MINUTES OF THE
SUPREME COURT ADVISORY COMMITTEE
SEPTEMBER 15-16, 1995

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock on Friday, September 15, 1995, pursuant to call of the Chair.

Friday, September 15, 1995:

Supreme Court of Texas Justice and Liaison to the Supreme Court Advisory Committee, Justice Nathan L. Hecht was present.

Members present: Luther H. Soules, III, Prof. Alexandra W. Albright, Pamela Stanton Baron, Honorable Scott A. Brister, Prof. Elaine A. Carlson., Professor William V. Dorsaneo III, Anne L. Gardner, Hon. Clarence A. Guittard, Charles F. Herring, Jr., Donald M. Hunt, Tommy Jacks, Joseph Latting, Gilbert I. Low, John J. Marks, Jr., Russell H. McMains, Anne McNamara, Robert E. Meadows, Richard R. Orsinger, Paula Sweeney and Stephen Yelenosky.

Ex-officio Members present: Carl Hamilton, David B. Jackson, Michael Prince, Hon. Paul Heath Till and Bonnie Wolbrueck

Members absent: Alejandro Acosta, Jr., Charles L. Babcock, David J. Beck, Ann T. Cochran, Sarah B. Duncan, Michael T. Gallagher, Michael A. Hatchell, Franklin Jones, Jr., David E. Keltner, Thomas S. Leatherbury, Hon. F. Scott McCown, Harriett Miers, Hon. David Peeples, David Perry, Anthony J. Sadberry and Stephen D. Susman.

Ex-Officio Members absent: Hon. Sam Houston Clinton, Hon. William Cornelius, Paul Gold, Doris Lange and Kenneth Law.

Others present: Lee Parsley (Supreme Court Staff Attorney) and Holly H. Duderstadt (Soules & Wallace).

Chairman Soules brought the meeting to order.

Joe Latting presented the Sanctions Report on Rules 13 and 166d.

Rule 13, Effect of Presenting Pleadings and Motions; Sanctions, was brought up for discussion.

Joe Latting moved for the adoption of the subcommittee's Rule 13. Discussion followed.

Pam Baron proposed the following amendment. On the 2nd page on subsection (4) before the language that says "an award of an appropriate amount of costs" adding

"if no due diligence is shown, an award of an appropriate amount costs." She also proposed deleting comment 2. Judge Brister seconded the motion.

Judge Guittard proposed (4) as follows: "If a lack of due diligence is shown, an award of appropriate amount of costs for inconvenience, harassment, and out of pocket expenses incurred or caused by the violation found". Discussion followed.

Judge Brister made a counter-proposal for the following language in (4): "If there has been a lack of diligence throughout the litigation, an order of appropriate amount of costs and expenses incurred or caused by the litigation." Discussion followed.

Chairman Soules proposed deleting paragraph 4. Discussion followed.

Joe Latting made a motion to vote on whether or not we want to try to pass a rule that is not in conflict with this statute. A vote was taken and by a vote of 16 to 1 we will try to pass a rule.

Discussion continued regarding paragraph 4.

Orsinger brought up the fact there are two issues we are dealing with. One is liability triggered and the other one is when liability is triggered then what are the damages that you award. Discussion continued.

Judge Brister proposed "lack of diligence through" and then striking "inconvenience, harassment." Discussion continued.

Pam Baron withdrew her amendment because she has the burden in the wrong place. The burden needs to be on the moving party to show a lack of diligence instead upon the defending party to show diligence.

Judge Brister restated his motion. Insert before the start of "for" "if there has been a lack of diligence throughout the litigation" and delete "for inconvenience, harassment" and "out-of-pocket". John Marks seconded the motion. Discussion followed.

Judge Guittard brought up a concern about the phrase "throughout the litigation". Would prefer language like "if there are repeated violations." Discussion followed.

Chuck Herring proposed "If the Court finds that a person has failed to exercise due diligence on a continuing basis throughout the course of the litigation." Discussion continued.

Anne Gardner proposed "continued or repeated violations of this rule."

Discussion continued regarding paragraph (4).

Joe Latting proposed in (4) "and if throughout the litigation there has been a lack of due diligence, the court may also..." Discussion continued.

Professor Dorsaneo suggested that instead of listing sanctions in paragraph 13(d) that we incorporate the sanctions of proposed 166. Discussion continued.

Mike Prince proposed the following language for (4): "Upon a finding of no diligence in the subject litigation, an award of an appropriate amount of costs and expenses caused or incurred." Discussion continued.

Chairman Soules proposed "for a violation of (a)(1) and a further finding of no diligence in the subject litigation". Discussion continued.

A discussion was had regarding the fact you only get to paragraph (4) penalties for violating (a)(1). Discussion followed. A vote was taken on this concept and the concept failed.

Orsinger proposed it be premised on a violation of (a)(3). Discussion followed.

Chairman Soules proposed "Upon a showing of a continuing lack of diligence an award of an appropriate amount of costs and expenses incurred or caused by the subject litigation". Judge Brister accepts the proposal. Joe Latting proposed "and a violation of". Judge Guittard proposed "in violation". Joe Latting wants to make the continuing lack of diligence in addition to (1), (2), (3) and (4).

Chairman Soules reads the language "Upon a showing of a continuing lack of diligence in additional to a violation of paragraph (a), an award of an appropriate amount of costs and expenses incurred or caused by the subject litigation." Pam Baron comments that its really a continued lack of diligence in violation of (1), its not just a lack of due diligence unconnected with (a). Discussion continued.

Scott Brister, Pam Baron, Steve Yelenosky and Carl Hamilton suggest language. Chairman Soules read the language "Upon a showing of a continuing lack of diligence to cure a violation...". Judge Guittard thinks "diligence" is a mistake and explains why. Discussion followed.

Chairman Soules inquires why the concept in 166(d) be used in 13 "upon a showing or finding that a party has repeatedly violated paragraph (a)". Discussion followed.

Judge Scott Brister suggested "continuing and repeated". Mike Prince suggested using "continuing and repeated" and in a comment says its our sense that a lack of due diligence exists in continuing and repeated violation of these rules. Addressing due diligence by use of the words "continuing and repeated." Professor Dorsaneo talks about the context in which this is likely to operate. Professor Dorsaneo concerned about the terms "repeated and continuing". Discussion continued.

A discussion continued regarding the terms "repeated", "continuing", and "throughout the litigation".

Chairman Soules indicated that the consensus is that "for inconvenience, harassment" comes out. The term "repeatedly" is unacceptable. Suggested proposing to the Supreme Court a rule that does not have paragraph 4 in it at all. Let the jurisprudence development as it may.

Buddy Low seconded the suggestion.

Chairman Soules indicated the next thing to be debated is Bill Dorsaneo's concept of whether we simply put in section (d) of Rule 13, refer over to 166(d) subparagraph (b) for the sanctions. Discussion followed.

Tommy Jacks says that in order to get hit with costs under (4) you have to have (1) violated paragraph (a) and (2) done something else on a continuing basis. Mr. Jacks proposed inserting at the beginning of paragraph (4) the following language "Upon a showing that the offending party or attorney has violated paragraph (a) and has additionally failed on a continuing basis to exercise due diligence in an effort to comply with said paragraph." Stephen Yelenosky suggested changing "said paragraph" to "that paragraph". Then pick up with "an award of an appropriate amount of costs" striking "for inconvenience" and expenses incurred or caused by the subject litigation." Judge Brister seconded the motion.

Chairman Soules called for a vote to get a consensus. The vote was eight to seven. Discussion continued.

Richard Orsinger expressed concern over the part that would make the lawyer liable for what the party does that's a lack of due diligence. Discussion followed on how to fix the problem. Chairman Soules reads the language "a continuing failure to exercise due diligence to comply with paragraph (a) an award of appropriate amount of costs or expenses incurred or caused by the subject litigation.." Discussion continued.

A discussion was had regarding the difference in the words "continuous" and "continual".

Chairman Soules read the proposal as follows "Upon a showing of a violation of paragraph (a) and a further showing of a continual failure to exercise due diligence to comply with paragraph (a) an award of an appropriate amount of costs and expenses incurred or caused by the subject litigation." Judge Brister seconded the proposal.

The discussion continued regarding using the words "repeatedly" and "continual".

Chairman Soules proposed the following language "Upon a showing of a violation of paragraph (a) and a further showing that after the violation there is a knowing and

continuing failure to exercise due diligence to comply with paragraph (a)." Discussion continued.

Robert Meadows comments there needs to be some notice provision. Chairman Soules proposed "Upon a showing of a violation of paragraph (a) and a further showing that after notice of the violation there is a knowing and continuing failure to exercise due diligence to comply with paragraph (a)."

Ann Gardner comments that the language in the statute is a there is a requirement that no due diligence be shown. There has to be some evidence of no reasonable basis to raise an issue of fact, and the sum evidence has to specifically go to the issue of whether there is no reasonable basis. The Supreme Court could ultimately determine that creates a heightened burden on the moving party, which would be good. Proposed language about showing there is no due diligence whatsoever. Discussion followed.

Chairman Soules advises they are trying to nail down what the sanction is going to be and then we will list the conditions in it. The sanction will be an award of an appropriate amount of costs and expenses incurred in the subject litigation. Judge Brister asks why we are dropping "or caused by". Chairman Soules explains because it is in order to get away from consequential damages. We are talking about litigation costs and nothing else.

There is no disagreement that this is the sanction. A discussion was had regarding whether or not this conflicts with the statute.

A discussion was had about having "and caused by" in the rule.

A vote was taken on having "or caused by" in the rule. The vote was six to three in favor of having "or caused by" in the rule. Discussion followed whether or not this means to include damages.

Tommy Jacks proposed "litigation costs and expenses caused by". Also sees no reason not to include a comment. Discussion was had regarding a comment. Discussion was had regarding Tommy Jacks' proposal.

A vote was taken and by a vote of nine to five the language will read "An award of an appropriate amount of litigation costs and expenses incurred or caused by the litigation." Buddy Low questioned why "litigation" is in there twice. Discussion followed.

A discussion was had regarding what is the sanction. Judge Guittard's proposal is upon a showing of (1) repeated and continuous violation of paragraph (a) and (2) a failure to exercise diligence to award such violation. Then (4) will come into play. Tommy Jacks explains why Robert Meadows notice provision wasn't picked up. Discussion followed.

A vote was taken on the following language "Upon a showing of (1) repeated and continuing violations of paragraph (a) and (2) failure to exercise due diligence to avoid such violations..." By a vote of 13 to 6 the proposed language passed.

Richard Orsinger expresses concern about putting the other lawyer on the stand or if the burden is wrong you have to get on the stand and reveal work product, need to be worried about attorney-client privilege, thinks there is an inherent conflict between the lawyer and the client when a motions for sanction is filed and there may be an issue as to whom has to accept the blame. Would be in favor of something that no one can be prejudiced by failing to voluntarily waive what's nonexempt, what's exempt from discovery and that the failure to reveal that doesn't have any negative consequence. Discussion following.

Buddy Low commented that the proof should be clear and convincing and it should be by means other than testimony by calling the opposing counsel to the stand.

Paula Sweeney proposed adding a new section (c) entitled "Evidence. A moving party must prove by means other than by calling opposing counsel to the stand and by clear and convincing evidence that the sanctionable conduct has occurred." Buddy Low seconded the proposal. Discussion followed.

Joe Latting made a motion to have a comment that Rule 13 ought not to be used as a fishing expedition and that great care ought to be taken in any invasion of attorney-client privilege. Put our concerns into a comment. John Marks seconded the motion.

Professor Dorsaneo brings up the idea of having to have an affidavit.

A vote was taken on Joe Latting's motion. By a vote of 13 to 3 the motion passed.

Richard Orsinger proposed that the fine be limited to $00 or the penalty paid into court be limited to $500. Discussion followed. The motion failed for lack of a second.

Chuck Herring asked for a clarification as to whether or not our rule would apply to replies to motions and to briefs, to affidavits since we deleted the language "and other papers" from our rule. Joe Latting indicates that it does not. They are covered elsewhere in the rules if they are abusive. Chuck Herring says they are not actually covered.

Paula Sweeney inquires whether we should incorporate some sort of "safe harbor" provision. Discussion followed. Paula Sweeney made a motion to include judges under the safe harbor provision. Anne Gardner seconded the motion. Discussion continued.

John Marks proposed "No sanctions shall be issued if the violation is corrected within 21 days after the show cause order." Discussion followed.

Chairman Soules advises in (c) the language needs to be changed because the court doesn't enter orders in Texas. It should be "make an order" or "render an order". Judge Guittard suggested "issue an order".

Discussion continued regarding the 21 days notice. Chairman Soules indicates that the motion is that if the challenged pleading or motion is withdrawn or corrected prior to the hearing no sanctions shall be imposed. Stephen Yelenosky advised then you need to delete the second sentence on the next page that talks about show cause order. Chairman Soules asks what does it hurt to leave it in.

Judge Brister proposed in (b) after the first "21" adding "before being either filed or presented to the court". Therefore it would read "21 days before being either filed or presented" and then "the motion shall neither be filed nor presented to the court". Discussion followed. Joe Latting says it should say "The motion shall be served at least 21 days before being either filed or presented". Judge Brister continued "If withdrawn the motion shall neither filed nor presented."

Chairman Soules read paragraph (c) "The court on its own initiative may make an order describing the specific conduct that appears to violate paragraph (a) of this ruling and directing the alleged violator to show cause on 21 days notice why the conduct has not violated the rule." Richard Orsinger proposed "not less than 21 days notice." Chairman Soules continued "If the challenge, pleading, or motion is withdrawn or corrected prior to the hearing, no sanctions shall be imposed."

A vote was taken and by a vote of 16 to nothing paragraph (c) passed.

A discussion continued regarding the 21 day filing requirement.

Chuck Herring made a motion to put "or other paper" back in. Joe Latting seconded the motion. Discussion followed.

A discussion was had regarding whether or not the committee wanted to include briefs.

A discussion was had regarding a discovery request is "other papers".

A vote was taken on including "other papers". By a vote of 16 to 1 the motion carried.

Richard Orsinger expressed concern that we are requiring them to show cause why they haven't violated the rule suggests the burden is on the responding party to prove they didn't violate. Richard Orsinger made a motion to put a sentence saying the burden is on somebody, the burden is obviously on the movant who is seeking sanctions, if the court is the one who initiates it, still ought to allocate the burden to somebody besides the respondent.

Alex Albright proposed amending paragraph (e) to read "This rule is inapplicable to discovery requests and responses, including objections and claims of privilege". Judge Brister seconded the motion. A vote was taken and there being no opposition the motion carried.

Carl Hamilton made a motion that if the document is filed in violation and the court so finds, the pleading ought to be stricken. In (d) add a new (1) "An order striking the motion, pleading, or other paper;". There being no opposition the motion carried.

A vote was taken on Rule 13 as amended by the committee today. By a vote of 14 to 4 the amendments to Rule 13 carried.

A lunch recess was taken.

The meeting reconvened. Joe Latting presented the report on Rule 166d, Failure to Make or Cooperate in Discovery; Remedies, and made a motion to approve Rule 166d. Discussion followed.

John Marks made a motion to delete from (C) the language "or discovery requests or objections to discovery that are not reasonably justified" and to delete all of (D): "has otherwise abused the discovery process in seeking, making or resisting discovery." Anne Gardner seconded the motion. Discussion followed.

Anne Gardner advised that if paragraph (D) is made clearer by adding "repeatedly" after "has otherwise" she would withdraw her second to the motion to delete the last part of paragraph (C). She still seconds the motion to delete (D). Richard Orsinger seconded the motion.

A vote was taken on the deletion of (D). The vote was six in favor and however many voted against it made it a close vote therefore discussion continued.

Joe Latting advised that in (b) Sanctions there is an error. The language should read: "A court may impose any of the following sanctions that are just and that are directed to remedying the particular violations involved and that are no more severe than necessary to satisfy the legitimate purposes of such sanctions."

Discussion continued.

A vote was taken on deleting (D). By a vote of ten to eight paragraph (D) stays in .

Paula Sweeney inquires what is meant by a "discovery order" in paragraph 3(a)(i). Proposed just using "order". Discussion followed. Chairman Soules proposed "an order under this rule". Joe Latting proposed using "an order". Discussion continued. Joe Latting seconded Paula Sweeney's motion to take out the word "discovery" and just have

"order". Carl Hamilton proposed "an order relating to discovery". There being no opposition "an order relating to discovery" was approved.

A vote was taken on adding "repeatedly" in (D) and on a vote of nine to nine with the Chairman breaking the tie "repeatedly" is added to (D).

Richard Orsinger commented that because we put the Transamerica language under 3(b) that means the rule doesn't say it applies to (1) and (2). Is that our intention? In other words the Transamerica considerations only apply to those sanctions under 3(b) and not to sanctions under 2? If we mean it to apply to 2 we've got to put it someplace else besides 3(b). Discussion followed.

Richard Orsinger asked for an explanation regarding the statute on sanctions not applying to discovery because we say so. The statute doesn't say it doesn't apply to discovery. Discussion followed.

Discussion continued regarding the Transamerica language in 3(b) and whether something should be added to 3(a). Stephen Yelenosky proposed to strike in 3(a) the language "one or more of the" and add "as" between "sanctions" and "set forth". There being no opposition the proposal was adopted.

Chairman Soules reads the proposal for 3(b) as follows: "A court may impose any of the following sanctions that are just and that are directed to remedying the particular violation involved and that are no more severe than necessary to satisfy the legitimate purposes of such sanctions."

Alex Albright proposed amending (ii) (C) and (D) as follows: "(C) has repeatedly made discovery responses that are untimely, clearly inadequate or made for the purposes of delay; (D) has repeatedly made discovery requests, objections to discovery or claims of privilege that are not reasonably justified." And then change (D) to (E).

There being no objection the proposed change is approved.

Alex Albright proposed an amendment to (b)(2) as follows: "Allowing or disallowing further discovery in whole or in part, including changing discovery limitations."

Judge Guittard proposed "modifying discovery limitations", which was okay with Alex Albright.

A discussion was had regarding what "discovery limitations" means.

There being no opposition the changes to (b)(2) were approved.

Rusty McMains made a motion to delete paragraph (8). The motion failed for lack of a second.

A discussion was had regarding where the sanction is for deemed admissions.

A vote was taken on Rule 166d as amended today. By a vote of 16 to five the rule passed.

Chairman Soules asked for volunteers to assist Alex Albright in finalizing the comparison of the proposed discovery rules against the current rules to make sure nothing has been left out.

Stephen Yelenosky presented the report on Rule 25, Medical Records of a Nonparty advising of the following changes. In the third line of John Mark's version he would change "medical authorization" to "medical records release". At the very end of the rule add "Nothing in this rule excuses compliance with laws concerning the confidentiality of medical records." Mr. Yelenosky moved for the adopted of this rule. John Marks seconded the motion. Discussion followed.

Richard Orsinger indicated this rule ought to say mental health records as well as medical because there are separate privileges. There was no disagreement. Mr. Orsinger also feels there should be a minimum 10 days notice.

Justice Guittard proposed amending the last sentence of the rule to remove both instances of the word "being" and changing "is" to "will". There being no objection the amendment was approved.

Discussion continued regarding Rule 25.

A vote was taken on Rule 25 as amended. By a vote of 13 to 0 the rule was approved.

Richard Orsinger made a motion to add the following language to the end of the rule: "The copy of the notice served upon the nonparty shall state that the records may be privileged and that the nonparty may make objection to the requesting party within 10 days of service of notice. If such an objection is made within 10 days, the requesting party may obtain such records only upon motion and order with notice to the nonparty." Discussion followed.

A vote was taken on Mr. Orsinger's motion and by a vote of 9 to 10 the motion failed.

Alex Albright made a motion to delete "by oral or written deposition" and insert "request such documents pursuant to Discovery Rules 11, 14, 17 or 19. The nonparty whose records are sought shall be served with notice of the request in the same manner as service of citation as provided in Rule 106." Discussion followed. Alex Albright withdrew her proposal that reads "the nonparty whose records ..." Discussion continued regarding her first proposal.

Chairman Soules proposed "oral or written deposition or request for production". Discussion continued.

Chairman Soules asked if there is second to Alex Albright's motion to use the blanks for numbers. Mike Prince seconded the motion. Discussion followed.

A vote was taken and the motion failed by a vote of five to three.

Alex Albright restated her motion to delete "by oral or written deposition" and inserting the words "such production shall request such documents pursuant to proposed Discovery Rules 11, 14 17 and 19." Mike Prince seconded the motion. Buddy Low proposed "pursuant to the rules of discovery'. Judge Scott Brister proposed deleting everything in the first sentence after the word "records release" and in the second sentence deleting the works "by oral or written deposition". Alex Albright accepted the amendment. Buddy Low seconded the motion.

Chairman Soules reads the proposal rule as follows: "When the production of medical or mental health records of a nonparty is sought and the nonparty has not signed a records release the nonparty who records are sought shall be served with notice in the same manner as required under these rules for service of notice to a party".

Richard Orsinger brought up the issue that this doesn't include subpoenas. Discussion followed.

Hon. Paul Heath Till presented a status report on the Task Force on Justice Court Rules.

Buddy Low presented a status report on the Task Force on the Rules of Evidence.

Stephen Yelenosky presented the report on Rule 145, Affidavit of Inability. Alex Albright moved for the adoption of the amendments.

Carl Hamilton proposed amending the rule so that the indigent must file an affidavit. Richard Orsinger seconded the motion. There being no opposition the proposal was adopted.

Judge Brister made a motion to drop paragraph (1) out of no. 3, leave it as it is in the current rule and make the IOLTA section a separate section that has the mandatory - type language in it.

Chairman Soules proposed leaving (3) as it is in the current rule and making paragraph (3) in the draft paragraph (4). Mr. Yelenosky will redraft the rule with these changes and bring it back to the committee.

A vote was taken on these changes, without regard to the issue in (1) about the clerk contesting the affidavit, and by a vote of thirteen to 1 the vote carried.

The issue about whether the clerk should be allowed to contest the affidavit (other then the ones that are under paragraph (4)) was brought up for discussion. Bonnie Wolbrueck made a motion that we put back in the rule the clerk's ability to contest an affidavit of inability. Judge Brister seconded the motion. Discussion continued.

A vote was taken and by a vote of 16 to 0 the motion carried.

Anne Gardner made a motion to delete the last sentence of paragraph (1). Carl Hamilton seconded the motion. There being no opposition the motion carried.

Alex Albright presented the report for the Subcommittee on TRCP 1 - 14.

In Rule 4, Computation of Time, in the third line "periods" should be changed to "period" and "purpose" should be changed to "purposes". There being no opposition the changes will be made.

Rule 9, Number of Counsel Heard, should be moved and become the last sentence of Rule 7(a). There being no opposition that change will be made.

The Subcommittee recommended that Rule 14c concerning deposits in lieu of bond be made the same as the TRAP rule. There being no opposition those changes will be made.

Don Hunt presented the report for the Subcommittee on TRCP 300 - 331.

The revisions to Rule 320, Motions for New Trial, were explained by Mr. Hunt. The Subcommittee moved for the adoption of 320(a). Discussion followed.

Anne Gardner brought up questions on paragraph (7). Discussion followed. Richard Orsinger proposed modifying the language to say "insufficient evidence of the damages or of the" and then borrow the language out of the Compugraphic opinion about this causal relationship between the event and the claimed injury. Mr. Hunt does not have a problem with this.

Richard Orsinger proposed adding a new (i) to paragraph (7) about "lack of proper notice" or "lack of due process" and then renumber the rest of the subparagraphs.

Professor Dorsaneo expressed his opinion that the real vote is whether we should try to have a rule that articulates what the main good cause situations are or whether like our current rule we make reference either specifically or opaquely to the law. His preference would be that the rule give a pretty good list of the circumstances in which you could get a new trial.

Chairman Soules indicated that the consensus is to have a rule that is not exclusive but instructive.

Anne Gardner made a motion to delete paragraph (7)(ii) "because of insufficiency of the evidence of damages". Richard Orsinger proposed leaving it in but putting it at the end in its own category saying that the new trial is as to that part of causation and damages only.

Judge Guittard proposed adding in (a) the words "a full or partial" after "For good cause, a" .

Discussion continued.

Richard Orsinger seconded Judge Guittard's motion.

Professor Dorsaneo suggested "complete or partial new trial as appropriate." Chairman Soules suggested "a new trial or partial new trial". Professor Dorsaneo suggested "partial new trial in accordance with subparagraph ___".

Mr. Hunt will revise the lead in to (a) to fit the consensus of the Committee.

Richard Orsinger made a motion to amend (i) to say "because of a lack of proper service of process or defect in the petition."

Judge Guittard proposed there ought to be a separate subdivision as to petitions. Add a new (ii) defect in or lack of service. Discussion followed.

Professor Albright moves to adopt Professor Dorsaneo's suggestion that we say "when a default judgment was improper on legal or equitable grounds." There being no disagreement, in paragraph 7 everything after "improper" will be stricken and "on legal or equitable grounds" will be added.

Richard Orsinger comments may we ought to just say "where a default judgment was improper." Discussion followed.

Chairman Soules reads the proposal for (7) as follows: "when a default judgment should be set aside on either legal or equitable grounds:" There being no disagreement the change will be made.

Chairman Soules proposed adding a paragraph (11) as follows: "such other grounds as warrant a new trial." Discussion followed.

Chairman Soules revised his proposal to say "such other grounds as warrant a new trial and in the interest of justice." Discussion followed.

Carl Hamilton asked if we need paragraph (8) in light of the changes that were made to paragraph (7). Discussion followed.

Chairman Soules proposed deleting "among others" in the preamble since it was put in (11). No opposition was stated.

Don Hunt proposed that in the second line of (a) changing the word "motion" to the word "initiative" since judges don't make motions. Chairman Soules proposed "on the judge's own ruling." Discussion followed.

A vote was taken on using "initiative" or "motion". By a vote of four to two "motion" stays in.

Mr. Hunt brought up a question in paragraph (a)(5) where it says "any communication to the jury". Do we want to keep that language? Discussion followed. Judge Guittard proposed "outside influence made to bear on the jury." Discussion continued. Professor Dorsaneo proposed striking the language. Discussion continued. There being no objection paragraph (iii) was deleted and the remaining subparagraphs renumbered.

Don Hunt moved for the adoption of Rule 320(a) as amended.

Richard Orsinger indicated there is a problem in subdivision (a)(5)(iv) regarding errors that resulted in injury to the movant. Don Hunt proposed replacing "has probably resulted in injury to the movant" with "reasonably calculated to cause and probably did cause a rendition of an improper judgment". Discussion followed.

Chairman Soules indicates in paragraph (10) "probably resulted in" should be changed to "is reasonably calculated" and so forth.

Richard Orsinger proposed that instead of "reasonably calculated to and probably did cause" use ""probably did cause."

Don Hunt indicated the motion was that in all instances in (4), (5), (6), and (10) it should simply read "probably caused rendition of improper judgment." There being no objection the motion carried.

Don Hunted moved for the adoption of Rule 320(a) as amended.

Chairman Soules points out a problem in the language in (6) because it says "resulted in a verdict favorable to the movant." Discussion followed.

Anne Gardner proposed "that it is so material that it would probably produce a different result if a new trial were granted." Chairman Soules indicated an alternative would be to say "and the unavailability of the evidence probably caused rendition of an improper judgment."

Don Hunt proposed "When new evidence which is not cumulative, has been discovered that was not available at the trial by the movant's use of reasonable diligence,

and it's unavailability probably caused the rendition of an improper judgment." There being no opposition the language was approved.

A vote was taken on Rule 320(a) as amended. There being no opposition it was approved.

The meeting adjourned until Saturday morning.

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock on Saturday, September 16, 1995, pursuant to call of the Chair.

Saturday, September 16, 1995:

Supreme Court of Texas Justice and Liaison to the Supreme Court Advisory Committee, Justice Nathan L. Hecht was present.

Members present: Luther H. Soules, III, Charles L. Babcock, Pamela Stanton Baron, Honorable Scott A. Brister, Prof. Elaine A. Carlson., Sarah B. Duncan, Anne L. Gardner, Hon. Clarence A. Guittard, Donald M. Hunt, Joseph Latting, Russell H. McMains, Anne McNamara, Robert E. Meadows, Richard R. Orsinger, Hon. David Peeples, Paula Sweeney and Stephen Yelenosky.

Ex-officio Members present: Carl Hamilton, David B. Jackson, Hon. Paul Heath Till and Bonnie Wolbrueck

Members absent: Alejandro Acosta, Jr., Professor Alex Albright, David J. Beck, Ann T. Cochran, Professor William V. Dorsaneo, Michael T. Gallagher, Michael A. Hatchell, Charles F. Herring, Tommy Jacks, Franklin Jones, Jr., David E. Keltner, Thomas S. Leatherbury, Gilbert I. Low, Hon. F. Scott McCown, Harriett Miers, David Perry, Anthony J. Sadberry and Stephen D. Susman.

Ex-Officio Members absent: Hon. Sam Houston Clinton, Hon. William Cornelius, Paul Gold, Doris Lange, Kenneth Law and Michael Prince.

Others present: Lee Parsley (Supreme Court Staff Attorney) and Holly H. Duderstadt (Soules & Wallace).

Chairman Soules brought the meeting to order.

Don Hunt continued the report for the Subcommittee on TRCP 300-331. Mr. Hunt explained the changes made to TRCP 320(b). There being no opposition the changes are approved.

Mr. Hunt explained the changes made to TRCP 320(c). Discussion followed. A vote was taken and by a vote of 13 to 0 the changes are approved.

Mr. Hunt explained the changes made to TRCP 320(d). Discussion followed. Richard Orsinger proposed deleting "supported by affidavit" from (d)(1). Discussion continued. A vote was taken on whether or not to take the language out and by a vote of seven to five it comes out. Mr. Orsinger proposed in (d)(1) changing the language "injury probably resulted to the complaining party" to "probably caused rendition of an improper judgment." Discussion followed. Mr. Orsinger withdrew his proposal but the discussion continued. Justice Duncan reasserted Richard Orsinger's motion. Discussion continued.

Judge Guittard expressed the opinion that the committee would do better to stick with the language that's now in the rule so that we don't create uncertainty in the law.

A vote was taken on whether to leave the rule as written by Mr. Hunt's subcommittee on page 5 or substituting the language "probably caused rendition of an improper judgment". By a vote of 12 to 2 Rule 320(d)(1) will stay as proposed.

Judge Guittard made a motion to go back a fix paragraph (a)(5) also.

Carl Hamilton brought up the discussion on whether "any communication made to the jury" should be taken out of (d)(1) because we took it out of paragraph (a)(5). Discussion followed.

Chairman Soules indicated it should be taken out of both places or fixed. Discussion continued.

A vote was taken on whether the rules should articulate that improper communication made to the jury is a ground for a motion for a new trial. The vote was 15 to 1 in favor of suggesting that we change (a)(5)(iii) and put it back to say "improper communication made to the jury."

Judge Guittard proposed taking the word "made" out and just saying "improper communication to the jury." There being no objection that was done in both places.

Judge Peeples brought up the discussion about whether or not we are talking about outside communication. Discussion followed.

With regard to paragraph (d)(2) (Testimony of Jurors) Don Hunt explained the purpose of footnote 1 regarding the language "however a juror may testify whether any outside influence was improperly brought to bear upon any juror. Discussion followed.

Chairman Soules indicated that the motion on the floor is the adoption of Rule 320(d) as presented by the Subcommittee except for the changes that have been voted on in paragraph (1). The discussion continued.

Chairman Soules advised that there is no motion on the floor to adopt the last sentence of paragraph (2) regarding outside influence. A vote was taken on Rule 320(d) as modified. There being no opposition the rule was approved.

Don Hunt explained the changes made to TRCP 320(e), Excessive Damages, Remittitur. Discussion followed. Justice Duncan proposed deleting in paragraph 1 the word "reasonably". Discussion followed. Discussion was had regarding the language "legally or factually sufficient evidence." Richard Orsinger proposed substituting the words "reasonably sustainable" for "supported by." Richard Orsinger opens the discussion regarding using the word "legally". Discussion followed. Don Hunt explained the reason they had "legally and factually sufficient evidence" in the first part. Discussion continued.

Chairman Soules indicated that the feeling is, although there is no motion, that the words "legally or" in the second line of (e)(1) be deleted. Discussion continued. A vote was taken to delete the words "legally or" and by a vote of 10 to 1, they will be deleted.

A vote was taken on Rule 320(e)(1) as a whole as modified by the discussions today. There being no opposition the rule is approved.

Discussion was had on paragraph (e)(2), Remittitur by Party. Justice Duncan proposed changing "execution shall issue" to "execution can issue" in the last sentence of this paragraph. Joe Latting and Richard Orsinger proposed using the word "may". Justice Duncan and Richard Orsinger proposed moving the word "only" to after the word "issue". There being no opposition Rule 320(e)(2) is approved.

Justice Duncan brought up the discussion on whether they should consider "additur." Discussion followed.

Mr. Hunt explained the changes in Rule 320(f), Partial New Trial. There being no opposition to 320(f) as written the changes were approved.

Don Hunt explained the changes to Rule 321, Preservation of Complaints, paragraph (a), General Preservation Rule. Discussion followed. Justice Duncan made a motion to delete the last two sentences. The motion was seconded by Anne Gardner. A vote was taken and by a vote of twelve to two the last two sentences were deleted.

Don Hunt moved for the approval of Rule 321(a). A vote was taken and by a vote of 11 to 1 the rule was approved.

Don Hunt explained the changes to Rule 321(b), When a Motion for New Trial is Required, and made a motion for the adoption of the rule. Discussion followed. Justice Duncan brought up a problem with paragraph (b)(1)(6). This is a Wilson v. Dunn problem. That is subparagraph (6) you can preserve a complaint that was waived during trial by putting it in a motion for new trial. Discussion continued. Richard Orsinger also opposed paragraph (6) because it has ramifications that are severe. Discussion

continued. Richard Orsinger indicated that (b)(6) is in the wrong place. It shouldn't have anything to do with a motion for new trial. It is in 321(a) and TRAP 52 and if we add (6) here we are now requiring everybody to put all of their modification issues in a motion for new trial when they don't really want a new trial. Rusty McMains brought up a discussion regarding the incurable jury argument issue. Chairman Soules inquired that if we took Wilson v. Dunn would the catch all work if it said "complaints seeking a new trial which cannot be raised prior to judgment". Justice Guittard comments if you leave (6) then the old paragraph (5) ought to be restored which would take care of Rusty's problem. Don Hunt explained the reason for striking (5) was not to eliminate it from the jurisprudence but because of the presence of (6). If we put this back in we should put back paragraph (5). Discussion continued.

Justice Duncan made a motion to have the general preservation rule and then title (b) "Complaints That Must Be Preserved in a Motion for New Trial." Judge Brister seconded the motion along with Richard Orsinger. Judge Guittard proposed changing subdivision (6) to read "any unwaived ground for new trial not otherwise ruled on by the trial judge." Richard Orsinger, Chairman Soules and Justice Guittard proposed the following language: "Grounds for a new trial that are not waived and not raised prior to judgment." Discussion continued. Judge Brister moved that they drop the catch all. Chairman Soules indicated what the Supreme Court is saying we should consider is complaints which cannot be raised prior to judgment and complaints that 52(a) contemplates must be raised by some means tantamount to a motion for new trial. Discussion continued.

Anne Gardner proposed "any timely complaint not raised prior to judgment". Discussion continued. Pam Baron commented that the concept we are trying to get across is that any complaint properly raised for the first time after the judgment can be either in a motion for new trial, motion to modify, any post judgment motion so we should say "any complaint properly raised for the first time after judgment is preserved if brought in a post-judgment motion whether it be new trial or other." Judge Guittard commented that he feels that subdivision (6) is redundant. The problem in Wilson v. Dunn was Rule 324 that said that "no motion for new trial is required except ..." No we have changed that so that (b) says "the following complaint shall be made in a motion for new trial" because that in essence takes care of the Wilson v. Dunn problem and then as suggested you go back to (a) and it says that the complaint must have a timely request, objection or motion, must appear of record, and maybe that takes care of the situation and we don't need (6). Justice Duncan agreed.

Chairman Soules indicates the motion on the floor is that we delete (6) and add (5) back in. Mr. Hunt indicated that is acceptable to his subcommittee. Chairman Soules gives a summary of where we are.

Rule 321(b) would be as presented by the subcommittee from the beginning through paragraph (4). The stricken through language that was paragraph (5) would be reinstated and the committee's paragraph (5) would be changed to paragraph (6) and the

committee's paragraph (6) would be deleted. There being no opposition the proposal passed.

Chairman Soules proposed paragraph (6) be changed to "the jury verdict will not support any judgment." Discussion followed.

Justice Guittard made a motion to delete paragraph (5) "a material and irreconcilable conflict in jury findings" and not put anything in its place. There being no opposition that was approved. Paragraph (5) will be restored and the rule will stop there. Judge Brister inquired what the thinking was on adding the word "factual" in paragraph (4). The current rule says "inadequacy or excessiveness which he thinks is right. Justice Guittard proposed "inadequacy or factual excessiveness". Sarah Duncan explained that the appellate rules committee thought Rule 324(b)(4) meant was that it was only in instances of factual insufficiency that it had to be raised in the motion for new trial and that if it was a legal error that could be raised in the 301 motion. That is what we are trying to fix. Professor Carlson asked if that wouldn't be covered by (2) and (3), that clarification that its a factual insufficiency complaint if its going to damages so it would be covered already by (2) and (3).

Justice Duncan proposed taking out paragraph (4) with a comment that says by deleting (4) we do not mean to imply that you don't have to preserve factual sufficiency points related to damages in a motion for new trial. Discussion followed. Justice Duncan suggested deleting (4), merging (2) and (3) and make (3) the standard that it actually is on appeal which is so against the great weight of the preponderance of the evidence as to manifestly unjust. Justice Guittard proposed using the language of subdivision (a)(3) "when the damages awarded by the jury are manifestly too large or too small because of the factual insufficiency or overwhelming preponderance of the evidence. Chairman Soules restated Justice Guittard's proposal as leaving (2) alone, leaving (3) alone, and to make (4) "that the damages awarded by the jury or manifestly too large or too small because of the factual insufficiency of the overwhelming preponderance of the evidence. Richard Orsinger felt 320(a)(1) should be identical to 324(b)(2). Justice Duncan proposed "as a prerequisite to appellate review any complaint listed in Rule 320(a)(1) through (11) must be stated in a motion for new trial. Discussion followed.

Justice Duncan proposed that we have no rule 321(b). The motion failed for lack of a second. Judge Brister made a motion to change Rule 321(b)(4) to be parallel with 320(a)(3) by saying "damages awarded by jury are manifestly too large ..." Richard Orsinger made a motion that (2), (3), and (4) should track the language of (1), (2) and (3). Discussion followed.

Professor Elaine Carlson proposed a change on (b)(1) in the first line, after "jury misconduct, newly discovered evidence", adding "equitable or legal grounds to set aside a default judgment". Discussion followed. Professor Carlson withdrew her suggestion.

A vote was taken on Rule 321(b) as modified. There being no opposition the rule was approved.

Don Hunt explained the changes to 321(c), Jury cases: Legal Sufficiency of Evidence. Richard Orsinger suggested taking out the reference that it need not be made in a motion for new trial and just say that it must be made in the trial court and can be included in a motion for judgment as a matter of law and add an objection to the jury charge. He would strike "or in a motion for new trial". Discussion followed. Anne Gardner proposed in the third line substituting the words "shown in the record" to the word "preserved" to it says "need not be made in a motion for new trial if otherwise preserved or otherwise presented to the trial court". Discussion followed. Richard Orsinger made a motion that they insert an objection to the jury charge. Discussion followed. Chairman Soules takes a straw poll to determine whether or not we should have a paragraph (c) at all. By a vote of 8 to 7 paragraph (c) failed.

Don Hunt explained the changes to Paragraph 321(d), Non Jury Cases: Legal and Factual Sufficiency of Evidence.. There being no opposition the changes were approved.

Don Hunt explained the changes to paragraph 321(e), Presentation of Motions. Chairman Soules proposed deleting the word "properly" in the last line. Discussion followed. Richard Orsinger proposed an alternative which would be to say that overruling of motion by operation of law is equivalent to overruling by order of the court. Judge Guittard proposed adding "unless evidence is presented - required". Chairman Soules reads the proposed rule as follows "unless the taking of evidence is necessary for presentation of a complaint in a motion for new trial, the overruling by operation of law of a motion for new trial or of a motion to modify the judgment..."

Anne Gardner proposed changing "unless the taking of evidence is necessary" to "unless evidence is necessary." Discussion continued. Chairman Soules proposed "unless evidence is necessary for presentation of a complaint in a motion for new trial, the overruling by operation of law of a motion for new trial or of a motion to modify the judgment shall have the same effect as an order overruling the motion." Discussion followed.

Chairman Soules proposed "the overruling by operation of law of a motion for new trial or of a motion to modify the judgment has the same effect as an order overruling the motion except with respect to grounds where evidence is necessary for presentation of a complaint in a motion for new trial."

Chairman Soules indicated the proposal is taking out the words "unless the taking of evidence is necessary for presentation of complaint on a motion for new trial", the rule would then begin "The overruling by operation of law of a motion for new trial or of a motion to modify the judgment has the same effect as an order overruling the motion except as to grounds that require evidence". Discussion followed. Rusty McMains expressed his problems with the rule changes. Chairman Soules proposed adding after "evidence" the words "that was not presented to the trial court." Discussion followed.

Chairman Soules proposed striking the exception in the rule being one sentence "The overruling by operation of law of a motion for a new trial or of a motion to modify the judgment has the same effect as a order overruling the motion". Discussion continued.

Anne Gardner proposed that since the exact language of (e) is already contained in (a) that we delete paragraph (e) in its entirety. Don Hunt does not have a problem with that. There being no opposition paragraph (e) is deleted. Judge Guittard indicated he wants to have it left in so a vote was taken and by a vote of 7 to 4 paragraph (e) is deleted.

Paula Sweeney indicated that her subcommittee is at a standstill and she needs some guidance from the Committee. Stephen Yelenosky indicated he had a redraft of Rule 145. A discussion was had regarding what the Supreme Court would like to have. Don Hunt indicated that a good place to stop with his report for the day would be at Rule 322. Mr. Hunt indicated that paragraph (f) and (g) are simply what we have already adopted as a part of Rule 52 and moved for the adoption of those as is because there are not changes. Judge Brister indicated he had a problem with paragraph (f).

Mr. Yelenosky again expressed his desire to get Rule 145 to the Supreme Court.

Justice Duncan proposed that the 301 series of rules be included this section of rules. Chairman Soules asked Mr. Hunt's committee to take over Rules 296 - 314.

Chairman Soules advised that the Subcommittee chairs would be receiving a disposition table for every rule addressed in their section which will need to be completed and brought to the next meeting.

A general discussion was had regarding the promulgation of the appellate rules.

Paula Sweeney presented a report regarding the Batson rules. Her committee needs guidance on (1) whether we should have these rules, (2) what does the committee should be the effect of an improper strike, and (3) what they have done is listed what the Supreme Court has spoken on race, ethnicity, and gender and then have added "or other unconstitutional basis" since we don't know what that may be. Needs the committee's thoughts on whether that should be in there. Discussion followed.

Justice Duncan asked if the Committee had voted on retaining peremptories. A vote was taken and with a vote of the house to one there will be peremptories.

Paula Sweeney's subcommittee recommends that there should be some rules. Discussion followed. A vote was taken on whether the subcommittee should continue working on Batson rules. By a vote of 11 to 1 the subcommittee will continue its work.

The meeting was adjourned.