

**SUPREME COURT ADVISORY BOARD MEETING**  
Held at 1414 Colorado,  
Austin, Texas 78701

Taken May 31st, 1985

By Mary Ann Vorwerk

**AFFILIATED REPORTERS**

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18 MARY ANN VORWERK,  
19 Certified Shorthand Reporter  
and Notary Public

20  
21 ALSO PRESENT:

22 DEBBRA WOOD  
23 Certified Shorthand Reporter  
and Notary Public  
24  
25

## MORNING SESSION

1  
2  
3           CHAIRMAN SOULES: Good morning to you.  
4 Our meeting is convened. Thank you all for being  
5 here. I want to say that we appreciate Justice  
6 Wallace being here this morning from the Supreme  
7 Court, who is our liaison with the court, and he  
8 has some welcoming remarks.

9           JUSTICE WALLACE: Thank you, Luke. Along  
10 with Luke, I want to welcome all of you here, tell  
11 you how much we, as the court, appreciate the time  
12 and effort that you have put in on this committee  
13 and are going to put in. As someone said, here's  
14 what we're going to do today. So everybody, I'm  
15 sure, has reviewed it and is ready to go to work  
16 now. It means so much to us because we are, as you  
17 know, charged with the responsibility of  
18 promulgating rules. And without the people in this  
19 room and your counterparts around the state,  
20 without the input from you and the work that you  
21 do, we would never get the rules promulgated and  
22 amendments made that are needed. So, we appreciate  
23 your time and effort and hopefully we're going to  
24 have a very productive day and hopefully we can get  
25 it done today.

1           Does everybody have a copy of the -- if you  
2           don't have one of these, there is some here on the  
3           table.

4           CHAIRMAN SOULES: There is some down at  
5           the other end also, Judge.

6           JUSTICE WALLACE: So, just help yourself  
7           to one, and we'll be following the agenda in there,  
8           pretty closely anyway, won't we, Luke?

9           CHAIRMAN SOULES: Yes, we will. Thank  
10          you, Justice Wallace.

11          We'll take up two things before we start this  
12          agenda. The first item off will be the proposed  
13          joint appellate rules for the criminal and civil  
14          process and then the Rules of Evidence that have  
15          been distributed and then we'll get to the things  
16          that are in this binder which I've called  
17          Miscellaneous Rules, for lack of a better term.  
18          That simply is rules that don't relate to the Rules  
19          of Evidence or to appellate procedure, at least  
20          this big project that we've undertaken.

21          We have arranged for this meeting, and I  
22          believe for the first time, to have court reporters  
23          here to transcribe and then create a record of the  
24          meeting. So, if you could say your name as you  
25          speak, I know that will help them. We do have name

1 tags out there, but they may not be able to see  
2 them as clearly.

3 With that, Justice -- Chief Justice Frank  
4 Evans from Houston has some remarks to make about  
5 the appellate rules, and he is on a tight schedule.  
6 And then Chief Justice Guittard also is in the same  
7 situation, and I appreciate it if we would indulge  
8 them to speak first and then we'll get to the  
9 committee.

10 CHIEF JUSTICE EVANS: Thank you, Mr.  
11 Chairman, Judge Wallace.

12 The message I have is in the nature of a  
13 request, and Judge Guittard and I are over in  
14 opinion writing school at the University of Texas,  
15 you'll be glad to know and -- at least in my part.  
16 And so we will have to leave you. Judge Guittard  
17 is going to be here a few minutes more than I.

18 But the request I had -- I have -- and I  
19 speak not only on my behalf but on the behalf of  
20 the chief justices of the courts of appeals, is  
21 that we and the judges on the intermediate  
22 appellate courts have some opportunity to review  
23 proposed rules and to have some input. We've  
24 already had this, through work with Judge Wallace  
25 and Judge Guittard, who has sort of been our point

1 man and advisor and leader in this area. But I  
2 think it's important for obvious reasons, to be  
3 assured that we have the cooperation and the  
4 support of all of the appellate judges of the  
5 intermediate appellate court. They have had the  
6 opportunity in the past to review most of the  
7 proposed rules, but there are changes that we're  
8 undergoing on a day-to-day basis. And so it's a  
9 matter of a time schedule of working out how that  
10 could be effectively done without any hindrance to  
11 your combined effort. So, that is our number one  
12 request, the opportunity for review and input in  
13 any way that you all work it out.

14 Second thing I'd like to mention is that  
15 Judge Wallace has encouraged us to try to develop  
16 statewide rules for our intermediate appellate  
17 courts, so that lawyers going from one jurisdiction  
18 to the other and within the jurisdiction will have  
19 some idea of what they need to do to effectively  
20 prosecute their appeal or defendant in a particular  
21 court. That would leave us, as I understand it,  
22 open to set some scheduling in our rules according  
23 to our local needs and decisions, but we are all  
24 committed to this, Mr. Chairman, and our staff  
25 attorneys have already begun to work on a statewide

1 basis to try and effect this. So I think we can do  
2 it. They tell us we can do it, and we're  
3 encouraged by your efforts.

4 The final thing, and this is just a matter of  
5 -- it's the deepest philosophical question that I  
6 can see in any proposed rule. We would like to do  
7 something about the court reporter situation that  
8 would take the burden off of the lawyer, so far as  
9 the preparation of the appellate record. I think  
10 more and more judges that I've talked to, at least  
11 on appellate level, consider it a court  
12 responsibility rather than a lawyer responsibility  
13 to see that the record is prepared, both civil and  
14 criminal. The rules are unclear about whose, in my  
15 opinion, responsibility it is for the preparation  
16 of the record, whether it is the trial judges or  
17 the appellate court judges. We're equally somewhat  
18 vague about what sanctions are available to the  
19 various courts to see that the record is promptly  
20 prepared.

21 With new technology and new cooperative  
22 efforts between the trial judges and the appellate  
23 court judges, I think we could make some -- save a  
24 lot of lawyer time and a lot of clients' money, in  
25 that respect. That ends my remarks, and thank you

1 very much.

2 CHAIRMAN SOULES: Thank you, Chief  
3 Justice Evans. We will certainly want to have your  
4 input and the input of the other court of appeals  
5 judges on these new appellate rules, the harmonized  
6 rules because the courts of appeals are one of the  
7 central focuses of these rules. An effort to try  
8 to get your courts one set of rules, with whatever  
9 variations, may have to be made to accommodate the  
10 differences between the civil and criminal  
11 practice. But essentially, rules that are  
12 harmonious and don't have differences that are not  
13 explained, other than -- well, those were in a  
14 court of -- the Code of Criminal Procedure and the  
15 others evolved through the Rules of Civil  
16 Procedure, but there's no real necessity.

17 Secondly, we have been addressing, at least  
18 at the COAJ, and will to some extent today, be  
19 addressing the problems with local rules in the  
20 district courts and in the courts of appeals,  
21 differences that also simply, perhaps through  
22 evolution, through independent processes, are  
23 different, but don't have any real reason to be  
24 different. They could be made uniform throughout  
25 the state. So, we will appreciate very much the

1 efforts of you and your committees towards helping  
2 us deal with the court of appeals' aspect of that  
3 at least. And we do have a proposal from Frank  
4 Baker of San Antonio to deal with the court  
5 reporter problem that you've addressed. Whether  
6 his proposal or some other will be the one that we  
7 ultimately work out, your suggestions in all those  
8 respects are appreciated and we will try to keep  
9 you informed and hope to get information from you  
10 as well.

11 CHIEF JUSTICE EVANS: Thank you very  
12 much.

13 CHAIRMAN SOULES: Thank you, Chief  
14 Justice. Chief Justice John Hill has come in, and  
15 I know that he has some welcoming remarks as well,  
16 and I'd like to welcome him to our meeting.

17 CHIEF JUSTICE HILL: Thank you, Luke.  
18 Good morning to all of you, friends all, nice to  
19 see all of you. Hope to get to visit with you at  
20 the break.

21 We're going to be calling on this committee  
22 as never before. This is a very important  
23 committee, under utilized, and we want to really  
24 bring it forward and make it very meaningful  
25 because we need your help desperately. We have

1 been given now, under the new Court Administration  
2 Act, new and far-reaching administrative  
3 responsibilities. We have been mandated by the new  
4 Administration Act, which I encourage all of you to  
5 get a copy of and really get into it because it's  
6 heavy and it can't be just a quick once over.  
7 You've really got to get into it and see what it  
8 does. It carries a new number, and I'll have to  
9 rely on Ray Judice or someone to help me. I think  
10 it's House Bill 1186 but --

11 MR. ADAMS: 1658.

12 CHIEF JUSTICE HILL: 1658. It's kind of  
13 interesting how all that happened. The Legislature  
14 works in mysterious ways, and we really -- we beat  
15 our opponents, but we sure didn't beat the system.  
16 And the system just ate us up in the last stages,  
17 but this was one place where the system didn't eat  
18 us up. We were able to use the system and salvage  
19 this bill which had originally been Senate Bill  
20 586. And somebody lost their two appellate courts,  
21 I don't want any responsibility for that because I  
22 wasn't in that fight, but in that --

23 CHIEF JUSTICE GUITTARD: We were hoping  
24 that you were.

25 CHIEF JUSTICE HILL: I know you were,

1 Judge, and I was trying my best, too. I was trying  
2 to fight so hard for 331 and some other things that  
3 I kind of left that over on your plate. And you  
4 were successful with it. And out of that -- when  
5 those two bills went down, they had it on the  
6 calendar. So we are able to virtually just  
7 substitute our Court Administration Bill under that  
8 banner and bring it on in for a vote and get it  
9 passed. So, to say everything seems to work in  
10 mysterious ways the last two or three days of the  
11 Legislature. So you were successful and we were  
12 successful.

13 This bill is there and I'm sure will be  
14 signed by the Governor and we'll be in business,  
15 whether we want to be or not. We're going to be  
16 heavily involved in the administration of the  
17 courts as never before at the Supreme Court level.  
18 And that means that's where we need you badly,  
19 because these rules just can't just jump out and be  
20 done, as you know. We've got to work out these new  
21 rules that are mandated in that act for the  
22 administration of our courts. Does anyone happen  
23 to have a copy of that handy?

24 CHIEF JUSTICE WALLACE: Gay Curry,  
25 Senator Glasgow's administrative assistant back at

1 the back has some.

2 MR. WELLS: I have a question. Senator  
3 Glasgow circulated that through the committee  
4 Senate Bill 354.

5 CHAIRMAN SOULES: That's essentially it.

6 MR. WELLS: Was it passed in that form?

7 CHIEF JUSTICE HILL: This is a different  
8 bill than I'm referring to. This is the one that's  
9 dealing with other matters. The Court  
10 Administration Bill -- I'm not prepared, I've just  
11 gotten back in town, and I'm not prepared. I'll  
12 tell you frankly, I am not. So, I'm simply saying  
13 to you I'm not prepared in the sense that I can't  
14 give you chapter and verse right now of what's in  
15 this bill. I do know that it mandates us to set  
16 up, what do you call them, Rules of Governness or  
17 Rules of Administration?

18 Good morning, Justice Pope. How are you,  
19 Chief?

20 And we will, through these rules, be more in  
21 charge -- the courts themselves will be more in  
22 charge of their dockets. Whether you operate in a  
23 county where you have central dockets, or whether  
24 you operated in a county where you have  
25 individualized dockets, these rules will bring us

1 into a new era. It's going to be popular with some  
2 people and not so popular with others. If you're a  
3 lawyer that's operated under lawyer diligence all  
4 your life, as most of you have, you're probably not  
5 going to like it all that much. It's directed at  
6 the courts being in charge of their dockets.

7 Judicial passivity is over. We won't be just  
8 working in terms of the lawyer that's done the best  
9 job of getting the case ready and getting the case  
10 prepared will be the one that will get to trial.  
11 The court's going to be in charge of trying to  
12 marshal the cases on their docket and to bring them  
13 through the system in some sort of orderly way,  
14 much like the federal system. And we'll have tough  
15 rules about dismissal dockets probably every couple  
16 of years. We'll have settlement -- more settlement  
17 conferences provided. We'll have more  
18 opportunities for cases to be disposed of and  
19 face-to-face confrontations that the courts will  
20 arrange. We will have tougher continuance  
21 policies. Motions for continuance will not be very  
22 favored. We will be in the business of trying to  
23 see that pretrials are carried forward and actually  
24 done in these cases. We'll be trying to see that  
25 when a case is set, that something happens and that

1 it triggers some other event. And there will be  
2 time schedules that will be cranked into the rules.

3 So, you can see that it means that in our  
4 Civil Rules of Procedure, really, are an additional  
5 group of rules known as Rules of Administration.  
6 We're going to be heavily involved in saying we're  
7 going to try to bring some uniformity, if you  
8 please, that's done under the name of efficiency,  
9 of moving these cases, unclogging these dockets.  
10 And obviously if it's overdone, we'll rush people  
11 to judgment and people will be abused by the very  
12 system we put in place, if we're not careful. On  
13 the other hand, if we don't do it, we're not going  
14 to be doing what the Legislature has mandated us to  
15 do.

16 One of the reasons that we're not more  
17 successful, in my opinion, in the Legislature, in  
18 getting what we need, badly need, for our trial  
19 courts in the way of administrative help and  
20 increased salaries and computer-aided transcription  
21 and all of the things that we've contended for is  
22 that there's still this lingering feeling in the  
23 Legislature on the part of some that we're not  
24 doing a good enough job, that we're not  
25 administering the courts as heavily and properly as

1 we ought to be and that until we do that, until we,  
2 as they say, clean up our act and get our show on  
3 the road in terms of the Supreme Court being  
4 heavily involved in seeing that our courts are  
5 administered more efficiently and that the trial  
6 judges are more in charge of their work -- and you  
7 still hear the recurring complaint of the dockets  
8 not being equal or work loads not being equal and  
9 some of the judges not doing their fair share.  
10 I've just been living over there a lot this last  
11 Legislative session, and I'm just here to report to  
12 you, not that any of that's necessarily true, but  
13 that those are the kind of problems that we're  
14 contending with in our efforts to get for our  
15 courts what we need. So, they have loaded up our  
16 boat.

17 In addition to this, we have judicial  
18 redistricting that will be voted on in November,  
19 first time in, I guess, ever that we've really  
20 bitten the bullet; and it looks like it may happen.  
21 I'm going to get on the program and do all I can to  
22 see that we have it passed. And so, if we will do  
23 our good work now over the next year and implement  
24 these new initiatives that are being placed on us,  
25 that should buy us additional credibility, for one

1 thing. It should add to what we've been trying to  
2 do, and that's to precondition the Legislature for  
3 the fact that our courts are in trouble and we need  
4 help. And we must build the kind of political  
5 force here at this committee level, on the courts,  
6 among our judges, among our lawyers throughout this  
7 state, with citizen input where we can go over  
8 there and be real contenders next time for the  
9 things that we just simply desperately need to move  
10 the system of justice forward.

11 But in the meantime, they're saying to us,  
12 "Get this job done." And maybe that means we'll be  
13 more receptive, but only time will tell. But  
14 that's where we are, gentlemen, and you can see  
15 that this is major business we're talking about.  
16 This is no nonsense stuff. This is get your coat  
17 off and roll up your sleeves and let's work it out.  
18 I got nothing to tell and nothing to sell, I'm just  
19 down here trying to get a job done that needs  
20 doing. I'm willing to provide all the leadership  
21 that I'm capable of providing to get this job done,  
22 but we cannot do it alone. You have got to get in  
23 here and help us work this out, and I know that you  
24 will.

25 Thank you very much and welcome.

1                   CHAIRMAN SOULES: Mr. Chief Justice,  
2                   thank you for those remarks, and I feel sure that  
3                   you'll have all the support that energies --  
4                   individual energies and joint energies you can get  
5                   behind that effort.

6                   I'll have some general matters to attend to  
7                   in a little while, but I want to be sure that we  
8                   get Judge Guittard accommodated on his time  
9                   schedule. I do want to welcome Justice Ray and  
10                  Chief Justice Pope to our meeting. They have both  
11                  come in.

12                  A committee chaired by Chief Justice  
13                  Guittard, which had as its reporters Bill Dorsaneo  
14                  and Judge Daley -- Bill essentially having major  
15                  input from the civil side and Judge Daley having  
16                  principal input from the criminal side. But those  
17                  two working together, with Chief Justice Guittard  
18                  as chairman, served an interim Senate committee  
19                  that was appointed by Senator Glasgow; and his  
20                  right-hand person, Gay Curry, is here with us today  
21                  and has helped in making distribution of those  
22                  materials.

23                  And, Gay, we welcome you and thank you for  
24                  being with us.

25                  That committee had as its responsibility the

1 production of a harmonized set of rules to  
2 accommodate both the criminal and civil appellate  
3 systems, if such a harmonized set of rules could be  
4 produced.

5 The purpose for that was to underpin the  
6 legislative effort headed by Senator Glasgow to  
7 give the courts -- the Court of Criminal Appeals  
8 rule making authority at least to the extent of its  
9 own appellate rules and to get those out of the  
10 Code of Criminal Procedure so that that court,  
11 together with the Supreme Court of Texas could try  
12 to harmonize their rules. And the Legislature, at  
13 least the sponsors of the bill, didn't seem  
14 convinced that without a set of rules in place or  
15 proposed that appeared to be workable and  
16 substantially so, that the bill to give the Court  
17 of Criminal Appeals that rule making authority  
18 would have a great deal of success. Why I'm not  
19 sure. But at any rate, that's what we were given  
20 to understand. So, over a period of a few months  
21 and several Saturdays, we -- and several weekdays  
22 as well, the committee met. And I can't really  
23 imagine, but many, many more hours by the reporters  
24 Bill Dorsaneo and Judge Daley had produced this  
25 work product that you see bound in legal size or

1 stapled together in legal size.

2 I want Chief Justice Guittard first to speak,  
3 so that he can go and make his next speech over to  
4 the opinion writing seminar being held for the  
5 courts of appeals. And then Bill Dorsaneo, and  
6 then we'll have whatever discussion and extensive  
7 discussion to the extent that you all wish to have  
8 input about this effort.

9 Chief Justice Guittard.

10 CHIEF JUSTICE GUITTARD: Thank you Mr.  
11 Chairman.

12 Perhaps most of you have read the statement  
13 that was -- the three statements that were  
14 published in the January Bar Journal by me and Mr.  
15 Soules and Clifford Brown, concerning these  
16 proposed uniform, or rather harmonized, appellate  
17 rules, and the proposed rules themselves were  
18 published in the February Bar Journal.

19 The origin of this project, as the chairman  
20 stated, was -- came from Senator Glasgow, for whom  
21 I have conceived a very great respect. When he was  
22 appointed chairman of the Subcommittee on Criminal  
23 Matters of the Select Committee on the -- Interim  
24 Select Committee on the Judiciary, he circulated  
25 all the judges and asked for suggestions about what

1 their committee might be working on. And some of  
2 us appellate judges who had gone through the throes  
3 of trying to get adjusted to two systems of  
4 appellate procedure suggested that there should be  
5 an effort to eliminate the unnecessary  
6 discrepancies between the two systems and to bring  
7 criminal rules in line with the more efficient  
8 civil rules of appellate procedure. And so,  
9 Senator Glasgow took off on that, and he liked that  
10 idea so well that he conveyed the idea to the Court  
11 of Criminal Appeals and the Supreme Court that if  
12 they didn't get together and work out some  
13 appellate rules, harmonize appellate rules, the  
14 Legislature was apt to take over the whole project  
15 and prescribe a uniform code. And that didn't set.  
16 That got the attention of both the Supreme Court  
17 and the Court of Criminal Appeals.

18 And so, as a result of this suggestion, and  
19 at the request of the Subcommittee on Criminal  
20 Matters, the Supreme Court and the Court of  
21 Criminal Appeals adopted a joint -- appointed a  
22 joint advisory committee to draw up a tentative  
23 draft of the proposed rules with the idea, as Luke  
24 indicated, that if we're going to go to the  
25 Legislature, they're going to want to see what the

1 project's all about.

2 So, on that committee, Luke served as one  
3 member and Rusty McMains and Bill Dorsaneo among  
4 your members. There were also both appellate and  
5 trial judges, lawyers from both the civil and  
6 criminal practice. And so, this is what we've --  
7 after meeting, I forget how many meetings during  
8 the summer and early fall, I think it was seven or  
9 eight meetings I think we had. And amazingly we  
10 didn't have a single time where we didn't have a  
11 quorum during the middle of the summer. But we  
12 came up with these proposed draft of appellate  
13 rules, and we were under this constraint.

14 The court -- the Supreme Court had already  
15 gone through the process of some rather extensive  
16 recent amendments to the civil appellate rules, as  
17 this committee knows as well as anybody, and they  
18 were -- they indicated to us that they were very  
19 reluctant to make any changes, that the Bar  
20 wouldn't stand for any more. And so, one of our  
21 objectives in preparing these rules was to -- not  
22 to change the practice, not to unsettle the lawyers  
23 by some more changes. So, we have adopted that as  
24 our guide post. And although we have proposed to  
25 rearrange the rules, and in some cases restate them

