

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

Taken May 31st, 1985

By Mary Ann Vorwerk

ORIGINAL

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I N D E X

Description	Page	Line
Chairman Soules Convenes Meeting	4	3
Justice Wallace - Opening Statements	4	9
Chief Justice Evans	6	10
Chief Justice Hill	10	17
Chief Justice Guittard	20	10
Chairman Soules - Opening Statements	27	9
Professor Dorsaneo - Report on Harmonized Rules	37	19
Chief Justice Pope - Comment on Publishing Opinions	60	3
Consensus on Publishing Opinions 10 For, 8 Against	80	22
Professor Dorsaneo - Continues Report	83	1
Subcommittee on Implementing House Bill 1658 Chairman: William Dorsaneo Russel McMains John O'Quinn Harry Tindall Steve McConnico Gilbert Adams, Jr. Frank Branson	96	17
Consensus on Citing Unpublished Opinions 14 For, 3 Against	105	21
Consensus on Citing Unpublished Opinions 14 For, 3 Against	98	4
Consensus for Harmonized Rules Agreeable to both Supreme Court and Court of Criminal Appeals General Consensus	103	7
Consensus on Addressing Additur and Remittitur	105	18
Morning Session Adjourned	108	17
Afternoon Session Opened	109	3

Description	Page	Line
Trial Court Administration Committee	115	16
Chairman: James Kronzer		
Sam Sparks		
Linda Thomas		
Tom Ragland		
Harold Nix		
Charles (Lefty) Morris		
David Hittner		
Pat Beard		
Soloman Casseb		
Hadley Edgar		
Franklin Jones	128	22
Professor Blakely - Report on Proposed Rules	136	13
Motion on Rules 509(d)(4) and 510(d)(5)	174	17
17 For, 1 Against		
Motion on Rule 509(d)(5)	175	21
All in Favor		
Motion on Rule 601(a)(2)	177	19
All in Favor		
Motion on Rule 610 and Renumbering	182	5
All in Favor		
Motion on Rule 610(c)	184	11
Most in Favor, 1 Against		
Correction of Named Second for Motion on 610	185	1
Motion on Rule 611	197	18
4 For, 12 Against		
Motion on Rule 801	205	13
1 For, Most Against		
Motion on Rules 801(e)(3) and 804(b)(1) to	226	14
Refer for Further Study		
Most For, 5 Against		
Motion on Rule 803(6)	228	5
Majority in Favor		
Motion on Rule 902(10)(b)	228	20
Majority in Favor		

Description	Page	Line
Motion on Rule 1007 Majority in Favor	229	17
Committee on Local Rules Chairwoman: Linda Thomas	234	21
Committee on Pretrial and Discovery Rules 15 through 215(a) Chairman: Sam Sparks	234	25
David Hittner	243	15
William Dorsaneo	243	20
David Beck	243	22
Tom Ragland	244	12
Steve McConnico	244	3
Committee on Trial Rules Rules 216 through 314 Chairman: Franklin Jones Frank Branson	235	8
Frank Branson	243	15
Committee on Post-Trial Rules Rules 315 through 331 Chairman: Harry Tindall	236	9
Committee on Court of Appeals Rules Rules 352 through 472 Chairman: William Dorsaneo	236	15
Committee on Supreme Court Rules Chairman: Russel McMains	237	1
Committee on Ancillary Proceedings Chairman: Broadus Spivey	240	14
Committee on Special Proceedings Chairman: James Kronzer	242	1
Committee on Attachments, Sequestrations, etc. Chairman: Pat Beard	243	2
Evidence Subcommittee Chairman: Newell Blakely John O'Quinn	244	19
John O'Quinn	245	15
Next Meeting November 1st and 2nd	252	14
Chief Justice Hill - Closing Comments	253	15
Meeting Adjourned	257	8

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MARY ANN VORWERK,
Certified Shorthand Reporter
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ALSO PRESENT:

DEBBRA WOOD
Certified Shorthand Reporter
and Notary Public

MORNING SESSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 very much.

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

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

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

11 CHIEF JUSTICE EVANS: Thank you very
12 much.

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

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

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

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

11 MR. ADAMS: 1658.

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

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

25 CHIEF JUSTICE HILL: I know you were,

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

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

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

1 the back has some.

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

5 CHAIRMAN SOULES: That's essentially it.

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Thank you very much and welcome.

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

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

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

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

25 That committee had as its responsibility the

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

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

1 stapled together in legal size.

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

9 Chief Justice Guittard.

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

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

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

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

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

1 project's all about.

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

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

1 in language that we thought was a little clearer,
2 we have not attempted to make a substantial change
3 in the practice.

4 The principal change has been on the criminal
5 side, and that would require a -- that did require
6 amendments, repeals of certain provisions of the
7 Code of Criminal Procedure. And those amendments
8 did finally pass on the last day of the session.
9 So, now the Court of Criminal Appeals, as well as
10 the Supreme Court, has rule making power with
11 respect to appellate procedure.

12 Now, the changes that were in the civil side
13 are really minor. One of them is -- you're
14 familiar with Rules 435 and 438 that has to do with
15 penalties. Well, we just thought that a 10 percent
16 penalty, 10 percent of the amount in controversy,
17 was meaningless in lots of cases. And we really
18 needed to expand that penalty. So, we've
19 essentially adopted the federal standard while
20 keeping our standard as to when penalties apply, to
21 give the court a little more leeway in assessing
22 penalties in cases of where the appeals really have
23 -- probably have no merit nor taken for delay. I
24 believe there's also a limit on the -- well, I'm
25 not sure about that, I forget all these details.

1 On this criminal side, the main problem has
2 been the preparation of the record. The court of --
3 the Code of Criminal Procedure has had provisions
4 which have long since been considered obsolete and
5 have been eliminated in the civil practice,
6 particularly the requirement that the record be
7 approved by the trial court and certified by the
8 trial judge before it's filed in the appellate
9 court. So, there's a whole series of steps in the
10 Code of Criminal Procedure, Article 4009, that
11 caused us on the Appellate Court a great deal of
12 trouble if we had any -- if we felt any
13 responsibility for accelerating the process.

14 Inefficiency is built into the system, and
15 there were various kinds of things that had to be
16 done and there were, in many cases, no time limit
17 specified as to when they should be done. And as a
18 result the trial judges, who after having tried a
19 case, naturally don't find these appellate matters
20 a matter of high priority. They tended to shove
21 these matters aside, and long delays occurred for
22 which there's no justification. So, what's the
23 remedy for that? Obviously, adopt the Rules of
24 Civil Procedure, which are essentially just as
25 applicable in criminal cases in principle as they

1 are to civil cases. That has been our primary
2 approach.

3 Now, I'm not going to go into the details of
4 the rules. Bill Dorsaneo can do that with you. I
5 would leave you with this thought. One of the
6 reasons why there's been such a discrepancy between
7 the civil and criminal appellate rules, heretofore,
8 has been that the Supreme Court had authority over
9 the civil rules, and the Legislature was the only
10 agency that could change the criminal rules. Now
11 that's changed to the extent that the Court of
12 Criminal Appeals has authority over these criminal
13 rules. But as long as the Court of Criminal
14 Appeals and the Supreme Court function separately,
15 there will still be lots of occasions, it seems to
16 me, where there will be a lack of harmony. And the
17 value of our committee was that we had a committee
18 appointed by both courts.

19 Now the Court of Criminal Appeals is going to
20 have to adopt the rules, promulgate the rules
21 insofar as they apply to criminal cases. The
22 Supreme Court will have to adopt them by way of
23 amendments to their present Rules of Civil
24 Procedure insofar as they apply to civil cases.
25 They will, of course, rely upon their advisory

1 committees.

2 The Supreme Court has this committee, the
3 Court of Criminal Appeals has an advisory
4 committee, which Clifford Brown of Lubbock is the
5 chairman. He was a member of this joint drafting
6 committee. Now, if these committees work
7 separately, without consultation between each
8 other, then I'm afraid this is going to lead us
9 down a road that will defeat the objective of
10 harmonizing the appellate rules and give us
11 appellate judges, as well as the Bar, will
12 perpetuate the differences and the confusions that
13 we've been laboring under. So, I hope that there
14 will be some way of working out some liaison
15 between this committee and the Court of Criminal
16 Appeal's Committee, so as to avoid that problem.

17 I want to say particularly before I leave
18 you, that this work could not have been done
19 without the help of Bill Dorsaneo and Carl Daley.
20 Bill is really the one that organized the rules.
21 So, if you have any concern about the organization
22 and the way they're numbered and all that sort of
23 thing, well, talk to Bill about that. He's done an
24 excellent job. I commend him for it.

25 Now, if there's any questions that any of you

1 would like to raise with me, I'm available here for
2 a few minutes and will respond to your inquiries.

3 CHAIRMAN SOULES: Questions for Chief
4 Justice Guittard?

5 Mr. Chief Justice, thank you for a portion of
6 your morning and at a critical time, too. We
7 really appreciate your coming.

8 CHIEF JUSTICE GUITTARD: Thank you, Luke.

9 CHAIRMAN SOULES: I think all the
10 schedules that really had to be accommodated, other
11 than everyone here, of course, is busy as they
12 could possibly be, have been accommodated. And I
13 just wanted to say a few things about where we get
14 our work and what our work is because we have a lot
15 of new members here and perhaps that would give
16 them a little bit of guidance about what we're
17 going to be doing for the balance of the day and
18 maybe some reminder to ourselves as well.

19 This committee functions and has functioned
20 since -- I believe it was 1939. Initially it was
21 pulled together as the Advisory Committee to the
22 Supreme Court of Texas to draft the "New Rules"
23 that became effective in 1941. It has been
24 continuously in existence since that time, meeting
25 and convening to advise the Supreme Court of Texas

1 about amendments to those rules. And we had, as
2 you know, a series of some -- over a hundred rules
3 that became effective in 1984 alone. So, there has
4 been a constant observance and effort to keep those
5 rules responsive to the needs of the judicial
6 system. How well they've worked I guess is
7 anyone's view, but they seem to have worked pretty
8 well, and I know that they've had an awful lot of
9 attention from a lot of people.

10 Our work comes from many sources. This
11 committee, I understand, at one point may have
12 limited its concerns to matters that have been
13 submitted here from the Committee on Administration
14 of Justice of the State Bar of Texas. That is
15 certainly not the case at this time. We do take
16 work from the Committee on Administration of
17 Justice, and actually some of the best information
18 that we get to support our work comes from that
19 committee because it functions more frequently,
20 meets several times every year. Its principal
21 purpose is to consider proposed rule changes to the
22 civil rules. It occasionally also addresses
23 criminal problems and occasionally also addresses
24 Legislative problems that bear on procedural
25 matters in the court system. But its primary focus

1 is on rules. So, when we get matters from the COAJ
2 and the State Bar, we usually get something that
3 has had a lot of study and is supported by some
4 information, some reasoning, maybe even some case
5 authorities and is addressed to -- usually focused
6 at specific problems.

7 However, for reasons known only perhaps to
8 that committee, many things go there and really
9 don't get addressed. Some get addressed very
10 thoroughly, and some don't. And this committee
11 takes matters referred directly to it from members
12 of the public, from district clerks, from members
13 of the Bar, including judges, from every source
14 and, of course, from the Legislature. We have --
15 basically our first item on our agenda comes as a
16 result of Legislative action. The second item on
17 the agenda, the Rules of Evidence, comes from a
18 different committee of the State Bar, the State Bar
19 Committee on Rules of Evidence.

20 So, whatever matters may be addressed by the
21 Supreme Court of Texas in its rule making authority
22 come through here from whatever source. Now, we
23 don't always get the benefit of input in the
24 Supreme Court before rules are made or changed.
25 But we almost always do. And only in cases of

1 emergency, in my experience, has the Supreme Court
2 made changes that at least this committee has not
3 addressed. That's not to say --

4 CHIEF JUSTICE HILL: If you would like,
5 Luke, to bat a hundred percent, which is all I can
6 say, I don't know that anyone can say that you're
7 not going to have a special situation. But we want
8 to work with this committee, and I want that very
9 clear. I know I speak for the court in that
10 regard, that we want to work with this committee.
11 We want to have your input before rule changes are
12 made. I know there's been some thought in the past
13 that maybe that has not been our attitude, but it
14 is our attitude.

15 CHAIRMAN SOULES: Well, we appreciate
16 that, Chief Justice Hill. And the only thing that
17 I attempted to reserve in that remark was that
18 occasionally there are emergency situations, the
19 rules or the courts rules. And if it has to speak,
20 it has to speak; and to convene this committee may
21 just be impossible in the time required. But they
22 are -- those instances have been, in my judgment,
23 very rare. That's not to say that the Supreme
24 Court agrees with this committee or agrees with
25 sometimes a lot of work that's been done on matters

1 before coming to this committee. In some instances
2 the proposed rules from this committee are taken
3 pretty much as they're recommended or altogether as
4 they are recommended and adopted by the court. I
5 think that, for example, happened in connection
6 with the extraordinary writ remedies that were
7 extensively redone after Fuentes vs. Shevin and the
8 cases declaring certain aspects of prejudged
9 procedure unconstitutional.

10 On the other hand, to distinguish that, the
11 Committee on Administration of Justice spent hours
12 debating how sanctions should be conducted in civil
13 trials for discovery abuse, and a good bit of
14 meeting of this committee was spent on that. And
15 it was the conclusion of the COAJ and of this
16 committee that sanctions should be imposed on a
17 two-step level, that discovery should be initiated
18 and responded to by the lawyers, that if there was
19 an effort by a defending lawyer in his discovery to
20 try to avoid that discovery, he would file a motion
21 and seek sanctions; or if he felt that what he had
22 gotten -- the party seeking discovery felt what he
23 got was not adequate or needed to be compelled, he
24 could file a motion to compel. But that at that
25 level, the only sanction to be imposed would be

1 attorneys' fees and expenses. And the rule went to
2 the Supreme Court that way and then only whenever
3 there had been an order entered that had been
4 violated, would the extensive sanctions of
5 dismissal, default judgment, that sort of thing, be
6 imposed. And the Supreme Court flatly disagreed
7 with that and put the most severe sanctions in
8 effect for the first trip. And so, they don't
9 always do what we say even after we've spent a lot
10 of time resolving among ourselves what we feel
11 should be done because they disagreed. And there,
12 like that -- what is it, 12 thousand-pound gorilla,
13 Mr. Kronzer, he sleeps wherever he wants to sleep.
14 Whenever they disagree, and they've given it a lot
15 of thought I'm sure. Of course, it comes down in
16 the rules that way, as did that particular aspect.

17 Because this committee has worked so
18 diligently over the years, we don't meet but about
19 once a year, sometimes twice, but still our work is
20 intense when we do. And because we hear from so
21 many sources, and because the Supreme Court,
22 essentially, listens to us, the Rules of Civil
23 Procedure, we feel, do stay modernized. And the
24 best example of how that has worked in contrast to
25 another system, in my view, comes from the

1 committee that we had, the Joint Committee to
2 Harmonize the Appellate Rules.

3 There was a great deal of background and
4 understanding and reasoning for the Appellate Civil
5 Rules. Some of the reasoning some of you may
6 disagree with, but at least they had been worked on
7 over the years at every session of this committee
8 that I've ever attended. And this committee has
9 been a form for suggestions from every source as to
10 how those rules can be kept modernized.

11 On the other hand, the appellate rules that
12 are in the Code of Criminal Procedure, there's
13 really no forum other than the Legislature, and
14 that's only when it's in session with lots of other
15 things to do, for people to have input into that
16 system. When it was put in place, it was -- it
17 adopted many things that were somewhat archaic that
18 we'd already put aside when the Code of Criminal
19 Procedure came along. So, in that committee,
20 although we had criminal lawyers and trial judges
21 who essentially try criminal cases, and judges on
22 the Court of Criminal Appeals all on that
23 committee, the reasoning behind the civil way of
24 doing things, whenever there was no real reason to
25 have a difference between the civil and the

1 criminal, almost uniformly prevailed.

2 So, that gives you an example of how ours
3 have been kept modern, readable, and doable, and
4 are even readily accepted by people who have been
5 practicing almost altogether in a different system
6 for many years now. That, I think, is a credit to
7 this committee over the years and to our court that
8 we serve.

9 That's my speech. Thank you all for being
10 here. Particularly welcome all the new members.
11 We'll have coffee after awhile and shake hands with
12 them. At this time --

13 Gay, did you have any message to bring to us
14 from Senator Glasgow?

15 MS. CURRY: Well, none other than he
16 sends his apologies for not being able to be with
17 you, but when they finally adjourned after the
18 session -- special session, he said that there was
19 a banker knocking at his door and he needed to get
20 home and practice his law. He had a lot of court
21 cases and a lot of clients that were waiting for
22 him to come home so he had to return to
23 Stephenville. But he felt very good that we were
24 finally able, in the last few hours, to pass the
25 legislation and to give a product that he was very

1 proud of to you all for your scrutiny and your
2 advice.

3 CHIEF JUSTICE HILL: I would appreciate
4 it if you would convey to Senator Glasgow my
5 personal thanks and the thanks of the Court for his
6 steadfast help throughout the session on all
7 matters relating to the welfare of the judicial
8 system of Texas. He is a true friend, a proven
9 friend of the judiciary. We need more of them, and
10 I want to be sure that you express that. I'll
11 write him, of course, but I wanted to convey that
12 through you to him.

13 MS. CURRY: Thank you very much, he was
14 trying to the bitter end.

15 CHAIRMAN SOULES: Tell him we appreciate
16 it so much. As a matter of fact, he had to miss
17 the bill that had been carried through and finally
18 was not going to get on the calendar at the last
19 minute and voted on, acted on, so he managed to get
20 it on to another bill that was going to get acted
21 on; otherwise, this effort to harmonize rules would
22 be sitting around for another session of the
23 Legislature, so he was a true shepherd.

24 Give him our thanks, too, Gay. And thank you
25 for being here.

1 Okay. Bill, we'll get down to the business,
2 to the specifics. Bill Dorsaneo, if you'd make a
3 report on the harmonized rules, please.

4 PROFESSOR DORSANEO: How specific do you
5 want me to be, Mr. Chairman?

6 CHAIRMAN SOULES: Well, by way of
7 scheduling, I thought we might spend as much as all
8 morning on the harmonized rules, if we have that
9 much interest and attention and input from you.
10 It's a good work product. Bill, I think perhaps
11 you need to point out the problems that you see
12 with it and the vacancies that are in it, so that
13 we can do that. If we're through with this early,
14 we'll try to get the rules of evidence done as well
15 before the noon break and then take this
16 miscellaneous agenda this afternoon through our
17 5:00 o'clock cocktail hour. And we are going to be
18 honored by the Supreme Court of Texas at a
19 reception at 5:00, which will be right across on
20 the other side of this first floor of the Bar
21 Building.

22 MR. O'QUINN: Bill, when you go through
23 it, I'd appreciate it if you would highlight for us
24 anything that would represent a change in the way
25 we do appeals on the civil side, anything that

1 would involve something, not just mere form, so I
2 could understand what things are different.

3 CHAIRMAN SOULES: I think just be as
4 extensive as you can be, Bill.

5 MR. O'QUINN: Whatever you feel would
6 result in any kind of substantial change in the way
7 we currently handle appeals that would protect the
8 appeals or perfect them or anything like that.

9 CHAIRMAN SOULES: For purpose of dealing
10 with this, I, as Chair, will just yield to Bill.
11 So that, as we go along, if you have questions at a
12 particular point, why don't you go ahead and raise
13 your hand and address it to Bill, so that he can
14 make those explanations or make notes to address
15 those problems. And if that takes the balance of
16 the morning, of course, it will be time well spent,
17 no doubt.

18 Thank you, Bill. Bill Dorsaneo.

19 PROFESSOR DORSANEO: Thank you, Mr.
20 Chairman.

21 As Chief Justice Guittard indicated, the
22 major change, if you could even call it a change,
23 is organizational or structural. You may want to
24 turn to the one page sheet with the lable "Plan" on
25 it, which follows the table of contents, in order

1 for me to give you an idea of the structure.

2 The principal difficulty in harmonizing the
3 Civil Appellate and the Criminal Appellate Rules
4 that we encountered at the outset was somewhat of a
5 surprise to me, but it basically involved the fact
6 that although our Texas Appellate Rules have been
7 redrafted, modernized, made more workable over the
8 years, the structure of the rule book has not had
9 its integrity preserved since the time that the
10 Rules of Procedure were adopted initially. By way
11 of amendments over a period of years, things kind
12 of got put in odd places, such that if someone sat
13 down to read our Rules of Appellate Procedure
14 today, without any prior knowledge of how things
15 work, you would end up with a lot of confusion in
16 your mind. A few little minor examples.

17 We all know how important Rule 21c is. 21c
18 is not even in the appellate rules. Moreover, it
19 is not in the general rules for the Texas Rules of
20 Civil Procedure. It happens to be in the part of
21 the rule book that deals with the rules for
22 district and county courts.

23 Rule 18b, Refusal of Justices of Courts of
24 Appeals. The Supreme Court, where is that? It's
25 up in the front of the rule book, also, not even in

1 the general rules.

2 If you would go and take a look at the
3 appellate rules in part three of the Rules of
4 Procedure, you would find a very large section
5 dealing with proceedings in the courts of appeals.
6 That section does not appear to me today to have
7 any particular coherency or order, primarily as a
8 result of amendments, repeals, changes. That has
9 caused us some problems in the past. You probably
10 remember the revisions to Rules 386 and 387. It
11 just so happened that there was a Rule 437 some
12 distance away in the rule book. It took the
13 Supreme Court and the rest of us some time to
14 recognize the inconsistency and decide what rule
15 would be the appropriate one to choose.

16 So, the first thing that we had to do,
17 because it would be quite difficult to mesh in
18 criminal appellate practice with disorganized civil
19 appellate practice, was to develop a structure.

20 The structure is in this plan, and it really
21 is fairly simple. Section 1, Applicability of
22 Rules is just a general section. It probably could
23 be reworked some, but it basically doesn't need to
24 be gone into.

25 Section 2, General Provisions, this follows

1 the pattern of the Federal Rules of Appellate
2 Procedure by having a set of general provisions
3 that don't necessarily fit into a particular place.
4 Virtually all of those general provisions rules are
5 verbatim copies of existing Rules of Civil
6 Procedure, with a very few changes that wouldn't
7 affect civil cases; adding in information dealing
8 with criminal cases, such as terminology,
9 definitions, uniform terminology. There is some of
10 that in criminal cases.

11 There really isn't anything, in my
12 recollection at this point, in Section 2 that you
13 haven't seen before with the possible exception of
14 Rule 5, which relates to a difficult problem area
15 and what is currently Rule 306a. The rule -- if I
16 had to pick something in Section 2, and I think it
17 would be the only thing that I would pick, Rule 5
18 would be something that deserves study and
19 additional work primarily because I think Rule 306a
20 still needs it. And it is a very difficult problem
21 that we didn't really attempt to resolve in this
22 reorganization.

23 CHAIRMAN SOULES: Generally, what's the
24 nature of that problem, Bill?

25 PROFESSOR DORSANEO: Luke, I really would

1 rather not get into it because I don't think there
2 is a way into it and out of it with any kind of
3 dispatch.

4 CHAIRMAN SOULES: All right.

5 PROFESSOR DORSANEO: One thing about
6 Section 2, we didn't put all of this business on a
7 computer to go through and check and double check
8 to see whether there are any other things that
9 ought to be in the General Provisions.

10 Undoubtedly, there are things that ought to be
11 added. There are other rules in this book that
12 haven't found their way into Section 2 that
13 probably ought to go there. That would be
14 especially true in the rules in the early -- the
15 late 200s and the early 300s where some of that
16 information is going to need to be put in Section
17 2. But the general provisions don't require a lot
18 of conversation either.

19 Sections 3 and 4 are really the main
20 sections, substantively. And if you'll look,
21 perhaps now, at the Table of Contents, you will
22 note that there is, or I hope there is logic in the
23 organization of Sections 3 and 4.

24 We talk first about how the appeal is filed
25 or perfected. There is a special rule for appeal

1 by writ of error in civil cases. Basically,
2 Section 3 attracts, perhaps not always verbatim,
3 existing Rules of Civil Procedure, but tries to
4 organize them in a more logical fashion. And if I
5 had to pick one rule in Section 3, and I would pick
6 it, that is, it deals with a difficult problem area
7 that will require, I think, additional work and
8 discussion, it would be Rule 32. Now, let me talk
9 about that for a minute.

10 You are familiar with Rules 372 -- existing
11 Rules 372, 3, whether you know their numbers or
12 not. I'll talk about it in a minute. 372 and 373
13 and also 3 -- a little bit of 376, these are the
14 rules that deal with bills of exception. 372 deals
15 primarily with form of bills of exception. 373 is
16 the rule that says that exceptions are not
17 necessary. A rule which provided useful
18 information to a lawyer who practiced in the 1940s,
19 probably provides us with interesting historical
20 information.

21 What Rules 372 and 373 do not currently do
22 and what the Rules of Evidence also do not do, is
23 set up a procedure to tell the lawyer how to make a
24 bill of exception, I'll call it an informal bill of
25 exception. We have the Rule of Evidence 103,

1 Professor Blakely can correct me if I'm wrong, and
2 I would hope he would, that says, "Offer approved.
3 Okay. Unless somebody complains, then question and
4 answer bill of exceptions." But the Rules of
5 Evidence don't tell us how to do that. The Rules
6 of Procedure don't tell us how to do it either, it
7 kind of falls between the rule books. Principally,
8 under the handy work of Carl Daley, we attempted to
9 deal with that problem, so a lot of Rule 32 is new,
10 whereas most of the rest of Section 3 is not new,
11 with a few little exceptions.

12 JUDGE HITTNER: Bill, let me ask you a
13 question. The Chairman's letter, which we
14 received, referred to a new proposed Rule 364(a),
15 the Stay of Enforcement of Judgments Pending Appeal
16 in Rules of Supersedeas Bond. I notice your Rule
17 27, looking through it, deals with Supersedeas
18 Bond. I guess you didn't touch the proposed new
19 Rule 364(a) in your draft, is that correct?

20 PROFESSOR DORSANEO: No, Judge, we didn't
21 have that at the time. I don't know what we would
22 have given our charge, which was to harmonize and
23 make as few changes as possible. We probably
24 wouldn't have put that in there anyway.

25 CHAIRMAN SOULES: Judge Hittner, that

1 rule came up through the Committee on
2 Administration of Justice at about the same -- in
3 about the same time frame that the appellate rules
4 were being developed. That rule clearly
5 contemplates a change, the proposed 364(a). There
6 are changes in them, but that was not the principal
7 purpose of the appellate effort.

8 Rusty?

9 MR. McMAINS: Point of fact, Luke, I
10 think. There were some rules changes that came out
11 in March that are also not in -- not reflected in
12 these because this document was done before then.

13 CHAIRMAN SOULES: Thank you.

14 PROFESSOR DORSANEO: A few other comments
15 about Section 3, and I'll try to be brief. Some of
16 the other little changes, to give you an idea, are
17 really of this kind of nature. In the rule for
18 perfecting an ordinary appeal, when we went and
19 studied the matter, we noticed that under those
20 rare circumstances when an appellant perfects an
21 appeal by giving notice of appeal, that although
22 the rules provide for a motive, if you're
23 perfecting an appeal by posting security, that you
24 can reasonably explain late filing. Am I getting
25 my point across? Someone who had to perfect an

1 appeal by posting a bond or making a cash deposit,
2 could, under existing rules, not do that on time if
3 they filed a motion within 15 days and reasonably
4 explained why the appeal hadn't been perfected on
5 time.

6 If you were in a position of having to
7 perfect an appeal by giving notice of appeal, under
8 our current rules, you don't have that opportunity
9 to file a motion for an extension of time. It just
10 doesn't -- the extension procedure in existing
11 Rules 355 and 356, really 356, doesn't deal with
12 someone who perfects an appeal by giving notice of
13 appeal. When we reworked the appellate rules
14 before, obviously we weren't thinking about those
15 people, because -- well, I know from my perspective
16 they are never meek. So, those little kinds of
17 things that you notice years later come up, and
18 that's one of them. Another type of thing you'll
19 notice, there's, in Section 3, a provision called
20 Involuntary Dismissal, Rule 40.

21 Well, sometimes we change the title of rules,
22 in fact, frequently. The Involuntary Dismissal
23 Rule, I think, is current rule, without change,
24 387, which is entitled Dismissal or Affirmance on
25 Notice. The title doesn't really communicate very

1 much to me, and part of our idea was to have -- in
2 the organization was to have a structure and a
3 table of contents that someone could use, rather
4 than having you be in a position of knowing that
5 Rule 387 is the rule that deals with this problem.
6 I can't remember what the title is, but it's some
7 odd title; that kind of thing we tried to resolve
8 as well. We didn't change any of the components of
9 appellate practice. We didn't change any of the
10 timetables. I may -- I think those statements are
11 accurate. It's been a little while. We certainly
12 didn't plan to do it.

13 So, Section 3, with the exception of Rule 32,
14 I would say, shouldn't give practicing lawyers very
15 much trouble. They don't know the rules' numbers
16 anyway, very many of them. And it basically is the
17 same as it was, with some cleaning up.

18 MR. O'QUINN: Even as to Rule 32, I
19 briefly looked at it. It doesn't seem like it's
20 changed the practice.

21 PROFESSOR DORSANEO: Well, it depends on
22 what part of the state you're from, actually. And
23 a lot of times the practice doesn't conform to any
24 known law.

25 MR. O'QUINN: But as far as making the

1 bill is concerned.

2 MR. McMains: Well, except for -- there
3 is, bills made, a specific difference between this
4 and 103(a)(2) in the Rules of Evidence in that this
5 appears to authorize the judge to allow an offer of
6 proof by narration by counsel unilaterally,
7 regardless of whether the other side objects or
8 not. That's what this particular rule authorizes.
9 Now, was that -- I was not at the committee meeting
10 when that was done. Was that a conscious decision
11 or was it --

12 PROFESSOR DORSANEO: We recognized that
13 Rule 32 would probably need additional work and
14 input. And I know from my own perspective, my
15 attitude was, "Well now, we have a pretty good
16 start." But that's one of those rules that I think
17 may need some committee work or some additional
18 input along the way.

19 MR. McMains: That is a different --

20 PROFESSOR DORSANEO: Yes. Section 4,
21 dealing with -- consisting of three parts, dealing
22 with motions, briefs, arguments, admissions, has
23 some changes. I don't think that they're of
24 particular consequence, most of them, but I'll
25 mention a few of them anyway.

1 Rule 50, a rule on motions, is basically a
2 new provision. It doesn't suffer from the same
3 kind of problems as Rule 32 might. The reason why
4 it was added in is that we have no rule on motions
5 at all. We all know what a motion is supposed to
6 look like and what it's supposed to contain and
7 what it is, but there is no such rule in our Rules
8 of Procedure. So, we thought that the Federal
9 Appellate Rule 27, a pretty good rule, with some
10 provisions added which are in our Rules of
11 Procedure now, concerning notice of motions and
12 determination of motions. I don't think anybody
13 would be offended by the fairly innocuous
14 provisions of Rule 50, which tends to deal with
15 practices anyway, what the form book raised
16 following their form draft.

17 Rule 56 is also new. It is not new in a --
18 in one sense, that is to say, this subject is
19 ordinarily covered by local rules, how is your
20 motion for extension of time to be prepared, what
21 does it need to contain. But there is no rule like
22 that in the big rule book. So, some -- and this
23 one is fairly similiar, not surprisingly,
24 considering we panned it out to the Dallas Motion
25 for Extension Rule.

1 Rule 57, getting into briefs and arguments --
2 turn to that for a second. There are some definite
3 changes there, although only some of them are of
4 real consequence. To give you, the best I
5 remember, the details of that, Rule 57(b) -- this
6 is modeled on current rule -- what is it, Rusty? 4 --
7 414.

8 MR. McMAINS: It used to be --

9 PROFESSOR DORSANEO: 414 now. 414 and
10 old 418 said that you have a Subject Index at the
11 beginning of your brief. And, of course, that's a
12 Table of Contents, and we just thought that we
13 ought to call it a Table of Contents because the
14 Subject Index -- whoever did that initially, got
15 confused about what goes at the back of the book
16 and what goes at the beginning of the book. So
17 that kind of thing is changed.

18 MR. McMAINS: Actually it says both.

19 PROFESSOR DORSANEO: Well, I know. I
20 didn't want -- thinking there may be some logic to
21 this.

22 The Points of Error Provision, a very
23 important provision of the rule, also has been
24 changed. My recollection is that what the
25 committee would recommend is to go back to what was

1 and now repealed Rule 418, which didn't find its
2 way into the new brief Rule 414, probably as a
3 result of the fact that we had so much to do, it
4 dropped through the cracks, but I really don't know
5 why; and add in to the points of error provisions
6 of this proposed rule language allowing points to
7 combine several complaints. The language is meant
8 to be verbatim what was in Rule 418, which is
9 something this committee talked about some years
10 back and it disappeared on April 1, 1984. If there
11 was some reason why that disappeared, we didn't
12 know about it. And that is an important change.
13 Let me see if there is anything else on that.

14 There are so many things that you discuss,
15 and my memory gets foggy on this. I don't think we
16 changed anything in terms of page limits from
17 existing law, and those are the things that I
18 remember about the -- about the brief rules. But I
19 guess it's another one of those that ought to be
20 looked at because there were a lot of -- this is
21 more than just a verbatim reorganization kind of
22 thing.

23 The Argument Rule is basically the same. The
24 submission in the courts of appeals rules, one made
25 the most important change there, I think, involves

1 the addition of Rule 62, Panel En Banc Submission.
2 We have no such rule in the big rule book for civil
3 cases dealing with that. There is either -- there
4 is a criminal appellate rule that deals with that
5 problem, and we like it and basically revised and
6 changed it and put it in this proposal. That's the
7 major change.

8 Section 5 is not changed at all, except for
9 the fact that the rules concerning mandamus. Other
10 original proceedings in the intermediate appellate
11 courts are now there. Those were revised, as you
12 all remember not too long ago, by Chief Justice
13 Pope. And there is nothing wrong with those rules,
14 basically, and they are incorporated there.

15 Section 6, the Certified Questions Rules,
16 which you may recall, had themselves been revised
17 recently, principally by Chief Justice Guittard,
18 are contained in this package without change.

19 Section 7, Judgments, Opinions and Rehearing.
20 These rules, I recall, seem to me to be the most
21 clumsily worded rules in the appellate rules as
22 they exist today. And without getting into the
23 details, we tried to take the clumsiness out of
24 them and have them make sense. I would suggest
25 that they be looked at with some care because

1 although major substantive changes were not
2 intended, there was a lot of rewording going on in
3 trying to get the sense of what the rule was trying
4 to say. And it's possible to make a mistake, it's
5 possible to -- I don't think that happened, but I
6 would really want someone to look at those
7 carefully to be certain that something wasn't done
8 inadvertently.

9 Rule 9 -- which one is it now? Chief Justice
10 Guittard mentioned the Damages for Delay Provision,
11 Rule 94. That's a major change, taking the 435 and
12 438 and basically substituting, as he said, the
13 federal approach for that.

14 JUDGE HITNER: Would that knock out both
15 of those rules?

16 PROFESSOR DORSANEO: Yes.

17 JUDGE HITNER: Because some of the
18 appellate courts now are issuing -- what do you
19 call it, damages for delay on their own motion. I
20 had a couple of cases where they did it on their
21 own motion. Will they be able to do that, as you
22 see it, under Rule 94? Is there any change in the
23 case law or is this just broadening it out, the
24 authority of an appellate court to give damages for
25 frivolous appeals? It's on Page 120 --

1 PROFESSOR DORSANEO: First of all, it's
2 broadening it out, yes. Now, on the question of
3 the judge being able to do it on his own motion --

4 JUDGE HITTNER: A number of appellate
5 court opinions that I've seen on their own motion
6 have assessed a 10 percent penalty.

7 PROFESSOR DORSANEO: That's beyond what I
8 can say anything about. The main change from the
9 text of Rule 438 is the last part which authorizes
10 the court of appeals to award just damages in
11 single or double cost to the appellee. Are you
12 talking about trial judges?

13 JUDGE HITTNER: No, appellate judges on
14 the appellate court. When you use the word "and"
15 in there, meaning that they can assess damages not
16 necessarily restricted to 10 percent plus single or
17 double cost, is that your understanding on that?
18 The "and" in there? The very last line.

19 PROFESSOR DORSANEO: Yes, just damages.

20 JUDGE HITTNER: All right. Your feeling
21 is that this is stronger than the present rule as
22 we have it.

23 PROFESSOR DORSANEO: I think so, yes.
24 Don't you think so, Rusty?

25 JUDGE HITTNER: I would agree. I just

1 wanted to make sure that was your interpretation,
2 also.

3 PROFESSOR DORSANEO: That is one of those
4 policy decisions, very few of which were made by
5 the members of the committee.

6 MR. McMAINS: It actually weakens the
7 existing standard, in my judgment, actually. It's
8 now required to be frivolous. That language is in
9 there, it says, "taken without just cause."

10 MR. BRANSON: Bill, was it the
11 committee's intention that there be --

12 MR. O'QUINN: No, I think it's
13 substantive.

14 CHAIRMAN SOULES: Frank Branson has the
15 floor.

16 MR. BRANSON: Was it the committee's
17 intention that there be any limits on the appellate
18 courts' ability to award damages?

19 MR. O'QUINN: No remittitur.

20 PROFESSOR DORSANEO: I don't know how to
21 deal with that. Let's pass by later.

22 JUDGE HITTNER: For whatever it's worth,
23 it's my feeling that the appellate courts are just
24 getting flooded with frivolous appeals. And I'm
25 all for something like this, where they can really

1 tighten up on it. If someone has really got a
2 gripe, let them take it up; but if not, it really
3 ought to end at the trial court.

4 MR. McMAINS: I think the question is:
5 Is there any upward limit and where do you go if
6 the court of appeals decides that this is really
7 frivolous.

8 JUDGE HITTNER: I guess you go to the
9 Supreme Court.

10 MR. McMAINS: You get hit for a thousand
11 and they assess a million. I think that's
12 unlikely, but there are no restrictions on it at
13 this point.

14 JUDGE HITTNER: I'm not sure we need a
15 restriction, but I'm pleased to see that it
16 broadens that out.

17 MR. O'QUINN: So am I.

18 MR. McMAINS: And I know that it's
19 intended. I believe that the rule was, in fact,
20 intended to authorize the assessment of more
21 damages than there were awarded. Because it was in
22 small cases that were being appealed that were a
23 real problem.

24 JUDGE HITTNER: 10 percent of a thousand
25 dollars, you know, an extra hundred dollars,

1 meanwhile the man's waiting for his money down
2 below.

3 MR. McMAINS: That's right.

4 MR. O'QUINN: Great change.

5 PROFESSOR DORSANEO: Can I get through
6 the end of this?

7 MR. BRANSON: I vote for that.

8 MR. O'QUINN: I'm ready to vote on that
9 rule.

10 MR. BRANSON: May I get a response from
11 my question?

12 PROFESSOR DORSANEO: I didn't understand
13 you, Frank.

14 MR. BRANSON: My question is, was there
15 any intention to having a limit of any kind, and is
16 it, I assume, reviewable by the Supreme Court?

17 MR. O'QUINN: Sure.

18 PROFESSOR DORSANEO: The intention was to
19 eliminate 435 and 438, which themselves were
20 somewhat inconsistent, and to take out this 10
21 percent figure that's in both of them, although
22 dealing with a different thing, and to substitute
23 the practice in the federal system, which was
24 thought to be more liberal and flexible, and would
25 require judicial interpretation as to what that

1 means, "just damages."

2 CHAIRMAN SOULES: No arbitrary limit,
3 Frank.

4 MR. BRANSON: That's all I was asking.

5 CHAIRMAN SOULES: No arbitrary limit.

6 MR. McMAINS: There is no limit.

7 MR. O'QUINN: It would have to be just.

8 PROFESSOR DORSANEO: On the balance of
9 it, Rule 100, Opinion Publication and Citation, I
10 don't remember the citation part. It's something
11 you may want to look at. The rules on publication
12 of opinions have been somewhat controversial. And
13 the rules themselves in this area were different.
14 Let me back up one second.

15 In many instances, there are no criminal
16 rules dealing with particular types of problems or
17 subjects. In this instance, there were complex and
18 detailed rules concerning publication of opinions
19 and things of that character in the Code of
20 Criminal Procedure, I believe. So, Rule 100
21 borrows some from that and retains some of Rule
22 452, I think. It's a combination thing, and that
23 may be something you want to look at with care.

24 JUDGE HITNER: Has any thought ever been
25 given to attorneys' input as to whether or not a

1 case should be published or not?

2 PROFESSOR DORSANEO: I don't know.

3 MR. McMAINS: It depends on whether
4 you're a winner or loser.

5 MR. TINDALL: You can wage a campaign
6 with a bunch of lawyers --

7 MR. McMAINS: Luke, my principal concern
8 with the entire concept of non-published opinions
9 is that -- in spite of the fact I realize it
10 shouldn't be published, I mean, we try and not clog
11 the books with unnecessary opinions -- there needs
12 to be some, in my judgment, centralized
13 identifiable location of where opinions and
14 judgments affecting particular parties may be
15 indexed and found, particularly with the advent in
16 continuing decision making in collateral estoppel
17 areas, for instance, and that sort of thing in
18 which it doesn't matter whether it's important to
19 the jurisprudence. It may be important to
20 determine a collateral issue that's involving a
21 piece of property or another party or something
22 else. And I don't have any great recommendations
23 as to where to do that, and I realize that means
24 keeping more paper than one wants to do. But there
25 should be, it seems to me, an availability of being

1 able to find out where those opinions and judgments
2 are.

3 JUDGE HITTNER: Of course, isn't it
4 California -- the Supreme Court of California can
5 order an opinion unpublished? I believe the
6 Supreme Court in California can order a published
7 opinion unpublished.

8 MR. McMAINS: I have also heard input
9 from the -- from other people in the Bar that they
10 consider the non-publication of their opinions a
11 deprivation, as it were, of some rights to an
12 otherwise convent in a subsequent case. They may
13 have a case in which they got one decision that was
14 unpublished and a second case in which it is
15 published, and now these rules say you can't cite
16 the prior case which would give you Supreme Court
17 jurisdiction under Article 1728, Section 2.

18 And there -- I know a number of lawyers that
19 actually raised that complaint and gotten it
20 through, but they still tend to ignore it. But I
21 think it is not just enough to say we're going to
22 allow people not to publish opinions, just kind of
23 hide them out in the closet. There really needs to
24 be some more input, I think, into that rule.

25 CHAIRMAN SOULES: To that end --

1 CHIEF JUSTICE POPE: May I comment?

2 CHAIRMAN SOULES: Chief Justice Pope.

3 CHIEF JUSTICE POPE: This is a rule that
4 has been discussed and debated on the National
5 scales. Texas is very late in coming through with
6 a rule that limits publication. Put a pencil to
7 it. I don't know what it is now, but 10 years ago
8 it cost \$200. Every time a judge writes an
9 opinion, he's sending a collect telegram to the
10 lawyers of Texas, collectively, for about \$300 a
11 page.

12 This last week I took up a challenge and read
13 a letter -- and wrote a letter to a friend of mine
14 calling his attention to an opinion that was
15 written by one court of appeals in Texas that had
16 one sentence that had 347 words in it. One
17 sentence. Of course, that's not the record. The
18 record is in excess of 800 words. Now that type of
19 thing just is costly to the lawyers. It's
20 destroying the profession and it's a matter that
21 has been thoroughly discussed and debated on by the
22 Appellate Judges Conference of the American Bar.
23 This limitation of the citation of cases is almost
24 unanimously accepted over the United States. Now,
25 of course, on collateral estoppel or something like

1 that, that's a matter that is a matter of proof,
2 not a matter of precedent. But if we start -- if
3 we have a rule, I mean this is a thing that's been
4 thoroughly discussed by this committee two or three
5 times before we ever came around to doing this.
6 It's a policy matter.

7 The question that you raised, Rusty, I know
8 is out there. Of course, all of these decisions
9 are available. You can find extracts from them in
10 the trial of this new publication or you can find
11 the briefs of them in all of the -- in the Weekly
12 Digest of cases. But it's just a policy thing
13 that's either one way or the other. But the
14 alternative is we're making dinosaurs of our law
15 libraries, and we're going to perish.

16 MR. McMAINS: I'm not suggesting that we
17 provide that -- I am in favor by any means of
18 requiring publication in all cases or even
19 authorizing any kind of review of the decision to
20 publish or anything like that. All I'm saying is
21 that I think it is important to the legal community
22 in a number of different contexts to have access to
23 some system to get to the unpublished opinions. I
24 believe, frankly, that probably a private publisher
25 would be willing to do it, you know, without any

1 kind of state funds or anything else, if he were
2 encouraged to get something together. And people
3 could send their unpublished opinions to him and
4 then forget it. And, you know, they could do a
5 private indexing and private charges.

6 But there are a number of different relevant
7 reasons, I think, why general access by the lawyers
8 in the state to knowing the parties involved and
9 results of judgments that they may know occurred
10 and they just can't figure out what happened.
11 There are a lot of times trial court records are
12 sealed. There are all kind of ways.

13 CHIEF JUSTICE POPE: I have no question.
14 As a matter of fact, I rather suspect that that's
15 being done today. Just don't cite them to the
16 court. That's the only thing --

17 MR. McMAINS: I don't have any problem
18 with that, but that's all I'm saying, though, is I
19 think that there needs to be some -- we need to
20 figure out some way that we can get these things
21 indexed and centralized. Whether or not we do it
22 or get it done --

23 CHIEF JUSTICE POPE: Is that the function
24 of this committee? I would think not. I would
25 think that if they want to do that just as a matter

1 of general knowledge and information, it's all
2 right. But the reason the court says don't publish
3 this thing is that it's already been tread 150
4 times.

5 CHAIRMAN SOULES: Judge, that's not the
6 standard for not publishing.

7 MR. McMAINS: Let me suggest something
8 though, Judge. The one problem that we have is
9 that there are some judges that don't publish
10 opinions because they don't want to be embarrassed
11 by the result, or at least that is the general
12 suspicion as to why they don't. They may be going
13 out on a limb to accomplish a particular result;
14 and by not publishing it, they figure they have a
15 better chance of getting it in.

16 And I merely mentioned that, and with no
17 reviewing ability, no standard or no place to go on
18 the publication decision, then all those things in
19 the closet basically just stay in the closet and
20 you've got only one person that's got the key. And
21 I suppose that's my basic concern. It's both
22 legal, it's political and it's practical because
23 there are -- I realize we've now done away with the
24 venue practice, appeal-wise, but there were a
25 number of times when I saw lots of very strange

1 decisions on venue cases that were unpublished and
2 they were designed largely to accomplish a result.

3 CHAIRMAN SOULES: Harry Reasoner.

4 MR. REASONER: Well, I think one
5 difficulty with Rusty's suggestion is that the
6 tendency of all of us as lawyers is to try to
7 collect unpublished opinions and cite them, use
8 them, whether the courts publish them or not. And
9 I think the great difficulty they've had is the
10 Ninth Circuit, which is one of the earlier circuits
11 to really start a lot of unpublished opinions, is
12 the continuing attempt of the Bar to rely on them.

13 And I would suggest that any practice of
14 centralization and indexing is first. We're all
15 going to buy them and have them in our libraries,
16 so we want to accomplish the economies involved
17 there.

18 And secondly, you just encourage the Bar to
19 continue to try to rely on them and use them in the
20 appellate courts, whether the appellate courts say
21 not to or not.

22 And I have the same instinct that I suspect
23 Rusty does, if the judge doesn't publish it, I
24 might say I'll use it if it's ever useful to me.

25 CHAIRMAN SOULES: Frank Branson.

1 MR. BRANSON: By not addressing the
2 matter in some format though, aren't you really
3 encouraging the abusive system that Rusty
4 described?

5 MR. REASONER: I'm not sure I understand
6 what the abuses are. Collateral estoppel, I agree
7 with Judge Pope, is a matter of proof. And in any
8 case where you're litigating, where you suspect the
9 possibility of collateral estoppel, you'll get it
10 on discovery of proof.

11 JUDGE HITNER: I think what Rusty is
12 saying is that in marginal opinions, the marginal
13 reasons of things that a lot of people wouldn't
14 agree on if it got published, it's unpublished, and
15 it's literally buried, but it sure hurts those
16 folks that get stuck with it.

17 CHAIRMAN SOULES: To that end -- and I
18 don't know whether this has ever been addressed --
19 given Rusty's example, where conflict is the only
20 ground that that party has for asserting
21 jurisdiction in the Supreme Court of Texas, without
22 that ground, there is none. And a rule that says
23 that the parties seeking jurisdiction can't cite
24 the unpublished case where there is a conflict in
25 the courts of appeals, then that conflict statute

1 doesn't say "in published opinions", that I know
2 of. He can't cite that case, therefore he's denied
3 access to the highest court in the state. To me
4 that reaches constitutional proportions.

5 Even, in my judgment, to say that you cannot
6 cite an unpublished opinion -- now that is a public
7 record of the state -- that you cannot cite it to a
8 higher court -- I realize they've got the right to
9 make their rules, but I don't believe that's
10 constitutional and I don't know whether that's ever
11 been looked at.

12 And apparently all of the big courts have the
13 policy of precluding citations, so I suppose if the
14 issue of constitutionality is addressed by those
15 courts, they're going to find out -- they're going
16 to rule that it's all right. But I'm just not so
17 sure that it is, that we can be tongue-tied by a
18 rule of court from citing a public record that is
19 precedent, that supports our client's position.
20 I'm on a soap box.

21 CHIEF JUSTICE POPE: Luke, I'm taking too
22 much of your time.

23 CHAIRMAN SOULES: No, you're not, Judge.

24 CHIEF JUSTICE POPE: You raised the
25 question of constitutionality. I'm not sure that

1 there is any constitutional requirement that there
2 be a written opinion by any appellate court. The
3 English precedent was that the judges ruled from
4 the bench and the people wrote it down in longhand
5 and that came to be the common law. But now on
6 this matter about there must be a conflict
7 expressed on the face of the opinion, which you're
8 aware that a smart court of appeals judge can write
9 an opinion and dispose of it without raising this
10 conflict thing at all, but that doesn't keep the
11 Supreme Court from looking at it.

12 Now, the requirement that the conflict must
13 appear on the face of the opinion, I don't think
14 that has anything to do with the publication of the
15 opinion or not, because the judge who's reviewing
16 it, he's got that written opinion before him. And
17 it's either a conflict on the face of the opinion
18 or not. What I'm saying is I don't see where
19 publication enters into that problem.

20 CHAIRMAN SOULES: Well, can they -- is it
21 permissible to cite the unpublished case for
22 purpose of establishing a conflict to get
23 jurisdiction or is that an exception to the rule
24 prohibiting citation, is my point. I don't know.

25 CHIEF JUSTICE POPE: No, I don't think

1 you can cite that unpublished account.

2 CHAIRMAN SOULES: Then how do you show
3 the conflict, Judge?

4 This is Orville Walker, Professor Orville
5 Walker.

6 PROFESSOR WALKER: This case has been
7 decided 150 times. You don't need that case to
8 have a conflict. You've got 150 other cases or 149
9 to show the conflict. Why would you have to have
10 that one?

11 CHAIRMAN SOULES: If the court of appeals --

12 PROFESSOR WALKER: It's already been
13 decided so many times, it's repetitious, adds
14 nothing to the jurisprudence of the state. You
15 don't need it to show conflict.

16 MR. McMains: The point I'm making is not
17 in the dominant number of cases in which there is a
18 fairly standard non-controversial appellate point
19 or substantive point or wholly factual point.
20 There's no significance to the jurisprudence of the
21 State. There are cases coming down virtually every
22 week, in my judgment.

23 The courts of appeals in this state, on
24 controversial subjects with controversial holdings,
25 where they published that would be controversial

1 that are buried in the back room and appear only on
2 the desk of the Supreme Court, who gets no help on
3 the controversy because nobody knows it's there.
4 It gets to them before anybody in the Bar, apart
5 from lawyers involved immediately in that case,
6 know anything about. And it has a way of finding
7 its distribution among certain people, whoever it
8 favors in a certain class of that type of
9 practitioners, and is not widely disseminated, not
10 widely debated, and it is a suppression of certain
11 very controversial areas by procedural trick, as it
12 were.

13 And I wish that that weren't going on. I
14 know it does go on. I've seen it in cases on both
15 sides. And I have also, when the publication rule
16 first came in, I had a court of appeals in Houston
17 that wrote on what I felt was a very unique point.
18 I actually won, so I didn't care whether it was
19 published or not, but it was 28 pages long. And
20 it's the only decision in the state that I could
21 find because I was making an extension order on a
22 very controversial issue and it doesn't appear
23 anywhere in the books. And the reason was it was
24 somewhat embarrassing to the lawyer on the other
25 side, I think. And as a matter of politics, they

1 decided they were already pouring them out. There
2 was no reason to make it worse by publishing it.
3 But if that practice did not go on, I don't have a
4 problem. But that's my concern, and I don't know
5 what the answer to it is because I also realize the
6 paper concerns.

7 CHAIRMAN SOULES: I think we've got the
8 issue pretty well drawn between Rusty and Justice
9 Pope and the other comments that are here.

10 And, Justice Pope, would you like a
11 rejoinder? I want to take a consensus as to
12 whether or not we feel that this needs to be
13 reviewed in any way or whether we're pretty well
14 going to go along with it like it is for now.

15 CHIEF JUSTICE POPE: No, I don't. As a
16 matter of fact, my only point is that this is not a
17 new matter. It has been frequently debated. And
18 unless there is some public emergency of some kind,
19 I think that it's a fair system and that our system
20 just has to simplify itself.

21 CHAIRMAN SOULES: Let me get a consensus
22 on this because I know the committee's going to
23 need some guidance. How many feel that we're --
24 put it this way, we're going to have to live with
25 what we have and we don't need to try to reorganize

1 the unpublished opinion practice, or we are going
2 to have to live with it like it is now?

3 JUDGE HITTNER: Mr. Chairman, I've got
4 one question in my mind.

5 CHAIRMAN SOULES: All right. Judge
6 Hittner.

7 JUDGE HITTNER: I just talked to
8 Professor Dorsaneo. Apparently the policy is or
9 the rules are, that unless a writ of error -- is it
10 true that unless a writ of error is granted, the
11 Supreme Court cannot or will not order an opinion
12 published? Is that -- Justice Wallace?

13 CHIEF JUSTICE WALLACE: Say that again,
14 David.

15 JUDGE HITTNER: In other words, if an
16 unpublished opinion comes up to the Supreme Court,
17 whether you grant writ or not, can the Supreme
18 Court order something published that's not
19 published?

20 CHIEF JUSTICE HILL: Yes, we did that
21 just the other day.

22 JUDGE HITTNER: I remember reading.

23 CHIEF JUSTICE HILL: But to send a
24 message out in the discovery area, we've been --
25 this was a dismissal.

1 JUDGE HITTNER: Was that the writ refused
2 case?

3 CHIEF JUSTICE HILL: It dismissed the
4 plaintiff's cause in a malpractice case because
5 plaintiff persistently refused to comply with the
6 discovery. And the sanction was, of course, a
7 harsh one, the harshest of all, and that was to
8 dismiss the case. And we ordered it published and
9 writ refused it, which both is unusual.

10 As you know, we probably have a reputation as
11 being maybe too much of an NRE court, but certainly
12 when we say "writ refused", that is a clear
13 message, the clearest sort that we knew to send.
14 And we did order it published so that the Bar would
15 know that not only are there sanctions to be
16 employed in the violation of the spirit of our
17 discovery rules, but there is severe penalties.
18 So, yes, we did that and we would do it in a
19 situation where we felt there was some overriding
20 reason, but it would have to be a strong one.

21 CHAIRMAN SOULES: Frank Branson.

22 MR. BRANSON: Mr. Chief Justice, is there
23 a mechanism by which the trial lawyer can request
24 the court overrule the civil appeals court and have
25 the opinion published without regard to the effect

1 on the appeal to the Supreme Court? Let's assume
2 that it's an opinion, as Rusty described. It is
3 not one that has come down hundreds of times
4 before. And in order to avoid the injustice of
5 having a unique point buried in smokey-filled back
6 rooms of some intermediary court of appeals, would
7 it be possible to create, if the mechanism is not
8 present, another review in those extraordinary
9 circumstances?

10 CHIEF JUSTICE HILL: Oh, sure. You can
11 create whatever you want to create out of that. We
12 make the rules. The thing that we've got to keep
13 in mind is that we're basically talking about the
14 integrity of the Court of Appeals of Texas.
15 Because if the integrity factor is there and it's
16 complied with as intended, I don't think we get
17 into those kind of problems.

18 I think what -- the thing that's painful is
19 that the point that's being made is, you can't
20 spell it out any other way and make it smell any
21 different than that some judges are being thought
22 to have failed to publish opinions for the wrong
23 reasons. And I don't know, I'd like to think that
24 isn't true, but I'm not naive. And if it is, I
25 guess the one thing to do is for us to try to see

1 that we get the message out at judicial conferences
2 and around that let's do this thing the way it's
3 intended, and truly not publish when it falls
4 within the Judge Pope 150 times it's been written,
5 no need to junk up the place with it. But not do
6 it for other reasons. That's certainly one way to
7 approach the problem.

8 I don't know what we would do, frankly,
9 Frank, with your suggestion. That would be a court
10 policy, a court decision, and we've never discussed
11 it. I'd like to keep where we are if we can and
12 solve the problems that are being discussed. I
13 think there is some merit to the points that are
14 being brought forward, but I certainly share Judge
15 Pope's view that we can't go back over this ground
16 totally again because we've just been over it too
17 many times.

18 Why don't we just -- let us work with it this
19 year. I've heard the discussion and see what we
20 can do in terms of trying to investigate and see
21 really how prevalent the matter of abuse is. And
22 then we'll talk about it at the conference in
23 September and certainly get it out in a workshop
24 atmosphere and dust it off. And then if anybody's
25 got any suggestions about what we might do in a

1 given case -- that sure would be hard to implement,
2 it sure would be difficult. I guess I'm just not
3 looking for any new work right now.

4 CHAIRMAN SOULES: Well, these rules do
5 provide that upon the grant or refusal, regardless
6 of what notations are made pursuant to the refusal,
7 that the Supreme Court may order an opinion
8 published. Now, these proposed rules --

9 CHIEF JUSTICE HILL: You can correct me.
10 I don't remember seeing a request from the
11 participants in the litigation. I'm sure there
12 would be nothing to foreclose that. But I -- have
13 you seen any?

14 MR. BRANSON: So, you're saying that the
15 rules are sufficiently broad to allow that
16 currently?

17 CHAIRMAN SOULES: Well, the rules that
18 are being proposed now, the harmonized rules, have
19 this -- let's see, it's on Page 132.

20 JUDGE HITTNER: Isn't it H?

21 CHAIRMAN SOULES: It's part of Rule 100
22 that starts on 131 and it's Subsection H of that
23 rule that appears towards the bottom of 132 and
24 says, "Upon the grant or refusal of an application
25 for writ of error whether by outright refusal or by

1 refusal of no reversible error an opinion
2 previously unpublished, shall forthwith be released
3 for publication if the Supreme Court so orders." If
4 that stays in, it would be a signal. I don't know
5 why "want of jurisdiction" and all the other
6 notations that they can put on refusals is not a
7 part of that. There may be a reason for it or
8 there may not, if so, they may get included. That
9 is suggested and, of course, it is the practice, as
10 we know, and you recently did it. So, it properly
11 should be in the rules if it is in practice.

12 CHIEF JUSTICE HILL: It should be. And
13 with nothing foreclosed, you're doing what Frank
14 Branson has suggested in a given case. Maybe we
15 need a little bit of a signal. Some lawyer in the
16 case feels that it should be published and sets out
17 some reasons for it. I don't know that that would
18 make any difference with us, but they might try it.

19 CHAIRMAN SOULES: How many feel that a
20 lawyer, not intending to appeal the result of a
21 case, or party, should have some new procedure not
22 -- that does not now exist, because we would have
23 to create a new procedure to seek that the Supreme
24 Court order that the court of appeals' opinion be
25 published? How many feel that that's --

1 MR. ADAMS: You're talking about
2 something broader than Rule H.

3 CHAIRMAN SOULES: I think that's what
4 Frank Branson is talking about. I'm not
5 complaining of the judgment, but I want my opinion
6 published.

7 MR. BRANSON: I'll be honest with you,
8 Luke. I wasn't aware of the provisions in Section
9 H, but I'm --

10 CHAIRMAN SOULES: You're satisfied with
11 that?

12 MR. BRANSON: Yes, I am.

13 CHAIRMAN SOULES: If we put maybe WOJ I
14 don't know what other notations should be in there,
15 but there are other notations behind refusal that
16 might should be considered. Would that satisfy you
17 if we go that far?

18 MR. BRANSON: Yeah, I think provision
19 Rule H, now that I have analyzed it, is broad
20 enough to cover the problems that I had. And any
21 of the true inequities that Rusty is talking about
22 should be addressed.

23 CHAIRMAN SOULES: That seems like a
24 consensus. If there's any objection, just let me
25 hear it now. All right.

1 How many then feel that with that Subdivision
2 H in the proposed rules, and should it be adopted
3 by the Supreme Court, that we'll just have to live
4 with it as it is beyond that? Show me by a show of
5 hands so I can see a consensus. Okay.

6 How many feel that there should be changes
7 beyond that on the unpublished opinion practice?
8 Jim Kronzer.

9 MR. KRONZER: I've always felt that the
10 court should order the publication of any opinion
11 of a court of appeals upon which they place their
12 imprimatur refused. Because that still means that
13 that is their opinion. And this still gives them
14 discretion to do it or not to do it. And I don't
15 think they should have the discretion where they
16 are outright refusing it. They may say they'll
17 always exercise it for publication, but I don't
18 think they should have that discretion.

19 CHIEF JUSTICE HILL: I agree with that.
20 I think the Court would agree with that.

21 CHIEF JUSTICE POPE: I can't think of an
22 instance where we refused. As a matter of fact,
23 it's real difficult to remember an instance when we
24 refused a case. But I can't think of an instance
25 where we ever refused a case where we didn't order

1 it published if it were unpublished.

2 CHAIRMAN SOULES: Bill, can you write
3 that in at the back?

4 MR. KRONZER: Another instance, I feel
5 that when the Court grants and writes an opinion,
6 then I, at least in my judgment, I feel that the
7 opinion of the court of appeals should be
8 published, and I believe that for two reasons.
9 One, it gives you a chance to fully flush out what
10 the court is meaning and doing with its activity.
11 And the other is it makes court of appeals'
12 justices be a little more careful about what
13 they're writing, doing and saying.

14 CHAIRMAN SOULES: Maybe that's a safety
15 valve.

16 CHIEF JUSTICE POPE: May I disagree with
17 that?

18 CHAIRMAN SOULES: Yes, Judge.

19 MR. KRONZER: Certainly.

20 CHIEF JUSTICE POPE: A court of appeals
21 writes an opinion that's wrong and supposedly the
22 Supreme Court is going to give a fair statement of
23 what the facts are and what the arguments are and
24 going to reverse it. What does it contribute to
25 the law to have a 32-page opinion? I can give you

1 the case for that. That has been reversed where
2 the reasons have been stated why it's reversed.
3 Which one is the law? It's the Supreme Court
4 that's the law and so, we are just charging the
5 lawyers for the cost of a non opinion.

6 CHAIRMAN SOULES: Mr. Kronzer, a
7 rejoinder?

8 MR. KRONZER: Only in this respect. When
9 the Supreme Court speaks from Mount Olympus,
10 sometimes they speak more cryptically, particularly
11 in Rule 483 cases, than people would like for them
12 to do. And if you're trying to get meaning out of
13 action by the Supreme Court, I believe that you
14 very often can get syntax, context and meaning out
15 of what they have done through that court of
16 appeals. That's what I believe.

17 CHAIRMAN SOULES: In order to have
18 guidance for the draftsmen, how many feel that we
19 should at least explore the --

20 MR. KRONZER: I'm only talking about
21 where there has been a grant and an opinion.

22 CHAIRMAN SOULES: Okay. In order to get
23 guidance for the draftsmen who will be bringing
24 these proposed rules back, let's get a consensus on
25 that. How many feel that the draftsmen should at

1 least approach and attempt to draft, whether we
2 adopt it or not, not only that refused writs have
3 to include the publishing of an unpublished
4 opinion, but that writs granted and opinions
5 written should carry with that the responsibility
6 of publishing the lower court's opinion? How many
7 feel that way? Let's see a consensus. Or they
8 should at least draft it? Ten. How many feel the
9 other way about that? Eight. It's about even.

10 So my ruling is that we draft that in so
11 we'll have another look at it whenever we meet
12 again to really pass on these in a final way. And
13 whether it's our judgment then to recommend it or
14 not, at least we'll have it before us. I think the
15 vote was ten in favor and nine against. But that's
16 too narrow of a majority rule to make it for sure
17 one way or the other, in my judgment, at this
18 meeting.

19 Yes, Harry Tindall.

20 MR. TINDALL: Could I ask about Rule 32?
21 That's a long complicated rule, and I've not had
22 the opportunity --

23 CHAIRMAN SOULES: Bill, have you finished
24 going through them and then we'll go back. Bill?

25 MR. TINDALL: Okay. I'm just asking,

1 structurally, though, is this a rule that even
2 belongs in what we're reviewing? It seems to me,
3 as I read through this, that it almost deals
4 entirely with the trial of the case and what you're
5 doing at the trial level and more goes into the
6 Rules of Evidence. Because once the judgment's
7 signed, your deal is done. Then you can start
8 looking at the Rules of Appellate Procedure. And I
9 know you can -- a lot of things can
10 jurisdictionally fall into either set of rules, but
11 this seems to fall more heavily into the Rules of
12 Evidence more than the Rules of Appellate
13 Procedure.

14 CHAIRMAN SOULES: Let me set that aside
15 because I do want to give Bill a chance to get all
16 the way through the rules now instead of going back
17 to 32.

18 Bill, have you been pretty well through these
19 or do you have some --

20 PROFESSOR DORSANEO: Well, I have a few.

21 CHAIRMAN SOULES: We'll go back to
22 anything anybody wants to raise here. Since we're
23 past that, I'd like to -- well, we're back into
24 Rule 100 now.

25 Are you not there?

1 PROFESSOR DORSANEO: In this Section 7,
2 while listening to the discussion -- basically,
3 much of Section 7 involves a lot of reorganization,
4 rewording, it's not intended to be a substantive
5 change. My recollection is that a lot of it was
6 done at the committee meetings. I did a lot of the
7 drafting without benefit of a lot of input, and I
8 would say that virtually all of Section 7 needs to
9 be looked at with some care. It is not verbatim
10 what the current rules are. A lot of it is, but
11 some of it isn't.

12 My last comment is that the rehearing rule,
13 obviously an important rule, is one that underwent
14 a lot of language change, principally, as a result
15 of harmonization. Apparently, the Court of -- in
16 criminal practice you file a motion for rehearing,
17 there is an actual rehearing, and then there is a
18 judgment, as opposed to our more normal practice of
19 filing a motion for rehearing and there not being
20 any resubmission or anything like that. So, the
21 rule was drafted to kind of segment that out
22 logically. So, you have a judgment, a motion for
23 rehearing. If the motion's granted, there is a
24 resubmission which may involve argument or may not
25 involve argument and then there's another judgment.

1 Nothing would change the civil practice, but
2 the language of the rule now seems to make a bit
3 more sense, as the criminal rules do, in this area.
4 It's unusual for them to make more sense than the
5 civil rules, but they sometimes do.

6 A few other comments. Where do these rules
7 begin and end? This is an important problem area.
8 These rules -- I'll talk about the end first.
9 These rules do not cover proceedings in the Supreme
10 Court. They do not cover proceedings in the Court
11 of Criminal Appeals. Some minor work will need to
12 be done with respect to the Supreme Court rules.
13 Nothing of any major import would have to be done,
14 maybe just some changing numbers where there are
15 cross-references and things like that. I don't
16 know what would have to be done to the rules for
17 the Court of Criminal Appeals. Some of that would
18 need to be taken care of.

19 The harder part is the beginning. At our
20 initial meeting we had a hard time deciding what
21 the charge of the committee was. Where does
22 appellate practice really begin and where does it --
23 where does it begin? Does it begin with a motion
24 for new trial or are we meant to redo suggestion,
25 revision, reorganization of the motion for new

1 trial rules? Basically the decision was made that
2 this project would begin at the time the appeal was
3 perfected. You have to go back and figure when you
4 count from and that kind of business. But stated
5 simply, these rules do not -- these proposed rules
6 do not contain revisions or verbatim copies of
7 329b, 324.

8 Many of the rules, not too many, in the early
9 300s and some of the late 200s, will need to be
10 looked at.

11 It's similiar to what you're saying, Harry,
12 really, on rule -- this proposed Rule 32.

13 Why is it in there? Well, it's in there
14 because it has been in the preceding court of
15 appeals section of the rule book heretofore. Now,
16 maybe it shouldn't be in there, and there are some
17 things in the early 300s which are more appellate
18 oriented. And there are some rules in the early
19 300s which are going to need to be reworded even if
20 they stay there, because the rule deals with not
21 only activities in the trial court, but deals with
22 activities in the courts of appeals. Some rules
23 look in both directions, they look back to the
24 trial court and they look forward to the court of
25 appeals, and that needs work. And that's a fair

1 amount of work, and quite frankly, Carl and I were
2 not sure we wanted to do that until we knew whether
3 anything would come of anything. And that part of
4 the job still needs to be done.

5 My own view is that's probably the largest
6 part of the job remaining and frequently the most
7 difficult part because, if I can give my own
8 opinion, is that some of those rules in the early
9 300s really do need a little help. Even though
10 they have been -- some of them have been revised
11 recently, some of them haven't been dealt with
12 much.

13 MR. McMAINS: I notice in some of the
14 rules in the remittitur of practice, and that kind
15 of stuff that is discussed, used terminology that
16 does not appear anywhere else in the civil
17 practice. And it probably was because there was
18 some criminal input. But you talk, for instance,
19 when a case goes to the appellate -- is removed to
20 the appellate court before a remittitur is filed,
21 that language of removal to the appellate court
22 indicating mutual exclusivity of jurisdiction
23 doesn't appear anywhere in Texas civil practice
24 anywhere. It's in the remittitur rules that are in
25 there. I'm just -- is there anyplace else where

1 you're trying to suggest that once you get -- if
2 you go into the court of appeals book, you can
3 somehow terminate a trial court jurisdiction?
4 Because I don't think that was the intent of these
5 rules, but the implication is that once you get to
6 the court of appeals, anything you're going to do,
7 you've got to do there, you can't do it in the
8 trial court.

9 PROFESSOR DORSANEO: Well, this is a
10 problem in review. Rule 439 uses that term
11 "removed." And I didn't know that when you said
12 that until I looked, and it said "removed," that I
13 put that in there.

14 MR. McMANS: It's inconsistent with all
15 the revisions we did with 329b.

16 PROFESSOR DORSANEO: Well, it happens to
17 be in the rules right now, and goodness knows what
18 it means in the existing rules.

19 MR. McMANS: I was just curious. Is
20 there anything strange about criminal practice that
21 say --

22 PROFESSOR DORSANEO: No, they don't have
23 remittiturs.

24 MR. McMANS: I understand that. What I
25 mean as to when, if you do something too early,

1 your premature appeal or something, if you do
2 something too early in the criminal practice, does
3 that terminate trial court jurisdiction there,
4 whereas it might not in a civil suit?

5 PROFESSOR DORSANEO: I really can't
6 answer that. There are undoubtedly other rules
7 that I should have mentioned that have had
8 provision changes made to them. Probably the best
9 way to deal with my inability to remember this from
10 beginning to end, especially since I didn't know
11 that I was going to make this presentation today,
12 is to look at the comments under each of the rules.

13 Now, where the proposed rule is a verbatim
14 reproduction or is intended to be a verbatim
15 reproduction of an existing rule, that's stated.
16 Where the comment says, "This rule is based on,"
17 that means we changed it in some respect or
18 another. The change might be a deletion of a
19 phrase or a clause. It might be a change in
20 grammar. It might be a change in punctuation or
21 something like that.

22 Obviously, where rules are based -- proposed
23 rules are based on existing civil rules, existing
24 criminal appellate rules or statutes and perhaps
25 also where they're modeled on Federal Rules of

1 Appellate Procedure, that needs to be looked at
2 carefully. And the comments should provide you
3 with that information. They're intended to
4 indicate the source of everything, not only by many
5 rule numbers, but by subparagraph.

6 And those are really the only remarks that I
7 have, except that if anybody is interested, I
8 personally was ambivalent about whether or not it
9 was a good idea to change all of this structure and
10 move these numbers around, et cetera. But after
11 working through it, it has nothing to do with the
12 fact that -- it may have something to do with the
13 fact that we were working and invested some time
14 and effort in this. That's really not the
15 important thing. The important thing is this
16 structure is one heck of a lot better; and I think
17 it will be a real improvement, even without regard
18 to the major thrust of harmonization. This is
19 looking at it from the civil side. I think it's
20 something that hadn't been done in terms of
21 structure. There have been a lot of changes, a lot
22 of improvements, certainly, but in terms of
23 structure, that really needed to be done, I think,
24 and this was an opportunity to do that. Thank you.

25 CHAIRMAN SOULES: Before we start taking

1 questions, let me tell you what I feel like we're
2 going to be doing with these rules, and we want to
3 hear everybody's suggestions so that they'll have
4 input to the process that I do anticipate.

5 Bill Dorsaneo has agreed to be the chairman
6 of a subcommittee of this committee to continue to
7 work on these rules for presentation at our next
8 session, which I guess will be sometime in
9 September or October, depending on your wishes for
10 the final action. The subcommittee will need to
11 hear from Justice Frank Evan's group, and I feel
12 also to interface with the Advisory Committee of
13 the Court of Criminal Appeals. So, that when we
14 make a recommendation to our court, it will be
15 something that the Advisory Committee of the Court
16 of Criminal Appeals is going to also be
17 recommending to their court. And we won't have two
18 completely separate courses being taken.

19 I've asked that Bill select several people
20 that he wants to participate with him on that
21 committee, and I'm sure that anyone who wants to
22 join a committee, in addition to those, would be
23 very welcome.

24 So, with that in mind, it will be a committee
25 with a lot of work to do between now and September

1 or October. Please give us your input as fully as
2 you can, and we'll go on and work at least till
3 about 12:30 and then see who needs to take a break
4 at that point for lunch or otherwise. If we are
5 not through with our discussion of these rules by
6 that point in time, I think we will go ahead and
7 recess for lunch and then come back. The balance
8 of our schedule is to work until 5:00 today for the
9 reception, and we will not work tomorrow. As far
10 as this agenda is concerned, we're going to push
11 through it quickly and make assignments to
12 subcommittees from this for reporting our next
13 meeting as well.

14 MR. WELLS: Just a general question.

15 CHAIRMAN SOULES: Yes, sir. Mr. Wells.

16 MR. WELLS: What kind of feedback has
17 there been from the publication in the Bar Journal
18 of the proposed rules?

19 CHAIRMAN SOULES: There's been none, and
20 that caused me some question about why we may not
21 have heard from the courts of appeals yet. I hope
22 they are working on it. Obviously they are putting
23 together a committee to work on it. I guess we'll
24 get some feedback, but so far nothing.

25 CHIEF JUSTICE WALLACE: We expected more

1 from those people who practice in the criminal
2 area; and perhaps Sam Houston Clinton, who is the
3 liaison from the Court of Criminal Appeals on this
4 committee, might have heard more, but we've heard
5 nothing.

6 CHAIRMAN SOULES: One further thing on
7 that. Every Chief Justice was invited to this
8 meeting, and all of the judges on the Court of
9 Criminal Appeals were invited to this meeting by a
10 letter telling them that this was going to be item
11 number one, so that they wouldn't have to be
12 detained to hear matters they might not have an
13 interest in. And so we're certainly not excluding
14 them, we're inviting them in.

15 CHIEF JUSTICE HILL: Before you start on
16 your input, if I might, Gilbert has been kind
17 enough to get some copies of House Bill No. 1658,
18 and we will just simply pass them around and maybe
19 there will be some time on the agenda later on. I
20 don't want to jump in the middle of what's already
21 a very full agenda, but at least to have this to
22 take home with you.

23 And, Bill, the only thing -- you're such an
24 enormous resource for the state, people like you.
25 There are others here in this room that are just

1 such valuable resources to us in these kind of
2 efforts, that I don't know what we're going to do
3 when we're facing having to get this group of rules
4 together at some reasonable time. We can't wait
5 two years to do it. We can't even really wait a
6 year to do it. I guess we could wait six months or
7 so to do it. And I'm just concerned as I see the
8 volume of work that you're taking on. What are we
9 going to do to get a work group together as we need
10 to, to start trying to get on this matter also.
11 So, I don't need any answer at that right now.

12 Go right ahead, Luke, with your very able
13 agenda handling as you are doing, but please take
14 this home with you and be thinking with it, and
15 let's discuss sometime today before we break off
16 who's going to man this ship, who's going to take
17 the initiative and try to start pulling together
18 these rules of administration.

19 And if you will notice on Page 3, we'll just
20 take this moment to say that they're talking about
21 "time standards for pleading, discovery, motions,
22 and dispositions; dismissal of inactive cases;
23 judicial accountability, incentives to avoid delay;
24 penalties for filing frivolous motions; firm trial
25 dates with a strict continuance policy; restrictive

1 devices on discovery; a uniform dockets policy;
2 formalization of mandatory settlement conferences;
3 standards for selection and management of
4 nonjudicial personnel; monthly statewide
5 information reporting system," and on and on and
6 on. It's a big order. So, that's what we're
7 passing around and maybe we'll find 10 or 15
8 minutes before the day is over to at least start
9 focusing on this. If you'll give us some sort of
10 small subcommittee to start the initial work on it,
11 we would appreciate it.

12 CHAIRMAN SOULES: Well, we certainly will
13 do that, Judge, as part of the assignments on our
14 general agenda. We will get a subcommittee to work
15 on that and to start work right away.

16 Bill, have you some choices? I guess the
17 amount of work you've done almost entitles you to a
18 draft, at least to name persons who can decline, if
19 they wish, or accept, if they wish, your effort.

20 PROFESSOR DORSANEO: Well, I'd be willing
21 to have anybody help, but I guess I would really
22 like to have Rusty help.

23 CHAIRMAN SOULES: Rusty, will you help
24 with it?

25 MR. McMAINS: Sure.

1 CHAIRMAN SOULES: How about volunteers?

2 PROFESSOR DORSANEO: And John O'Quinn, if
3 he could, especially in the area of those rules in
4 the early 300s, that area.

5 MR. O'QUINN: Okay.

6 CHAIRMAN SOULES: Harry, you have a
7 special interest in those that are covered by 32.
8 Will you help with input on that?

9 MR. TINDALL: Okay.

10 CHAIRMAN SOULES: Harry Tindall, Rusty
11 McMains, John O'Quinn. Are there any other drafts
12 you want to make, Bill, or do you want to take
13 volunteers?

14 MR. McCONNICO: I'll help you, Bill.

15 CHAIRMAN SOULES: Okay. That's Steve
16 McConnico.

17 PROFESSOR DORSANEO: Really, I don't want
18 to make it too large by naming any names, suggest
19 anything. Anybody who wants to help and really
20 wants to work on it -- and that's the main
21 criterion. You all know better than anyone else
22 whether you're in a position to really do that.

23 CHAIRMAN SOULES: There are a lot of
24 other jobs, and we're going to need everybody on
25 subcommittees. So, the floor is now open for

1 volunteers to help with this effort because of a
2 special interest in these rules or related rules.
3 If anyone else would like to do that.

4 MR. ADAMS: I'd be glad to help, if you
5 need some more people.

6 CHAIRMAN SOULES: Gilbert Adams. And I'm
7 sure there are going to be some overlap between
8 committees. Anyone else? That's probably a large
9 enough committee.

10 Bill, are you satisfied with that, unless
11 there are other volunteers?

12 PROFESSOR DORSANEO: That ought to be
13 sufficient. We may need additional help, but I
14 have in my mind a way to go about this from this
15 point forward and --

16 MR. O'QUINN: Yeah.

17 CHAIRMAN SOULES: All right. That would
18 be assigned then to a subcommittee chaired by Bill
19 Dorsaneo with additional members, Rusty McMains,
20 John O'Quinn, Harry Tindall, Steve McConnico and
21 Gilbert Adams, Jr. Okay.

22 Now that the people know that they're going
23 to be on the committee, let's take a few minutes to
24 discuss any matters that you feel this committee
25 definitely needs to take into consideration as it

1 proceeds.

2 Pat Beard.

3 MR. BEARD: I think that unpublished
4 opinions should be cited in cases involving
5 substantially the same parties, substantially the
6 same facts, because you get the same cases coming
7 up, particularly over in the federal court where
8 they don't publish an opinion in the Fifth Circuit
9 and you're back in the state court with the same
10 facts and arguments. And I believe that where they
11 are the same parties and the same facts, you should
12 be able to cite them.

13 CHAIRMAN SOULES: Does that need
14 discussion or can we get a consensus on it without
15 discussion? First, I'm going to ask for a
16 consensus without discussion. How many feel that
17 Pat's thought there should at least be explored in
18 these rules? Raise your hands, please.

19 JUDGE TUNKS: I'm sorry, I didn't
20 understand you.

21 CHAIRMAN SOULES: His point was that
22 parties should be entitled to cite unpublished
23 opinions whenever the case on appeal involves the
24 same subject matter and the same parties as the
25 prior case that they're trying to cite. How many

1 feel that that should be permitted? Fourteen.

2 How many feel it should not be permitted?

3 All right.

4 Bill, that should be drafted in then, at
5 least for our next discussion, that that be
6 permitted. That's a vote of 14 to 3, as I counted
7 it.

8 Are there any other matters that you feel
9 this committee should seriously consider or even
10 lightly consider, give consideration to as it
11 produces these rules for our final adoption or
12 recommendation to the Supreme Court for adoption?

13 All right. If we -- Rusty?

14 MR. McMAINS: I just have one question
15 and that is from a format standpoint. It's
16 obviously anticipated that this is going to be
17 jointly done by the Court of Criminal Appeals and
18 the Supreme Court. And am I correct that they are
19 just now appointing an Advisory Committee for their --

20 CHAIRMAN SOULES: The Court of Criminal
21 Appeals has an Advisory Committee that functions in
22 fairly narrow territory because most of the rules
23 that govern criminal appeals are in the Code of
24 Criminal Procedure. Now, whether that same
25 committee will have the responsibility for this

1 effort or whether a different committee, we just
2 don't know.

3 MR. McMAINS: That's what I'm getting at,
4 Luke. Before we launch into a so-called final work
5 product, shouldn't we get the premitter of the
6 Court of Criminal Appeals Advisory Group? At least
7 an invitation to participate rather than just to
8 check our papers or something. I mean, I don't
9 want to get in a situation where, because I think
10 you saw it at the meeting over there where the
11 Court of Criminal Appeals feels like they're the
12 stepchild.

13 CHAIRMAN SOULES: Well, I have had a
14 direct meeting with Chief Judge Onion on this
15 subject and he has told me that they are very much
16 behind this, that at least the overwhelming
17 majority of the judges are behind this, and they've
18 read these rules and don't have any serious
19 problems with them. They understand the problems
20 of the courts of appeals. They want support from
21 us. We've been at this for years and I think --
22 from our court, that is, really, is the Supreme
23 Court going to be willing to yield to accommodate
24 in a joint set of rules the criminal process?

25 They're pleased to know that we've had the

1 support of the court at the joint committee effort,
2 and they are very positive to go forward with this.
3 And it would be my plan, subject to being otherwise
4 instructed by the court, to report back to Chief
5 Judge Onion the results of this and ask him to give
6 me whatever instructions he may want to give me on
7 interfacing with his committee, if he wants us to
8 interface with them, and I think that will produce
9 an interface.

10 CHIEF JUSTICE HILL: I'd like to say one
11 word on that if I might. Rusty raises a very valid
12 point. I would certainly urge the committee to sit
13 down with their Advisory Committee and with the
14 court and get a sign off, get it out of
15 generalizations, or it looks pretty good, get it
16 down and really get it agreed on, get it signed off
17 on so that we know precisely if there are any
18 specific disagreements with us on any particular
19 rule in here at all. Let's get it out on the table
20 and draft it out and strike an accord on it,
21 because otherwise you can, even with the best of
22 intentions, have a misunderstanding about it.

23 MR. McMANS: I think there's been good
24 communication between Bill and Judge Daley. And
25 probably Judge Daley would serve as the proper

1 liaison.

2 PROFESSOR DORSANEO: Maybe Clifford
3 Brown.

4 MR. McMAINS: Maybe. Okay.

5 PROFESSOR DORSANEO: I've done some
6 thinking about that already, and that shouldn't be
7 a problem.

8 CHIEF JUSTICE HILL: You couldn't be
9 working with a better person; and that's not my
10 point, but you're working with a full court. And
11 you need the decision of the court, final and
12 agreed on, because that's the way they like to
13 work. And that's fine.

14 But I'm glad you raised the point, and we
15 just need to crank in real close with them and be
16 sure that we're on the same wavelength and have the
17 discussion specific, so that you don't say, "Well,
18 I thought we had an understanding." And they'll
19 say, "Well, no, in rule so and so, we really didn't
20 quite understand it that way and we're going to do
21 it a little bit differently." Let's get all of
22 those kind of matters out of the way.

23 MR. WELLS: I have a question --

24 CHAIRMAN SOULES: Yes, sir. Mr. Wells.

25 MR. WELLS: -- that I'm not sure I can

1 formulate very well. I'm impressed with the plan
2 that Dorsaneo lists at the front end here. It --
3 and I'm obviously not really familiar with the
4 specifics of the rules, but it seems pretty clear
5 to me that the plan is a substantial departure from
6 what the Texas Bar is used to working under now,
7 and that there are going to be some grammatical
8 changes and also maybe some changes that may affect
9 substance. And is this court and is this committee
10 -- it seems to me that we have to understand that
11 there are those changes, and I want to be sure that
12 this committee is committed to that kind of a
13 program. I think there are a lot of lawyers out
14 there that are going to figure they didn't
15 understand that we're starting from scratch on
16 something brand new.

17 CHAIRMAN SOULES: Well, let's get a
18 consensus on that point. How many members of this
19 committee feel that you will ultimately be disposed
20 to recommend to the Supreme Court of Texas that
21 they adopt some form of harmonized rules agreeable
22 to us, as they are harmonized, and also agreeable
23 to the Court of Criminal Appeals, if we can get to
24 that point? How many so feel? I believe that's --
25 How many do not feel that way? How many feel

1 opposed to that effort?

2 MR. WELLS: Well, at the most, I have
3 some slight doubt. I think you're going to get a
4 lot of lawyers yelling at you, but I just wanted to
5 -- I think clearly the consensus wants to do it
6 that way. That's fine.

7 CHAIRMAN SOULES: The consensus would be
8 then that that be our goal and that we attempt to
9 get that done.

10 Frank Branson.

11 MR. BRANSON: Mr. Chairman, at the risk
12 of being one of the new kids on the block and not
13 being aware of the discussion of this committee in
14 the past, one of the exciting things to me about
15 having the opportunity to serve on this committee
16 is looking at some of the rules that, throughout my
17 practice, have perhaps given me the most
18 difficulty, one of them being the remittitur rule.
19 Is there a way to look at that rule philosophically
20 at this time as to whether or not there is a need
21 for a dual remittitur provision?

22 CHAIRMAN SOULES: I think so.

23 MR. McMANS: Are you talking about in
24 the context of this document or are you talking
25 about --

1 CHAIRMAN SOULES: I think so. We may
2 want to do that after lunch or you may -- would you
3 like to serve on the --

4 MR. BRANSON: No, after lunch would be
5 fine. I was just wondering if this would be the
6 appropriate time.

7 CHAIRMAN SOULES: Let me ask you if you
8 would be willing to function with that committee,
9 Frank, at least on that subject?

10 MR. BRANSON: I would be more than happy
11 to.

12 CHAIRMAN SOULES: Okay. State, Frank, if
13 you will, what your concern is or your difficulty
14 with that is, and maybe we can get that done before
15 we break.

16 MR. BRANSON: I've always had some
17 reservation about the trial court being able to
18 take money away that the jury has awarded. In
19 addition to that, when you give the defendants a
20 double bite of the apple, then allow the court of
21 appeals to make the same decision that the trial
22 court has previously ruled on, it gives me
23 additional philosophical problems. And
24 occasionally more than philosophical problems.

25 MR. TINDALL: Financial.

1 MR. BRANSON: Well, particularly in light
2 of the fact there appears to be no goose and gander
3 rule. That is, there's no additur allowed either
4 at the trial level or at the appellate level. And
5 coming from a county where juries can occasionally
6 get carried away for the defendants, it seems
7 appropriate if you're going to have a rule allowing
8 reviewing the appropriateness of the jury's award
9 on damages, you certainly ought to allow it to run
10 both ways.

11 CHAIRMAN SOULES: How many feel that the
12 question of additur, as well as remittitur, should
13 be addressed by the committee then, at least for
14 purposes of formulating their idea and their drafts
15 for the next time? Hold your hands up, please.

16 MR. McMANS: You mean just considered?
17 I mean, we're going to need to talk about it.

18 CHAIRMAN SOULES: Be a part of the draft,
19 I guess. How many opposed? Well, the consensus is
20 that it ought to be considered and reported back by
21 the subcommittee at least. Okay. Frank Branson is
22 added to the subcommittee then on the appellate
23 rules.

24 Are there any other matters that you want to
25 have input on right now, before the next session of

1 this committee as a whole, so that the subcommittee
2 can have your guidance as it functions?

3 MR. KRONZER: Mr. Chairman, I would only
4 like -- the part of the remittitur practice that I
5 would object to and I ask the committee to consider
6 is the holdings of Flannigan versus Carswell
7 (Phon.), which I do consider to be unfair, that is,
8 the trial court can cut the verdict and the
9 prevailing party can still appeal or you can appeal
10 from that action if you're the affected party and
11 you have to show the trial court abused its
12 discretion. And yet the party to have the benefit
13 of that cut work can still appeal as a matter of
14 first impression. And I think that the tail ought
15 to go with the hide. Flannigan, to my mind, works
16 unfairly. And if they want to appeal, still
17 complaining about the size of the verdict, they
18 ought to face it in the court of appeals as a
19 matter of initial impression.

20 CHAIRMAN SOULES: Would the committee
21 consider that then, that proposition, as well?

22 MR. KRONZER: I do consider that as an
23 element of unfairness.

24 CHAIRMAN SOULES: Now give us all the
25 guidance that you can give us because we're looking

1 at this kind of proposed schedule, and that would
2 be that there be this committee functioning. And
3 assuming the Court of Criminal Appeals functions as
4 well in the same timeframe, that somewhere in
5 September or October we're going to be recommending
6 to our court a list of rules. They will then meet
7 in session, and the rule making function of the
8 Supreme Court of Texas is a public function. It's
9 an administrative function. It's not the same as
10 holding conferences on opinions. Their conferences
11 on rules are public conferences.

12 They will then meet and decide what to do
13 with our recommendations. And then whatever they
14 do with them, if they adopt rules, those rules must
15 be published in the Bar Journal -- I believe it's
16 30 days in advance, but it may be 60 days -- in
17 advance of their effective date. And we're -- we
18 once had a goal of perhaps January 1, 1986. That's
19 just not realistic in view of Justice Evan's
20 request to have input. But our work on these rules
21 will be done in the interim and our recommendation
22 will be made to the court in September or October.

23 So, if anyone not on a committee has anything
24 now to submit, let's get it. And if you have
25 anything in the interim that you want to submit,

1 please address that to Bill Dorsaneo, and if you
2 will, please, copy me and Justice Wallace.

3 Are there any other recommendations now?
4 Rusty?

5 MR. McMains: All I'm going to say is I
6 don't think that what has been suggested by Jim and
7 Frank is a fairly complicated drafting procedure,
8 so I don't think that's going to present any kind
9 of a time bind.

10 CHAIRMAN SOULES: I'm more interested in
11 getting all the input that we can get now, because
12 we don't have literally years to work on this. We
13 have months to work on it, but not an inordinate
14 amount of time.

15 Does that get everybody's thoughts on the
16 table then on this subject?

17 Okay. Let's stand adjourned until 1:30.

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21 (Proceeding recessed until 1:30.)
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