the language "attorney in charge". Recommends the following language instead "if a party is represented by more than one attorney notice shall be made to the attorney whose signature first appears on the initial pleading of the represented party. Discussion followed.

Professor Dorsaneo moved for the deletion of the "attorney in charge" language. A vote was taken and by a vote of thirteen (13) to two (2) the motion failed.

Justice Duncan brings up the fact that we are continuing to use the word "his" and the fact that case law interprets "any party" to mean any noncorporate party and if that's the committee's view of what it should be we should say so. Discussion followed.

Judge Brister proposed deleting "on his own behalf" and inserting "personally". Don Hunt seconded the motion. A vote was had and by a vote of twelve (12) to two (2) Judge Brister's motion was adopted.

Professor Elaine Carlson makes a motion to add "of record" in the beginning of the second sentence. Discussion followed. There being no objection that change will be made.

Discussion continued regarding attorney in charge. Chairman Soules indicates that the proposed changes are substituting "personally" for "on his own behalf" and added "of record" after the word "attorney". A vote was taken and by a vote of eleven (11) to one (1) the amendment carried.

Paragraph (b), Motion to Show Authority, was brought up for discussion. This rule has been rewritten but the only substantive change is that the court is not compelled to strike the pleadings but may strike the pleadings. Discussion followed.

Chip Babcock inquired as to why the timing sentence was stricken, that it had to be heard and determined before announcement of ready for trial. Mr. Babcock proposed that that sentence be put back in. The subcommittee accepts the proposal.

Richard Orsinger proposed changing the language "if the party or no person who is authorized to represent the party appears" to "if neither the party nor any person who is authorized to represent the party". The subcommittee accepts the proposal.

Professor Carlson proposed deleting the word "his" out of the third sentence. No opposition.

Judge Cochran raised a concern regarding the fact we are not requiring notice to the party. Discussion followed.

Chairman Soules calls for a vote. Those who prefer "may" to "shall". The vote was unanimous.

Chairman Soules outlines the proposal for the changes to Rule 7(b) are as follows. In the third line delete "his", in the sixth line after "if" insert "neither", following that will be "the party nor any person" and carry forwarding the sentence "the motion may be heard and determined any time before the parties have announced ready for trial, but the trial should not be necessarily continued or delayed for the hearing. By a vote of fifteen (15) to one (1) Rule 7(b) is adopted.

Subparagraph (c), withdrawal of attorney, was brought up for discussion. Alejandro Acosta indicates this is just old Rule 10 with the exception of striking "in accordance with Rule 21a". A vote was taken and Rule 7(c) was approved unanimously.

Rule 9, Number of Counsel Heard, was brought up for discussion. The subcommittee's recommendation is to delete this rule. Discussion followed.

Chairman Soules proposed that we not delete the entire rule but delete only "in important cases and". Professor Carlson and Richard Orsinger proposed taking out the word "special". The subcommittee accepts the proposed amendment. A vote was taken and the amendments to Rule 9 were unanimously approved.

Rule 10 will be repealed and its contents moved to Rule 7(c).

Rule 11, Agreements to be in Writing, was brought up for discussion. Rusty McMains expressed concern over deletion of the terminology "unless otherwise provided

in the rules". Chairman Soules indicates that that terminology will stay in. Rusty McMains expressed concern regarding the timing of the filing. A discussion was had regarding the language "recorded by the court reporter". Rusty McMains indicates it is not clear whether that refers to both agreements made in open court and depositions upon oral examination. Discussion followed.

David Perry suggested that there is no reason that the written agreement ought to have to be filed with the clerk at any time. Professor Elaine Carlson suggested in response to Rusty McMain's problem the following language "or in a deposition upon oral examination recorded in the deposition transcript". Alejandro Acosta indicates the subcommittee accepts David Perry's suggestion and will incorporate it into the proposal. Discussion continued.

A discussion was had regarding who has to sign the agreements. Richard Orsinger endorsed Chairman Soules suggestion that says "signed by the parties to the agreement".

Chairman Soules read the proposed rule as follows: "Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing and signed or unless it be made in open court or in a deposition upon oral examination and recorded by the court reporter."

Robert Meadows made a motion to insert "by the party to be charged" after the word "signed". The motion was seconded by David Perry. Discussion followed.

Buddy Low proposed the following amendment: "Unless signed by the attorney or party".

Carl Hamilton proposed the following language be added "no promise or agreement shall be enforceable against an attorney unless it is signed by that attorney." Further discussion on this rule was had.

A vote was taken on inserting after the word "signed" the language "by the attorney or party to be charged". The amendment carried by a vote of thirteen (13) to eight (8).

Rusty McMains again voiced concern regarding making an agreement enforceable without it being required to be filed. Discussion followed.

A vote was taken regarding the requirement of filing. The filing requirement failed by a vote of thirteen (13) to seven (7).

Chairman Soules reads Rule 11 into the record as follows: "Unless otherwise provided in the these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it is writing and signed by the attorney for or the party to

be charged, or unless it is made in open court or in a deposition upon oral examination and recorded by the court reporter." A vote was taken on Rule 11 and by a vote of seventeen (17) to two (2) is was approved.

Alejandro Acosta advised that Rule 12 will be repealed and its contents moved to Rule 7.

Rule 14, Affidavits by Agents, was brought up for discussion. The subcommittee's recommendation is to delete this rule. Discussion followed. There being no opposition to repealing Rule 14, the recommendation will be to have it repealed.

Rule 14b, Return or Other Disposition of Exhibits, was brought up for discussion The subcommittee recommends making no change.

The Supreme Court Relating to Retention and Disposition of Exhibits was brought up for discussion. The subcommittee recommends no change.

Rule 14c, Deposit in Lieu of Surety Bond, was brought up for discussion. A discussion was had regarding using the same language as in TRAP 48. There being no opposition that will be done.

That concludes the report of the Subcommittee on TRCP 1 - 14.

Steve Susman presented the Discovery Subcommittee Report.

Rule 1, Discovery Limitations, was brought up for discussion.

Subdivision 1, Claims Seeking $50,000 or less, was brought up for discussion. Alex Albright explained the changes that were made to this rule. Chairman Soules indicates in subdivision (1) we need a sentence in paragraph (a) restricting amendments inside of thirty (30) days. David Perry proposed taking subparagraph (e), the last sentence that was stricken, that language needs to be used here. Discussion continued.

Chairman Soules advised the committee as a whole voted eighteen (18) to one (1) to have a different standard and a different pleadings cutoff under subdivision 1. Discussion followed regarding the discovery period and the discovery cutoff. Professor Dorsaneo proposed in 1(a) changing the language "this section on longer applicable" should say that the limitations contained in this section are no longer applicable and Professor Dorsaneo also proposed that in b(2) deleting the language "as contemplated by Article IX of the Rules of Civil Evidence". Steve Susman accepts both amendments on behalf of the subcommittee. Discussion followed on these amendments. A vote was taken on Rule 1, sections (a), (b) and (c) with the understanding that there is going to be a provision for discovery cutoff and a provision limiting amendments as passed by this committee 18-1 in a previous session. Discussion followed regarding the 30 day

limitation.

Subdivision 1 (Claims Seeking $50,000 or Less), sections (a), (b) and (c) were approved unanimously.

Subdivision 2, Discovery Control Plan, was brought up for discussion.

Steve Susman provided an explanation of what changes had been made. There being no opposition to Section (2) it is unanimously approved.

Richard Orsinger expressed concerns of the family law bar about the cutoff date of discovery in divorce cases. Explained what those concerns are. Discussion followed.

A discussion was had subdivision (c), paragraphs (2) and (3). David Keltner proposed eliminating (b) and changing (2) and (3) regarding things that cannot be changed. They are an essential part of the Discovery Control Plan but they can be changed by agreement without court approval. Discussion followed.

Scott Brister agreed with David Keltner's motion.

Discussion was had regarding getting the court involved.

Steve Susman read the proposal as follows: "In any suit, the court may order that the discovery be conducted in accordance with a Discovery Control Plan". Eliminate the words "the parties may agree or". The last sentence before (a) is: "The following provisions must be included in a Discovery Control Plan, may not be excluded from the Discovery Control Plan by agreement of the parties, and, as to (a), (b) and (c) below, may not be modified except by order of the court."

Steve Susman read the proposal as second time as follows: "The following provisions must be included in a Discovery Control Plan. The following provisions must be included in a Discovery Control Plan, and, as to (a), (b) and (c)(1) below, may not be modified except by court order."

Steve Susman said (a) should read as follows: "A trial date, or a requested trial date, if by agreement". The words "if by court order" after "date" have been stricken.

A discussion was had regarding subparagraph (b) and whether that is something that should be changeable by the parties agreement and not ordered by the court or whether it has to involve the court, or if the parties agree to it, the court can enforce it. Discussion followed.

A discussion was had regarding subdivisions (a) and (c)(1).

Susman accepts Judge Scott McCown's proposal for 2(b) as follows: "A discovery period during which all discovery shall be conducted;", striking the rest of the sentence. Discussion followed.

A vote was taken on subdivision (2), Discovery Control Plan, and by a vote of nineteen (19) to one (1) the rule is approved.

Subdivision 3, All Other Suits, was brought up for discussion. Justice Duncan proposed changing the title of the rule to "Suits Governed by a Discovery Control Plan". Judge McCown suggested "Discovery Control Plan Suits". Justice Duncan accepts Judge McCown's suggestion.

Steve Susman explains the changes to Subdivision 3. Justice Duncan proposed moving subsection (c) to (b)(1) and stating it affirmatively. The last sentence of (b)(1) would say "The parties may agree to extend it up to 12 months but no longer absent a Discovery Control Plan.

Richard Orsinger proposed adding the following to the end of (b)(1): "The parties can agree to extend the discovery period up to 12 months, and it cannot be extended any further except under a Discovery Control Plan. Richard Orsinger inquired as to whether family law courts may adopt standing orders that would alter some aspects of the discovery rules as applied under the Family Code. Discussion followed.

Richard Orsinger proposed the following language "Unless the suit falls under Section 1 or is governed by a Discovery Control Plan or by standing rule or local rule pertaining to actions originally arising under the Family Code." Discussion followed.

A vote was taken on how many members of the committee are willing to write into the Discovery Rules that they can be modified by local rule. The vote was eighteen (18) to two (2) against this proposal.

Discussion continued.

A vote was taken on how many feel in family law cases the rules should provide that local rules can trump these rules. This proposal failed by a vote of ten (10) to two (2).

The proposal for Subdivision 3 is as follows: Move (c) to 3(b)(1), add to the end of 3(b)(1) "The parties may agree to extend the discovery time allowed up to 12 months, but may not agree to extend the discovery period beyond 12 months without obtaining a Discovery Control Plan". A vote was taken and Rule 1, Subdivision 3 was approved unanimously.

Rule 2, Modification of Discovery Procedures and Limitations, was brought up for

discussion. Steve Susman explains what the changes were.

Justice Duncan proposed the following language for (1): "by the agreement of the parties or by court order in the specific case for good reason".

Chairman Soules proposed the following language instead "except where specifically prohibited in any suit..."

Judge Peeples proposed "the procedures and limitations set forth in these rules may be modified in any suit (1) by the agreement of the parties or (2) or by court order for good reason."

Chairman Soules reads the rule into the records as follows: "Rule 2, Modification of Discovery Procedures and Limitations. Except where specifically prohibited, the procedures and limitations set forth in these rules may be modified in any suit (1) by the agreement of the parties or (2) by court order for good reason."

A vote was taken on Rule 2 and by a vote of eleven (11) to one (1) this rule was adopted.

Rule 3, Permissible Discovery: Forms and Scope, was brought up for discussion. Steve Susman explained what the changes were.

Rule 3, Section (1) Forms of Discovery was brought up for discussion.

David Perry advised that in line 7 of section (1) "request for designation of and information regarding expert witnesses" need to come out.

A vote was taken on Subsection 1 of Rule 3 and the rule was approved unanimously.

Subdivision 2, Scope of Discovery, was brought up for discussion. Steve Susman explained what changes were made throughout this rule.

There being no opposition Subdivision 2 was approved unanimously.

Rule 4, Privileges and Exemptions from Discovery, was brought up for discussion. Steve Susman advised that a new rule is needed but the subcommittee is not prepared to report on this rule at this time. The rest of the discovery rules are not contingent on the completion of this rule.

Rule 5, Response to Discovery Requests: Supplementation and Amendment, was brought up for discussion. Steve Susman advised what the changes are to this rule. Discussion followed.

A discussion was had regarding the fact that even though the whole committee instructed the subcommittee to require that certain discovery be formally supplemented the subcommittee upon further reflection believes that the rule should require formal supplementation for all written discovery and submits the proposed draft this way.

Steve Susman proposed the language in the footnote "formal supplementation is required for the identification of persons with knowledge of relevant facts, trial witnesses, or expert witnesses, the production of documents, or if other or additional or corrective information has not otherwise been made known to the other parties in discovery or in writing." should be put back in.

Chairman Soules inquires as to whether it is the stricken language that's shown in rule 2 and the footnote language that should be in the rule.

Judge McCown explains that we are taking the quoted portion of footnote 3 and putting it where the stricken language is in 2. Discussion continued.

Justice Duncan proposed that the quoted sentence in footnote 3 be the first sentence of subsection 2. Discussion followed.

Judge McCown suggested instead of "formal supplementation" saying "supplementation in the form originally provided as required for the ...".

Chairman Soules proposed that on page 11 on line 3 it ought to say "may reopen discovery without leave of court." The subcommittee is to come back tomorrow morning with a new draft of Rule 5.

Rule 6, Failure to Provide Discovery, was brought up for discussion. Steve Susman explained the rule. Discussion followed.

Chairman Soules proposed that in Subdivision 2 instead of "expense of the delay" it should say "any expense caused by the delay".

A discussion was had regarding the difference between prejudgment interest and post judgment interest.

Chairman Soules advised that we are not going to vote on Rule 6 because it is going to be a part of the sanctions rules. We can vote on it as a matter of principal but have got to see how it works with the other sanction rules. Discussion followed regarding the concept of Rule 6.

Joe Latting proposed an amendment to have the attorney make a showing that he did not intentionally withhold the information. Paul Gold proposed using the terminology "conscience indifference" or "conscience disregard". Joe Latting offered an amendment

that adds the requirement that the lawyer certify or testify that it was not intentional conduct on his part or the result of conscience indifference. David Keltner seconded the motion. Judge Peeples indicated intentional is fine but conscience indifference increases satellite litigation. Joe Latting agrees to remove conscience indifference and leave it as intentional.

A vote was taken and the motion failed on a vote of six (6) in favor and eight (8) opposed.

Paul Gold made a motion that the word "timely" needs to be in the title.

A vote was taken on Rule 6 and it was approved unanimously.

The meeting was adjourned until Saturday, May 20, 1995, at 8:30 o'clock a.m.

Saturday, May 20, 1995:

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

Members present: Luther H. Soules, III, Prof. 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, Honorable Sarah B. Duncan, Michael T. Gallagher, Michael A. Hatchell, Charles F. Herring, Jr., Donald M. Hunt, Tommy Jacks, David E. Keltner, Joseph Latting, Honorable F. Scott McCown, Russell H. McMains, Anne McNamara, Robert E. Meadows, Harriett E. Miers, Richard R. Orsinger, Hon. David Peeples, Stephen D. Susman, and Stephen Yelenosky.

Ex-officio Members present: Paul Gold, Carl Hamilton, David B. Jackson, and Doris Lange.

Members absent: Alejandro Acosta, Jr., Ann T. Cochran, Michael T. Gallagher, Anne Gardner, Hon. Clarence Guittard, Franklin Jones, Jr., Thomas S. Leatherbury, Gilbert I. Low, John Marks Jr., David L. Perry, Anthony J. Sadberry and Paula Sweeney.

Ex-Officio Members absent: Hon. Sam Houston Clinton, Hon. William J. Cornelius, W. Kenneth Law, Thomas C. Riney, 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.

Alex Albright continued giving the Subcommittee report on the discovery rules.

Rule 7, Presentation of Privileges and Objections to Written Discovery, was brought up for discussion. Professor Albright explained what changes were made to the rule.

Rule 7, Subdivision 1, Objections, was brought up for discussion.

Don Hunt expressed concern with the language "unless the party has determined that its unreasonable". Suggested "unless its unreasonable under the circumstances. Discussion followed.

David Keltner proposed taking out the language "that party has determined". Discussion continued. Don Hunt seconded the motion. Discussion continued.

A vote was taken on whether or not to delete "that party has determined that". By

a vote of ten (10) to two (2) that language will be deleted.

David Keltner expressed about the first sentence "a party shall not object to an otherwise proper request on grounds it calls for the specific materials or information subject to the privilege pursuant to Rule 4". Discussion followed. David Keltner withdrew his comment.

Professor Dorsaneo expressed concern regarding the first sentence. His concern involves the idea of building in waiver problems unnecessarily by virtue of requiring a strict adherence to a particular method of preserving complaints. Chairman Soules indicates that the motion is that in the first sentence need to change "a party shall" to "a party need not", in subsection (2) delete the word "only" from the first line after the word "discovery" so the sentence would read "a party may preserve a privilege from discovery in accordance with this section". Professor Albright proposed deleting "may" and saying "a party preserves a privilege in accordance with this section". Joe Latting seconded the motion. Discussion followed.

Joe Latting withdrew his second to the motion. Chairman Soules brought up the idea of having a grace period written into the rules in case somebody uses the old practice instead of the new practice trying to preserve error. Discussion followed.

A discussion was had regarding filing prophylactic objections, filing belated withholding statements, sanctions, withholding statements as a way of asserting privileges. Professor Dorsaneo expressed a problem with the use of the word "privilege". Explained why. Discussion followed. Richard Orsinger proposed taking out "privilege" and using "exemption". Chairman Soules proposed "pursuant to a privilege or exemption". Judge Brister agrees with Bill Dorsaneo that we should just stick with "privilege".

A vote was had on Rule 7, Subsection 1. There being no opposition the rule was passed unanimously.

Rule 2, Paragraph 2, Withholding Privileged Information and Materials, was brought up for discussion. Carl Hamilton questioned the language in the fifth line that says "and only upon compliance with the request or any part thereof". Alex Albright explained what that is meant to mean and a discussion followed. Professor Albright indicates the problem is the word "compliance", "responding" may be a better word. Tommy Jacks brought up a concern regarding a situation in which you are making the objection that it is burdensome but also knowing that there is privilege material that he doesn't intend to produce without getting a ruling. Shouldn't he have to tell them that he has an objection under (1) and is going to be claiming a privilege under (2). Do you have to go down to the courthouse twice. Discussion followed.

Steve Susman proposed the following language "if a request calls for privilege

materials or information in response but is also otherwise objectionable, the responding party shall first assert other objections pursuant to section 1 of this rule and only upon resolution of such objections and compliance with the request for any part thereof without responsive privilege materials or information pursuant to this section".

Tommy Jacks proposed "if the objection is overruled then upon compliance". David Beck brought up a concern regarding the language "either when making the original response or thereafter when making an amendment or supplemental response." Professor Albright explains the purpose of that language.

Joe Latting proposed the following language "when a party actually withholds specific information and materials responsive to a request on the ground of privilege and when making the original response and thereafter if making an amended or supplemental response.

Chairman Soules advised there being no further discussion Rule 7, Paragraph 2(a), Asserting a Privilege, will go back to the subcommittee for redrafting.

Judge Peeples brought up the question as to whether or not we should focus some of this on the requesting party because a lot of time the requests are obviously excessive. Chairman Soules indicates that that will be taken care at Joe Latting Subcommittee.

Rule 7, Paragraph 2(b), Description of Withheld Materials or Information, was brought up for discussion.

Harriett Miers brought up a concern regarding the fifteen (15) day time period to prepare a privilege log. Discussion followed. Professor Dorsaneo indicates he has a problem with "will enable other parties to assess the applicability of the privilege". Explains why. Discussion followed. Steve Susman proposed using the language of the federal rule "the withholding party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that without revealing information itself privileged or protected will enable other parties to assess the applicability of the privilege or protection". Discussion followed.

A vote was taken on putting the federal language into paragraph (b). By a vote of fifteen (15) to five (5) that proposal was approved.

A vote was taken on paragraph (b) with that language included. By a vote of twenty-two (22) to one (1) Rule 7(2)(b) was approved.

Rule 7, Paragraph (c), Trial Preparation Materials, was brought up for discussion. Scott Brister questioned the language "withheld information or materials". Proposed dropping the first three words, there being no objection paragraph (c) will read "Materials created by trial counsel in preparation for litigation in which the discovery is requested

need not be included in a withholding statement or description except upon court order in appropriate circumstances." Discussion followed.

Bill Dorsaneo proposed leaving out "in preparation for the litigation in which discovery is requested". If its meant to be narrowed it should say "in preparation for trial". Discussion continued.

Professor Dorsaneo proposed the following language "in anticipation of litigation or in preparation for trial". Discussion continued.

Tommy Jacks proposed putting "privilege" at the beginning of the sentence. The sentence now reads "privilege materials created by trial counsel in preparation for the litigation in which the discovery is requested". Professor Dorsaneo proposed striking "in preparation for the litigation in which the discovery is requested" if you add "privileged" before materials.

Chairman Soules reads the proposed rule into the record as follows "Privilege materials created by trial counsel need not be included ..." Discussion followed.

Professor Alex Albright made a motion to amend (c) as follows "the privilege materials created by trial counsel in anticipation of litigation or preparation for trial in the litigation in which the discovery is requested need not be included in a withholding statement or description except upon court order in appropriate circumstances." Steve Susman seconded the motion. Professor Dorsaneo thirds the motion. Discussion followed.

Stephen Yelenosky made a motion to use the following language "materials in a counsel's file which are privileged as attorney work product or attorney client communication need not be included..." Professor Dorsaneo seconded the motion with Alex Albright's suggestion that it be limited to the lawsuit. Discussion followed.

Stephen Yelenosky suggested using "in possession" instead of "created". Judge McCown proposed the following language "anything protected from discovery under Rule 4 and created or assembled to prosecute or defend the litigation in which discovery is requested need not be included in the withholding statement or description except upon court order in appropriate circumstances." Steve Susman seconded the motion.

Chairman Soules indicates that paragraph (c) will go back to the subcommittee.

Rule 7, Paragraph 3, Hearing, was brought up for discussion. Discussion followed. Judge Scott Brister questioned the language "at or before the hearing". He suggested deleting "or before". Professor Albright proposed deleting the first clause and beginning "the party seeking to avoid discovery shall produce ..." Richard Orsinger proposed deleting the word "live" from "live testimony". Professor Albright brought up the issue of

requiring a motion specifying what part of the description or objection is being contested. A discussion followed.

Steve Susman brought up the issue that "motion to compel" does not appear in our rules. Maybe we need to specify a procedure or write a rule for a procedure dealing with how to handle motions to compel. Discussion followed.

Richard Orsinger brought up the issue of why the same procedures shouldn't apply to privileges in depositions. We ought to consider the fact that there may be a privilege as to an interrogatory answer or to a deposition question and we may want to have this hearing procedure apply to that. Discussion followed. Judge Brister proposes changing "inspection" to "review" in the fifth line of paragraph 3 to make it clear it is not just looking at documents. Discussion followed.

Paul Gold brought up the discussion again of the motion to compel procedure. Discussion followed.

Steve Susman goes through the remainder of the discovery rules in the report setting out what is in each one of them, requests everyone to read them carefully before the next meeting.

The meeting was adjourned.