MINUTES OF THE
SUPREME COURT ADVISORY COMMITTEE
JULY 19-20, 1996

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock on Friday, July 19, 1996, pursuant to call of the Chair.

Friday, July 19, 1996:

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, Honorable Scott A. Brister, Professor Elaine A. Carlson, Professor William V. Dorsaneo III, Sarah B. Duncan, Michael T. Gallagher, Anne L. Gardner, Hon. Clarence A. Guittard, Michael A. Hatchell, Donald M. Hunt, David E. Keltner, Joseph Latting, Russell H. McMains, Anne McNamara, Robert E. Meadows, Richard R. Orsinger, Stephen D. Susman, Paula Sweeney and Stephen Yelenosky.

Ex-officio Members present: Hon. Sam Houston Clinton, Hon. William Cornelius, Paul N. Gold, O.C. Hamilton, David B. Jackson, Michael Prince, Mark Sales, Hon. Paul Heath Till and Bonnie Wolbrueck.

Members absent: Alejandro Acosta, Jr., David J. Beck, Ann T. Cochran, Charles F. Herring, Tommy Jacks, Franklin Jones, Jr., Thomas S. Leatherbury, Gilbert I. Low, John H. Marks, Jr., and Hon. F. Scott McCown, Hon. David Peeples, David L. Perry and Anthony J. Sadberry.

Ex-Officio Members absent: Hon. Nathan L. Hecht, W. Kenneth Law, and Doris Lange.

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

Chairman Soules brought the meeting to order.

Mike Prince presented the report on the Texas Rules of Evidence.

Richard Orsinger reported on the reaction of the Family Law Council's Subcommittee to proposed changes to Rules 509 and 510.

Mr. Prince advised that neither his subcommittee nor Mr. Low's subcommittee had any recommendation for changes at this time. Mr. Soules requested he bring a recommendation to the September meeting.

Richard Orsinger commented on the relevancy exception issue. Discussion followed.

Chairman Soules advised that the committee did have a recommendation on this and that was there be no change to 510(d)(6) which was deferred until we heard back from the Family Law Council.

Mr. Prince advised that what they did not have a recommendation on was whether or not to put in the language "court and administrative proceeding" in both or court only in one.

Chairman Soules advised that what is now on the floor is whether or not to amend 510(d)(6) or 509(d)(6) or both. Discussion continued.

Chairman Soules indicated that the issue is do we propose to amend so that there is a privilege of an expert not to disclose his own counseling records. The proposal is adding that the 510(d) exception does include the records of the identity diagnosis for evaluation or treatment of a counselor or an expert witness involved in the case. Discussion continued.

A vote was taken on the subcommittee's recommendation that 510(d)(6) not be changed. By a vote of 2 to 14 the Committee voted for a change.

Chairman Soules indicated it would be referred back to the subcommittee but that a vote needed to be taken on what the change would be. Whether (6) should be eliminated or to make an exception to (6) for the records of experts.

A vote was taken and 12 members felt that (6) should be eliminated entirely.

Mr. Prince asked for a vote on in the addition of "administrative proceedings" in Rule 510. There being no opposition the change was approved unanimously.

Mr. Prince brought up for discussion the proposal by Mrs. Ramirez that there needs to be a rule that limits the compensation that can be paid to expert witnesses. The subcommittee recommended no change. There being no opposition the subcommittee's recommendation was adopted.

Mr. Prince brought up for discussion the recommendation by Robert M. Martin Jr. to adopt a rule similar to Federal Rule 706 allowing court appointed experts. The subcommittee recommended no change. There being no opposition the subcommittee's recommendation as approved. Judge Brister commented that he thought it would be a great idea, explained why and asked that his exception be noted. Judge Till agreed with Judge Brister. Mike Hatchell commented he thought the committee should consider whether

or not, in the wake of Dupont v. Robinson, it is useful for courts to have the power to appoint experts as advisors. Chairman Soules requested them to draft something and bring it back.

Mr. Prince presented the report on the Proposed Unified Texas Rules of Evidence. Discussion followed.

A vote was taken and by a vote of 15 to 4 the Committee voted to unify the rules of civil and criminal evidence.

Professor Dorsaneo inquired whether there were rules other than 106 and 107 that were not combined for historical reasons. Mike Prince pointed out that the following rules were not combined: Rules 202, 204, 410, 504.

Mr. Prince brought up for discussion proposed changes to Rule 412. The subcommittee recommended taking no action. There being no opposition the Committee adopted the recommendation.

Mr. Prince brought up for discussion proposed changes to Rule 503. The subcommittee recommended no change be made. There being no opposition the Committee adopted the subcommittee's recommendation.

Mr. Prince brought up for discussion proposed changes to Rule 705(b). The subcommittee recommended no change be made. There being no opposition the Committee adopted the subcommittee's recommendation.

Mr. Prince brought up for discussion Rule 1009, Translation of Foreign Records. The subcommittee recommended the adoption of Rule 1009. Discussion followed. By a vote of 7 to 0 the rule was adopted. Discussion continued. Judge Till brought up a problem he saw with subparagraph (e) and asked why it only applied to civil cases. Judge Till proposed amending the rule to cover both criminal and civil cases. There being no disagreement the amendment will be made.

Professor Dorsaneo asked to revisit the proposed changes to Rule 412. Chairman Soules asked Judge Clinton to take a look at it and see if there is a problem.

Chairman Soules inquired why, in Rule 1009(b), does an objection have to be verified under oath. Discussion followed. Chairman Soules proposed deleting "verified and under oath." Discussion continued.

Mr. Prince restated the changes that need to be made as follows: (1) take out language about service under 21a; (2) taking out the words "verified under oath"; (3) add an additional obligation that the objecting party points out not only the

inaccuracies but also what the correct translation should have been; and (4) delete in (e) the words "in a civil case".

Discussion continued regarding filing conflicting affidavits with no objection. Do we commit that to the jury or direct that the judge must make a decision in advance of trial.

Discussion continued regarding Rule 1009 in general.

Mr. Prince brought up for discussion Rule 514, Self-Critical Analysis. Mr. Prince advised that the State Bar committee voted for adoption of the rule and that the Supreme Court Advisory Committee Subcommittee voted against adoption of the proposal. Discussion followed.

A vote was taken and by a vote of 21 to 3 the Committee adopted the subcommittee's recommendation not to adopt such a rule.

Mr. Prince brought up for discussion the comment to Rule 702. Mr. Prince advised that the language has not been voted on by the Supreme Court Advisory Committee's subcommittee. Discussion followed.

Chairman Soules indicated the question is whether there should be some comment to Rule 702 in response to the appellate opinions coming out on expert witnesses. A vote was taken and by a vote of 19 to 2 the Committee voted to have no comment.

Mr. Prince brought up for discussion the issued raised by Chairman Soules whether or not proposed discovery rule 16 would necessitate any change in the rules of evidence as they deal with depositions taken in the same or different proceedings. Jack London studied the issue and concluded no change was necessary.

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

Bonnie Wolbrueck presented the report on the Clerk's Committee Report.

Professor William Dorsaneo presented the report on the Section 4: "Claims and Parties".

Professor Dorsaneo explained the changes to Rule 32, Permissive Joinder of Parties. Discussion followed. A vote was taken on whether to keep in or take the words "on the motion of any party". By a vote of 12 to 8 the language comes out.

Professor Dorsaneo explained the changes to Rule 33, Joinder of Persons Needed for Just Adjudication. Discussion followed. There being no disagreement the concept in Rule 33 is approved.

Professor Dorsaneo explained the changes to Rule 38, Intervention. Discussion followed. Judge Scott Brister proposed using "strike or sever." Discussion continued.

Steve Susman suggested that the severance be treated as the filing of new suit with a full filing fee. Discussion continued.

A vote was taken on three options: (1) strike; (2) sever/separate trial; (3) either of these at the judge's discretion. Those voting for (1) - none; (2) - three; and (3) - fourteen. Professor Dorsaneo proposed leaving out "separate trial". Chairman Soules asked what about "sever or dismiss". Discussion continued. Professor Dorsaneo proposing adding to the last sentence "or the intervenor".

Professor Dorsaneo reads the language for subparagraph (c) as follows: "In exercising its discretion to strike or sever an intervention, the court must consider whether the intervention will unduly prejudice, delay or prejudice the adjudication of the rights of the other parties or the intervenor." Richard Orsinger proposed just saying "the parties". Discussion followed.

Professor Dorsaneo explained the rest of the changes to Rule 38. Paula Sweeney asked why we are saying "person" as opposed to "party" or "entity". Discussion continued about the rule in general.

Paul Gold proposed using the word "strike" and define "strike" to mean sever of dismiss.

Discussion continued.

Richard Orsinger asked if we want the court to have greater latitude to sever an intervention that it does to sever a cause plead by an already joined party. If we do take out the word "sever" and use something like "docketed as a separate cause". Professor Dorsaneo agreed. Discussion continued.

Professor Dorsaneo commented we can't use the word "severance." Professor Dorsaneo proposed changing the severance issue to make it perfectly clear that the court can do it on the court's initiative. Discussion continued.

Carl Hamilton brought up a question regarding (a) and (c); (a) says intervention of right. Then it says a person shall be permitted. Then in (c) does that only apply to the (b) part? If you have the right to intervene how can the judge throw you out? Richard Orsinger explained they intended for (c) to apply, so that even someone who had intervention as a matter of right could be stricken or redocketed as a separate cause because of delay.

Discussion continued.

Justice Guittard inquired why the word "permitted" was used in (a) and (b) and proposed saying "a person may intervene" and "any person may intervene". Paul Gold agreed. Professor Dorsaneo will take out "be permitted to".

Justice Duncan inquired why some interventions were of right and some permissive. Discussion followed.

Professor Dorsaneo proposed taking out (a) and (b) altogether and have the rule read: "A person who is needed for just adjudication in accordance with Rule 32 or a proper party satisfying the requirements of Rule 33 may intervene by filing a pleading subject to being stricken or severed." Discussion followed.

Justice Cornelius indicated that if you're going to keep the distinction between intervention of right and permissive intervention, (a) ought to say that the court shall permit a party to intervene when thus and so occurs. (b) ought to say the court may permit a person to intervene when certain things occur. Then (c) ought to apply to (b) and not to (a). Discussion followed.

Professor Dorsaneo explained the changes to Rule 39, Substitution of Parties.

A vote was taken on Rule 39(b), Suit Against Dissolved Corporation, (c) Public Officers and (d) Substitution for Other Reasons. There being no objection the changes will be recommended by the Committee.

Professor Dorsaneo explained the changes to the unnumbered Rule entitled "Voluntary Dismissals and Nonsuits". Discussion followed.

Justice Guittard proposed changing the title to "Voluntary Dismissals (Nonsuits)" and strike "nonsuit" everywhere else. Discussion continued.

Justice Cornelius brought up a problem with the second sentence of paragraph (a). Discussion followed. Chairman Soules and Justice Duncan proposed starting the sentence with "But if the trial..." Discussion continued.

Judge Cornelius proposed the following language "if a person has tried one separable or bifurcated issue by putting on all of his evidence on that issue, then he cannot nonsuit as to any other separable or bifurcated issue."

Discussion continued.

Justice Cornelius proposed using "claim" instead of "issue". Discussion continued. Carl Hamilton proposed the following

language "Anytime before plaintiff has introduced all of plaintiff's evidence other than rebuttal evidence, plaintiff may dismiss his entire suit or that part of his suit begin tried in a separate or bifurcated trial." Discussion continued.

Professor Dorsaneo indicated he was troubled by the next to last sentence that reads "A party who abandons any part of a claim or defense contained in the pleadings..." Discussion followed.

Mike Gallagher proposed deleting everything after "record" and adding "subject to the applicability of the doctrines of res judicata and collateral estoppel." Discussion continued.

Chairman Soules indicated the focus of the discussion is we should leave abandonment in as something that a party can do, either a claim or a defense or an issue. But we shouldn't state whether or not its been tried or any other consequences, that that should not be temporal. That should not have any anchor at any particular time or any cutoff.

Professor Dorsaneo proposed "At any time during a hearing or trial without amending the pleadings."

Discussion followed.

Professor Carlson proposed making it a subsection. Discussion continued.

Justice Cornelius proposed deleting the sentence about abandonment entirely.

Chairman Soules proposed saying in the first sentence "At any time before the plaintiff has introduced all of his evidence other than rebuttal, the plaintiff may dismiss any claims or issues as to one or more of several parties." Richard Orsinger proposed "any or all claims or issues". Carl Hamilton commented you don't dismiss issues, you dismiss claims. Discussion continued.

Chairman Soules proposed leaving it "claims" in the first sentence and pick up in the second sentence "But if the trial is bifurcated into separate trials, the plaintiff cannot dismiss or nonsuit any claim or issue". Discussion continued.

Chairman Soules took a vote on who felt we should keep the concept of abandonment in the rules in addition to the concept of nonsuit. By a vote of 14 to 2 the concept says in.

Richard Orsinger brought up for discussion the sentence that reads "Omission of a party from the pleadings does not dismiss the action as to the omitted party." Discussion followed.

Richard Orsinger brought up for discussion the sentence that reads "Notice of voluntary dismissal of the entire case or one or more parties is immediately effective without necessity of court order if the notice is filed separately from the pleadings." Discussion followed.

Chairman Soules took a vote on whether omission of a party from amended pleadings does not dismiss. Five (5) members said it does not, five (5) members said it does. Discussion continued.

Another vote was taken. Six (6) members said it does not dismiss. Five (5) members said it does. Discussion continued.

Professor Dorsaneo indicated the rule needs to be written in terms of relation back. Discussion followed.

Chairman Soules indicated the issue on the floor is when a nonsuit is effective. And that should be either when its filed or made in open court on the record. Discussion followed.

Professor Dorsaneo explained subparagraph (b), Defendants Not Served. Discussion followed.

Richard Orsinger proposed changing (c), Avoidance of Prejudice, to read "Any dismissal or nonsuit taken pursuant to this rule does not prejudice the plaintiff's right to refile or the right of another party to be heard on a pending claim." Discussion followed.

Professor Dorsaneo explained that paragraph (d), Effect on Sanctions' Motions is verbatim from TRCP 162, 163 and 165.

Richard Orsinger commented we need a paragraph (e) Taxation and Costs.

Mike Prince proposed using the words "dismissal or nonsuit".

Professor Dorsaneo explained the next unnumbered rule entitled "Actions Against Accommodation Makers and Endorsers; Official Bonds". Discussion followed.

Justice Guittard proposed changing "such superior officer" to "a superior officer" in paragraph (b)(1). Richard Orsinger proposed "the" instead of "a".

Chairman Soules proposed changing the word "statute" in paragraph (b) to "as provided by law."

The meeting was adjourned until Saturday morning.

The Advisory Committee of the Supreme Court of Texas convened at 8:00 o'clock on Saturday, July 20, 1996, pursuant to call of the Chair.

Saturday, May 11, 1996

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, Honorable Scott A. Brister, Professor Elaine A. Carlson, William V. Dorsaneo III, Honorable Sarah B. Duncan, Michael T. Gallagher, Anne L. Gardner, Hon. Clarence A. Guittard, Michael A. Hatchell, Donald M. Hunt, Joseph Latting, Russell H. McMains, Robert E. Meadows, Richard R. Orsinger, Paula Sweeney and Stephen Yelenosky.

Ex-officio Members present: Hon. William Cornelius, Paul Gold, and O.C. Hamilton.

Members absent: Alejandro Acosta, Jr., David J. Beck, Ann T. Cochran, Charles F. Herring, Jr., Tommy Jacks, Franklin Jones, Jr., David E. Keltner, Thomas S. Leatherbury, Gilbert I. Low, John H. Marks, Jr., Hon. F. Scott McCown, Anne McNamara, Hon. David Peeples, David L. Perry, Anthony J. Sadberry, and Stephen D. Susman.

Ex-officio Members absent: Hon. Nathan L. Hecht, Hon. Sam Houston Clinton, David B. Jackson, W. Kenneth Law, Doris Lange, Michael Prince, Hon. Paul Heath Till, and Bonnie Wolbrueck.

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

Chairman Soules brought the meeting to order.

Professor Dorsaneo presented the report on Section 3: Pleadings and Motions.

Rule 20, Pleadings Allows; Separate Pleas and Motions was brought up for discussion. Joe Latting proposed using the word "complaint" instead of the word "petition". Discussion followed regarding Section 3.

A vote was taken and by a vote of 11 to 1 the Committee voted in favor of using "complaints" and "replies" instead of petition and supplemental petition language. Discussion continued.

A vote was taken on the language "No other pleading will be allowed" and by a vote of 7 to 1 it will not be included.

Discussion continued regarding going to the Federal practice.

Joe Latting proposed deleting paragraphs (b) and (c) from Rule 20. Discussion followed.

Rule 21, General Rules of Pleadings, subparagraph (a) Claims for Relief was brought up for discussion. Paul Gold inquired whether there should be something in the comment to give guidance about the last sentence of 21(a) which reads "Upon special exceptions, the court shall require the pleader to amend and to specify the maximum amount claimed." Discussion followed.

Justice Cornelius raised a concern with the comment. The rule speaks only to the legal theories but the comment goes further and give the legal theory plus the statutes. Discussion followed. Richard Orsinger proposed including one example that has no statute and some examples that do have statutes. Justice Cornelius indicated that would be all right. Discussion continued.

Rule 21(b), Denials of Claims or Defenses, was brought up for discussion. Chairman Soules indicated that the last sentence of paragraph (b)(3) needs to be split up. It has too much in it. Discussion continued. Steven Yelenosky proposed "When a party pleads an affirmative defense the affirmative defense shall be regarded as denied unless expressly admitted" and then do the next sentence to address avoidance.

Justice Guittard proposed "An affirmative defense need not be denied, but avoidance of an affirmative defense must be affirmatively pleaded."

Justice Duncan proposed moving (c) and changing it to say "In pleading to a preceding pleading, a party must set forth affirmatively any matter constituting an avoidance of affirmative defense, including, but not limited to..." Discussion continued.

Richard Orsinger proposed putting the discovery rule for limitations in (c).

Professor Dorsaneo restated the changes to be made to Rule 21(c), Affirmative Defenses.

Justice Duncan proposed beginning the rule on affirmative defenses and matters of avoidance by explaining what it is. What are its fundamental characteristics. Discussion continued.

Richard Orsinger proposed putting the reply to affirmative defenses after affirmative defenses. The rule would be "Any other matter constituting an avoidance or affirmance defense, including without limitation...", follow up with a section "Reply to Affirmative Defense. When a party pleads an affirmative defense no required...but it shall not be regarded as avoided by an affirmative defense." And then list your examples: "Pleas and

avoidance of affirmative defense, including without limitation, the discovery rule... must be specifically set out in the pleading."

Discussion continued. Professor Dorsaneo indicated he will redraft the rule and present it at the next meeting.

The unnumbered paragraph under Rule 21(c) was brought up for discussion. Richard Orsinger made a motion and Joe Latting seconded the motion to delete the paragraph. There being no opposition it was deleted.

Rule 21(d), Waiver of Pleading Defects; Special Exceptions, was brought up for discussion. Discussion followed.

Richard Orsinger proposed adding a paragraph setting out the other use of a special exception. Something like "A special exception also may be used to complain that the petition or complaint fail to state a cause of action recognized under law" and then further specify that the suit cannot be dismissed without giving the plaintiff an opportunity to replead, and that the failure to file special exceptions does not constitute a waiver of complaint.

Justice Duncan proposed the paragraphs be switched.

Discussion continued.

Rule 21, paragraphs 21(e), Pleading to be Plain and Concise; Consistency, and paragraph (f) Construction of Pleadings, were brought up for discussion. Discussion was had. Professor Dorsaneo proposed in paragraph (1) saying "Each allegation must be made in plain and concise language." Discussion continued. There being no opposition that change was made.

Mr. Orsinger proposed changing "he" to "the party" in the second to last line.

Justice Guittard inquired as to whether we should retain "hypothetically." Discussion followed.

Justice Duncan proposed the structure be reversed in the second sentence so the rule would read "A pleading is not made insufficient by the insufficiency of one or more alternative statements. If two or more statements are made in the alternative, and one of them, if made independently would be sufficient."

Justice Cornelius inquired if we are taking out "hypothetical". Discussion followed. A vote was taken and by a vote of 13 to 1 the term "hypothetical" was deleted.

Richard Orsinger asked if we need the second sentence at all. Discussion followed. A vote was taken and by a vote of 9 to 5 the sentence stays in.

Chairman Soules proposed deleting everything after the word "alternatively" in the first sentence of paragraph (e)(2). There being no opposition the language will be deleted.

Mr. Hunt proposed rephrasing the first sentence to read "A party may state two or more claims of defenses alternatively ..." There being no opposition the proposal was adopted.

There being no opposition paragraph (f) Construction of Pleadings was approved.

Professor Dorsaneo explained Rule 22, Pleading Special Matters.

Paragraph (a), Special act or law, was brought up for discussion. Chairman Soules inquired as to why this paragraph was preserved. Professor Dorsaneo explained. Discussion followed. Justice Duncan proposed having a reference to municipal ordinances. Discussion continued. The Committee decided to keep the paragraph in. Justice Duncan will provide language regarding adding municipal ordinance.

Paragraph (b), Conditions Precedent, was brought up for discussion. A vote was taken and there was no dissent with regarding to (b).

Paragraph (c), Judgment, was brought up for discussion. There being no opposition paragraph (c) was approved.

Paragraph (d) Special Damage, was brought up for discussion. Rusty McMains voiced concern over the term "naturally". Discussion followed. Chairman Soules proposed "Special damages are those damages that do not necessarily result from the alleged wrong." Discussion continued. Chairman Soules asked if we still need paragraph (d). Discussion continued. Chairman Soules proposed "Special damages are those damages that may not necessarily arise from another's wrongful conduct." Justice Cornelius proposed "that may, but do not necessarily, arise from the wrong". Discussion continued.

Richard Orsinger asked for a show of hands on deleting paragraph (d). Discussion continued. Elaine Carlson asked whether it would be better to address this back in 21(e) where we talk about the fair notice of claims.

A vote was taken on keeping the first sentence exactly the way it is. By a vote of 8 to 4 the sentence will stay the way it is.

A vote was taken on defining special damages in the second sentence. By a vote of 9 to 7 the motion failed. There will be no second sentence.

Rule 22, Paragraph (e), Certain Pleas to be Verified, was brought up for discussion. Justice Guittard proposed keeping the list, taking away the verification, and modernizing the language according to the alternative draft of Rule 22. Richard Orsinger agreed with the proposal. Justice Guittard also proposed adding "unless so denied, the matter shall be taken as established." Discussion followed.

A vote was taken on maintaining verification in some of the circumstances listed. By a vote of 8 to 7 the verification stays.

Rule 25, Presentation of Defenses; Plea or Motion Practice, was brought up for discussion.

Chairman Soules proposed eliminating the so-called "pleas" since the motion is as good a vehicle to get the issue to the court. Discussion followed. A vote was taken on whether to eliminate the concept of plea and to substitute motion as a vehicle to raise the same issue. There being no opposition the proposal was approved. Discussion continued regarding this issue.

The meeting was adjourned.