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BEFORE THE
SUPREME COURT ADVISORY COMMITTEE
AUSTIN, TEXAS

SUPREME COURT ADVISORY COMMITTEE

BE IT REMEMBERED that the
above entitled matter came on for hearing on
the 15th day of July, 1989, beginning at 8:30
o'clock a.m. at the Texas Law Center,
Austin, Texas, and the following meeting was
reported by ANNA L. RENKEN, Certified
Shorthand Reporter and Notary Public in and
for Travis County, Texas.

COPY

SUPREME COURT ADVISORY COMMITTEE

TRANSCRIPT OF PROCEEDINGS

JULY 15, 1989 MEETING

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1 (Saturday July 15, 1989 Hearing.)

2

3 MR. SOULES: Let's be in
4 order, and we'll go ahead and get started. I
5 want to thank everyone for being here on a
6 Saturday morning. I believe we have an agenda
7 that we can finish in a day, maybe even a
8 short day depending on the needs of each of
9 these suggestions for debate and maybe some
10 changing as we go along, but I don't think
11 there's going to be any problem getting our
12 agenda done today.

13 I want to welcome the new
14 members, Justice McCloud who is here
15 representing the chief justices, and Justice
16 David Peeples who is here, a new member
17 representing the State Bar of Texas Committee
18 on Administration of Justice, and Doak Bishop,
19 who is here as representative of the State
20 Bar's Rules of Evidence Committee. So welcome
21 to you new members. We appreciate your being
22 here to contribute today.

23 Our last agenda which we
24 managed to complete in a two-day session was
25 these materials (indicating), which ran about

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1 1200 pages; and our agenda today which
2 includes the suggestions, the minutes of the
3 last meeting and the red line versions of all
4 the rules that we're going to recommend
5 changing is about half the size of one of
6 those volumes. So to have done all that you
7 did last time was really amazing and a great
8 accomplishment.

9 I think to start with
10 today I'd like to recognize Elaine Carlson to
11 tell us about the local rules project, and in
12 recognizing her I need to tell you that she
13 has now read every published local rule in the
14 State of Texas.

15 JUDGE CASSEB: She ought
16 to really be confused.

17 MR. SOULES: As Mr. Casseb
18 said, she ought to really be confused. In the
19 local rules effort, we did gather up all of
20 the local rules that are printed in the State
21 of Texas, and we did that by just hounding
22 every district clerk and local administrative
23 judge until they either sent us their rules or
24 told us that they had no written rules, one or
25 the other. They either had to tell us they

1 didn't have them or send them to us. And
2 Holly spent about three months in that
3 effort. And as a matter of fact, there were
4 203 that have them or 201.

5 MS. HALFACRE: 203, I
6 believe.

7 MR. SOULES: 203 counties
8 have written local rules, and 51 do not. They
9 were all collected in volumes that were about
10 two -- they were actually thicker than this
11 (indicating), two volumes thicker than this;
12 and in a uniform numbering system some of
13 which was done by the local administrative
14 judges together with their judges, which is
15 the way we preferred to have it so that we
16 didn't get their rules in a category they
17 weren't pleased with. But there were a lot of
18 them that came in and we had to re-number them
19 and get them into a uniform numbering system
20 that's now mandated by the February 4, 1987,
21 Supreme Court Administrative Order and the
22 various rules of the regional judges.

23 But we've made a lot of
24 progress. Elaine then volunteered for an
25 enormous task, and that was to read all those

1 rules as they are numbered in the uniform
2 numbering system so that all the rules on a
3 certain number would be collected together, to
4 read all of those and to eliminate
5 duplications and inconsistencies with the
6 Texas Rules of Civil Procedure, which the
7 local rules, of course, are not supposed to
8 have any inconsistencies, and she has done
9 that and sent that work product back to my
10 office.

11 So I can't -- I don't know
12 how you can recognize that size of piece of
13 work other than just to say a "thank you."
14 That's the biggest word I can come up with,
15 Elaine. That's an amazing piece of work, and
16 we are forever indebted to you for that. That
17 advances this project certainly beyond what
18 anyone ever thought it would get to, and maybe
19 we're on the right track now.

20 MR. DAVIS: Are you
21 checking that over now to make sure it's
22 right?

23 MR. SOULES: Tom, if
24 Elaine Carlson did a job, would you re-check
25 it? Of course not.

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1 MR. DAVIS: That and other
2 reasons.

3 MR. SOULES: But if you
4 would like to form a committee and be its
5 chair. So, Elaine, give us --

6 MR. DAVIS: I thought the
7 chairman ought to check it. That's all.

8 MR. SOULES: Tell us about
9 your experience. I'm sure we are really -- at
10 least I know I am and I think the rest of the
11 committee are very curious to hear what you
12 found in that collection of rules and your
13 view of it and your view of how the project
14 can go forward from here.

15 PROFESSOR CARLSON: One
16 thing I concluded was that I think we found
17 the solution to repeat felony crimes and we
18 should make convicted felons read the local
19 rules. But beyond that, it was a very
20 interesting project and gave insight into a
21 lot of regional variations.

22 There are some problems
23 that remain, and as Luke suggested, what we've
24 done is gone through and try to eliminate what
25 were duplicating one another, to make the time

1 periods consistent with the Rules of Civil
2 Procedure, and third, to eliminate those rules
3 that are in conflict with the Rules of Civil
4 Procedure. I have set forth a very extensive
5 letter to Luke. I have tried to do my best to
6 edit any conflict, to amend a conflict of a
7 given rule, but I think what we have left is
8 still a pretty bulky project. I don't know
9 how many pages it's going to come down to. I
10 suspect it will have to be, Luke, a fifteen
11 some hundred pages, probably still probably a
12 thousand-page effort my best guess. And we
13 still have a problem that I think we need
14 another run-through for inconsistencies with
15 substantive law. I tried to do it as I went
16 through the phenominal project.

17 For example, in the Family
18 Law area local rules that said doesn't comply
19 with certain requirements your divorce decree
20 could be dismissed with prejudice. I suspect
21 the State of Texas can't require people to
22 stay married because the lawyer didn't comply
23 with the local rules. There were a few of
24 those blatant errors that I caught going
25 through, but we need another run through.

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1 The rules have not been
2 amended at all to conform with what might come
3 out of the work product from 1989 in this
4 committee. So that's another run-through on
5 those rules that the Supreme Court promulgates
6 this year effective 1990. They'll have to,
7 you know, cull through some of the local rules
8 as well. And some of the local rules in
9 counties don't have any local rules as Luke
10 suggested, and the major area of concern I
11 have left is whether or not the State of Texas
12 Supreme Court by the Regional Rules of
13 Judicial Administration mean to suggest that
14 courts do have to have some local rules on
15 certain subjects like docketing procedures and
16 trial settings. So whether that conclusion is
17 correct remains to be seen. But other than
18 that, the project is coming along, and we've
19 got one pass-through and suspect probably to
20 have several passes through before it's
21 finished.

22 MR. SOULES: Does anyone
23 have questions or comments for Elaine? Thank
24 you, Elaine.

25 Next on page -- beginning

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1 on page two are the minutes of our last
2 meeting, and I mailed these out, and I
3 appreciate the responses I got by phone and by
4 letter, and I attempted to make corrections
5 responsive to those suggested corrections, and
6 I don't know if I got them all made, but we
7 tried to. And if there are others of you that
8 may now have suggestions for the minutes, I'd
9 like to hear corrections to the minutes that
10 appear on pages one through ten, if there are
11 any corrections. If there are no corrections,
12 those in favor of approval of the minutes as
13 presented here, say "Aye."

14 COMMITTEE MEMBERS: Aye.

15 MR. SOULES: Opposed?

16 COMMITTEE MEMBERS: (No
17 response.)

18 MR. SOULES: If someone
19 finds an inaccuracy in these during the day,
20 please let me know, because we still can
21 correct them before they're sent to the
22 Supreme Court.

23 Next on page 12, the
24 Senate Bill 874 was a bill that passed both
25 houses of the legislature. When I finally

1 caught on to the bill, it was in the House on
2 the third reading on the local and consent
3 calendar, and had already passed the Senate
4 unanimously. There was no inconsistency with
5 the House version, so there wasn't going to be
6 a conference committee, and in order to stop
7 the bill we would have had to have a
8 two-thirds no vote on third reading on the
9 local and consent calendar with no one having
10 made an objection yet.

11 So obviously that wasn't
12 doable in spite of the fact that a number of
13 San Antonio legislators indicated that they
14 would help but for the status of the bill, and
15 they did help on the Rule 13, which I'll talk
16 about in just a minute. The Chief Justice and
17 Justice Hecht and many of you -- I know John
18 O'Quinn wrote a letter to the governor, and
19 Tony Sadberry and several others to veto that
20 bill, and the governor did veto it. But SB874
21 essentially said that the Supreme Court of
22 Texas couldn't make rules inconsistent with
23 the statutes, and put the legislature back
24 into the rule-making business; whenever they
25 decided they wanted to change a practice, they

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1 could pass a statute and that's the end of
2 it.

3 Well, that got vetoed.
4 And if we watch for it next time coming back,
5 if it does come back, and start out early
6 enough, I think we can probably keep it from
7 getting as far as it did, because just as a
8 matter of reason it shouldn't. That type of
9 legislation I think is not necessary. I
10 believe maybe we'll have some support in the
11 legislature, because on page 12 is a letter
12 that I got from Senator Glasgow. I went up
13 and testified on SB1013, which was a statute
14 for frivolous pleadings and suits, and ate
15 crow for about an hour, and just because
16 probably I did not communicate as well with
17 the legislature as I should have after we
18 passed Rule 13 to cover all cases and not just
19 tort cases, and with this SB1013 it got
20 stopped and never did pass out of House
21 Committee or the Senate Committee, I believe.
22 I think it never got out of either committee.

23 But the important thing, I
24 think, in this letter from Senator Glasgow
25 talking about that hearing and the letter that

1 was submitted and then this paragraph, "As we
2 discussed during the hearing, it appears that
3 part of the solution to this question
4 regarding sanctions for frivolous lawsuits
5 would be to have better lines of communication
6 opened up between the legislature and the
7 Supreme Court." I think that's part of our
8 job, maybe largely our job, especially on
9 rule-making.

10 And Senator Glasgow and I
11 really talked about better communications on a
12 broader basis than just frivolous lawsuits, so
13 I think perhaps maybe we should resolve here
14 to communicate as fully as we possibly can
15 with the Senate and the House in order to keep
16 them advised of the efforts that we are making
17 towards the improvement of the administration
18 of justice and the fact that we want to be
19 cooperative and work in cooperation with the
20 legislature to improve Texas administration of
21 justice in all ways.

22 Do we have a motion to so
23 resolve?

24 PROFESSOR EDGAR: So
25 moved.

1 MR. SOULES: Seconded?

2 JUDGE CASSEB: Seconded.

3 MR. SOULES: All in favor
4 say "Aye."

5 COMMITTEE MEMBERS: Aye.

6 MR. SOULES: That's
7 unanimous. I'll prepare a resolution of this
8 committee and submit it to Senator Glasgow,
9 who of course is the chair of the Senate
10 Jurisprudence Committee.

11 There were then other
12 letters back about our legislative efforts,
13 and I think -- I put these here just to show
14 that there is legislative response. So I will
15 try to do a better job about picking up early
16 on legislation of interest to us in the next
17 session and try to get that information to you
18 as early as I possibly can for any action that
19 we may chose.

20 Justice Hecht, 'good
21 morning to you, sir.

22 JUSTICE HECHT: Good
23 morning.

24 MR. SOULES: Do you have
25 remarks for the committee this morning?

1 JUSTICE HECHT: No. Once
2 again, we appreciate all the good work since
3 the last meeting and thank you for coming.

4 MR. SOULES: Next is a red
5 line version of the rules that we did last
6 time. That starts on page 17 and concludes at
7 page -- it looks like 120. I did get written
8 input from several of you, and I made the
9 changes that I felt were -- there were some
10 new suggestions, some thoughts for some maybe
11 some additions to what we had done, and those
12 I put in the new materials beginning at 121
13 and going back into the rest of the book for
14 action today. The suggestions that I got back
15 which were corrective to my original red-line
16 work product, I made or tried to make all of
17 those.

18 Does anyone see anything
19 in these pages from 17 to 120 now that's
20 inconsistent with the resolutions of the
21 committee in our last session?

22 MR. TINDALL: Luke, I have
23 one. I think it's really just a cleanup. On
24 page 46 when we added the psychologist, Rule
25 167(a) --

1 MR. SOULES: Right.

2 MR. TINDALL: -- I think.

3 On the next page, subpart two of that rule
4 needs to be changed also. There are two
5 references to physicians in the existing rule
6 where we need to also across-reference to
7 psychologists.

8 MR. SOULES: All right.
9 We need a rule book to look at that, don't
10 we? That's not on this. 166(a).

11 MR. TINDALL: 167(b)(2).
12 There are two references about physicians. It
13 needs to say "or psychologists."

14 MR. SOULES: 167. That's
15 Rule 167(a), paragraph (b) parenthesis (2).

16 MR. TINDALL: Parentheses
17 (2).

18 MR. SOULES: Paragraph
19 (2).

20 MR. SADBERRY: Add
21 psychologist.

22 MR. TINDALL: It talks
23 about the report of an examining physician or
24 the taking of a deposition of a physician in
25 both cases.

1 MR. SOULES: After the
2 words physician appearing twice in the last
3 sentence we should add "or psychologist"?

4 MR. TINDALL: Right.

5 MR. SOULES: All right.
6 If there's no objection, that will be accepted
7 as a corrective -- correction to the rule as
8 written and will go in to the Supreme Court
9 with those two additions. Being no objection,
10 that stands done unanimously. Any others?

11 JUSTICE MCCLOUD: I think
12 you ought to make a talk about that.

13 MR. SOULES: That's going
14 to be on the agenda.

15 JUSTICE MCCLOUD: Okay.

16 MR. SOULES: We've got
17 that redlined, Judge McCloud.

18 JUSTICE MCCLOUD: That's
19 good.

20 MR. SOULES: Okay. There
21 being no further comment, these then will be
22 submitted to the Supreme Court as written.
23 Again, however, if any of you see matters in
24 these rules that need correction, if you'll
25 let me know during the day today or as soon as

1 possible, I will make them conform and as soon
2 as possible and send the Supreme Court a
3 corrected version. I know there's nothing
4 about the timing here intended to stop your
5 helping me get these right if they're not
6 completely right now.

7 Okay. Well, that gets us
8 to today's business, I believe. The
9 legislature, I think, passed a resolution.
10 I'm told they passed a resolution. I haven't
11 really seen it -- that says that the Supreme
12 Court is to promulgate guidelines or rules of
13 some kind to -- regarding sealed records, when
14 records can be sealed and when they cannot.

15 JUSTICE HECHT: It's a
16 statute, right.

17 MR. SOULES: To conform
18 with the statute.

19 PROFESSOR EDGAR: What
20 page are you on?

21 MR. SOULES: This is page
22 121. Is Ken Fuller here today?

23 MR. FULLER: Yes.

24 MR. SOULES: Ken, sure.

25 There you are. Good. So we need to respond

1 to that and get that done as soon as we can,
2 but I'm somewhat impressed that that is going
3 to take a while to really resolve the
4 differences of view. John MacElhany, who is
5 with Locke, Purnell in Dallas and they
6 represent the Dallas Morning News, has sent in
7 an extensive work.

8 From the Donnybrook in
9 Dallas because -- I forwarded it because
10 someone contacted me. It doesn't necessarily
11 reflect my view. It's going to be really
12 volatile. Reserve time to hear from them.

13 JUSTICE HECHT: The
14 statute says, "The Supreme Court shall adopt
15 rules establishing guidelines for the courts
16 of this state to use in determining whether in
17 the interest of justice the records in a civil
18 case including settlement should be sealed."

19 MR. SOULES: Okay. So
20 we've got a mandate from the legislature, and
21 I'm satisfied, Justice Hecht, that that has
22 been assigned to our committee for
23 resolution. Is that right.

24 JUSTICE HECHT: That's
25 right.

1 MR. SOULES: "That's a
2 right," he says. But there has been
3 apparently a lot of negotiation between the
4 lawyers at Locke Purnell, lawyers for the
5 press and the lawyers for the District Clerk
6 of Dallas County on trying to set out some
7 guidelines for Dallas County; and at least in
8 one case it seems that they reached an
9 agreement.

10 MR. FULLER: Uh-huh.

11 MR. SOULES: And this is
12 McElhaney's work product that he sent to me.
13 He called me and has submitted this and
14 apparently has a lot more. And the letter
15 from McElhaney is at page 402 of these
16 materials.

17 MR. FULLER: 402?

18 MR. SOULES: 402, right.

19 It came in kind of late, so we stuck it to the
20 back. He gives a lot of parameters, so
21 there's a lot of thought process gone into
22 this already. We won't be just beginning with
23 no concepts at all. Okay. That by way of
24 asking for volunteers, persons who might be
25 interested in this project to where there is

1 someone who will chair or be willing to
2 co-chair the project as an ad hoc subcommittee
3 chair? Is there anyone?

4 MR. FULLER: I'll serve on
5 it. I don't want to chair it. I don't have
6 time for that.

7 JUDGE CASSEB: If Judge
8 Peeples will serve on it, I will, too.

9 MR. SOULES: Lefty, will
10 you chair it?

11 MR. MORRIS: Yes.

12 MR. SOULES: I think it
13 might be helpful for you and maybe Charlie,
14 someone who has good interaction with the
15 legislature, to chair this so that if there's
16 criticism in the legislature next time, of
17 whatever work product we come up with, there
18 will be some rapport from the work group that
19 can go over and tell the people what we did.
20 And there's obviously going to be an open ear
21 to everyone who wants input into this that we
22 did hear and we resolved it as fairly as we
23 could to everybody and give the background.
24 And that's why I think --

25 MR. HERRING: I'll serve

