

MINUTES OF THE
SUPREME COURT ADVISORY COMMITTEE
JANUARY 17-18, 1997

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock on Friday, January 17, 1997, pursuant to call of the Chair.

Friday, January 17, 1997:

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, Professor Alexandra W. Albright, Charles L. Babcock, Pamela Stanton Baron, Honorable Scott A. Brister, Prof. Elaine A. Carlson, Prof. William V. Dorsaneo III, Justice Sarah B. Duncan, Michael T. Gallagher, Anne L. Gardner, Michael A. Hatchell, Donald M. Hunt, Tommy Jacks, Joseph Latting, Russell H. McMains, Anne McNamara, Robert E. Meadows, Richard R. Orsinger, Honorable David Peeples, Paula Sweeney, and Stephen Yelenosky.

Ex-officio Members present: Justice Nathan L. Hecht, Paul N. Gold, Carl Hamilton, David B. Jackson, and Bonnie Wolbrueck.

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

Ex-Officio Members absent: Hon. William Cornelius, Doris Lange, W. Kenneth Law, Mark Sales, and Hon. Paul Heath Till.

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

Chairman Soules brought the meeting to order.

Professor Alex Albright presented the report for the Subcommittee on TRCP 166-209. Professor Albright explained that a majority of the letters contained in the agenda materials were debated as part of the discovery rules package. Some of the comments were adopted in whole or in part and other were rejected after considerable debate.

Professor Albright advised that the issues raised by Lloyd Lunsford regarding discovery requests, expert witnesses, and medical records have been addressed and taken care of in the proposed discovery rules.

Professor Albright advised that the letter from Allen Schecter regarding proving up medical records needs to be referred to the Evidence Subcommittee.

Professor Albright advised that the issues raised in the letter from Brent Keis have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from Judge Tony Lindsay have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from Tom Fleming regarding Rule 166 have been addressed and dealt with by the proposed discovery rules.

Professor Albright brought up for discussion the letter from John F. Nichols requesting a provision be added to Rule 166 to provide for telephone conferencing. The Advisory Committee has proposed a general rule allowing telephone hearings which addressed this problem.

Professor Albright advised that the issues raised in the letter from David J. Nagle regarding Rule 166 have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from Jim Foreman regarding Rule 166 have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from Jose R. Lopez II regarding Rule 166 have been addressed and dealt with by the proposed discovery rules.

Professor Albright proposed skipping all letters regarding 166a because the summary judgment rule will be debated at another time.

Professor Albright advised the issues raised in the letter from Justice James Bleil, Texarkana Court of Appeals, regarding Rule 166b have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised the issues raised by Chairman Soules regarding Rule 166b have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised the issues raised in the letter from Walter J. Kronzer III regarding Rule 166b(2)(g) have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from Robert Alden regarding Rule 166b have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from W. James Kronzer regarding Rule 166b have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the letter from Burt Berry was just a commentary regarding the fact that discovery rules are a mess. The subcommittee recommended no change but hopefully the new discovery rules will solve his problems.

Professor Albright advised that the issues raised in the letter from Robert Martin regarding Rule 166b have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the letter from Judge Scott McCown seeks a rule concerning disclosure of grand jury testimony like Federal of Criminal Procedure 6. This appears to be a Rule 76a issue and should be referred to the appropriate committee.

Professor Albright advised that the issues raised in the letters from Edward M. Lavin, Richard Tulk, Dana L. Timaeus, and Pat McMurray regarding Rule 166b have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from Stephen Mendel regarding Rule 166b(3) have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issues raised in the letters from Dan R. Price, Jeff T. Harvey, J. Patrick Hazel, and Reed Jackson regarding Rule 166b(4) have been resolved due to the fact that the Supreme Court withdrew the amendment retroactively in 1990.

Professor Albright advised that the issues raised in the letter from Bruce E. Anderson regarding Rule 166b(6)(b) wherein he recommended that once someone is identified as having knowledge of relevant facts or is identified as an expert witness, then any party should be able to use that witness. The committee as a whole had rejected this previously.

Professor Albright advised that the issues raised in the letter from Glenn Wilkerson regarding Rule 166b(6) have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issues raised in the letters from Dan Price and Glenn Wilkerson regarding Rule 166c have been addressed and dealt with by the amendments to Rule 11.

Professor Albright advised that the issues raised in the letter from Marc Schnall regarding Rule 168 have not been addressed by this subcommittee because there is another committee that is working on this issue.

Professor Albright advised that the issues raised in the letters from LaDonna Ockinga, John K. Chapin, Edward Lavin, and John F. Younger, Jr. regarding Rule 167 have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issue raised in the letter from Keith S. Dubanevich regarding amending Rule 167 to allow a defendant 50 days after service of citation to respond to discovery requests has been rejected by the committee.

Professor Albright advised that the issues raised in the letter from Ernest Sample regarding Rule 167 have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from Charles R. Griggs regarding Rule 169 have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issues raised in the letters from John Chapin and Stephen A. Mendel regarding Rule 167a have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from Daniel Tatum regarding Rule 168 have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the next item was a bill that was proposed by Tommy Jacks regarding discovery procedures having to do with health care liability and promulgating a standard set of interrogatories and request for production of documents. Alex Albright indicated this was just for information only, that no action was requested. Richard Orsinger inquired as to whether Mr. Jacks was on the Supreme Court Committee on medical malpractice discovery. Mr. Jacks advised that he was and advised that they finished their work two years ago and that there was a stalemate between the court and the committee which was never resolved.

Professor Albright advised that the issues raised in the letters from Robert C. Alden, Larry York, Danny Wash, Jim Foreman and John Wright regarding Rule 168 have been addressed and dealt with by the proposed discovery rules.

Professor Albright brought up for discussion the issues raised in the letter from Stephen Mendel regarding Rule 168. Mr. Mendel says there is a conflict between Rule of Evidence 703 and Rule of Civil Procedure 168. Mr. Mendel proposed that Rule 168 should yield to Rule of Evidence 703. Discussion followed. Paul Gold and

Richard Orsinger will look into this matter and bring back a report.

Professor Albright advised that the issues raised in the letters from Edward Levin and Pat McMurray regarding Rule 168 have been addressed and dealt with by the proposed discovery rules.

Professor Albright brought up for discussion the proposal by Lewin Plunkett to amend Rule 169 to provide that in the absence of court order, no answers are required within 30 days from the date of receipt of the request for admissions. The subcommittee recommended no action. If this occurs, court order will be available to withdraw deemed admissions.

Professor Albright advised that the issues raised in the letters from Pat McMurray, Harold D. Hammett, and John F. Younger, Jr. regarding Rule 169 have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from Glenn Wilkerson regarding a new rule for motions in limine have been assigned to Joe Latting for drafting and presentment to the Committee.

Professor Albright brought up for discussion the letters from the Committee on Court Rules, Lewin Plunkett as President of the Texas Association of Defense Counsel, John B. Beckworth, Frank Finn, Texas Pharmaceutical Association, American Insurance Association, Texas Association of Business, Consulting Engineers Counsel of Texas, Inc., Texas Chamber of Commerce, Texas Society of Professional Engineers, Texas Civil Justice League and Texas Medical Association regarding bifurcated trials. Judge Scott Brister will take a look at this issue and decide whether or not we need to make changes to Rule 174.

Professor Albright brought up for discussion the issue raised in the letter from Professor Jack Ratliff regarding the joinder rules. Discussion followed. Richard Orsinger advised that his subcommittee was looking at this issue and that his subcommittee is recommending that we conform the language between joinder and severance but that we reject his proposal to abandon a Nexus requirement as a condition for joinder.

Professor Albright advised that the issue raised in the letter from Harry Tindall regarding Rule 176 has been addressed and dealt with in new rule 22.

Professor Albright advised that the issue raised in the letter from John Chapin regarding Rule 176 has been addressed and dealt with in the proposed discovery rules.

Professor Albright advised that the issue raised in the letter from Judge James Mullin wherein he proposed amending the rule regarding automatic recusal of assigned judges is addressed by statute and therefore we cannot do anything with it by rule.

Professor Albright brought up for discussion the letter from Jess W. Young regarding Rule 188 wherein he indicated Rules 188 and 206 conflict. David Jackson will take a look at this letter and our proposed and make any recommendations that are necessary.

Professor Albright brought up for discussion the letter from Harry Tindall regarding amending Rule 200 to add a paragraph to allow people to designate non-smoking areas for depositions. Professor Albright advised that the subcommittee proposed a non-smoking rule that was rejected by the full Committee.

Professor Albright brought up for discussion the issue raised in the letter from Hardy Moore regarding Rule 200. Mr. Moore proposed amending the rule to require a deponent to be identified the same as in a case of a person having knowledge of relevant facts by including his residence and business address and telephone numbers rather than just the name. Proposed Discovery Rule 14 still only requires the name. There being no motion to change discovery rule 14, Mr. Moore's proposal was rejected.

Professor Albright advised that the issue raised in the letter from Wendall Loomis regarding Rule 168 has been addressed and dealt with in the general rule adopted to require service on an attorney rather than a party if a party has an attorney.

Professor Albright advised that the issue raised in the letter from E. J. Wohlt and Perry Archer regarding Rule 202 have been addressed and dealt with in the proposed discovery rules.

Professor Albright advised that the issue raised in the letter from Charles M. Jordan regarding Rule 206 have been addressed and dealt with in the proposed discovery rules.

Professor Albright advised that the issue raised in the letter from Dan L. Stunkard, President to Texas Shorthand Reporters Association, are statutory amendments not rule proposals therefore they are outside the Committee's jurisdiction.

Professor Albright advised that the issue raised in the letter from Eddie Morris, Eddie Morris Court Reporters, regarding Rule 206 have been addressed and dealt with in the proposed discovery rules.

Professor Albright advised that the issues raised in the letters from the Court Rules Committee regarding proposed amendments to Rule 166, 166e, 166f and 166g have been addressed and dealt with in the proposed discovery rules.

Professor Albright advised that the issue raised in the letter from Jim Parker regarding miscellaneous discovery rules have been addressed and dealt with in the proposed discovery rules.

Professor Albright advised that the issue raised in the letter from Ronald Wren regarding miscellaneous discovery rules have been addressed and dealt with in the proposed discovery rules.

Professor Albright advised that the issues raised in Shelby Sharpe's report to Lonnie Morrision regarding the ABA Summit on Civil Justice Systems Improvements have been addressed and dealt with in the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from James Guess regarding Rule 166b have been addressed and dealt with in the proposed discovery rules.

Professor Albright advised that the issue raised in the letter from Deborah Hiser, Advocacy, Inc., regarding Rule 166b have been addressed and dealt with by amendments to Rule 25.

Professor Albright advised that the issues raised in the letter from James D. Guess regarding Rule 166c have been addressed and dealt with in the proposed discovery rules.

Professor Albright advised that the issue raised in the letter from a paralegal in the Office of the Attorney General regarding Rule 166c have been addressed and dealt with in the proposed discovery rules.

Professor Albright advised that the issue raised in the letter from James D. Guess regarding Rule 168 have been addressed and dealt with in the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from James S. Frost regarding Rule 169 have been addressed and dealt with in the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from James D. Guess regarding Rule 170 have been addressed and dealt with in the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from Stephen Moss and George Petras regarding Rule 176 have not been addressed. It does not appear to propose changes to the rules of civil procedure but to the agency rules.

Professor Albright advised that the issues raised by a process server in Houston regarding Rule 176 have been addressed and dealt with in the proposed discovery rules.

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

Mr. Orsinger brought up for discussion the proposal by Charles Spain to amend Rule 21a to require notice to appropriate government entities whenever constitutionality is challenged. The subcommittee recommended adopting the proposal. Discussion following.

Mr. Orsinger proposed crafting a rule that would require a party who is seeking as part of their relief a ruling that a municipal ordinance or franchise or statute is unconstitutional must give notice to the attorney general or to the city attorney involved, but go no further than to require that notice and not specify waiver, penalties, when the AG can intervene, or anything of that nature. The rule would not in any way suggest that it is limited to declaratory judgment actions. Anne Gardner indicated she would be opposed to such a rule and explained why. Discussion continued.

Tommy Jacks made a motion that the Committee make no amendment to the rule. The motion was seconded by Joe Latting and Mike Gallagher. A vote was taken and 11 members were in favor of doing nothing.

Mr. Orsinger proposed doing something regarding this issue but do it with timetables so that the individual litigants are not prejudiced. There being only two members in favor of that proposal the Committee voted again to do nothing.

Mr. Orsinger brought up for discussion the proposal by Professor Jack Ratliff to amend Rule 41 to broaden the rules of joinder and conform the language in Rules 174 and Rule 41. Professor Ratliff also suggested amending Rule 40a so that joinder would be within the discretion of the trial court, subject to abuse of discretion review, and that the trial court should be able to join parties as long as there is not an inordinate amount of expense and no prejudice to the parties.

The Subcommittee recommended that the language between what used to be Rule 41 and what used to be Rule 174 be matched but the subcommittee rejected the suggestion that we eliminate the Nexus requirement that in order to join it must arise out of the same transaction, occurrence, or series of transaction or occurrences.

There being no opposition the subcommittee's recommendation was approved.

Mr. Orsinger brought up for discussion the proposal by Glenn Wilkerson to amend Rule 67 so that pleadings can be amended thirty days prior to trial. The subcommittee recommended counting backward from close of the discovery window and to table this

proposal until the discovery rules have been approved. There being no opposition the subcommittee's recommendation was approved.

Mr. Orsinger advised that the issue raised in the letter from Hannah Konkle regarding amending Rule 74 has been addressed and dealt with in the uniform fax filing rules.

Mr. Orsinger brought up for discussion the issue raised in the letter from Jack Garland regarding Rule 76a and the fact that there should be a distinction between a confidentiality order and a sealing order. Mr. Orsinger advised that the Supreme Court heard two days ago the case of General Tire v. Kepple and it is the subcommittee's recommendation that no action be taken until the Supreme Court rules on this case. Discussion followed.

There being no opposition Jack Garland's proposal was tabled.

Mr. Orsinger brought up for discussion the article sent in by Court TV regarding permitting cameras in the courtroom. The subcommittee's recommendation was to recognize the previous majority vote of the full committee for no change to the existing rule. The full committee also voted to forward to the Supreme Court as a minority report the subcommittee's recommendation of what a trial rule would look like if there is going to be a uniform trial rule regarding electronic media in the courtroom.

Judge David Peoples presented the report on Rule 166a and made a motion for its adoption. Joe Latting seconded the motion. Chairman Soules called for discussion on proposed paragraph (i).

Professor Dorsaneo proposed replacing the word "paragraph" with the word "subdivision" throughout the rule and changing the rule "shall" to "must". Discussion followed. There being no opposition those changes were approved.

Discussion continued regarding Rule 166a. Chairman Soules proposed changing the language beginning at line 8 to read "a motion filed under this paragraph must state that there is no evidence or information that can be reduced to a form that would be admissible evidence at a trial to support one or more specified elements."

Professor Dorsaneo made a motion to approve that language. Discussion followed.

Judge David Peoples proposed changing the language "the respondent produces evidence" to "unless the respondent produces summary judgment proof raising a fact issue." Discussion continued.

Tommy Jacks proposed adding the words "summary judgment" before the word "evidence" on line 13 and at the end of that line

after the word "fact" add the following language: ", or produces other information which raises a genuine issue of material fact, even though in not proper form for summary judgment evidence." Discussion continued.

Chairman Soules indicated that the alternatives to this rule are as follows: (1) leave it as is written by Judge Peeples; (2) change the rule to say "summary judgment evidence"; (3) to open discovery, to have a mandatory requirement that discovery must open if there is information that could be reduced to summary judgment evidence that has not yet been and is tendered to the court not in summary judgment evidence form but in some other form not admissible even on a summary judgment; and (4) to allow the use of information that can be reduced to admissible form and let it be used without opening discovery.

Chip Babcock indicated that one alternative to the opening of discovery is to go back to Rule 56 which allows the motion to be filed any time but permits a reasonable opportunity for discovery period. Discussion continued.

Richard Orsinger proposed changing the language in lines 12 and 13 to say "the court must grant the motion unless the respondent points to discovery or produces summary judgment evidence."

Paul Gold proposed on line 11, instead of "discovery" he would impose on the rule that there be mandatory disclosure because if there is mandatory disclosure then the party moving for the motion is not only saying that what they have produced won't lead to evidence but what they are hiding and what they haven't produce similarly would not lead to the evidence either.

Chairman Soules called for a vote of those in favor of leaving paragraph (i) as it is currently drafted. There were six members in favor and twelve opposed.

Chairman Soules called for a vote on changing the word "evidence" to "summary judgment evidence". By a vote of 11 to 7 the language failed.

Chairman Soules called for a vote on inserting "summary judgment" at line 13 and making it mandatory that the party be given an opportunity to do discovery or whatever else may be necessary to get it in admissible form. There were 10 members in favor and 6 members opposed.

Chairman Soules indicated the next issue was whether or not to permit the party with the burden to defeat the summary judgment now, to use information that if reduced to admissible form would be admissible in evidence at trial, and to use that information without it being in summary judgment form. Discussion followed.

A vote was taken with 4 members in favor and 12 members opposed.

Chairman Soules indicated the next issue to be addressed was whether or not to allow the motion to be filed at any time and then require reasonable discovery as under Rule 56. Discussion followed.

Chairman Soules restated the proposal is that the party with the burden to defeat the summary judgment must do so with summary judgment evidence, but it would allow the motion to be filed at any time, and if the party says "I need time to get my summary judgment evidence" the court would be required to give that party reasonable time. A vote was taken with 4 members in favor and 10 members opposed.

Chairman Soules indicated the next proposal to be addressed was the proposal by Richard Orsinger which is to permit the party with the burden to defeat the summary judgment to use all discovery product, whether or not in summary judgment evidence form, and any other summary judgment evidence. Discussion followed. A vote was taken with 12 members in favor and 5 members opposed.

Chairman Soules indicated the next issue to be addressed was whether the movant be required to make mandatory disclosure of everything the movant knows that is germane to summary judgment. A vote was taken with 2 members in favor and 13 members opposed.

Chairman Soules advised that there had been a majority on two alternatives which were as follows:

- (1) Summary judgment evidence is required but if the party demonstrates that they have something that may be put into summary judgment evidence form it would be mandatory discovery or time to get it into summary judgment form. Discovery would be one, affidavit would another one.
- (2) Use summary judgment evidence and the pool of discovery, whether or not it is in summary judgment evidence form.

Discussion followed.

Chairman Soules indicated that there are now three alternatives: (1) Summary judgment evidence is the only thing that can be used but if a party has information that can be reduced to summary judgment evidence form, they must be given time to do that; (2) You can use summary judgment evidence or anything in the discovery pool but you do not get any time; and (3) you can use summary judgment evidence, you can use the discovery pool, and you can use information, and you have to be given time.

Chairman Soules called for a vote on the three alternatives. There were 7 members in favor of alternative 1. There were 6 members in favor of alternative 2. There were 6 members in favor of alternative 3.

Stephen Yelenosky made a motion to submit to the Supreme Court alternative language.

Discussion continued regarding the three alternatives.

Chairman Soules called for a new vote on the three alternatives. The first alternative being summary judgment evidence and available remedies under the present practice. There were 2 members in favor of this alternative.

The second alternative would be summary judgment evidence plus the discovery pool. There were 5 members of this alternative.

The third alternative would be a combination of alternatives one and two plus information that can be reduced to summary judgment evidence form. There were 12 members in favor of this alternative.

Discussion continued.

Tommy Jacks proposed changing line 13 to read "respondent raises summary judgment evidence raising a genuine issue of material fact, or produces other information, including information obtained in discovery, which raises a genuine issue of material fact even though not in proper form for summary judgment evidence."

Mike Gallagher proposed the following language "the court shall grant the motion unless the respondent produces summary judgment evidence, or other information which, if in summary judgment evidentiary form, would raise a genuine issue of material fact, or other information which, if in summary judgment evidentiary form, would raise a genuine issue of material fact." Discussion followed.

Richard Orsinger proposed the following language "which can be reduced to summary judgment evidence form".

Chairman Soules proposed "produces summary judgment evidence or discovery product or other information that can be reduced to summary judgment evidence form raising a genuine issue of material fact." Discussion followed.

Chairman Soules proposed "discovery product or other material that can be reduced to summary judgment form." Discussion continued.

Carl Hamilton proposed "evidence can be reduced to admissible form". Discussion continued.

Chairman Soules read the proposed language as follows "the court must grant the motion unless the respondent produces summary judgment evidence or discovery product or other material that can be reduced to summary judgment evidence form raising a genuine issue of material fact." A vote was taken and by a vote of 13 to 1 the language was approved.

Chairman Soules inquired whether the committee wanted to except from this sentence a party's own responses to requests for admissions. Discussion followed. The committee voted to leave the language as it is.

Chip Babcock brought up for discussion the language regarding awarding reasonable attorneys fees.

Chairman Soules called for a vote on Rule 166a(i) as modified. By a vote of 13 to 1 paragraph (i) was approved.

Chairman Soules brought up for discussion what the title to the subparagraph (i) should be. The proposals were (1) Motion Asserting Respondent's Liability to Raise Fact Issue After Discovery; and (2) No Evidence Motion after Discovery Period.

A vote was taken and the committee voted in favor of the second alternative "No Evidence Motion After Discovery Period."

Chairman Soules called for a vote on the comment as modified. There being no opposition the comment was approved.

Chairman Soules advised that Rule 166a(i) as approved by the Committee will be as written in the draft with the exception of the change of the language in the middle of line 12 that will read as follows "The court must grant the motion unless the respondent produces summary judgment evidence or discovery product or other material that can be reduced to summary judgment evidence form raising a genuine issue of material fact." The only other change was changing "paragraph" to "subdivision" and changing "shall" to "must" where appropriate.

Chairman Soules instructed Judge Peeples to make the appropriate revisions and forward the final version of Rule 166a(i) to him for submission to the Supreme Court.

Judge Scott Brister presented the report on TRCP 18a and 18b. Discussion followed.

Chairman Soules indicated the issue on the table was whether or not to modify the word "interest". Richard Orsinger indicated the debate is whether this ought to be in the language of the

constitution or in the language of the constitution as it appears to have been interpreted by the Supreme Court. Discussion continued.

Chairman Soules called for a vote on whether there should be a modifier ahead of the word "interest" under paragraph (a)(2). By a vote of 7 to 3 there will be no modifier.

Judge Brister brought up for discussion the proposed changes to paragraph (a). Discussion followed.

Chairman Soules called for a vote on Rule 18a(a) as written with the exception of removing the word "economic" in paragraph (2). By a vote of 11 to 2 paragraph (a) was approved.

Discussion continued regarding subparagraph (a).

Judge Scott Brister brought up for discussion the changes to paragraph (b), Grounds for Recusal. Discussion followed.

Richard Orsinger inquired why the language "the judge's ruling shall not be used as the grounds for the motion but may be used as evidence supporting the motion" which was approved by the full committee is not in this draft. Discussion followed.

Judge Brister indicated that language would go back into the rule.

Discussion continued regarding the provisions of paragraph (b). A vote was taken on whether to leave paragraph (b)(2) as it is in the current rule or to change it as it is in the draft. By a vote of 4 to 4 there will be no change. Richard Orsinger requested additional discussion.

Carl Hamilton made a motion that paragraph (b)(4) read as follows: "The judge has personal knowledge of material evidentiary facts relating to the dispute between the parties." Tommy Jacks seconded the motion. There being no opposition that language was approved.

Judge Brister explained the changes to paragraph (b)(7). Discussion followed.

Judge Brister explained the changes to paragraph (b)(8). The Committee voted that it should be within the third degree of consanguinity.

Discussion continued regarding paragraph (7).

Judge Brister explained the changes to paragraph (c), Waiver and Cure. Discussion followed. Chairman Soules proposed the following approach. Make the rule say that the judge has to get

out and not talk about anything being void. You can ask the new judge to reconsider any prior rulings. This proposal would do away with the ability to cure by selling the stock. Discussion continued.

Chairman Soules proposed saying "recusal pursuant to subparagraph (b)(7) is not required except for the first degree." Discussion followed regarding the problems with Mr. Soules proposal.

Judge Brister proposed that there would be no cure and you are recused if it is shown that the family had a financial interest. By a vote of 9 to 2 that proposal was adopted.

Paragraph (c) would then read "Waiver. Disqualification cannot be waived or cured. A ground for recusal may be waived by the parties after it is fully disclosed on the record."

Judge Brister brought up for discussion paragraph (d), Procedure. Discussion followed. Chairman Soules called for a vote on whether to have the current rule or to have the rule as it is drafted here. By a vote of 8 to 4 the new rule as presented in the draft was approved. Discussion continued regarding (d).

Carl Hamilton proposed changing in paragraph (4) Hearing, "twenty days" to "ten days". Discussion continued.

A discussion was had on whether or not there should be a time limit on how fast the assigned judge has to have a hearing and rule. The proposed rule says the presiding judge must immediately assign and shall set a hearing within 20 days of the referral. Discussion continued.

Judge David Peeples proposed changing the rule to let the judge who is assigned to the case set the hearing.

A discussion was had regarding the provision of telephone hearings.

Anne Gardner brought up for discussion the next to last sentence of paragraph (d)(4) where the presiding judge may make such other orders including interim or ancillary relief.

Chairman Soules called for a vote on changing the time for setting a hearing in paragraph (4) from 20 days to 10 days. The Committee voted unanimously for 10 days.

Chairman Soules called for a vote of those members who are in favor of a time limit. All members were in favor of a time limit.

A discussion was had regarding how long the time period should be. Carl Hamilton proposed that it has to be set within 10 days

and shall not be continued except for emergency reasons. Richard Orsinger proposed "shall set a hearing to commence before such judge within ten (10) days and the assigned judge shall resolve the motion within ten days. Discussion followed.

Carl Hamilton proposed that if the motion isn't ruled upon within that time frame it is automatically granted. Discussion followed.

Chairman Soules advised that the proposal is that the judge has to rule within 20 days of the referral or the motion shall be deemed granted. There was no disagreement with that proposal.

Richard Orsinger brought up for discussion the fact that the presiding judge can assign himself or herself. Judge Peeples inquired whether or not we want to say anything about the right to object to an assigned judge as opposed to filing a motion to recuse. Discussion followed.

Chairman Soules proposed the following language: "the presiding judge of the region shall immediately hear or assign another judge to hear the motion".

Judge Brister brought up for discussion the language in paragraph (5), Disposition. Discussion followed.

Chairman Soules called for a vote on Rule 18a as modified by the discussions. By a vote of 9 to 1 the rule was approved. Anne McNamara requested the opportunity to explain why she voted against the rule.

Judge Brister explained that all of the definitions in Section IV of the current rule have been dropped rather than repeating.

Judge Peeples asked what happened to existing paragraph (h), Sanctions for Frivolous Motions. Judge Brister advised that it was left off due to the fact the decision was made to put all sanctions in one rule.

A vote was taken and there was no sentiment for putting paragraph (h) back into the new rule.

Professor Alex Albright continued her report for the Subcommittee on TRCP 166-209.

Professor Albright advised that the issues raised in the letter from James Guess regarding Rule 200 have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from R. Eric Hirtriter regarding Rule 202 have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from James Guess regarding Rule 202 have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from James Guess regarding Rule 204 have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from Michael Domingue regarding Rule 205 and Rule 206. Professor Albright indicated that this issue has already been addressed and the Committee recommended no change.

Professor Albright advised that the issues raised in the letter from Michael Paul Graham regarding identifying experts have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from Bruce Williams have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from Jim Arnold regarding various discovery rules have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from Brenda Norton have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from Gary Nickelson have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from Jim Loveless have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from The Locke Purnell Litigation Section have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the proposal by the Court Rules Committee to have a new rule providing an explanation for the purpose of pre-trial and discovery rules have been addressed and dealt with in part by the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from Doyle Curry for the Court Rules Committee regarding Rule 166 have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from Damon Ball regarding Rule 166a will be deferred until 166a has been addressed.

Professor Albright advised that the Court Rules Committee's proposed amendments to Rule 166b have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from Cherry Williams regarding Rule 166b have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from Judge James Brister regarding Rule 166b have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the opinion of the attorney general about stipulating that a deposition be taken by a person other than a certified court reporter when this conflicts with the government code has been addressed and dealt with by the proposed Discovery Rules.

Professor Albright advised that the Court Rules Committee's proposed amendments to Rules 166d, 166f, and 166g have been addressed and dealt with by the proposed discovery rules.

Professor Albright brought up for discussion the letters from Leonard Cruse and Mike Milligan regarding suggestions that the rules be changed to control the request for necessary documents and shifting the burden in the area of discovery requests to the requesting party. These letters are regarding Rule 167. Professor Albright advised that the committee did not do anything to limit the scope of discovery of documents. The subcommittee addressed this issue early in 1993 and decided not to change the rule.

Professor Albright advised that the Court Rules Committee's proposed amendment to Rule 167 have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issues raised by Tommy J. Turner regarding Rule 168 have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the Court Rules Committee's proposed amendments to Rule 174(b) will be addressed at the time Judge Brister presents his report on bifurcation.

Professor Albright advised that Court Rules Committee's proposed amendments to Rule 200 have been addressed and dealt with by the proposed discovery rules.

Professor Albright advised that the issues raised in the letter from Ken Howard regarding Rule 205 have been addressed and dealt with by the proposed discovery rules. David Jackson provided an explanation as to how this problem was resolved.

Professor Albright advised that the letter from the Attorney General's office regarding Rules 205 and 206 have been addressed and dealt with by the proposed discovery rules.

The meeting was adjourned until Saturday morning.

The Supreme Court Advisory Committee of the Supreme Court of Texas convened at 8:00 o'clock a.m. on Saturday, January 18, 1997, pursuant to call of the chair.

Saturday, January 18, 1997

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

Members present: Professor Alexandra Albright, Pamela Stanton Baron, Hon. Scott A. Brister, Professor Elaine Carlson, Prof. William V. Dorsaneo, Justice Sarah B. Duncan, Michael T. Gallagher, Donald M. Hunt, Joseph Latting, Russell H. McMains, Robert E. Meadows, Richard O. Orsinger, Luther H. Soules III, Paula Sweeney and Stephen Yelenosky.

Ex-officio members present: Paul N. Gold, Carl Hamilton, David B. Jackson and Bonnie Wolbrueck.

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

Ex-officio members absent: Hon. William Cornelius, Doris Lange, W. Kenneth Law, Mark Sales and Hon. Paul Heath Till.

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

Chairman Soules brought the meeting to order.

Richard Orsinger continued presenting his report on TRCP 15-165a.

Mr. Orsinger brought up for discussion Hugh Hackney's proposal that there be an offer of judgment rule, Rule 98a. Mr. Orsinger

advised that the subcommittee is working on this issue and will present a report at a future meeting.

Mr. Orsinger brought up for discussion the letter from Deborah D. Tucker regarding proposed amendments to Rule 107. Ms. Tucker advised that there is a problem with taking default judgments in family violence cases prior to return of service being on file for 10 days. The subcommittee recommended the adoption of the language as follows: "The court may grant a default judgment in a suit for protective order against family violence brought under the Family Code." Discussion followed.

Mr. Orsinger advised that pursuant to the discussion there is not a conflict and therefore the subcommittee withdrew it's recommendation and recommended no change.

Mr. Orsinger brought up for discussion the letter from Howard Hastings regarding proposed changes to Rule 165. Mr. Hastings has raised a complaint that under the dismissal procedures in San Antonio your case can be put on the dismissal docket on two weeks notice and you don't have the opportunity to get a trial setting which requires 45 days notice. Mr. Hastings wanted to lengthen the period of time between the giving of notice of the dismissal and the actual dismissal to permit scheduling of the case for trial. The subcommittee's recommendation was to require a minimum of sixty days notice of setting on the dismissal docket except for general docket call under local rules saying that where Plaintiffs fail to appear the suit can be dismissed. Discussion followed.

Pursuant to the discussion the subcommittee withdrew their recommendation and recommended no change. There being no objection there will be no changes to the rule.

Mr. Orsinger brought up for discussion the letter from Professor Hadley Edgar regarding Rule 165. Professor Edgar noted that in the dismissal rule it talks about reinstatement within 75 days after the judgment and suggested that it say "within 75 days after the order of dismissal." The subcommittee recommended adoption of the change. Discussion followed.

Don Hunt proposed leaving it as "judgment". Discussion continued. Professor Dorsaneo indicated that Professor Edgar's suggestion is part of a larger problem that the committee maybe needs to address further.

A discussion was had regarding how this would affect Rule 165a.

A discussion was had regarding how Rule 329b comes into play.

Chairman Soules indicated that this will be studied further and brought back to the Committee.

Professor Dorsaneo presented his report on Section 3, Pleadings and Motions.

Professor Dorsaneo explained Rule 21, General Rules of Pleading and made a motion for the adoption of same. There being no objection Rule 21 was approved.

Professor Dorsaneo explained Rule 23, Form of Pleadings, Motions and Other Papers and made a motion for the adoption of same. Discussion followed.

A discussion was had regarding accidentally leaving off somebody's name in a pleading. A discussion was had regarding whether or not you change the style when you add or delete parties.

Joe Latting made a motion that the style remain unaltered except that after an initial pleading that the parties can use an abbreviated version of the style. Don Hunt seconded the motion.

Justice Duncan proposed a friendly amendment to say that as long as the first name on each side doesn't change so the clerk will have a constant name.

Professor Albright proposed saying that it cannot change except by court order. Discussion continued.

A vote was taken on the motion and by a vote of 10 to 3 the motion passed.

Justice Duncan made a motion that Rule 23(a) also contain a sentence to the effect that the failure to include or the incorrect inclusion of any of these items does not effect the status of the document that is filed. There being no opposition, language to that effect will be drafted into the rule.

Rusty McMains brought up for discussion Rule 23(c), Adoption by Reference: Exhibits. Mr. McMains expressed his opinion that the incorporation by reference should be broad enough where we can incorporate by reference any previously identified pleading whether it is a live pleading or otherwise. It becomes a live pleading by our inclusion here so long as it exists somewhere and is easily referable along with any exhibits or attachments. Discussion followed.

Chairman Soules proposed that an amended pleading can adopt by reference exhibits to a prior pleading. In other words, you can't reference just the pleading language but you can reference the exhibits.

A discussion was had regarding having a master set of exhibits. Justice Duncan expressed the reasons why she disagreed with this proposal. Discussion continued. A vote was taken on

whether or not there should be a provision in the rule to allow the filing of some repository set of exhibits that can be thereafter referred to in the pleadings. By a vote of 9 to 1 that concept was approved by the Committee.

A vote was taken on permitting adoption by reference of exhibits to superseded pleadings but not the content of superseded pleadings. By a vote of 11 to 3 the committee voted in favor of that language.

Professor Dorsaneo requested a clarification of what was approved for changes to paragraph (a).

A discussion was had regarding who should be the keeper of the master set of exhibits. The consensus was that it should be by agreement of the parties.

Professor Dorsaneo explained Rule 24, Signing of Pleadings, Motions, and Other Papers; Sanctions. There being no opposition Rule 24 was approved.

Professor Dorsaneo explained Rule 25, Presentation of Defenses; Motion Practice. A discussion was had regarding paragraph (a), When presented. A discussion was had regarding filing answers to cross claims or replies to counterclaims.

Joe Lattig proposed changing the second sentence to read "an answer to a cross claim or a reply to a counterclaim, if required, must be filed within the same time for filing amended pleadings as provided in Rule 28."

Judge Brister proposed changing "if required" to "if any". Richard Orsinger proposed "any answer to a cross claim or reply to a counterclaim must be filed ..." Professor Albright proposed "an answer or reply, if any, ..."

Chairman Soules called for a vote on the number of days in the first sentence. Judge Brister made a motion for 30. There being no opposition 30 days was approved.

Professor Dorsaneo brought up for discussion Rule 25(b), How presented. Discussion followed. Richard Orsinger proposed moving paragraph (2) to (1), (3) is (2) and (1) is (3) and so forth.

Professor Alex Albright presented her report on Rule 86 regarding venue. Discussion followed. Professor Carlson indicated that in the second line of paragraph (5) the language "section 5" should read "section 4".

Professor Carlson proposed changing the last sentence of paragraph 5 to say "as set forth in 15.002 of the Civil Practice

and Remedies Code when support by a preponderance of the evidence..." Discussion followed.

Chairman Soules called for a vote on subdivision (5). There being no opposition subdivision (5) was approved.

Professor Albright brought up for discussion subdivision (9), Transfer If Motion Granted. Discussion followed.

Professor Albright brought up for discussion subdivision (2), Motion.

Discussion was had regarding the venue rule in general.

Chairman Soules called for a vote on version 1 or version 2. The discussion continued. Chairman Soules indicated that the question is: If the plaintiff's intervention fails for venue reasons only, do we believe the plaintiff should get to choose venue again, or does a plaintiff go where the defendant has designated a proper county?

Chairman Soules called for a vote of those who felt that plaintiff should have a second chance at selection of venue in those circumstances. There were 8 members in favor.

Chairman Soules called for a vote of those who felt that it should go to the county of proper venue denominated by the challenging defendant. There were 4 members in favor.

By a vote of 8 to 4 the plaintiff gets a second chance.

Discussion continued regarding the venue rules.

Chairman Soules called for a vote between the plaintiff saying where the case goes and the transferring judge deciding where the case goes. There were 2 members in favor of the plaintiff and 10 members in favor of the judge.

Chairman Soules indicated that this is for intervention and joinder.

Professor Carlson asked if you file a motion to strike under an intervention under Rule 60 have you waived venue if you lose your motion to strike? Discussion followed.

Chairman Soules proposed that in Rule 60 or its successor rule there should be a sentence that says that the filing of a motion to strike does not waive venue, does not waive a challenge to venue. There being no opposition the proposal was approved.

Professor Albright brought up for discussion paragraph (10), Motions Filed After Ruling. Discussion followed. Alex Albright,

Justice Duncan and Judge Brister will work on drafting some language to correct this problem.

Professor Albright inquired of the committee whether or not we want to change the procedure in Rule 257, motion to change venue for an unfair forum. Discussion followed. The Committee indicated it would be receptive to looking at changes to Rule 257.

Chairman Soules asked for any further comments on the venue rule. Professor Elaine Carlson commented paragraph (9) needs to be redone because it does not give a misleading import and is should start with "Venue proper to one defendant is proper to all except".

Professor Carlson also raised a question on paragraph (6). In all venue contests when there are multiple plaintiffs if the defendant files a motion to transfer venue, do the plaintiffs have to respond with an independent basis for venue, or only if the defendant challenges both venue under the traditional venue rules and venue under the multiple plaintiff rule? Discussion followed.

Professor Carlson raised a question on section (12), Consent. The draft requires the court to transfer upon the parties written consent where the current Rule 255 says "upon the written consent of the court by an order may transfer to where the parties have agreed." Discussion followed.

Bonnie Wolbrueck presented her report on Rule 622, Execution. Discussion followed. Chairman Soules indicated that version 1 is for multiple writs and version 2 is for sequential writs. A vote was taken with no one in favor of version 1 and 5 members in favor of version 2.

Professor Elaine Carlson presented a report on pages 500-509 of the Second Supplemental Agenda which were various letters regarding the eviction process. Professor Carlson indicated that these proposals were something that was looked at by Judge Till's task force but that did not become a part of their recommendation.

The meeting was adjourned.