

LHS III MASTER
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Meeting of the
Supreme Court Advisory Committee
September 12-13, 1986

UNIVERSITY OF HOUSTON LAW CENTER
UNIVERSITY PARK
HOUSTON, TEXAS 77004
713/749-1422



UNIVERSITY OF HOUSTON
LAW CENTER

TO: Luther H. Soules, III, Chairman
Supreme Court Advisory Committee

All members, Supreme Court Advisory Committee

Justice James P. Wallace, Rules Member,
Supreme Court of Texas

FROM: Evidence Rules Subcommittee
Newell H. Blakely, Chairman *NHB*

DATE: September 3, 1986

RE: REPORT ON QUESTION OF POSSIBLE TRANSFER OF RULES 176
THROUGH 185, TEXAS RULES OF CIVIL PROCEDURE, TO THE
RULES OF EVIDENCE

At the March 7-8, 1986 meeting of the Advisory Committee, it was requested that the Evidence Subcommittee consider whether Rules of Civil Procedure 176 through 185 should be repealed and incorporated in the Rules of Evidence.

At the March 7-8, 1986 meeting of the Advisory Committee, the Committee itself decided to recommend to the Court the repeal of Rule 184, Determination of Law of Other States, and of Rule 184a, Determination of the Laws of Foreign Countries, because those two rules already appear as Rules 202 and 203 in the Texas Rules of Evidence. It is assumed that respecting those two rules no action by the Evidence Subcommittee is called for.

With respect to the remaining rules under consideration by the Evidence Subcommittee, the Subcommittee recommends that no change be made. This attitude seems to stem largely from the belief that attorneys using these rules are accustomed to finding them in the Rules of Procedure, that if we leave things where they are now, it takes away all arguments based on the significance of change, and finally that there is no need for change.



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TO: Luther H. Soules, III, Chairman
Supreme Court Advisory Commission
All members, Supreme Court
Justice James P. Wallace,
Supreme Court of Texas

FROM: Evidence Rules Subcommittee
Newell H. Blakely, Chairman

DATE: September 3, 1986

RE: REPORT ON QUESTION OF PROPOSING
THROUGH 185, TEXAS RULES OF EVIDENCE

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recommendations
"no change"
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Agreed
Unanimous*

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At the March 7-8, 1986 meeting of the Advisory Committee, the Committee itself decided to recommend to the Court the repeal of Rule 184, Determination of Law of Other States, and of Rule 184a, Determination of the Laws of Foreign Countries, because those two rules already appear as Rules 202 and 203 in the Texas Rules of Evidence. It is assumed that respecting those two rules no action by the Evidence Subcommittee is called for.

With respect to the remaining rules under consideration by the Evidence Subcommittee, the Subcommittee recommends that no change be made. This attitude seems to stem largely from the belief that attorneys using these rules are accustomed to finding them in the Rules of Procedure, that if we leave things where they are now, it takes away all arguments based on the significance of change, and finally that there is no need for change.

The Subcommittee voted on the following propositions:

- (a) That 176, 177, 177a, 178, 179 and 180 are purely procedural and should be left in the Rules of Civil Procedure. Vote result: 5 for status quo; 0 for change; 1 abstention; 1 not yet voting.
- (b) That 185 involves sufficiency of evidence and pleading; that the Rules of Evidence deal with admissibility and have, by and large, avoided matters of sufficiency and pleading; that 185 be left in the Rules of Procedure. Vote result: 5 for status quo; 0 for change; 1 abstention; 1 not yet voting.
- (c) That 181 and 182 can either be left alone or put into the Rules of Evidence. If the latter, a possibility would be to set them up as 610(d) and add to the title of 610 "Adverse Parties." Vote result: 4 for status quo; 1 for change; 1 abstention; 1 not yet voting.
- (d) That 182a could be left alone or could be made the last sentence in Rules of Evidence 601(b).
Vote result: 4 for status quo; 1 for change; 1 abstention; 1 not yet voting.
- (e) That 183 could be left alone or could be made the first sentence of Rules of Evidence 604.
Vote result: 4 for status quo; 1 for change; 1 abstention; 1 not yet voting.

NB: Tom Ragland suggests that the Court recommend to publishers that they employ cross-referencing between the Procedure rules and the Evidence rules.

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SEE NEXT PAGE FOR POST-IT NOTE COMMENTS

RULE 103

~~OFFICER~~ WHO MAY SERVE

All process may be served by ^{any} the sheriff or ~~any~~ constable,
 or by any person who ~~is not a party and is~~ ^{who} ~~is~~ ^{authorized} not less than
 eighteen years of age ^{and is} ~~and is~~ ^{appointed by} ~~and~~ ^{written court} ~~and~~ ^{order} of ~~in~~
~~any county in which the party to be served is found, or, If~~ by
~~mail, either of the county in which the case is pending or of~~
~~the county in which the party to be served is found, provided~~
~~that no officer~~ ^{person} who is a party to or interested in the outcome
 of the suit shall serve any process, ~~therein.~~ Service by
 registered or certified mail and citation by publication ~~shall~~
 shall, if requested, be made by the clerk of the court in which
 the case is pending.

In addition to the above,

COMMENT: Attorney Don Baker suggested that the district clerk's office be required to make service by mail, because many clerks' offices often decline to accomplish service by registered or certified mail and his proposed amendment is to remove from those clerks such discretion and to require the clerks to accomplish that service if requested.

Guillermo Vega, Jr., an attorney, and Edward S. Hubbard, attorney for the Texas Association of Civil Process Servers, suggested that Rule 103 be amended to allow such civil process servers to serve citations.

~~May to amend 103 under 106(2)~~

All process may be served by
 or by any person who ~~is not a~~
 eighteen years of age ^{who} ~~and is~~ ^{adult} ~~appointed~~
~~any county in which the party to be~~
~~mail, either of the county in which~~
~~the county in which the party to~~
 that ~~no~~ ^{X person} ~~officer~~ who is a party to
 of the suit shall serve any pr
 registered or certified mail and c
 shall, if requested, be made by the
 the case is pending.

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 Approved

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COMMENT: Attorney Don Baker
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~~May to add sub 13 under 106(2)~~

SUPREME COURT OF TEXAS ADVISORY COMMITTEE
AGENDA

September 12-13, 1986

1. Report of Ad Hoc Committee composed of Spivey, Morris, McConnico and Reasoner regarding their work with the Supreme Court and their space requirements during the upcoming remodeling of the Court building.
2. Report of Judge Linda Thomas regarding the revision of Rules 8 and 10; Ray Hardy's letter regarding disposition of exhibits and Judge Frank Douthitt's proposal regarding 18a.
3. Discussion of Order of the District Court of Bexar County; Rule 165a.
4. Report of Sam Sparks (El Paso) regarding final form of Rules 103, 106, 107 and 145 and drafting of a rule permitting ruling on written motions if neither party asks for a hearing and permitting of telephone hearings if either party asks for a hearing. Sam Sparks also to report on Doak Bishop's input regarding Rule 188a.
5. Report of Professor J. Hadley Edgar on Rule 209.
6. Report on Rule changes addressed by the Standing Subcommittee on Trial Rules 216-314: Franklin Jones, Jr.
7. Report of David Beck's subcommittee regarding Rules 277 - 295.
8. Report of the Standing Subcommittee on Post Trial Rules 315-331: Harry Tindall
9. Report and final action on Rule changes addressed by the Standing Subcommittee on Court of Civil Appeals Rules 342-472 and Supreme Court Rules 474-515: Professor William Dorsaneo and Russell McMains
10. Report of the Standing Subcommittee on Justice Court Rules 523-591: Broadus Spivey
11. Report of the Standing Subcommittee on Special Procedures Rules 737-813: James Kronzer
12. Discussion of F.R.A.P. 10 proposed by Frank W. Baker

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MINUTES OF THE
SUPREME COURT ADVISORY COMMITTEE MEETING

May 15, 16, 17, 1986

The Advisory Committee of the Supreme Court of Texas met on May 15, 1986, pursuant to call of the Chairman.

Members of the Committee in attendance were Mr. Luther H. Soules III, Chairman, Mr. Gilbert Adams, Mr. Pat Beard, Professor Newell H. Blakely, Mr. Frank Branson, Honorable Solomon Casseb, Jr., Professor William V. Dorsaneo, III, Professor J.H. Edgar, Mr. Gilbert I. Lowe, Mr. Stephen E. McConnico, Mr. Russell H. McMains, Mr. Charles Morris, Mr. John M. O'Quinn, Mr. Sam Sparks, Mr. Sam D. Sparks, Mr. Broadus A. Spivey, Honorable Linda B. Thomas, Mr. Harry Tindall, Honorable Bert H. Tunks, Honorable James P. Wallace, and Honorable Allen D. Wood.

Upon motion by Harry Tindall, the minutes of the last meeting were unanimously approved.

In earlier discussions, the Committee voted unanimously to approve the changes suggested by Chairman Soules to Canon 3-C.

The Chairman then requested that Judge Casseb tender his opening remarks regarding the proposed Administrative Rules. Judge Casseb indicated that the draft that is now being circulated will be published in the June issue of the Texas Bar Journal and will be on the agenda for discussion at the State Bar Convention on June 18, 1986, in Houston.

Judge Casseb observed that there is a lot of opposition to the draft. Specific problems include the question of how to deal with cases already on the docket, courts that handle both criminal and civil cases, multi-county districts and allocations for instances where judges are on vacation. Judge Casseb has had written opposition to some commitments to reporting from district clerks.

Justice Wallace stated that he felt the Chief Justice intended that the Committee make sure that there was no conflict between the proposed rules and the current Rules of Civil Procedure.

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Judge Casseb motioned that a subcommittee consisting of Chairman Soules, Mr. McMains, Professor Dorsaneo, and Professor Edgar be appointed to deal with the harmonization of the Administrative Rules with the Rules of Civil Procedure, and Mr. Lowe seconded the motion.

Mr. Soules requested that anyone else who would like to volunteer to be on this subcommittee, other than those in the motion, raise their hand. There were no other volunteers.

Mr. Beard indicated that he felt lawyers should not have to look in two different places and have additional requirements in the rules because of the possibility of mistakes being made and suggested that the Committee make reference and incorporate the Rules of Civil Procedure where there are already procedures.

Mr. Soules stated that the Committee had an opportunity, as a whole, to look at the Administrative Rules in full text, in session, together and that if the Committee preferred they be studied in subcommittee, that would be its prerogative but it was his personal opinion that the Administrative Rules would not come before the Committee again.

By show of hands, the Committee voted that the meeting be adjourned and then re-convened at 1:00 p.m. and that, in the interim period of time, the subcommittee meet and study the Administrative Rules for conflict with the Rules of Civil Procedure. The philosophical aspects of the rules would then be discussed by the whole Committee. Two persons were opposed.

The subcommittee then convened, with members of the Committee not wishing to participate leaving the room.

The subcommittee decided to propose that the opening purpose paragraph of the Administrative Rules be numbered 1, and number the rest of the Rules consecutively after that.

Chairman Soules suggested that the subcommittee propose a Rule 11, that would state local rules shall not conflict with the Administrative Rules.

The subcommittee decided to propose that a rule allowing telephone conferences in lieu of hearings be encouraged.

Mr. McMains suggested that the Committee look at the attempt in the Administrative Rules to set timeframes, because of potential problems with scheduling of new and old cases.

The subcommittee identified certain conflicts between Administrative Rule 3-C and D and Rule 166 of the Rules of Civil Procedure. In particular, Rule 3-C4 conflicts with Rule 166-G. The 45-day provision conflicts with the 30-day provision in Rule 3-E concerning experts and other discovery under Rule 166-B.

There is a conflict between Rule of Civil Procedure 251 and Administrative Rule 4-H.

Mr. Tindall suggested that the language "domestic" "divorce" and "child custody" in Rule 4 be purged or modified.

The subcommittee decided to take up the issue of whether references to local rules should be omitted entirely from the Administrative Rules, particularly in Rule 4.

Professor Dorsaneo suggested cross-referencing Administrative Rule 5 with Rule of Civil Procedure 185.

The subcommittee agreed that the concept of a new "interruption docket" be discussed with the Committee.

The subcommittee saw no conflict with Administrative Rule 6 and Chairman Soules stated that the only place Administrative Rule 6 was mentioned was in Rule of Civil Procedure 18-A. Chairman Soules pointed out that in Rule of Civil Procedure 18-A, "district" should be changed to "region."

After discussion, the subcommittee decided that there were no conflicts between Administrative Rules 7 and 8 and the Rules of Civil Procedure.

The local rules section of Administrative Rule 9 was discussed.

After the whole Committee reconvened, the subcommittee reported on their findings.

It was agreed that the purpose paragraph be numbered 1 and that all other Rules then be numbered consecutively after that. The second sentence would say "It is intended that these rules be consistent with the Texas Rules of Civil Procedure. The Texas Rules of Civil Procedure shall govern in the event of conflict."

Chairman Soules assigned the question of where to insert a Rule regarding telephone hearings to Mr. Sam Sparks (El Paso); and deleting the reference to same from Rule 1 (purpose paragraph) of the Administrative Rules.

By show of hands, it was the consensus of the Committee that the phrases "within the periods of times listed" and "consistent with Texas Rules of Civil Procedure 1 and 2" be inserted within Administrative Rule 2. "Domestic actions" will be changed to "family law actions." It was suggested that a sentence also be added that states "That these time standards shall not apply to actions which are stayed, enjoined, abated or removed or in any other manner suspended from proceeding during the periods of any such suspension."

After considerable discussion, Chairman Soules asked how many were in favor of adding the language to Rule 3 that "cases pending would be deemed filed on the effective date of the rules" and that the "effective date of the rules be one year after they are promulgated by the Court to final form." By show of hands, 12 were in favor and 4 were opposed to the addition.

Mr. Tindall suggested that printed Rule 2 (what the Committee discussed as Rule 3) become Rule 6 and the rest of the Rules be numbered accordingly.

The language of Rule 3-C was changed to "within 30 days after the general appearance of the last defendant to appear." In C-3, the language would read "After the order was scheduled for the completion of discovery and preparation of the trial has been rendered."

After discussion, it was the general consensus that Rule 3-C should state "In the event additional persons become parties after the order for the schedule for the completion of discovery and preparation of trial has been rendered, then any party may, within 21 days from the day such additional persons make a general appearance, proposed changes in such schedule."

It was agreed that Rule 4 should read, in part, "As soon as reasonably practical after the time period for responding to a proposed plan has elapsed, the Court shall render and sign its written order, or if any additional parties are added, its amended order for completion and discovery, for preparation of trial and for trial setting. The clerk of the court shall immediately give notice by copy of the order to the parties or their attorneys of record by first class mail." It was the unanimous decision by the Committee that the Court should be required to deliver or mail an order.

Professor Edgar suggested changing the word "plan" in Rule 4 to "schedule." The Committee suggested that the wording change be adopted throughout the Administrative Rules.

Professor Edgar indicated that paragraph a in Rule 3 conflicts with Rule 245, dealing with the assignment of cases for trial generally, and that Rules 3, 4, and 5 should be inserted into the Rules of Civil Procedure. He suggested that the Court could abolish current Rule 245 and make Administrative Rules 3, 4 and 5 Subdivisions A, B and C of new Rule 245. "A party may request a scheduling hearing, which the Court shall hold within 10 days of the request." and was numbered (5) under section C.

Rule 3e(2) conflicts with Rule 166-b(5)(b) It was agreed to change 166-b to 45 days and this one to 30.

Mr. Branson motioned to delete Subdivision 3h entirely as it conflicts with Rules of Civil Procedure 251, 252 and 254. Mr.

Lowé seconded it. Two members were opposed. After further extensive discussion, by show of hands, the vote was 7 to 2 to delete it. An alternative, as suggested by Professor Edgar, would be "All motions for continuance of the trial dates shall be in writing and shall contain a statement by counsel that a copy has been mailed or delivered to the client. The motion shall comply with the applicable Texas Rules of Civil Procedure."

Mr. Soules reported on the changes made by the subcommittee: changed "family law" into "title", delete the provisions to local rules in F and G so that all family law matters are controlled by rule 4 and not by variance of various local rules.

In Rule 4c(3), the words "child custody" were changed to "conservatorship" C-3.

Under Rule 5b(3) "entry of judgment" was changed to "defer signing of judgment."

Under Rule 5c(2) the word "entry" was changed to "signing."

A statute reference for 200-A in Administrative Rule 7 will require revision whenever it is codified.

If Administrative Rule 8 is adopted, there will be a necessity for a change in Rule of Civil Procedure 18(d).

It is on record that the subcommittee has a question as to whether or not 8e applies to all budgeting in all courts or with just the budgeting for the Administrative Region.

In Rule 9, in the third line from the bottom, the subcommittee recommended deletion of the phrase "to be in effect."

The subcommittee recommended the following language for Rule 9c: "The local administrative judge will submit the local rules adopted by their courts to the presiding judge of the administrative region for review, comment and approval before they are furnished to the Supreme Court for approval pursuant to Tex R. Civ. P. 3-A."

The subcommittee recommended that the word "local" be inserted in the title of Rule 10 before the word "rules."

The subcommittee recommended that an "i" subparagraph that states "Local rules shall not conflict with these rules." be added to Rule 10.

The Chairman then opened the floor for philosophical discussions concerning the proposed Administrative Rules. Mr. Tindall talked about the disposition rates and family law matters and discussion ensued.

Mr. Branson moved that the Committee vote to reject Dean Friessen's proposal in toto and Mr. Lowe seconded it. By show of hands, nine members voted to reject the rules, one voted to approve them and two members, including Chairman Soules, abstained from voting.

The Committee met at 8:45 a.m. on Saturday, May 16, 1986, and the following members were in attendance: Mr. Luther H. Soules III, Chairman, Mr. Gilbert Adams, Mr. Pat Beard, Mr. David J. Beck, Professor Newell H. Blakely, Mr. Frank Branson, Professor J.H. Edgar, Mr. Gilbert I. Lowe, Mr. Stephen E. McConnico, Mr. Russell H. McMains, Mr. Charles Morris, Mr. Harold W. Nix, Mr. Sam Sparks, Mr. Sam D. Sparks, Mr. Broadus A. Spivey, Honorable Linda B. Thomas, Mr. Harry Tindall, Honorable Bert H. Tunks, Honorable James P. Wallace and Honorable Allen Wood.

The Chairman made opening remarks concerning the distress warrant rules and garnishment statutes and rules and ex parte receiverships and the Committee's rejection of the proposed Administrative Rules the day before. He also addressed the harmonization of the Criminal and Civil Appellate Rules of Texas. The appellate rules have been signed by both courts, have been promulgated, and will become effective on September 1, 1986.

Concerning Rule 18a, the Committee decided that the 215 series should be the span of sanctions. It was suggested that the standard should include "for the purpose of delay, without sufficient cause and resulting in delay", and that all three of those should be present. A vote was taken regarding the standard and the Committee voted in favor of same, with the exception of Judge Thomas, who voted against it. It was determined that the final rule should read "If a party files a motion to recuse under this rule and it is determined by the presiding judge or the judge designated by him at the hearing and on motion of the opposite party, that the motion to recuse is brought solely for the purpose of delay and without sufficient cause, the judge hearing the motion may, in the interest of justice, impose any sanction authorized by Rule 215-2(b)."

Sam Sparks (San Angelo) moved that 18a(h) not be recommended for adoption and Mr. Morris seconded. There was a unanimous vote that Sam Sparks' motion be turned down. After further discussion, Chairman Soules requested that the Committee go on and then come back to this rule.

After discussion, the Committee voted unanimously to reject 27a, b and c, recommended by the COAJ.

Professor Edgar moved to reject Rule 72 as presented by Jeremy Wicker. By show of hands it was unanimously rejected.

Mr. Beard moved that proposed Rule 99 be rejected. Chairman Soules' changed it to read "When a petition is filed with the

clerk, the clerk shall promptly issue such citations as shall be requested by any party or its attorney. The clerk shall promptly deliver such citations to any persons designated by the requesting party or his attorney, or in the absence of such designation, the clerk shall deliver such citations according to the clerk's ordinary course of proceedings." On a show of hands, three members favored leaving "or his attorney" and six members were opposed. It was a unanimous view that the first sentence entitles a party to as many citations as that party wants to pay for against any given defendant. Rule 99 was then unanimously approved for recommendation for adoption as changed.

The Committee then discussed at length the proposals under Rule 103, 106, and 107. Mr. Sparks (El Paso) will take the comments of the Committee concerning these rules and will draft proposed rules in final form for the September meeting.

After a motion by Professor Edgar and a second by Mr. Sparks (El Paso), the Committee voted unanimously to reject Representative Patricia Hill's suggestion concerning Rule 107.

It was unanimously voted to delete the second sentence of Rule 142, and recommend for adoption the remainder of the Rule.

The Committee then considered a proposed change to Rule 145 by the Gulf Coast Legal Foundation. After discussion, the Committee unanimously voted to recommend for adoption Rule 145 after striking "or appeal" on the first line of the paragraph and in paragraph 1 under "procedure" of the first line striking "or appeal", leaving the word "and" and striking the rest of that sentence and inserting the language from the present rule that says after the word "and" the words "perform all other services required of him, in the same manner"; then stopping after "docket the action" and picking up the old rule "issue process and perform all other services required of him in the same manner as if security had been given" and deleting the taxing against the defendants. Sam Sparks (El Paso) will study how this rule dovetails into the justice courts and will rewrite the rule using the above recommendations for consideration in September.

The Committee voted unanimously to recommend for adoption the proposed change to Rule 162 and to redraft Rule 164, with "no order required" language in both Rules.

Mr. Morris moved that Rule 165a as proposed by Judge Nelson, be rejected, Mr. Sparks (San Angelo) seconded the motion and the Rule was unanimously rejected by show of hands.

Rule 166b was unanimously approved.

Mr. Sparks (El Paso) moved for rejection of the COAJ's recommendation regarding Rule 166f and Mr. McConnico seconded it. The proposal was unanimously rejected by show of hands.

Chairman Soules suggested that the Committee attempt to write a rule permitting ruling on written motions if neither party asks for a hearing and also permit telephone hearings if either party asks for a hearing. By a show of hands, eight members were in favor and one member was opposed.

Chairman Soules suggested that Mr. Sparks (El Paso) send proposed Rule 188-A to Doak Bishop for his input and guidance.

The Committee voted unanimously to approve the changes suggested by John Wright to Rule 201, after re-editing by Mr. Sparks (El Paso) and Mr. Tindall.

With reference to the requests of Charlie Haworth, Harris Morgan and Tom Ragland regarding to Rule 204(4), the Committee voted unanimously by show of hands that its previous action would stand.

The suggestions for changes to Rule 205 by Charles Matthews and George Hickman were unanimously recommended for adoption.

Professor Newell Blakely moved that Rule 207, as drawn up by him, be recommended for adoption and Mr. Branson seconded the motion. The Committee approved the recommendation for adoption of Rules of Evidence 801 and 804 and Rule of Civil Procedure 207, with "an interest similar" being changed to "a similar motive to develop the testimony by direct, cross or indirect examination", by show of hands, twelve to one.

After discussion, it was decided that Tom Ragland's suggestion for a new Rule 209 be incorporated into an order for the Supreme Court to hand down regarding disposition of deposition transcripts. Professor Edgar will draft a proposed order and will report to the Committee with his findings at a later date.

It was unanimously voted to recommend the adoption of the addition of the sentence "The burden of establishing good cause is upon the offeror of the evidence and good cause must be shown in the record" to Rule 215-5.

Rule 215-2 was unanimously rejected by show of hands.

The proposed amendments to Rules 239a and 306a(3) submitted by Professor Jeremy Wicker, Charles M. Jordan and I. Nelson Heggen were unanimously rejected.

The suggested changes to Rule 169 were rejected unanimously by show of hands.

By show of hands, the Committee voted unanimously to recommend adoption of Rule 167(3) after the insertion of the phrase "If objection is made to a request or to a response,

either party may...", deletion of the second sentence, and retainage of the third and final sentence.

It was voted by the Committee that, under Rule 167, (5) will become (3), (3) will become (4) and (4) will become (5) and that the language of (3) will be "The original of such request or response shall be maintained by the party receiving same and shall be available for copying and inspection by other parties to the suit. A party serving a request under this rule shall not file such a request or response with the clerk of the court unless the Court upon motion and for good cause permits the same to be filed." The title of (3) will be "Custody of Originals by Parties." After discussion, it was voted, ten to one, that the originals be kept by the originating attorney. It was unanimously decided that new (4) shall read "Order. If objection is made to a request or to a response, either party may file a motion and seek relief pursuant to Rules 166b or 215.

The Committee reconvened on May 17, 1986. Those persons in attendance were Mr. Luther H. Soules III, Chairman, Mr. Gilbert Adams, Mr. Pat Beard, Mr. David J. Beck, Professor Newell H. Blakely, Mr. Frank Branson, Professor J.H. Edgar, Mr. Gilbert I. Lowe, Mr. Stephen E. McConnico, Mr. Russell H. McMains, Mr. Charles Morris, Mr. Harold W. Nix, Mr. Sam Sparks, Mr. Sam D. Sparks, Mr. Broadus A. Spivey, Honorable Linda B. Thomas, Mr. Harry Tindall, Honorable Bert H. Tunks, Honorable James P. Wallace, Honorable Allen Wood.

Chairman Soules turned the meeting over to Professor Edgar to enable him to report on his subcommittee's findings regarding proposed Rule 364-A. Professor Edgar stated that, after review, the subcommittee was of the opinion that a rule of this nature was desirable; that the philosophy of allowing the Court to, in certain cases, not require a supersedeas bond of the type now in effect was a desirable rule. Professor Edgar then opened the matter for discussion.

Mr. Branson opposed the Committee discussing proposed Rule 364-A at this time because he didn't think it appropriate considering the high percentage of members of the Committee who have involvement with the outcome of the Pennzoil v. Texaco litigation.

Chairman Soules, an attorney of record for Pennzoil, and Judge Woods withdrew from the discussion and left the room. Other committee members remained to further consider the proposed rule.

After considerable discussion, Mr. Adams moved that proposed Rule 364-A be rejected and Mr. Beard seconded. Mr. Beck and Mr. McMains abstained. Chairman Soules and Judge Woods remained out of the room. The motion passed, eight to four.

Chairman Soules returned to the room and resumed the chair.

Chairman Soules then directed comments to the Committee regarding Administrative Rules 3, 4, and 5, and their possible placement into the Rules of Civil Procedure should be addressed by the Committee.

After discussion, the Chairman asked the Committee if the Court would be better informed if public hearings were held around the State rather than the one hearing in Houston. The Committee recommends hearings around the State.

The Committee unanimously voted in favor of proposed Rule of Civil Procedure 8. Judge Thomas will rewrite the rule in clear language and present it to the Committee for final approval in September.

The Committee unanimously voted in favor of proposed Rule 10, subject to rewriting by Judge Thomas' committee in conformance with the Committee's comments.

It was moved by Mr. Sparks (El Paso) that proposed Rule 10-A be rejected, with a second from Mr. Beard. The Committee, by show of hands, unanimously rejected proposed Rule 10-A.

Mr. Beard moved to reject proposed Rule 10-B and Mr. Sparks (El Paso) seconded. By show of hands, the Committee voted unanimously to reject proposed Rule 10-B.

The Committee voted unanimously to adopt the proposed changes to Rule 3-A as stated on page 103 of the meeting booklet.

Mr. Branson moved and Judge Thomas seconded that Bruce Pauley's proposed amendment to Rule 13 be rejected. The Committee voted unanimously to reject same.

Rule 14c was rejected by a show of hands, eight to four.

Professor Blakely addressed the Committee regarding 3737-h. He suggested to the Committee that it recommend to the Supreme Court that the legislature has attended to Mr. Beckworth's concerns and take whatever action it feels necessary regarding that. His suggestion was seconded by Professor Edgar and the Committee unanimously voted to reject the suggestion by Mr. Beckworth because it feels the Legislature has handled the problem.

Proposed Rule 366a was rejected on a show of hands, eight to four.

Mr. Beard moved that the Committee recommend for adoption the amendments to Rules 503, 657 and 621-A, Mr. McConnico

seconded the motion, and the Committee voted unanimously to recommend same.

Mr. Beard moved that Jay Vogel's proposed new Rule 37 be rejected and Professor Edgar seconded. By show of hands, the Committee unanimously rejected proposed new Rule 37.

John Pace's recommendations concerning Rules 621-A and 627 were rejected unanimously.

The Committee voted to change the time period in Rule 680 to a 14 day time period by show of hands, five to three. All other suggestions from Judge William Martin regarding Rule 680 were unanimously rejected. Rule 683 was unanimously rejected.

David Keltner's proposed change to Rule 685 was unanimously rejected.

Rule 696 was unanimously adopted.

The meeting of the Supreme Court Advisory Committee was adjourned at 12:30 on May 17, 1986. The Committee will next meet on September 12, 1986, from 8:30 a.m. to 5:30 p.m. and on September 13, 1986, from 8:30 a.m. to 1:00 p.m.



RAY HARDY
DISTRICT CLERK
HOUSTON, TEXAS 77002

September 15, 1983

Supreme Court Justice James P. Wallace
Supreme Court Building
P. O. Box 12248
Austin, Texas 78711

Dear Justice Wallace:

I am writing to you again regarding the consideration of adopting several State Rules to delineate the following areas:

(1) Clarification of Lead Counsel and Attorney of Record

There appears to be some inconsistency with respect to which attorney is attorney of record and lead counsel, and which are recorded only as attorneys of record. According to State Rules 8 and 10, lead counsel is the first attorney employed (does this mean just employed, or the attorney whose signature appears on the first instrument filed by a party to a suit?), and remains such until he designates another attorney in his stead. Does State Rule 65, substitution of amended instrument for the original, act to substitute the lead counsel automatically? Or simply to remove the superceded instrument? If lead counsel remains such until a separate designation is made, of record, by the counsel substituting "out", then is it necessary to provide notice under State Rule 165a of dismissal for want of prosecution to all attorneys of record, or only to lead counsel? If the intent of the rule is to insure notification be made to the party, then notification to lead counsel should suffice; if, however, the notice is intended to protect every attorney connected to the suit (multiple attorneys representing one party, potentially), then the Rule would be left as written.

Below is Rule 1.G. (1) and (4), of the Local Rules Of The United States District Court for the Southern District of Texas, amended May, 1983, effective July 1, 1983, which appears to adequately answer these questions:

1.G. Attorney in Charge.

(1) Designation and Responsibility. Unless otherwise ordered, in all actions filed in or removed to the Court, each party shall, on the occasion of his first appearance through counsel, designate as "attorney in charge" for such party an attorney who is a member of the Bar of this Court or is appearing under the terms of paragraph E of this rule. Thereafter, until such designation is changed by notice pursuant to Local Rule 1.G.(4), said attorney in charge shall be responsible for the action as to such party and shall attend or send a fully authorized representative to all hearings, conferences and the trial.

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1.G.(4) Withdrawal of Counsel. Withdrawal of counsel in charge may be effected (a) upon motion showing good cause and under such conditions imposed by the presiding judge; or (b) upon presentation by such attorney in charge of a notice of substitution designating the name, address and telephone number of the substitute attorney, the signature of the attorney to be substituted, the approval of the client, and an averment that such substitution will not delay any setting currently in effect.

Regarding the problem of appropriate attorney notification, the same Rule, 1.G.(5), regarding Notices, specifies:

All communications from the Court with respect to an action will be sent to the attorney in charge who shall be responsible for notifying his associate or co-counsel of all matters affecting the action.

(2) Attorney responsibility for the preparation and submission of a Bill of Costs:

Originally legislation was proposed to place the responsibility on each party to maintain a record and cause to have included in the judgment their recoverable costs. This legislation was not adopted. We recommend consideration of a State Rule which would require that each attorney be responsible for the inclusion of the recoverable cost in the Judgment submitted to the court. This might be attached to either State Rule 127 or State Rule 131, or be a separate rule, such as:

Rule: Parties Responsible for Accounting of Own Costs.

Each party to a suit shall be responsible for the accurate recordation of all costs incurred by him during the course of a law suit, and such shall be presented to the court at the time the Judgment is submitted.

(3) Removal of the Filing of All Depositions and Exhibits:

It is recommended that in an effort to save the counties from increasing space requirements to provide library facilities for case files, that a limit be set on the depositions, interrogatories, answers to interrogatories, requests for production or inspection and other discovery material so that only those instruments to be used in the course of the trial are filed. Again, the United States District Court for the Southern District of Texas has adopted this rule:

Rule 10. Filing Requirements.

F. Documents Not to be Filed. Pursuant to Rule 5(d), Fed. R. Civ. P., depositions, interrogatories, answers to interrogatories, requests for production or inspection, responses to those requests and other discovery material shall not be filed with the Clerk. When any such document is needed in connection with a

pretrial procedure, those portions which are relevant shall be submitted to the Court as an exhibit to a motion or answer thereto. Any of this material needed at trial or hearing shall be introduced in open court as provided by the Federal Rules. (Added May, 1983).

and

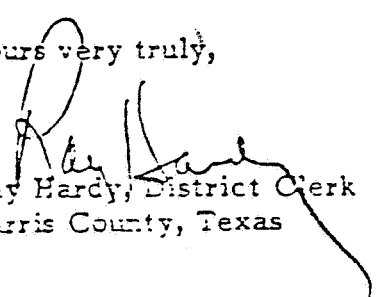
Rule 12. Disposition of Exhibits.

A. Exhibits offered or admitted into evidence which are of unmanageable size (such as charts, diagrams, and posters) will be withdrawn immediately upon completion of the trial and reduced reproductions substituted therefor. Model exhibits (such as machine parts) will be withdrawn upon completion of trial unless otherwise ordered by the Judge.

B. Exhibits offered or admitted into evidence will be removed by the offering party within 30 days after final disposition of the cause by the Court without notice if no appeal is taken. When an appeal is taken, exhibits returned by the Court of Appeals will be removed by the offering party within 10 days after telephonic notice by the Clerk. Exhibits not so removed will be disposed of by the Clerk in any convenient manner and any expenses incurred taxed against the offering party without notice.

C. Exhibits which are determined by the Judge to be of a sensitive nature so as to make it improper for them to be withdrawn shall be retained in the custody of the Clerk pending disposition on order of the Judge.

Yours very truly,



Ray Hardy, District Clerk
Harris County, Texas

RH/ba

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Proposed Rule: Parties Responsible
for Accounting of Own Costs

Each party to a suit shall be responsible for accurately recording all costs and fees incurred during the course of a lawsuit, and such record shall be presented to the Court at the time the Judgment is submitted to the Court for entry, if the Judgment is to provide for the taxing of such costs. If the Judgment provides that costs are to be borne by the party by whom such costs were incurred, it shall not be necessary for any of the parties to present a record of court costs to the Court in connection with the entry of a Judgment.

A judge of any court may include in any order or judgment all taxable costs including the following:

- (1) Fees of the clerk and service fees due the county;
- (2) Fees of the court reporter for the original of stenographic transcripts necessarily obtained for use in the suit;
- (3) Compensation for experts, masters, interpreters, and guardians ad litem appointed pursuant to these rules and state statutes;
- (4) Such other costs and fees as may be permitted by these rules and state statutes.

Proposed Rule: Documents Not To Be Filed

Depositions, interrogatories, answers to interrogatories, requests for production or inspection, responses to those requests, and other pre-trial discovery materials propounded and answered in accordance with these rules shall not be filed with the Clerk. When any such documents are needed in connection with a pre-trial procedure, those portions which are relevant shall be submitted to the Court as an exhibit to a motion or answer thereto. Any of such material needed at a trial or hearing shall be introduced in Open Court as provided by these rules and the Rules of Evidence.

Proposed Rule 8: Attorney in Charge

Each party shall, on the occasion of its first appearance through counsel, designate in writing the "attorney in charge" for such party. Thereafter, until such designation is changed by written notice to the Court and written notice to all other parties in accordance with Rules 21a and 21b, said attorney in charge shall be responsible for the suit as to such party and shall attend or send a fully authorized representative to all hearings, conferences, and the trial.

All communications from the court or other counsel with respect to a suit will be sent to the attorney in charge.

Proposed Rule 10: Withdrawal of Counsel

Withdrawal of counsel in charge may be effected (a) upon motion showing good cause and under such conditions imposed by the Presiding Judge; or (b) upon presentation by such attorney in charge of a notice of substitution designating the name, address and telephone number of the substitute attorney, with the signature of the attorney to be substituted, the approval of the client, and an averment that such substitution will not delay any setting currently in effect.

Proposed Rule 14(b): Return or Other Disposition of Exhibits

(1) Exhibits offered or admitted into evidence which are of unmanageable size (such as charts, diagrams and posters) will be withdrawn immediately upon completion of the trial and reduced reproductions substituted therefor. Model exhibits (such as machine parts) will be withdrawn upon completion of trial, unless otherwise ordered by the Judge.

(2) Exhibits offered or admitted into evidence will be removed by the offering party within thirty (30) days after final disposition of the cause by the court without notice if no appeal is taken. When an appeal is taken, exhibits returned by the Court of Appeals will be removed by the offering party within ten (10) days after telephonic notice by the clerk. Exhibits not so removed will be disposed of by the clerk in any convenient manner and any expense incurred taxed against the offering party without notice.

(3) Exhibits which are determined by the Judge to be of a sensitive nature, so as to make it improper for them to be withdrawn, shall be retained in the custody of the clerk pending disposition on order of the Judge.



RAY SHIELDS
COURT REPORTER

FRANK J. DOUTHITT

P. O. BOX 530
HENRIETTA, TX 76365-0530

LINDA BURLESON
COURT COORDINATOR

JUDGE
97TH JUDICIAL DISTRICT
ARCHER, CLAY AND
MONTAGUE COUNTIES

AREA CODE 817
538-5913

May 21, 1986

Luther H. Soules, III
800 Milam Building, East Travis at Soledad
San Antonio, Texas 78205

Re: Supreme Court Advisory Committee

Dear Luke:

Thanks for your list of the members of the above committee. I was in the State Bar Center at the same time as your meeting and ran into Frank Branson. He invited me to come in and talk to the Committee about my problem, but we were so busy with Pattern Jury Charges I, I never got in.

From looking at the Committee it's obvious that very few of the Committee members practice in a multi-county district court. Because of that, I want to make one more short comment about the two matters I have brought to the Committee's attention in the past. One has to do with recusal practice and the other with time table for filing the record in appellate courts. Both are problems in rural districts. Apparently, they are not such a problem in an urban district. I believe I know why.

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RECUSAL PRACTICE

My original proposal was that the lawyer be required to swear to a Motion for Recusal setting forth with particularity the reasons he seeks to recuse a judge. That the rule be changed (and probably the statute) to permit the judge that the recusal is directed against to summarily deny it if it does not state a proper cause for removal.

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In an urban area, there are many judges in the courthouse and a judge can simply get one of them to come hear the recusal motion. It creates no problem. In a rural area, we have to get a judge from somewhere else assigned. The recusal has to wait until that judge can be there and until the judge against whom the recusal is directed can be available in the county that the recusal is filed in. He may have to recess a jury trial in another county in order to meet the visiting judge's schedule, or make some other kind of docket change. Usually, the recusals that I see are actually made for the purposes of delay and that is obvious. If the lawyers had to swear to these, they wouldn't file them except when they were true. They would not then be summarily denied by the judge against whom they are directed.

A couple of years ago when my daughter was showing heifers, we had a show in Tucumcari, New Mexico followed by one in Cheyenne, Wyoming. Because a recusal that did not state proper grounds had been filed in a criminal case, set for jury trial the week following the calf shows, I had to make a trip from Tucumcari back to Henrietta when a visiting judge could be here so I could have the hearing on the recusal. I then went on to Cheyenne to be with my daughter showing heifers. If I had not done that, the case would not have gone to trial the week in question.

I am probably the only judge that ever had to make that kind of a trip because of a recusal practice, but it's ridiculous to have rules that permit lawyers to use recusals for continuances.

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R 346
APPELLATE TIME TABLE

Luke, I am not going to go into any further detail about the rules themselves and the time table. From the transcript furnished me of the meeting, the Committee understands that. What they don't understand, is that the rules permit a lawyer to perfect an appeal and request the statement of facts as

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little as 10 days prior to the time it's due in the Appellate Court. I don't know of any court reporter except those with a CAT who can get out a record in 10 days if he's got any business in his courthouse. It's a bigger problem in the country because if you have 30 minutes or an hour of dead time in the court, and you are in the city, the court reporter is always at his office and can simply go in and type during that time period.

In the country, my court reporter is with me in the other two counties and the office is in Clay County. If we are sitting idle for an hour in Montague, he cannot be working on that record.

There is no problem with the 60 days permitted if the lawyer has to notify the court reporter timely and there is no problem with the additional time period in the event of a motion for new trial. However, it just makes sense that a court reporter ought to have at least 30 days to get a statement of facts ready.

If the rule is not going to be changed, I think the appellate judges should quit going to the conferences and complaining about court reporter delay when the Supreme Court's own rules create some of the problem.

Luke, my feeling about these two matters is really not much different than a lot of other things. The Legislature very seldom thinks about those of us out here that have got miles and miles between courthouses. I guess those drafting the rules seldom do either. I don't know all the details of how your committee operates. However, I obviously have not been able to articulate the problem well by letter and probably haven't improved on it much with this letter. If the Committee ever takes testimony from individuals about these matters, I would certainly like to appear. Based upon the transcripts you have furnished me with respect to both of these matters, I do not think the problem that exists

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for rural judges is being addressed. I know the rules should not be tailored just to fit the rural judges. However, they should not be drafted ignoring us either.

Luke, I appreciate your consideration of this matter and if I can do anything further to at least get the real issues discussed, I would appreciate hearing from you.

Sincerely,

A handwritten signature in cursive script, appearing to read "Frank J. Douthitt". The signature is written in dark ink and is positioned above the typed name.

Frank J. Douthitt

FJD:lb

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LAW OFFICES

SOULES & REED

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HUGH L. SCOTT, JR.
SUSAN C. SHANK
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W. W. TORREY

TELEPHONE
(512) 224-9144

August 19, 1986

Mr. Sam Sparks
Grambling, Mounce, Sims,
Galatzan & Harris
P.O. Drawer 1977
El Paso, Texas 79950

RE: Report on Rule 165a

Dear Sam:

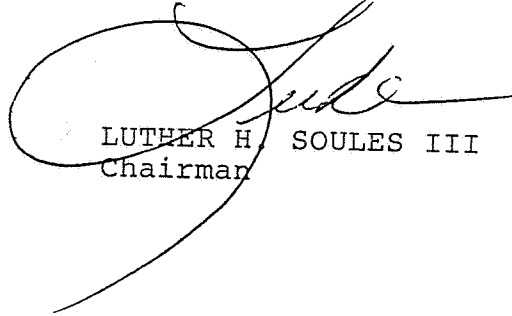
Enclosed are some documents showing the success of the Dismissal for Want of Prosecution procedures that have been pursued by Bexar County. In FYE August 31, 1985, the total cases in Bexar County increased by only 1,000 in the face of 26,338 new filings on top of a back log of 44,052 pending cases, for a virtual "zero growth." In the first 10 months of FYE August 31, 1986, i.e. through June 30, 1986, the total number of pending cases had been reduced from 45,038 to 37,291, i.e. by a factor of just over 17%. Seventy-one percent of the cases disposed of in June were 18 months or less in age, while 39% were over 18 months. While disposing of a heavy percentage of old cases, the newly filed cases are still getting attention as well. In recent years before the implementation of the Dismissal for Want of Prosecution procedures, our courts were reasonably holding their own through effective utilization of a well organized central docket. I do not advocate the central docket for all districts, but do bring this to your attention as to how the central docket can work to dispose not only of recently pending cases but also older cases that are the subjects of an absence of prosecution by the parties.

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Mr. Sam Sparks
August 19, 1986
Page 2

You may want this information in connection with your
upcoming report.

Very truly yours,



LUTHER H. SOULES III
Chairman

LHSIII:gc
Enclosures

cc: Judge Raul Rivera
Judge Joe Kelly
Judge Solomon Casseb, Jr.

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July 14, 1986

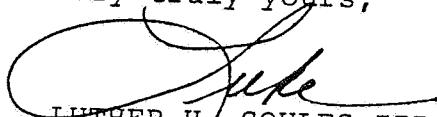
TO ALL MEMBERS OF THE SUPREME COURT ADVISORY COMMITTEE:

Enclosed for your information is a copy of:

- (1) Order of the District Courts of Bexar County, Texas For Dismissal for Want of Prosecution of Ad Valorem Tax Cases Filed Prior to January 1, 1980, signed by Judge Raul Rivera on April 9, 1985;
- (2) Joint Order of the District Courts of Bexar County, Texas, Concerning Dismissal for Want of Prosecution or Alternative Pretrial Procedure for Civil Cases Filed Prior to January 1, 1983, signed by each of the Civil District Court Judges.

I have included same for discussion on our September agenda under Rule 165a and request that Sam Sparks (El Paso) make a Subcommittee report critiquing this as a method to dispose of pending case backlog. Judge Solomon Casseb, Jr., should be consulted for input.

Very truly yours,


LUTHER H. SOULES III
Chairman

LHSIII/tat
enclosures

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As Signed 4-9-

ORDER OF THE DISTRICT COURTS OF BEXAR COUNTY, TEXAS
FOR
DISMISSAL FOR WANT OF PROSECUTION OF AD VALOREM
TAX CASES FILED PRIOR TO JANUARY 1, 1980

Political subdivisions having ad valorem taxing authority over property situated in Bexar County, Texas, filed certain suits to collect delinquent taxes prior to January 1, 1980, of which approximately 5,000 remain pending as inactive cases and should be dismissed for Want of Prosecution for the following reasons:

1. Most of the cases were filed by either the City of San Antonio or the County of Bexar and all of the cases so filed pertaining to ad valorem taxes remaining delinquent and unpaid as of January 1, 1980, have been refiled and superseded in lawsuits reinitiated by separate filings on or after January 1, 1980, and no rights to collection of the subject taxes are diminished by dismissing these cases.

2. All other pending ad valorem tax cases filed prior to January 1, 1980, and not since refiled, have been inactive for over five (5) years with no indication from the pertinent taxing authorities of intent to pursue same. In any event, no rights to collection of the subject taxes are diminished by dismissing these cases because any such cases having merit and deserving pursuit can be refiled without payment of filing fees and without substantial risk of expiration of lengthy limitations periods generally applicable to such suits.

3. These numerous pending cases are unnecessarily burdensome to the District Courts and District Clerks and costly to the County to retain in that: (a) the papers must be kept retrievable as active files, (b) the pending dockets of the Courts appear statistically distorted, (c) the disposition of pending cases by the Courts appears statistically distorted, (d) the cost of maintaining these inactive pending cases has no offsetting benefit and should be avoided, and (e) microfilming these files upon dismissal and subsequent destruction of the paper files will free physical space critically needed by the District Clerk for storage of active litigation files.

It is accordingly ORDERED that:

The District Clerk shall give notice by publication on four separate occasions of dismissal for want of prosecution of all ad valorem tax suits filed prior to January 1, 1980, and shall further give written notice directly to all political subdivisions having ad valorem taxing authority over property of any kind situated in Bexar County, Texas, delivered or mailed to the highest official of each such political subdivision with instructions that such notice be forwarded to current attorneys for such subdivision.

Thirty (30) days after the last notice is given as above provided, all cases not individually set for immediate trial with notice of such setting given to the District Clerk by certified mail, return receipt requested, will be dismissed for want of prosecution by blanket order dismissing all pending ad valorem tax cases filed prior to January 1, 1980, excepting only those so set for trial with such notice to the District Clerk given by individual cause number.

At any time following the expiration of thirty (30) days after the dismissal, and compliance by the District Clerk with all necessary legal prerequisites,

