

BEFORE THE
SUPREME COURT ADVISORY COMMITTEE
AUSTIN, TEXAS

FEBRUARY 9, 1990

Austin, Texas

ANNA RENKEN & ASSOCIATES

CERTIFIED COURT REPORTING

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2 HEARING HELD IN AUSTIN, TEXAS, ON FEBRUARY 9, 1989

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4 B-E-F-O-R-E

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6 LUTHER H. (LUKE) SOULES, III
7 CHAIRMAN

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8 SUPREME COURT:
Justice Lloyd Doggett
9 Justice Nathan Hecht

10 COURT OF CRIMINAL APPEALS:
11 Judge Sam Houston Clinton

12 COAJ CHAIR
Justice David Peeples

13 COARCE CHAIR:
14 Doak Bishop

15 SENATE JURISPRUDENCE COMMITTEE:
Marty Swanger

16 OTHER COMMITTEE MEMBERS:
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20 J. Hadley Edgar
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21 Franklin Jones, Jr.
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22 Steve McConnico
Russell McMains
23 Charles (Lefty) Morris
John M. O'Quinn

24 Tom L. Ragland
Broadus A. Spivey
25 Harry L. Tindall

OTHER SPEAKERS:
Jim George
Tom Leatherbury

SUPREME COURT ADVISORY COMMITTEE
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FEBRUARY 9, 1990

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1 who is going to make David Beck's report? Steve McConnico,
2 is he here?

3 MR. MORRIS: No, Steve is not here yet.

4 CHAIRMAN SOULERS: Bill, why don't we just
5 start with your report since you are here and go into it as
6 much as we can, and we will stop when we have Justice Doggett
7 here and then get back to it later. Bill's is a separate
8 item. It is not in the agenda.

9 MR. DORSANRO: Does everyone have one of these
10 then?

11 CHAIRMAN SOULERS: These are the TRAP rules.

12 MR. McMAINS: Happily named.

13 MR. DAVIS: Luke, I have a document you sent
14 out, the report of the advisory committee to the Supreme
15 Court. Is this what we sent to the Court?

16 CHAIRMAN SOULERS: Yes.

17 MR. DAVIS: But it doesn't include what they
18 may have sent back.

19 CHAIRMAN SOULERS: That is right. This went to
20 the Court on August 25th after our August 21st meeting. This
21 is what has happened since -- part of what has happened
22 since.

23 Okay, and in the agenda, these -- let's see, a lot
24 of these same materials start at Page 465, and I guess, go
25 through 494. And then there is --

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MR. DORSANRO: Does everybody have one of these now?

Shall I begin, Mr. Chairman?

CHAIRMAN SOULES: Yes, sir, please do. Bill Dorsaneo with a report on the TRAP rules.

TEXAS RULES OF APPELLATE PROCEDURE

Rule 100(g)

MR. DORSANRO: The little separate report dated February 6, 1990 deals with virtually all of the suggestions made principally by appellate judges concerning changes that should be considered for the Texas Rules of Appellate Procedure.

In the short period of time allotted this morning, I think we can probably take up Items Numbered 1 through 4. Basically, those are proposals that have come from the Texas Supreme Court with respect to particular problem areas in the TRAP rules. You will need to look at this little report as well as particular pages in the meeting agenda. I will identify the pages so that you can be looking at both things simultaneously.

In the agenda on Pages 777 and 778, there is a memorandum concerning Rule 100(g) or Rule 100. It may or may

1 not end up getting resolved by changing June. The basic
2 problem is a simple one. At the time that Rule 21 -- 21(a),
3 which appeared in the Texas Rules of Civil Procedure, was
4 shifted out of Texas Rules of Civil Procedure and placed in
5 the appellate rules, the decision was made to break that rule
6 up such that every time there would be a need for an
7 extension of time with respect to particular appellate
8 action, there would be a particular subpart of the pertinent
9 rule providing for the motion.

10 For example, there are particular parts of the
11 appellate rules concerning the record that involve
12 subparagraphs authorizing motions for extension of time. Old
13 Rule 21(c) -- 21(a), pardon me, was a comprehensive rule
14 which dealt with all of these problems in one wrong place in
15 the Texas Rules of Civil Procedure.

16 As indicated in the memo on Page 777, 21(c) -- I
17 guess it is 21(c), I am sorry. As indicated in the memo,
18 there was some language in 21(c) that was deleted.

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20 "Any order of the Court of civil appeals granting
21 or denying a motion for late filing of any such
22 instruments shall be reviewable by the Supreme
23 Court for arbitrary action or abuse of discretion."

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25 To make a long story short, that particular

1 language was used by the Court in a case called
2 *Banales v. Jackson* as, in part, a justification for
3 authorizing a review by the Supreme Court before -- or
4 different from writ of error review of a decision of court of
5 appeals denying a motion for extension of time to file a
6 motion for rehearing.

7 I guess recently -- last week was it -- a decision
8 of the Supreme Court -- I forget the name of it -- came down
9 and said basically the *Banales v. Jackson's* approach is still
10 a viable approach, notwithstanding the nonincorporation of
11 this particular sentence in the motion for rehearing rule.

12 I suppose there are two options here. My report,
13 which unfortunately refers not to old Rule 21(c) but to
14 21(a), would suggest the addition of some language different
15 from the language that used to be in 21(c), principally to
16 try and codify, in part, *Banales v. Jackson*. We can either
17 do that or something like that or just simply leave well
18 enough alone given the last Supreme Court decision, I
19 suppose.

20 CHAIRMAN SOULES: What is the recommendation?

21 MR. DORSANEO: Well, my recommendation would
22 be to add this little sentence.

23 MR. EDGAR: Second.

24 CHAIRMAN SOULES: Moved and seconded. All in
25 favor -- any discussion? All in favor say "Aye." Opposed?

1 Okay.

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DISCUSSION

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MR. McMANS: May I ask one question? Is that dealing only with motions for rehearing?

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MR. DORSANEO: Yes. The only time it would be a problem is when there is a denial of a motion of extension of time to file a motion for rehearing. Is that right, Justice Hecht?

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JUSTICE HECHT: Yes, that is the specific problem.

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MR. DORSANEO: And so I want advice on whether the sentence is right.

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MR. EDGAR: Bill, I presume that the motion really is to add the language appearing at the bottom of this first page that you have given us as the last sentence in Rule 100(g).

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MR. DORSANEO: That will work, that will be all right.

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MR. EDGAR: But I mean we need to know where to put it. I presume that that is what you are doing is moving that that sentence be made the last sentence of 100(g).

1 MR. DORSANEO: Yes.

2 MR. EDGAR: That is what I thought. Okay.

3 CHAIRMAN SOULES: Okay, that is unanimously
4 approved. Next?

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Rule 130(c)

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9 MR. DORSANEO: All right, the next problem --
10 I really want to take up Item 3, it is 130(c). It is an
11 easier problem. Let me find that in the agenda. 569?

12 CHAIRMAN SOULES: Yes, 569 is 130(c).

13 MR. DORSANEO: Page 569, please. Thank you,
14 gentlemen.

15 This is a relatively simple suggestion. Well,
16 actually, it is on 570. A relatively simple suggestion is to
17 let you look at what is said on 570. It speaks for itself.
18 And I would move the adoption of the amendment proposed in
19 the memorandum to Luke Soules from Justice Hecht.

20 CHAIRMAN SOULES: The motion is to change
21 Rule 130(c) to delete the language that is stricken through
22 on the agenda on Page 570 and add that -- that is with the
23 gray marks over the top. Is that right?

24 MR. DORSANEO: Yes.

25 CHAIRMAN SOULES: Okay.

1 MR. DORSANEO: It also appears on the second
2 page of my memo. It should be verbatim.

3 CHAIRMAN SOULES: Okay, second?

4 MR. DAVIS: Second.

5 CHAIRMAN SOULES: Discussion? All in favor
6 say "Aye." Opposed? That is unanimously approved.

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Rule 140

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11 MR. DORSANEO: Let's do 140 next. 140 is on
12 page -- I hope it is on 781 through 783. This is a proposal
13 for a rewrite of the direct appeal rule.

14 As I understand it, to paraphrase the memo, the
15 thrust of it is to make direct appeals discretionary, and
16 also to provide a procedure for determining whether the
17 Supreme Court has jurisdiction.

18 Another thing that happens along the way here in
19 this proposal to amend Rule 140 is that the jurisdictional
20 grounds are basically left to the statutes rather than being
21 repeated in the rule, as they are now. I don't suppose that
22 will cause any confusion to anyone, but it is just a thing
23 that I wanted to mention. It doesn't look like this is
24 intended to change the jurisdiction of the Supreme Court to
25 consider direct appeals and appropriate cases as provided by

1 the Constitution and statutes. It just looks like it is
2 meant to deal with the determination of the jurisdictional
3 issue, except that at least there is clarification on this
4 being a species of discretionary review like the writ of
5 error practice rather than the way it is worded now, if I can
6 just put it that way.

7 And I move the adoption of Rule 140 as proposed on
8 Pages 782 and 783 in order to get the ball rolling, in lieu
9 of the current Rule 140.

10 CHAIRMAN SOULES: Repeal the current 140 and
11 replace it with this rule in its entirety. Is that correct?

12 MR. DORSANTO: Yes.

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DISCUSSION

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CHAIRMAN SOULES: All right. Anybody have a
chance to look at that?

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MR. EDGAR: Basically, what this does then,
Bill, is simply eliminates reference back to the Constitution
and the Legislature authorizing direct appeals and without
any intended substantive changes in the rule?

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MR. McMANS: There are two changes.
JUSTICE BRECHT: It makes two substantive
changes. One is to make the jurisdiction discretionary so

1 that if the case is not important to the jurisprudence of the
2 state or there is some other problem, then the case does not
3 make it appropriate for the Supreme Court review, the Supreme
4 Court would not have to take the case.

5 And the second is that the direct appeal practice
6 has never been very well defined. And the way we do it,
7 there are cases that say if you file a direct appeal in the
8 Supreme Court and you lose on jurisdiction, you can't appeal
9 to the Court of Appeals. You are out. You have had your
10 bite at the apple. And that doesn't seem an appropriate
11 disposition of the appellate issues in the case. And if the
12 Supreme Court doesn't have jurisdiction, then surely the
13 Court of Appeals has jurisdiction.

14 So what the practice is now, when you bring in a
15 direct appeal, the clerk just receives it and gives it to one
16 of the staff attorneys who looks it over to see if he or she
17 thinks that you are likely to have jurisdiction, and if he or
18 she thinks you are probably not going to have jurisdiction,
19 they strongly suggest to you you may want to file that at the
20 Court of Appeals. And then you sort of proceed at your own
21 risk. But that is not a very kosher way of doing business.

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1 where the problems of the courts of appeals are confronted
2 are because the interlocutory appeal rule is pretty quick.
3 If you don't get any action within 20 days, then you are out
4 anyway in the other area. So I mean what that really
5 means -- is supposed to say, I think, is that it runs -- that
6 they shall pursue it from the date of the dismissal).

7 Now, the next question is do you want to pursue it
8 from the date -- you have got a problem of you say no
9 probable jurisdiction. That means that you would then take
10 the case. But suppose after you took it you decided that
11 really you didn't. If your ultimate disposition were
12 dismissal, is it the Court's inclination that they would
13 still want you to have a right to go back even if it had
14 already been taken, briefed, even argued, perhaps, and still
15 send it back to the court of appeals?

16 JUSTICE RECHT: I don't know what the Court's
17 feeling on it is, but I would think that is the fair way. It
18 strikes me that it if the Supreme Court ultimately decides
19 that they don't have jurisdiction over the appeal,
20 particularly if there is an element of discretion in the
21 jurisdiction, which has never been clear before. So if we
22 are making that clear and we are saying the Supreme Court may
23 turn you down -- and let me give you -- one example is
24 because there are material unresolved fact questions in the
25 appellate court that basically means all the Supreme Court is

1 going to do is write an advisory opinion. It can go back and
2 be retried, the facts could all be different, and trial court
3 could render a judgment that didn't have anything to do with
4 the Supreme Court's opinion.

5 So rather than do that, we would just say no, you
6 need to go back and try this, and then if you want a direct
7 appeal, you can. But if along the way the Supreme Court
8 decides that it is not going to exercise jurisdiction over
9 this appeal, then it looks like to me that the parties ought
10 to be able to pursue whatever rights they would otherwise
11 have in the court of appeals, which they really don't have
12 now.

13 MR. McMANS: Now, there is another problem
14 that I see too. Suppose that the reason it is dismissed for
15 want of jurisdiction is because they blew the times for doing
16 it, which means they would have blown it anyway in the court
17 of appeals.

18 JUDGE HECHT: We don't want to resurrect. We
19 don't want to resurrect --

20 MR. McMANS: Because, I mean, that would be
21 your action either way. You would dismiss it for want of
22 jurisdiction if they tried to perfect the appeal in 30 days
23 or 40 days or whatever, and it was late, you would still get
24 a dismissal order. So if you revive the right of appeal
25 based on the dismissal order that isn't really a merits type

