

## MINUTES SUPREME COURT ADVISORY COMMITTEE

March 7-8, 1986

The Advisory Committee of the Supreme Court of Texas met on March 7, 1986, at 10:30 a.m. pursuant to call of the Chairman.

Members of the committee in attendance were Honorable Luther H. Soules III, Chairman, Gilbert T. Adams, Jr., Pat Beard, David J. Beck, Professor Newell Blakely, Frank L. Branson, Professor William V. Dorsaneo III, Professor J. Hadley Edgar, Chief Justice John Hill, Vester T. Hughes, Jr., Franklin Jones, Jr., W. James Kronzer, Gilbert I. Low, Steve McConnico, Russell McMains, Charles Morris, Harold Nix, Honorable Jack Pope, Tom L. Ragland, Harry M. Reasoner, Sam D. Sparks, Sam Sparks, Broadus A. Spivey, Harry Tindall, Honorable Bert H. Tunks, Professor Orville C. Walker, Justice James P. Wallace, and Honorable Allen Wood.

Welcoming remarks were received from Chief Justice John L. Hill.

Upon motion by Franklin Jones, Jr., seconded by Charles, the minutes from May 31, 1985, were approved.

The Chairman requested discussion concerning Canon 3C of the Code of Judicial Conduct. The language "shall" was changed to "should" by a show of hands 14 to 2. The Chairman's suggestion that the proposed Canon 3C be recommended to the Supreme Court was unanimously approved.

Professor Dorsaneo gave his subcommittee report. Rules 354 and 380 has been incorporated in proposed Rule 30(a)(3)(B). Rule 377 submitted by Raymond Judice has been taken care of by the Supreme Court itself. Rule 4 regarding certification form on the transcript or statement of acts, pursuant to a memo to Chief Justice Pope from Ray Judice, dated August 22nd, was done. Current Rule 423 was done by the Supreme Court in the last amendment of Rule 423. Rule 439, submitted by Justice Robertson, was reported on at the last meeting. It was decided by both the subcommittee and the full committee that Rules 439, 440, and 441 relating to remittiturs not be abolished. Rule 452 was extensively discussed last meeting and there will be no change in the present practice recommended. Rule 458, submitted by Judge Casseb, was voted down in the last meeting.

It was unanimously decided that Judge Frank J. Douthitt's recommendation regarding changing the time periods in the appellate timetable not be considered.

After discussion, Professor Jeremy Wicker's recommendation that the reference to a notice of appeal be deleted from current Rule 360 and from proposed Rule 35 at paragraphs 5 and 8 was unanimously rejected.

It was moved by Professor Dorsaneo and seconded by Mr. Sparks that Professor Wicker's recommended change of Rule 363, incorporated in Proposed Rule 30(a)(1) be rejected. The committee voted unanimously to reject same.

Professor Dorsaneo's recommendation that the sentence that currently appears in Rule 363 that is the subject matter of Professor Wicker's second recommendation be moved from proposed Rule 30(a)(1) to proposed appellate Rule 35 was unanimously approved, after being moved by Professor Dorsaneo and seconded by Mr. McMains.

Professor Wicker's recommendation that Rule 447 be corrected by replacing the reference to the repealed rule with the reference to the rule that covers that matter was approved and the change will be recommended.

After a motion by Professor Dorsaneo, and a second by Mr. Tindall, it was approved by a show of hands that, in the proposed rule that would supersede current Rule 447, there would be no cross reference to other rules. Proposed appellate Rule 88 will be used as a guide in drafting same.

Professor Wicker's suggestion concerning Rule 496, suggesting that it refer to the rule that contains the requirements or requisites for an application for writ of error rather than the rule for preparation of a brief in the court of appeals has already been addressed by Professor Dorsaneo's committee. Professor Wicker's suggestion that "J" and "N" be eliminated was approved and Professor Dorsaneo's suggestion that Proposed Rule 136(b) be corrected to reflect the foregoing was carried unanimously after motion by Professor Edgar and a second by Mr. Beck and Judge Tunks.

After discussion, it was agreed that Professor Dorsaneo would contact Professor Wicker for clarification of his suggestion regarding Rule 376(a).

Professor Wicker's suggestion concerning current Rule 388a (incorporated in the proposed appellate rules as Rule 13) was next considered by the committee. It was moved by Professor Dorsaneo and seconded by David Beck that, if the proposed rules are adopted, the order ought to be changed to refer to Rule 13 of

the Texas Rules of Appellate Procedure. The motion carried unanimously.

As per Professor Wicker's suggestion, Professor Dorsaneo moved that current Rule 385a, and if it's adopted, Proposed Rule 16, be corrected by changing the reference from the repeal statute to the appropriate section of the Texas Government Code. Mr. Sparks seconded and the motion carried unanimously.

Professor Dorsaneo made the same recommendation concerning Rule 469 (Proposed Rules 131 and 483, located in the proposed rules as Proposed Rule 133) and current Rule 499a (Proposed Rule 140) and the recommendation carried unanimously. Professor Dorsaneo and Mr. Tindall suggested deletion of the word "Texas" and it was the consensus of the committee that the deletion be made.

Professor Dorsaneo then read his redrafted Proposed Rule 84 to the committee and requested whether he had followed the committee's wishes as expressed in its November, 1985, meeting. Discussion ensued regarding current Rules 435 and 438, and there was extensive discussion regarding the wording of Proposed Rule 84. 11 members felt the Rule should contain the word "frivolous" and 11 members felt the phrase "without sufficient cause" to be appropriate. Chairman Soules read Rule 84, as changed in the committee's discussion, out loud as follows: "In civil cases where the court shall find that an appeal or writ of error has been taken for delay and without sufficient cause then the court of appeals may award the appellee as much as 10 percent of the amount of damages awarded in the judgment." Mr. Spivey motions to table the discussion and take it up at a later point in the session.

Professor Dorsaneo then reported to the committee that, since its last meeting, the Court of Criminal Appeals promulgated a version of the Texas Rules of Appellate Procedure that goes into effect September 1, 1986. He also discussed with the committee the work that needs to be done to harmonize the rules promulgated by the Court of Criminal Appeals and the ones that will be promulgated by the Supreme Court. David Beck volunteered to have his office read the two drafts, highlight the differences and send them to Professor Dorsaneo. Chairman Soules then appointed David Beck and Russell McMains to work with Professor Dorsaneo in working with the Court of Criminal Appeals for a June publication of a joint set of appellate rules. Justice Wallace will work with Mr. Beck, Mr. McMains and Professor Dorsaneo.

Chairman Soules stated that, in the event that 364a or 365a is adopted or recommended, then 368, 627 and 634 would also need to be amended as a housekeeping measure. Mr. Branson suggested that the matter be tabled, since several members of the committee represent both sides in the Pennzoil vs. Texaco litigation. Chairman Soules stepped down and appointed Professor Dorsaneo as

chairman in this particular matter and discussion ensued. Mr. Branson ruled that consideration of Proposed Rule 365a be tabled and Mr. Low seconded. By show of hands, by two-thirds vote, the committee tabled consideration of Proposed Rule 365a. David Beck, Russell McMains, Luther Soules, Harry Reasoner and James Kronzer abstained from voting. Mr. Low requested that the record reflect that his vote in no way reflected on any member of the committee. Justice Wallace requested that the issue be taken up again as soon as possible. Professor Dorsaneo, as acting chairman, appointed a subcommittee to be chaired by Professor J. Hadley Edgar with Broadus Spivey and Sam Sparks of El Paso to make a report at the next meeting.

Professor Edgar gave a brief summary of proposed Rule 277, regarding standardization of broad form questions, and the subcommittee's reasoning processes behind its recommendations for changes. Said changes were discussed extensively by the committee. The first sentence of the first full paragraph on Page 15 under the Proposed Rule 277 was changed by deleting from "in any case" in the first line, and deleting all of the second, third, fourth, fifth, sixth and seventh lines through the word "culpable." The word "also" was struck from the second sentence of the first full paragraph on page 15. Chairman Soules asked, by show of hand, how many felt good cause should be retained for the submission of a general charge. Ten felt it should be retained and ten felt it should not. On a show of hands, fourteen members approved the adoption of Rule 277, as proposed on page 13, with one change, deleting the words "in a proper case" and inserting "for good cause" in their place. Eight members opposed the motion. Regarding inferential rebuttal issues, the rule as written was defeated by a majority by show of hands with four opposed. It was voted, house against one, that the proposed rule have language saying "inferential rebuttal questions shall not be submitted." The language "Placement of the burden of proof may be accomplished in instructions rather than by inclusion in the question" was recommended by a unanimous show of hands. Chief Justice Pope commented at length regarding the court advising the jury of the effect of its answers. Upon unanimous vote, it was decided to delete the first sentence in the first full paragraph on Page 16, "upon request of either party the court may instruct the jury as to the effect of its answers to questions will have upon the judgment to be rendered in the case." It was moved by Mr. Branson and seconded by Professor Edgar that the second sentence, "counsel may argue to the jury what they contend to be the effect of the jury's answers and the judgment to be rendered." Upon show of hands, sixteen members voted for deletion and four members voted for retention. Retention of the last sentence of the rule was approved, sixteen to five. Eight members voted to make the last sentence mandatory, with the last sentence being permissive carrying. "The court may predicate the damage question upon affirmative findings of liability" was moved to the first paragraph on Page

15 to read "The court shall instruct the jury to answer the damage question or questions without any reduction because of the percentage of negligence or causation, if any, of the person injured. The court may predicate the damage questions upon affirmative findings of liability." The committee voted to adopt the last paragraph on Page 16, as written. Six members felt that the judge should be able to explain from the bench to the jury without given them a written instruction, be outside of a written instruction in the event of a conflict. Nine members felt that the judge, whenever he does instruct, if he can instruct on an inconsistency, should be confined to a written instruction which he may read to the jury from the bench after an opportunity for objections. Chairman Soules' suggestion to move the paragraph regarding written instructions being read from the bench from Rule 277 to Rule 295 was unanimously approved by show of hands. Chairman Soules then moved that Rule 277 be recommended to the Supreme Court and upon a show of hands, it was carried, with Harry Reasoner and James Kronzer voting against same.

The committee discussed meeting times and dates and agreed that it should attempt to meet quarterly instead of twice a year, meet earlier in the day and schedule working lunches instead of lunch breaks.

The committee agreed to meet on May 16th and 17th, 1986, beginning at 8:30 a.m. on the morning of May 16, 1986.

After discussion, Mr. Branson moved that the committee adopt the provisions underlined on Page 21 regarding broad form questions. Mr. Low seconded the motion and by show of hands, eleven to six, it was adopted.

The committee re-convened on March 8, 1986.

It was proposed that the word "judge" in Rule 271 be changed to "trial court". The motion carried unanimously.

On Rule 272, "judge" was changed to "court" "his" to "its" and an addition was made "outside the presence of the jury". The changes will be recommended to the Supreme Court as a unanimous recommendation of the committee.

Rule 273 as proposed will be recommended for adoption by the Supreme Court as the unanimous recommendation of the committee.

Rule 274 as proposed will be recommended for adoption by the Supreme Court as the unanimous recommendation of the committee.

It was unanimously agreed that the word "charge" be eliminated from Rules 273, 274, and 275.

It was unanimously agreed that the first word in the third sentence from the bottom of Page 8 "requested" be deleted from

Rule 275. With that deletion, it was unanimously agreed that Proposed Rule 275 be recommended to the Supreme Court for adoption.

Rule 277 and 295 came up for further discussion. It was moved by Mr. Beck and seconded by Mr. Sparks that they be referred back to Mr. Jones' subcommittee for further review.

Chairman Soules requested that Mr. Beck and Mr. Jones work on the issue submission aspects of Rules 295 and 286.

Proposed Rule 278, "Submission of Questions" is the first full paragraph of what used to be Rule 279. Mr. Low moved that the first line of Proposed Rule 278 be deleted, with Professor Edgar seconding. The motion was unanimously carried. The committee moved to eliminate the words "the controlling" and the first clause in the sentence. After further discussion, It was agreed that further work was necessary before Rule 278 could be submitted.

Proposed Rule 279 was then discussed. Suggestions concerning deletions and changes to language were made and it was referred back to subcommittee.

The deletion of the phrase "as well as distance actually traveled in serving such process" in Rule 16 was unanimously recommended.

Chairman Soules included Rule 21c in the repealer list to the appellate rules project under no objection from the committee.

It was moved by Mr. Sparks to approve the recommendation made by Mary Jo Carroll regarding Rule 117a, seconded by Professor Dorsaneo. Rule 117a was adopted unanimously by show of hands.

The idea of "good cause" in Rule 165a(2) was rejected unanimously by show of hands, after motion by Mr. Kronzer and second by Mr. McConnico. The proposal to extend the time to seek reinstatement to six months will be taken up at the next meeting by Mr. Sparks. Professor Wicker's suggestion to change "is" to "are" in the phrase "The same reinstatement procedures and timetables" was unanimously recommended by show of hands.

It was moved by Professor Dorsaneo and seconded by Mr. Sparks that Rule 184 and 184a be repealed, since the subject matter is covered by the Texas Rules of Evidence. Chairman Soules, Mr. Kronzer, Mr. Reasoner, Mr. McMains, Mr. Beck and Judge Casseb abstained from voting.

Chief Justice Hill requested a subcommittee be appointed to assist the Supreme Court in the remodeling of the Supreme

Courtroom and its chambers. Mr. Reasoner was appointed chairman, with Mr. Spivey, Mr. McConnico and Mr. Morris volunteering as members.

Chairman Soules requested that Mr. Professor Blakely study the Rules of Practice in District and County Courts in Section 9, Evidence in Depositions and Subsection A, Evidence, numbered Rules 176 through and including Rule 185 to determine whether they should be repealed in light of the subject matter being covered by the Rules of Evidence.

A meeting was scheduled for September 12th and 13, 1986, beginning at 8:30 a.m. and ending at 5:30 on Friday and from 8:30 a.m. to 1:30 p.m. on Saturday.

Mr. Sparks addressed Don Baker's suggestion regarding Rule 201. The committee decided that it had already accepted his suggestion and incorporated it into the Proposed Rules.

It was unanimously decided that the committee would recommend Judge Barrow's suggestion regarding Rule 206, reinserction of the provision that the original deposition be taxed as costs, which is the current practice.

The suggestion regarding Rule 209, allowing clerks to dispose of depositions 180 days after judgment was tabled for further investigation by subcommittee.

Professor Jeremy Wicker's suggestions concerning the rules beginning with Rule 18a through 182a were unanimously approved by show of hands.

Professor Wicker's suggestions concerning Rules 167 through Rule 209 are being studied and will be studied further by Mr. Sparks' committee and he urged members of the committee to send in their comments and/or suggestions regarding same.

Rule 84 was again discussed at length. It was unanimously decided that each delayed appellee can recover up to ten percent of the taxable costs from the parties causing the delay and that the sentence "a request for damages for delay shall not have the effect of permitting the appellate court to consider error that has not been preserved for appellate review" be retained.

It was unanimously decided that Rule 438 should contain the language "where the court upon its own motion or upon request of any party shall find".

Judge Casseb gave a summary of actions taken by the task force in response to House Bill 1658. Judge Casseb strongly urged that the committee review the output of his subcommittee for consistency and harmony with the Rules of Civil Procedure before its adoption by the Supreme Court. Chairman Soules

suggested that the committee meet on May 15, 1986, to discuss Judge Casseb's recommendations to House Bill 1658.