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SUPREME COURT ADVISORY COMMITTEE

May 15, 1986

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SUPREME COURT ADVISORY BOARD MEETING
Held at 1414 Colorado,
Austin, Texas 78701
May 15, 1986

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1 CHAIRMAN SOULES: Let's open up on the
2 record. Are there any changes in the minutes?

3 MR. TINDALL: I move they be approved.

4 CHAIRMAN SOULES: Okay. There's no
5 further discussion and we'll approve the minutes
6 of our last meeting. And I'll submit those to the
7 court reporter to attach to the transcript. I
8 welcome all of you. We've been here a few
9 minutes. The weather has delayed starting the
10 meeting, but we are now convened. In earlier
11 discussions, the committee voted unanimously to
12 approve the suggested changes to Canon 3-C1 by
13 making the recommended changes and putting a 1
14 beside "disqualification" and a 2 beside
15 "recusal," and then renumbering the other portions
16 of Canon 3-C which were 2 and 3, to renumber them
17 to be 3 and 4. The word "he" in the second line
18 of the A part of 3-C1 is to be deleted. It should
19 have had a strike through. And the S, I believe
20 that does have a strike through on some copies,
21 and the B part is to be deleted. That was an
22 unanimous recommendation. We have been discussing
23 here for some time informally the Administrative
24 Rules. And, Judge Casseb, you were going to make
25 a general statement about those rules to start our

1 discussion on the record, and I certainly
2 appreciate hearing from you on that now.

3 JUDGE CASSEB: I am concerned as to
4 whether or not this committee can actually, at
5 this time, proceed with the program that the
6 Chairman has indicated that we should be doing
7 right now concerning these suggested rules of
8 administration which have been proposed mainly
9 because these proposed rules have not received, in
10 my opinion, the wide-spread circulation that it is
11 now going to get.

12 After the last Task Force meeting, it was
13 then brought to the attention of the powers of the
14 -- that we were getting from many areas opposition
15 to the proposed rules as they were being
16 disseminated and filtered into their area, and
17 they became knowledgeable of same. So that then
18 it was decided that the draft of these rules as
19 you have now would be published in the June issue
20 of the Texas Bar Journal so that it have complete
21 exposure throughout the state.

22 In addition, it's on the agenda to be taken
23 up and discussed at the State Bar Convention on
24 June the 18th at the State Bar Convention in
25 Houston.

1 Now, I am still -- because I was on the
2 subcommittee of a Task Force under Rule 3, I'm
3 still getting opposition from members of that
4 subcommittee, including one that I got today from
5 James Kronzer, that he is still opposed to what we
6 did and put into Rule 3.

7 Now, I feel that perhaps the most that we
8 could do today is merely to look at these proposed
9 rules and see where it may be questionable in the
10 existing Rules of Procedure that we have now. So
11 that then maybe we can then, as these things come
12 along, to make some decision with reference to
13 it.

14 I can't help but feel that there are some
15 real big questions, and a lot of opposition is
16 going to come to doing this as it is right now,
17 because I've been traveling this state and I've
18 been hearing it. And I don't want word to get
19 back that I am trying to come on a collision
20 course with Chief Justice or anything else. I'm
21 not. I think that we need to do something with
22 reference to it.

23 But even as we now have these suggested
24 rules, it does not -- nothing is there to address
25 itself to what's happened and to the cases which

1 are on the dockets now. How are we going to
 2 handle those? How are they going to be
 3 processed? These rules merely say when a case
 4 starts. But what is going to happen to all these
 5 cases that are on the docket now? Nothing is
 6 addressed to that.

7 MR. BRANSON: There's a little squib,
 8 Judge, that says that the same attitude shall
 9 apply to cases pending.

10 PROFESSOR EDGAR: It's a comment under
 11 Rule 1.

12 JUDGE CASSEB: Under Rule 1.

13 MR. BRANSON: I'm not sure there's
 14 even a definition of attitude in the rules.

15 JUDGE CASSEB: That's right. But how
 16 are you going to fit it in there?

17 Another thing that I see here that you're
 18 going to find problems in this, is where you have
 19 the courts that handle both civil and criminal
 20 cases. You have the same judge like you do in
 21 Nueces County. How is he going to be able to fit
 22 it in? Also, in your multi-county districts where
 23 they have your civil, criminal and whatnot. I
 24 think you're going to have that there.

25 And also, I'm afraid that you're going to

1 find that when you -- these rules -- you've got to
2 have a judge working 365 days of the year, and
3 there's no allocation there for what happens if
4 he's on vacation or whatever. What is going to
5 happen to that?

6 I believe that we're losing sight of the
7 practical aspects of the trial of cases in this
8 huge state of ours and the way it operates in
9 different areas. And you're also finding in here,
10 under these proposed rules, some commitments to
11 reporting, which you're finding, and I've already
12 had written opposition from the district clerks in
13 which it says, "We don't have the money to do it,
14 to put on the personnel. We're not going to do it
15 because we're not answerable to the judges; we're
16 answerable to the people who elected us."

17 Now, that's an overall view of what I'm
18 telling you. So I think we've got to tread it a
19 little bit more cautiously. I don't want to see
20 this committee spending so much time trying to
21 figure out if these proposed rules, in any which
22 way, conflict with our existing rules when,
23 perhaps, it may not even be adopted.

24 That's all I have to say.

25 CHAIRMAN SOULES: Okay. Two points of

1 that from the Chair, and the Chief Justice asked
2 us to scrub these for conflicts with the Rules of
3 Civil Procedure One. And we need to do that and
4 I'm not saying whether I favor or disfavor these
5 rules, because maybe that's not my prerogative, at
6 least at this juncture.

7 But, secondly, if they do get on a fast
8 track, we want to have had our work done because
9 it could happen that they -- I think it could
10 happen that they could get on a fast track. So we
11 need to address them, and the Chief asked us to
12 have this extra day here today to do that.

13 Finally, before we start, one of the bugles
14 that Ernie Friessen blows about Canon or Article 3
15 is that it does not control any single case; that
16 every case has the potential of being an
17 exception; that it is a statistical aggregate type
18 of a rule. And when you read it literally, that's
19 true, but when it's applied by the courts, it may
20 not be true.

21 What we always hear in the Task Force from
22 the Chair or from the advisors in response to
23 things like Judge Casseb just covered is that,
24 well, these rules don't cover any single case. I
25 don't know whether that's to try to get the eyes

1 off of a single case, which is our concern, to try
2 every client's case as a single case the best we
3 can, or whether it really will be that cases have
4 free opportunity to be exceptions.

5 I wanted you to hear that, what Friessen
6 says, before we really started our discussion so
7 that you would have that in your mind. But Judge
8 Casseb has certainly voiced what's a very strong
9 voice from a lot of people on the Task Force and
10 otherwise. And I appreciate those comments,
11 Judge, because we need to address them.

12 MR. BRANSON: Mr. Chairman, in light
13 of the Judge's remarks, might it not be prudent on
14 our part to wait until after the hearing cry from
15 the bar and have a meeting following the bar
16 committee meeting this summer to deal -- to have
17 this committee have whatever input it's going to
18 to these rules.

19 CHAIRMAN SOULES: If you want to delay
20 the substantive input as to whether or not we
21 ought to have them at all, that's fine. But I
22 don't want to delay scrubbing them for harmony
23 with the Rules of the Civil Procedure because they
24 may get on a fast track, and we want to be sure
25 that we don't permit egregious conflict.

1 MR. BRANSON: Well, Mr. Chairman most
2 of what Judge Casseb is referring to on parts of
3 these rules which, in fact, conflict with our
4 current Rules of Civil Procedure. I mean, you
5 either, basically, have to follow our current
6 Rules of Civil Procedure or you have to follow
7 these new Administrative Rules.

8 CHAIRMAN SOULES: Well, we'd have to
9 take them one at a time, Frank, to see where they
10 conflict. They may not --

11 MR. BRANSON: Can you think of any
12 Rules of Procedure that Rule of Procedure 3
13 doesn't cross over?

14 CHAIRMAN SOULES: I don't see anything
15 in the Rules of Civil Procedure that says that a
16 judge can't enter a docket control order to
17 control his cases on time standards. That's not a
18 conflict.

19 JUDGE CASSEB: You've got it under
20 166.

21 CHAIRMAN SOULES: 166 permits that.
22 It expressly permits that.

23 MR. TINDALL: Luke, why do we -- I
24 mean, I envision from what Judge Casseb is saying
25 there may be substantial revision to these rules.

1 I mean, it seems like to me, why should we state
2 what yet has not been sort of sanitized into what
3 may be a probably final form.

4 I know the Family Law Section certainly would
5 like to urge further revision of 1 and 4. If we
6 can do it today and then it's changed again, what
7 have we really accomplished?

8 MR. BRANSON: Not only that, Mr.
9 Chairman, I get the impression that there may well
10 be some of the membership of this committee that
11 didn't -- was absent because they didn't want to
12 incur the wrath of the Chief Justice regarding
13 this rule.

14 CHAIRMAN SOULES: Rusty McMains.

15 MR. MCMAINS: Since I think that what
16 you've been indicating as our supposed charge
17 today is more of a -- is almost clever in the
18 sense that you want to identify where there is a
19 deviation or a conflict between these rules and
20 the Texas Rules of Civil Procedure that would have
21 to be either clarified or require an amendment
22 from one or the other for harmony purposes.

23 I personally believe that it's not very
24 functional for an entire committee of this size to
25 do that if that's the principle function of what

1 it is it wants to be done. And I don't have any
2 problem at all, frankly, from a standpoint of
3 trusting certain members of the committee on a
4 smaller level to get together in a couple of hours
5 and figure that out in total.

6 And I don't think, as an example, and while
7 he was volunteered by Mr. Dorsaneo, that Dorsaneo
8 has suggested that he and he thinks with Hadley
9 Edgar can probably do that in about two hours.
10 And, whereas, I don't think this committee can
11 probably do that, because I'm not sure this
12 committee agrees on what the Texas Rules of Civil
13 Procedure provide, let alone what these do, in two
14 days.

15 And I think that's a much more functional use
16 of the committee time from that function purpose.
17 And I would move or make it in the form of a
18 motion that Hadley and Bill or any other persons
19 you saw fit -- but I wouldn't want to get it too
20 big, because I think they can solve any conflict
21 problems that are irreconcilable, either to solve
22 or pinpoint where those are in a very short period
23 of time.

24 And I really think that the only thing that
25 most of the people on the committee want to talk

1 about is the philosophy behind what is attempting
2 to be done and whether or not we're headed in the
3 right direction, and which is something that, I
4 think, does require full committee input.

5 CHAIRMAN SOULES: Well, you made a
6 motion. I'm assuming everybody that came here
7 today knew that we were going to talk about these
8 administrative rules; some haven't come. I don't
9 know whether their reasons are to avoid
10 confrontation or whether they had conflicts with
11 other matters.

12 But if there is anyone here who does not want
13 to have an input through our meeting today and to
14 these administrative rules and how they work with
15 the Rules of Civil Procedure, there is no need for
16 them to be here, because that's what we're going
17 to do today. However many there are, whether it's
18 Bill and you and me or whoever it is. Because I'm
19 going to be a part of that, and the only way I can
20 be a part of it is do it in session or adjourn the
21 session and do it by committee. And I'll do it
22 either way.

23 MR. BRANSON: Mr. Chairman, let me ask
24 a question.

25 CHAIRMAN SOULES: Yes, sir.

1 MR. BRANSON: Maybe some people in the
2 committee are not sure what our function here is.
3 Maybe Justice Wallace can help us.

4 Would the Court like for the Supreme Court
5 Advisory Committee to look at the work done by the
6 Task Force and make a recommendation to you as to
7 whether or not we approve the substance of those
8 rules, or would the Court like for us to merely
9 rubber stamp what the Task Force did and let the
10 court rule, because really, to the committee, I'm
11 sure it makes no difference whichever way the
12 Court wants to do it.

13 JUSTICE WALLACE: Let me answer this
14 the only way I know how, Frank. As I understand
15 the Chief Justice asked the committee to do what
16 Luke has outlined, make sure there was no conflict
17 between these proposed rules and the current Rules
18 of Civil Procedure. And I talked with him
19 Wednesday afternoon, I guess it was -- Tuesday
20 afternoon; and that was, he said, his intent in
21 asking Luke to do this, so that was his.

22 Now, as the Court itself, as all of you are
23 familiar, you know how the rules are promulgated.
24 This committee makes recommendations after the
25 Committee on Administrative Justice has considered

1 proposed amendments, then it goes to the Court and
2 let the Court to do. Nine members of court vote
3 on what happens.

4 And since I do the black bean on heading up
5 this Task Force, I'm going to do everything I
6 possibly can to get to every member of the Court,
7 every comment that is made and directed to me or
8 to this committee so that they are fully advised
9 of how everybody feels.

10 Now, that is what I intend -- that is my
11 number one priority. And how each of those nine
12 members on the Supreme Court are going to vote on
13 these administrative rules is going to be up to
14 them. But my job, which I have given myself,
15 since I was assigned as Chairman of this Task
16 Force, is to make sure that the members of the
17 Court are advised of how the people out there are
18 going to work with these rules feel about it.

19 And I know that those members appointed each
20 and every member of this committee. And if they
21 had not valued your judgment, they would not have
22 voted to appoint you on this committee. And so I
23 think the Court, as a whole, would like hear from
24 members of this committee, how you feel about
25 these rules, as well as all those thousands and

1 thousands of lawyers and judges out there who are
2 not on the committee. So, does that answer your
3 question, Frank?

4 MR. BRANSON: Yes, sir, it does.

5 CHAIRMAN SOULES: Buddy Low.

6 MR. LOW: I think what Rusty meant --
7 I don't think Rusty meant to say that the
8 committee wouldn't consider this as a whole. As I
9 understood what he was saying, he thought that
10 certain things may certainly not be in conflict,
11 no question. I mean, but to go through them in
12 detail, a couple of people will say, "Well, I
13 think this dovetails or it doesn't, or is in
14 conflict," and then to come back and discuss those
15 areas that they think there is possibly a problem
16 with the group, rather than just a group taking it
17 sentence by sentence.

18 I don't think he meant to do -- what to say.
19 And I would certainly concur in that if -- and I'm
20 willing to sit here because I certainly came here
21 to voice my opinion about these rules and I have
22 one.

23 CHAIRMAN SOULES: Professor Edgar.

24 PROFESSOR EDGAR: Let me just make a
25 suggestion. I'm trying to bring you all together

1 on this.

2 I believe Rusty is right, that as far as
3 trying to sit down and determine which of the
4 Rules of Civil Procedure may be in conflict with
5 these Administrative Rules is really probably a
6 waste of of committee time. And what I would like
7 to recommend, to carry out what your mission is,
8 is to adjourn this committee at 3 o'clock this
9 afternoon and for Rusty and Bill and me and you to
10 sit down together for two hours, go over these
11 rules, and I think we can come back with a
12 subcommittee report to this committee tomorrow
13 morning to carry out what you perceive our mission
14 to be.

15 CHAIRMAN SOULES: Okay. Well, we may
16 do that in a minute, but we can't do it at 3:00
17 because we have other business tomorrow and
18 Saturday that's going to take all of tomorrow and
19 Saturday, but that may work.

20 PROFESSOR EDGAR: But I think that a
21 small group could work far more efficiently and do
22 what you perceive our mission to be today.

23 CHAIRMAN SOULES: All right. That's
24 fine. The Administrative Rules are really, to me,
25 not that complicated. They may be very

1 controversial --

2 PROFESSOR EDGAR: Well, the reason I
3 suggested before is --

4 CHAIRMAN SOULES: -- but not
5 particularly --

6 PROFESSOR EDGAR: -- because we have
7 all been on the Task Force and we basically know
8 what the Administrative Rules provide, and it
9 won't take us very long to look through the Rules
10 of Procedure and see where apparent conflicts
11 might exist without going to the merits of the
12 rules.

13 CHAIRMAN SOULES: You may --

14 JUDGE CASSEB: I'll make that in the
15 form of a motion.

16 MR. LOW: I second it.

17 CHAIRMAN SOULES: How many want to
18 participate -- I'm not going to exclude anyone
19 who's here today from participating in the look at
20 these rules one by one to say whether or not you
21 feel they conflict with a different part of the
22 Rules of Civil Procedure than before.

23 How many want to participate in the look at
24 these rules one by one and the input into where
25 you feel they conflict? Show me your hands. No

1 one.

2 MR. SPARKS (SAN ANGELO): You mean,
3 other ones that are --

4 MR. LOW: Other than the ones in the
5 motion.

6 CHAIRMAN SOULES: Other than the ones
7 that are in motion. No one else wants to have
8 input. Pat does.

9 MR. BEARD: The basic philosophy
10 problem I have with the Rules that I expressed on
11 the Task Force is, I don't think that the
12 Administrative Rules we're talking about have
13 continuance rules in them. And I think those all
14 ought to be over rules and they ought to be
15 incorporated by reference in these rules.

16 And I just don't -- we're not looking at
17 making them harmonious repeating them. It appears
18 to me that the continuance rules ought to be over
19 in the Rules of Civil Procedure and incorporated
20 by referencing.

21 Lawyers should not have to look in two
22 different places and have additional requirements
23 in the rules because they're going to make
24 mistakes in the process. And that's the only
25 thing I can say about it, that as far as making

1 them harmonious, we should make reference and
2 incorporate the Rules of Civil Procedure where we
3 have procedures already.

4 CHAIRMAN SOULES: Okay. The last
5 thing I'll say about that is that this committee
6 has an opportunity today, as a whole, to look at
7 these rules in full text, in session, and
8 together.

9 If the committee votes not to pursue that,
10 that's fine with me. If they want to adjourn to a
11 subcommittee, that's fine with me. But I do want
12 you to know that these rules will not be back here
13 probably, and that's my judgment call. But I
14 think they will not be back here again.

15 JUDGE THOMAS: Which rule?

16 CHAIRMAN SOULES: The administrative
17 rules.

18 MR. TINDALL: I thought we were only
19 referring to them against the TRCP at this time,
20 and we could still open up for discussion about
21 the substantive requirements of rules.

22 CHAIRMAN SOULES: Okay. Well, we're
23 going to adjourn, though, in 15 minutes for a
24 two-hour adjournment, and then we're going to
25 start on the Rules of Civil Procedure conflicts

1 because that's what the Chief has told me to do.
2 But I can't delay that until the end of the
3 afternoon because we've put Sam Sparks off three
4 times now, and he's got about 50 rules to report
5 on. And aside from these administrative rules,
6 there is 600 and -- well, that includes these
7 administrative rules, which isn't very many
8 pages.

9 We've got 661 pages of materials that have
10 been sent to us from the public to deal with that
11 we have not dealt with in three previous
12 sessions. And we have dealt with a lot in the
13 three previous sessions, including this book,
14 which is just as thick on the Appellate Rules. We
15 just have an awful lot of work to do. So we can't
16 put this off until tomorrow. And it's fine with
17 me.

18 All I want is that I want everybody, when
19 they vote on whether we adjourn into a small
20 group, to know that when we do reconvene, say at
21 1 o'clock, we're going to have that four and a
22 half hours to shoot at the whole project and also,
23 to take up the Rules of Civil Procedure
24 conflicts.

25 To me, one approach, or a different approach,

1 would be to start with Rule 1. It doesn't take
2 long to read them. Every one of us can read fast
3 and go through these today, and everybody shoot at
4 Rule 1 as Rule 1 and its substance, and shoot at
5 Rule 1 as to how it conflicts with TRCP, and go
6 through them. But that's just a contrary view to
7 the motion that's on the table and all I want to
8 do is have it expressed.

9 If we're going to compress our -- we may wind
10 up compressing our discussions into less time if
11 we go along with the motion and adjourn at 11:00.
12 But if we adjourn, we're going to adjourn at 11:00
13 to 1:00 and then reconvene.

14 MR. TINDALL: Luke, I detect the
15 committee would like to discuss the philosophy of
16 the rules and let a subcommittee meet while we're
17 even meeting to perhaps go over the conflict.

18 CHAIRMAN SOULES: We can't do that
19 because the Chairman has to be both places.

20 PROFESSOR BLAKELY: Mr. Chairman, in
21 your view, which process will take less time?
22 Just guess.

23 CHAIRMAN SOULES: I think if you run
24 them both together, you've got on the record here
25 "Rule 1 addressed." As to how it philosophically

1 fits our view and how it, as a practical matter
2 and as a working matter, dovetails into the TRCP,
3 and when we're through with Rule 1, we go to Rule
4 2. And I believe an orderly process like that
5 will create a record that will be most
6 meaningful. But it may be that it gets bogged
7 down in oversights.

8 JUDGE CASSEB: I agree; there are too
9 many.

10 CHAIRMAN SOULES: Buddy Low.

11 MR. LOW: I don't see the committee as
12 doing exactly what you're saying, that we're
13 giving up our chance and our charge to do this,
14 because I don't see that the motion included the
15 fact that when these people come back, that we
16 want to bring up Rule 1; they don't mention we can
17 do it.

18 CHAIRMAN SOULES: That's right.

19 MR. LOW: So I don't see this
20 committee doing exactly what you're saying and the
21 rest we're delegating everything to them. I don't
22 see it that way because as I see it, we still have
23 a right to come in, and they pinpoint these
24 things; we discuss what we need.

25 CHAIRMAN SOULES: Okay.

1 MR. LOW: So I see it as being
2 streamlined, but not giving up any doing that we
3 charge to do, because I don't think any member of
4 this committee is doing that.

5 CHAIRMAN SOULES: No, I don't think so
6 either. I'm just asking, who wants to be a part
7 of this first process, or do we really want to do
8 it that way?

9 MR. TINDALL: Is the alternative that
10 we can take up the rules now and discuss as a
11 committee as a whole, both conflict with the TRCP
12 and substantive comments about the rules. Is that
13 the alternative?

14 CHAIRMAN SOULES: That was my approach
15 to it when I came here, if we got into the
16 substantive aspects of it. As I said, I didn't
17 say we couldn't; I just said I didn't, you know --
18 Judge Wallace has said that he wants to hear
19 that. And that's the first time that we've been
20 told clearly that.

21 So that would be the organization that I
22 would pursue if we stay in session as a whole and
23 start with Rule 1 and finish with Rule 9 with both
24 aspects of it on the table. So that's what we're
25 going to vote on.

1 The motion is that we designate a
2 subcommittee to look at it for a couple of hours
3 to look at these rules for where conflicts may
4 appear with the Rules of Civil Procedure and then
5 reconvene this committee as a whole -- for what,
6 Judge? To discuss those, Judge Casseb, and the
7 substantive reports?

8 JUDGE CASSEB: Yes. And then go into
9 your substantive deal.

10 CHAIRMAN SOULES: Okay. That's a
11 motion. And was it seconded by you, Buddy?

12 MR. LOW: Yes.

13 CHAIRMAN SOULES: And Rusty. Okay.
14 All in favor show by hand.

15 Those that want to stay in session and
16 proceed rule by rule show by hands. Okay, that's
17 two. You two are certainly invited to leave with
18 our committee and have your --

19 MR. TINDALL: What we voted on will
20 not preclude us from discussing the rules
21 philosophically.

22 CHAIRMAN SOULES: That's correct.
23 Well, it precludes two hours of that.

24 Yes, sir. Sam Sparks from San Angelo.

25 MR. SPARKS (SAN ANGELO): I have some

1 problem with separating the conflicts from the
2 philosophical point.

3 CHAIRMAN SOULES: I do too.

4 MR. SPARKS (SAN ANGELO): And, you
5 know, I went over and talked to Judge Curt Steib
6 in San Angelo. He's probably one of the best
7 administrative judges that I have seen and wanted
8 his input, and he said he didn't really give a
9 damn. The Supreme Court wasn't going to slow our
10 docket down anyway. That was his attitude,
11 because we trialed in about three months. It's a
12 different world out there.

13 But, on the other hand, the conflict I get is
14 the continuance problem we're talking about,
15 because I have stood in that court before where
16 both the plaintiff and the defendant -- there were
17 three defendants in a complicated suit saying
18 "We're not ready." The Judge said, "It doesn't a
19 matter; you're going to trial."

20 Well, it's fantastic because you try to work
21 out some settlements when you're really down to
22 that and really move the docket along. But
23 philosophically, justice doesn't necessarily get
24 done. And that's what bothers me, when there is
25 no method for review of what your trial judge

1 does. So the continuances and what happens
2 thereafter -- that conflict between the Rules of
3 Procedure and what happens here is not only a
4 conflict, but it's a philosophic difference with
5 me.

6 So for the subcommittee to look at it, I want
7 them to -- I voted for them to look. I think
8 that's very important, and we can do it faster.
9 But that is the very area that bothers me; it's
10 not the recordkeeping or whether we got the money
11 to do it or anything else. It's just when you let
12 speed get in the way of justice.

13 CHAIRMAN SOULES: Okay. Well, I'm
14 satisfied that this committee is going to express
15 some views. The stuff that all may have had an
16 interest in. But we do stand adjourned as a
17 committee, and the subcommittee will please move
18 here and meet right up here. And everybody who
19 wants to be on the subcommittee can stay and be on
20 the subcommittee.

21 MR. SPIVEY: When will the rest of us
22 come back? Do we come back at 1:00?

23 CHAIRMAN SOULES: Well, we'll have
24 lunch served in the hallway here at noon. We'll
25 work through lunch in here with our lunches, but

1 we're going to stay. We'll be on the record with
2 the subcommittee as well. See you at 1 o'clock.

3
4 (Some members left room while
5 (subcommittee reconvened.
6

7 CHAIRMAN SOULES: The subcommittee now
8 is convening at 11 o'clock. It was recommended
9 and voted on by the committee as a whole, the
10 subcommittee, to try to identify where there are
11 conflicts with the Administrative Rules and the
12 Rules of Civil Procedure.

13 PROFESSOR DORSANEO: The only comment
14 I have about Rule 1 with respect to the Texas
15 Rules of Civil Procedure is that I think that it
16 conflicts potentially with Rules 1 and 2 of the
17 Texas Rules of Civil Procedure because aside from
18 this introductory paragraph, that I don't know is
19 part of anything, there isn't any resolution of
20 inconsistencies or potential disharmony between
21 the Rules of Civil Procedure and these proposed
22 administrative rules.

23 I think we just kind of hide or pretend that
24 there isn't going to be a problem at some point.
25 So let's resolve that one of them prevails over

1 the other if there is a conflict.

2 MR. SPARKS (EL PASO): Well, I agree,
3 but I think that the language as proposed, clearly
4 shows that it's intended that the administrative
5 rules will be held superior in times of any
6 conflict. My only point is, we ought to bring
7 that out to the committee.

8 PROFESSOR EDGAR: Sam, is it your
9 thought that these Administrative Rules would take
10 precedence over the Rules of Civil Procedure where
11 they are in conflict?

12 MR. SPARKS (EL PASO): No, that's not
13 my thought, but I think that's what it says.

14 PROFESSOR DORSANEO: I think that's
15 just the opposite.

16 PROFESSOR EDGAR: I think that's just
17 the opposite; that's why I mentioned it.

18 MR. MCMAINS: I agree with the
19 observation. First of all, it troubles me that
20 whatever the purpose clause of the rules --
21 whatever it is, isn't in the rules. It is in our
22 current Rules of Civil Procedure. And it would
23 seem to me that Rule 1 of the Administrative
24 Rules, whether you have a policy rule or not,
25 ought to also have a purpose rule and something

1 which says which one governs, whether it is the
2 Rules of Civil Procedure in case of conflict or
3 the Administrative Rules in case of conflict.

4 Because I can see arguments both ways right
5 now that these rules are intended to cover or that
6 the Rules of Civil Procedure are intended to cover
7 when there is any inconsistency.

8 MR. SPARKS (EL PASO): Let me also
9 say, I think that if there's going to be any sense
10 to these rules, the Administrative Rules are going
11 to govern individual cases as they proceed.

12 PROFESSOR DORSANEO: My specific
13 comment, with respect to the Rule 2 of the Texas
14 Rules of Civil Procedure that's related to the
15 previous comments, is that it provides in its
16 opening sentence that these rules, the Texas Rules
17 of Civil Procedure, shall govern the procedure in
18 justice, county and district courts of the State
19 of Texas in all actions of a civil nature.

20 And at the very least, Rule 2 of the Texas
21 Rules of Civil Procedure will need to be amended
22 in order to take into account the promulgation of
23 these proposed Administrative Rules.

24 PROFESSOR EDGAR: Or couldn't we
25 simply recommend the insertion of a sentence in

1 the purpose clause up here, something to the
2 effect that, in the event of inconsistency, the
3 Texas Rules of Civil Procedure will govern?

4 CHAIRMAN SOULES: Let me ask you, what
5 about this? What about just putting a period
6 after "procedure." "It is intended that these
7 rules be consistent with the Texas Rules of Civil
8 Procedure."

9 PROFESSOR EDGAR: Well, but that
10 doesn't tell you, though, what happens in the
11 event of a conflict.

12 CHAIRMAN SOULES: It would say that
13 you resolve that conflict in a way consistent with
14 the Rules of Civil Procedure because that's the
15 intent, is that these be consistent and not
16 inconsistent so that you would look at a
17 consistent resolution.

18 MR. MCMAINS: But it's still not part
19 of the rule.

20 CHAIRMAN SOULES: I'm sorry?

21 MR. MCMAINS: As presently proposed, I
22 mean, it's still just kind of sitting up here;
23 it's not even part of the rule.

24 CHAIRMAN SOULES: So you would say,
25 "inconsistencies shall be resolved in favor of the

1. Rules of Civil Procedure?"

2 MR. SPARKS (EL PASO): No, no. He's
3 saying --

4 MR. MCMAINS: No. I'm saying, it's
5 not in a rule. The first paragraph of the
6 document is not in the rules.

7 CHAIRMAN SOULES: Right.

8 PROFESSOR EDGAR: Maybe the way to cure
9 that would be to make the purpose paragraph Rule
10 1, so that it will be a part of the rules.

11 CHAIRMAN SOULES: All right.

12 PROFESSOR EDGAR: You see, Rusty's
13 concern is that it's just hanging there, and it
14 really doesn't have any advocacy at all.

15 CHAIRMAN SOULES: That solves that.
16 Does that solve it for you, Rusty?

17 MR. MCMAINS: Well, I mean, that
18 solves the initial question.

19 CHAIRMAN SOULES: Now then, we're down
20 to my question, and that is, can we just delete
21 the last part of it after the word "procedure," or
22 do we have to go on and say --

23 PROFESSOR EDGAR: That would be okay.

24 MR. MCMAINS: You don't have any
25 problems with me on that, but my perception of the

1 Task Force and Justice Hill's position on this, is
2 that the Administrative Rules will control.

3 CHAIRMAN SOULES: Well, that needs to
4 be presented.

5 PROFESSOR EDGAR: Well, all we do is
6 present our view.

7 MR. MCMAINS: I understand. I don't
8 disagree with that view, but all I'm saying is
9 that it was my perception that these rules were
10 expected to be more specific in the control of
11 individual docket matters and were anticipated
12 that they would control even if there was a
13 conflict, so that's a fundamental, philosophical
14 difference.

15 CHAIRMAN SOULES: But the Supreme
16 Court in the '40s said those rules comply, to
17 control those Rules of Civil Procedure. If they're
18 going to change that, they've got to change it.
19 And we're saying there is a conflict there, and
20 they haven't told us one way or the other. And if
21 they're going to change the Rules of Civil
22 Procedure, they need to make that change. And if
23 they are not, then they need to make it clear that
24 Rule 1 still applies in civil cases by deleting
25 this -- not specifically covered by these rules,

1 because that's somewhat confusing. What do you
2 do? I mean, we've got two different views on what
3 that means and they are opposite to one another
4 right here.

5 MR. MCMAINS: That's right.

6 CHAIRMAN SOULES: If we delete that,
7 then we're saying that you're resolved. Then
8 maybe we need to say that, specifically, that
9 apparent inconsistencies between the
10 Administrative Rules and the Rules of Civil
11 Procedure will be resolved in favor of the Rules
12 of Civil Procedure.

13 I don't know whether we need to go that far,
14 but we can take that up, I guess, in the
15 committee, as a whole, and we would add that part.

16 MR. SPARKS (EL PASO): I think that's
17 a real policy, though, decision more so than
18 it's --

19 MR. MCMAINS: That's a fundamental
20 policy decision.

21 MR. SPARKS (EL PASO): I don't think
22 these rules make any sense if they're going to be
23 subject to the Rules of Procedure, but I think the
24 Court has answered that recently in that case
25 involving on the Dallas County Local Rules on

1 Discovery where the --

2 PROFESSOR EDGAR: Are we going to
3 make the purpose clause in Rule 1?

4 CHAIRMAN SOULES: Rule 1.

5 MR. MCMAINS: Aren't you going to
6 suggest it?

7 PROFESSOR EDGAR: Well, I mean, that's
8 my recommendation. Yeah, pardon me.

9 CHAIRMAN SOULES: The problem, Sam --
10 the difference between local rules and these rules
11 is that the Rules of Civil Procedure expressly say
12 how you do that. The Rules of Civil Procedure
13 control because they can't enact the local rules
14 that are inconsistent, but you got the same courts
15 passing two separate rules.

16 MR. MCMAINS: In that connection, Mr.
17 Soules, you must understand that if we do a
18 purpose clause that says that when inconsistent in
19 any manner, that the Rules of Civil Procedure
20 apply, you then also have the Rules of Civil
21 Procedure expressed provision for local rules.

22 Now, so that an argument can then easily be
23 made that a local rule conflicting with the
24 Administrative Rules, which is authorized by the
25 Texas Rules, will then prevail over the

1 Administrative Rules.

2 CHAIRMAN SOULES: Well, that probably
3 needs to be a rule now.

4 JUSTICE WALLACE: It particularly
5 says there are only -- that the Supreme Court
6 Committee to the Supreme Court can approve --

7 MR. MCMAINS: That's true.

8 JUSTICE WALLACE: -- can take
9 effect --

10 MR. MCMAINS: That's true. But then
11 by now, I assume that most of them have been. No,
12 they haven't been?

13 JUSTICE WALLACE: No, none of them
14 have been.

15 MR. MCMAINS: All right.

16 CHAIRMAN SOULES: We probably need a
17 Rule 11 that local rules may not conflict with
18 these rules. I mean, at least we need to put that
19 to the court one way or the other. Is that --

20 JUSTICE WALLACE: Well --

21 CHAIRMAN SOULES: Judge, I'm talking
22 about the rule in the Administrative Rules that
23 say that because the Rules of Civil Procedure take
24 care of themselves, but the Administrative Rules,
25 I don't think, take care of themselves. Well, of

1 course, the Supreme Court has got to approve it.

2 MR. MCMAINS: The Supreme Court could
3 always, I suppose, say that we're not going to
4 approve these local rules because they conflict
5 with our Administrative Rules, in which case that
6 would eliminate the argument. But what that does
7 is it puts the onus on the Supreme Court of 254
8 counties trying to create exceptions.

9 CHAIRMAN SOULES: I think --

10 MR. MCMAINS: I'm not sure. I mean,
11 maybe that's fine. Maybe what the Administrative
12 Rules should provide is that unless that there are
13 local rules that are approved in conflict --
14 because most people's complaint is that a lot of
15 their systems seem to be working fine.

16 And if that's a vehicle -- if the use of
17 local rules is a vehicle to kind of get around the
18 universal application of these if, in fact,
19 they're functional, I certainly don't have any
20 problem with inviting that and inviting a little
21 bit of experimentation. But maybe the Court might
22 not want to get into the problem of administrating
23 254 different counties.

24 JUSTICE WALLACE: Well, I propose that
25 the next step, as soon as we get these next

1 administrative rules out of the way -- and we had
2 started on it before this came up and they put it
3 on the back burner, is that each administrative
4 judge must approve any local rules, and before he
5 is to approve them, then they are to be as nearly
6 uniform as possible within his district. And then
7 once he has done that, then send it on up for us
8 to go over.

9 We're just doing everything. The big move is
10 to eliminate so far as possible all these local
11 rules. And what is necessary, then go ahead and
12 put them in the Rules of Civil Procedure and all
13 the those "rinky, dinky, little
14 let's-get-the-out-of-town boy" we'll just do away
15 with it then.

16 CHAIRMAN SOULES: Let's discuss with
17 the committee as a whole whether we add a Rule 11
18 that just says local rules shall not conflict with
19 these rules. And maybe that ought to be expressly
20 stated. The Supreme Court might want to say that
21 in these Administrative Rules.

22 Okay. Look at that second sentence now, Rule
23 1, what we now call the rule. "In the execution
24 of these rules, telephone hearings or conferences
25 in lieu of court appearances are encouraged."

1 PROFESSOR DORSANEO: The third
2 sentence.

3 CHAIRMAN SOULES: The third
4 sentence. Do we need that? Why is that in
5 there? Right up there in the front, "Do business
6 by telephone instead of in person."

7 JUSTICE WALLACE: I don't --

8 PROFESSOR EDGAR: Well, I remember
9 when it was discussed in the committee hearing,
10 and it was simply a vehicle by which matters could
11 be expedited, to try and encourage the use of the
12 telephone conferences rather than having hearings
13 in person in open court.

14 PROFESSOR DORSANEO: Mr. Chairman, I
15 think, that we may well need to put something like
16 that in our Rules of Civil Procedure somewhere,
17 because it is a fact that our Texas practice of
18 having meetings and sitting in courtrooms when
19 neither a meeting nor a three-hour delay before a
20 meeting takes place is necessary, is probably
21 outmoded and does contribute to delay.

22 I would suggest that this be considered as
23 either a separate Administrative Rule or a
24 separate Rule of Civil Procedure that would be
25 included, perhaps, in the Rules of Civil Procedure

1 in the general rules in Part Two relating to
2 practice in district and county courts. It's a
3 good idea but there isn't much here expect a
4 precatory kind of statement.

5 PROFESSOR EDGAR: How about Rule 21?

6 MR. MCMAINS: That's actually part of
7 the Nueces County practice, as we have docket
8 control conferences all the time that are by
9 telephone. That's the way our initial docket
10 control conferences are all a part of, generally,
11 not always, but, generally, handled, is by
12 telephone. It works very well.

13 On the other hand, I, personally, have some
14 concerns to the extent you're talking about
15 telephone conferences on very fundamental
16 decisions, either under the discovery rules or
17 under these rules in terms of the availability of
18 a record, in that, unless these things are
19 recorded through the clerk's office or by the
20 reporter -- you know, if it's on the speaker phone
21 and are reported in chambers or something, because
22 the Rules are very clear that if anybody request
23 that the proceedings be transcribed, they are
24 entitled to it.

25 And nobody is going to want to be

1 blind-sighted. Your first telephone call -- you
2 know, maybe you're a virgin, but after that, if
3 something untorrid comes out of your first
4 significant telephone call conference, you
5 scramble around trying to figure out how to file
6 bills of exception and get things done.

7 I've got no problem with conducting business
8 over the telephone, so long as we can assure a
9 record can come out of that. And the problem with
10 that, being the one of fundamental problem of
11 expense of whether or not recording devices,
12 speaker phones, et cetera, are really and truly
13 available to all the district judges or their
14 court reporters.

15 CHAIRMAN SOULES: Do we want to give
16 priority preference to telephone conferences as
17 opposed to open-court hearings on all the matters
18 that are subject except those that are precluded?
19 Some of them are precluded. You get over to the
20 family law and you can't talk by phone; you got to
21 show, under these rules.

22 MR. SPARKS (EL PASO): I think the
23 language is fine. It just says it's encouraged.
24 I like the language because there a lot of places
25 that if you had this, a judge down there in Marfa

1 might allow it. Right now they would just say,
2 "No. Come down there." But I don't want to do
3 anymore than encourage it.

4 CHAIRMAN SOULES: Well, let's
5 prioritize it. It says, "Conferences in lieu of
6 hearings are encouraged."

7 MR. MCMAINS: But again, that doesn't
8 -- it says it's encouraged, but that's in concert
9 with the expeditious intent of rules. It's
10 certainly nothing required. But my only --

11 CHAIRMAN SOULES: Well, telephone
12 hearings may be held in lieu of court appearances.

13 MR. MCMAINS: Yes.

14 CHAIRMAN SOULES: But this, to me,
15 prioritizes the telephone conferences.

16 PROFESSOR DORSANEO: I had in mind
17 that this sentence was also directed really at a
18 larger problem. And that is, in lieu of having
19 court appearances, we can dispose of motions or
20 particular matters on a written record with the
21 assistance of the telephone conference, et
22 cetera. We have in this jurisdiction the practice
23 of going to the courthouse to dispose of
24 everything that simply is a gigantic waste of
25 time.

1 MR. MCMAINS: Because a lot of times
2 your opposition doesn't show up.

3 PROFESSOR DORSANEO: And on many
4 Fridays, I spend three hours in the courthouse to
5 argue something for 20 minutes. That's a
6 pointless exercise. When, quite frankly, I would
7 do much better to have it written down, because I
8 can't anticipate what the counter-argument is.

9 I understand that in some counties that there
10 are local rules that suggest that matters be dealt
11 with without the necessity of formally appearing
12 in court. I think, for example, venue matters,
13 what's the point of having a venue hearing at this
14 point in time? What's the point, in a lot of
15 instances, of having a court appearance?

16 Again, I would suggest that we consider such
17 a rule that would encourage the disposition of
18 motions without court appearance when that would
19 facilitate the expeditious handling of the court's
20 business without affecting the judicial process,
21 but that it be included in Section 1 of Part Two
22 of the Texas Rules of Civil Procedure, which
23 concern general rules of practice in district and
24 county courts.

25 And I think this is merely a beginning point,

1 and I don't really believe it belongs in the
2 Administrative Rules at all.

3 CHAIRMAN SOULES: Well, that's what
4 I'm thinking.

5 MR. MCMAINS: I agree.

6 CHAIRMAN SOULES: If we are going to
7 prioritize it, I don't think maybe we should. I
8 think we ought to probably set out maybe some
9 different language, and we already have -- you
10 know, I've encountered a practice in Houston that
11 works fine. And that is, if you file a motion, it
12 will be set for submission. If you don't ask for
13 oral submission, it will be heard by the judge on
14 submission day without appearance, and the other
15 side is not expected to be there, and if you come,
16 you should not expect to be heard because you
17 didn't ask to be orally heard.

18 Now, the problem is that some of the judge's
19 good political friends may show up and argue and
20 you get ex parte. And you got to be damn careful
21 about that because local rules are not tight
22 enough on what if one guy shows. They should be
23 tight enough to preclude him from being able to
24 speak, but that's not the case always.

25 But if you're a defendant, the same thing, if

1 you want an oral submission, you have to give
2 notice and it will be set for oral submission.
3 But if neither side asks for oral submission, it
4 is heard on submission day by the Court without
5 oral submission all based on the other pleadings.
6 And there's no problem with that practice, not
7 that I like everything they do in federal courts.

8 I suppose the Texas practice would favor, if
9 somebody wants one, you give it to him instead of
10 like the federal practice where you're just lucky
11 if you ever get heard.

12 But I think you're right. I think probably
13 this needs to be in the Rules of Civil Procedure,
14 that telephone conferences may be held in lieu
15 of --

16 MR. SPARKS (EL PASO): Maybe it ought
17 to say they are permitted.

18 CHAIRMAN SOULES: They are permitted
19 in lieu of any hearing required by these rules.

20 MR. SPARKS (EL PASO): I think that's
21 a good suggestion.

22 MR. MCMAINS: Well, I don't know about
23 any hearing.

24 CHAIRMAN SOULES: So long as there's a
25 record.

1 MR. MCMAINS: Because there are
2 hearings that require testimony.

3 PROFESSOR DORSANEO: Let's leave the
4 details of it until later.

5 PROFESSOR EDGAR: No, you wouldn't
6 want that because --

7 CHAIRMAN SOULES: We already have it.

8 PROFESSOR EDGAR: -- you might want
9 the -- I can think of a lot of situations where
10 you would really want some type of recording even
11 though there was no testimony because statements
12 were made by counsel that later may be construed
13 as admission and things like this that were really
14 not intended.

15 MR. MCMAINS: I agree with that. But
16 I'm saying, clearly, anything in which there was
17 an evidentiary hearing, you've got --

18 CHAIRMAN SOULES: No, we already
19 permit sworn testimony in court by telephone.

20 MR. MCMAINS: No, I understand that.

21 CHAIRMAN SOULES: Why exclude it from
22 this if the judge -- we may be on a motion. But
23 we can take depositions by telephone right now,
24 and that's admissible into evidence, Summary
25 Judgment evidence, for example.

1 MR. SPARKS (EL PASO): That's right
2 because you've got a court reporter. But you
3 could say that telephone conferences or hearings
4 are permitted --

5 CHAIRMAN SOULES: Well, the court
6 reporter may be on the phone. You just have to
7 have a Notary that swears the witness that can say
8 they are a Notary. The court reporter may be on a
9 different phone and not even present with one of
10 the witnesses.

11 MR. SPARKS (EL PASO): Well, that's
12 right. Usually they're in the lawyer's office.

13 CHAIRMAN SOULES: Usually they would
14 be there and they testify.

15 MR. SPARKS (EL PASO): But that
16 telephone arrangement, I guarantee you, it doesn't
17 exist in some parts of West Texas.

18 CHAIRMAN SOULES: We need to probably
19 put that in the early Rules of Civil Procedure
20 permitting things other than open-court hearings
21 and then something that says, if neither party
22 requests an oral hearing, the Judge can hear the
23 motion -- can hear a -- whatever we would describe
24 it. You were worried about the word "motion"
25 before Bill -- but can hear whatever is before him

1 based on the written pleadings of the parties when
2 the time comes for submission.

3 Okay. Well, those things we can cover.
4 Let's go on to 20 unless somebody else really sees
5 something in 1 that we need to address. Rusty,
6 you started to make a statement earlier about how
7 this might conflict with Rules 1 and 2.

8 MR. MCMAINS: Well, if you have a
9 purpose rule, it -- I mean, you know, it just
10 didn't have a purpose rule. I mean, most people,
11 I would think, would interpret a policy rule would
12 be the same thing as a purpose rule. Once you've
13 relabeled the purpose rule, then that eliminates
14 much of the problem.

15 CHAIRMAN SOULES: All right. Now, we
16 also have a problem there where this is a new rule
17 setting time standards on pending cases. And we
18 have a comment that says it's suppose to govern
19 pending cases as well as new cases.

20 MR. MCMAINS: Yes.

21 CHAIRMAN SOULES: So we're all of a
22 sudden in the throws of a lot of cases where we're
23 counsel of record.

24 MR. MCMAINS: Where we're beyond all
25 of these provisions.

1 CHAIRMAN SOULES: Beyond all these
2 provisions. And what kind of soup are we swimming
3 in?

4 MR. MCMAINS: It seems to me that
5 there has to be a specific rule on any
6 Administrative Rule that tries to set up
7 timetables that has to have in it a new rule, I
8 mean, a specific rule that tells you when you
9 start calculating on cases already pending.

10 I mean, if you want to say that all cases
11 pending shall be treated as having been filed on
12 the date of the enactment of the rules -- I mean,
13 I'm not suggesting that that's a good idea, but we
14 need to know.

15 CHAIRMAN SOULES: That may be the best
16 we can get.

17 MR. MCMAINS: Very specific.

18 PROFESSOR DORSANEO: What would be
19 wrong with that?

20 CHAIRMAN SOULES: Well, we have not
21 taken dockets, taken cases. We have not loaded
22 our own dockets for clients that we represent and
23 with whom we have fiduciary relationships to
24 accommodate these kinds of time standards because
25 those have not been imposed on us in our fiduciary

1 capacity that is representative of our clients
2 until these rules start.

3 MR. SPARKS (EL PASO): You would also
4 have to take the problem that somebody may take
5 advantage of it and say, "I now have 270 days,"
6 whatever the timeframes are. In other words, "I
7 don't have to go to trial next month."

8 CHAIRMAN SOULES: I don't think that
9 business litigators have the same degree of
10 problem. I can live with these, certainly, if all
11 my cases are deemed filed on the day these rules
12 become effective, because we tend to handle fewer
13 cases. Or if we do, they're cases that we can --
14 we've got a lot of collection cases we can somehow
15 automate them on word processors and go over there
16 and have -- we can manage; it may be tight.

17 But the injuries lawyers who take referrals
18 -- and I don't know whether Rusty is in that, but
19 I have a lot of good friends in Houston, and they
20 take referrals from Angleton and all those towns
21 down there, and they take the good ones and the
22 bad ones. Because the lawyers that refer those
23 cases don't just let you pick and choose. And
24 they've got some old cases that they took, a lot
25 of old cases. I don't know what the percentage

1 is, but say, there's one good 1 in 20, or whatever
2 the number may be, comes out of Lake Jackson.

3 They took those cases without having to worry
4 about these rules to deal with them as they found
5 time to deal with them, or however. Now, all of a
6 sudden, they've got 300 or 400 plaintiffs' cases
7 of which there are 50 of them they're working on,
8 and they've got to get all of them disposed of
9 posthaste and deal with them in a fiduciary
10 manner. And I think they're going to have some
11 problems if we throw them all together.

12 PROFESSOR DORSANEO: Mr. Chairman, I
13 suggest that that issue is really outside this
14 subcommittee's purview. It doesn't deal with the
15 conflict, and that's --

16 MR. MCMAINS: Well, except that I
17 think that what we need to say is that the comment
18 that is in this rule --

19 CHAIRMAN SOULES: Beyond Rule 1.

20 MR. MCMAINS: -- puts us in a real
21 conundrum with regards to the Texas Rules
22 themselves, because it would appear that just the
23 ordinary rules applied to the Administrative
24 Rules. There's nothing specifically applying.
25 Somehow they have to be reconciled. That's all.

1 I think that's the only function of our
2 committee, is just to identify that that comment
3 isn't really satisfactory for what happens to the
4 existing caseload.

5 PROFESSOR DORSANEO: You put that as
6 item 3 on the agenda?

7 MR. MCMAINS: Yes.

8 PROFESSOR DORSANEO: The things we've
9 gone through.

10 MR. MCMAINS: This may be beyond the
11 scope of what we're supposed to be doing as well,
12 and I won't dwell on it very much. But any
13 attempt to do this is, well --

14 I mean, any attempt in the Administrative
15 Rules to set timeframes, like in Rule 1, puts us
16 in a worse posture than we ever had been in terms
17 of the recurring problem now in business, as well
18 as PI litigation, people going to bankruptcy
19 court, of bringing in new defendants who file new
20 motions to transfer, of cases actually physically
21 getting transferred, maybe after the thing is, you
22 know, already set for trial. You've already got
23 all this stuff, and then the case gets
24 transferred. I mean, this thing has got no
25 provisions in it for starting times over when it

1 gets refiled in a new county.

2 CHAIRMAN SOULES: We're going to get
3 to that one, though, because we get over to where
4 you've got a lot of bankruptcy dockets; that's
5 back in here, but not transfer dockets. I don't
6 think transfer dockets.

7 MR. MCMAINS: Where is the bankruptcy
8 stuff?

9 CHAIRMAN SOULES: Well, it's back here
10 a little bit further.

11 MR. SPARKS (EL PASO): With the active
12 and passive --

13 MR. MCMAINS: But anyway, I'm just --

14 CHAIRMAN SOULES: I'm not sure it
15 covers your problem.

16 MR. MCMAINS: Yes. See, the problem I
17 have, though, is this says, you know, the clock is
18 ticking. And we really don't have, once it's a
19 deficiency, frankly, in our Texas Rules -- because
20 we don't have any provisions with our Texas Rules
21 that dovetail and show you that even though you've
22 got certain time limits to do things, if all of a
23 sudden the Federal Court says, "You can't handle
24 your lawsuit anymore for a while until I let you
25 free from the stay over," there's nothing in the

1 Texas Rules that says that you get any protection
2 from that.

3 And that's not just true in the trial rules;
4 that's true in the Appellate Rules. I've had
5 people that have gone into bankruptcy after the
6 appeal is perfected or even after the case is
7 argued. But worse, after it's perfected but
8 before the record is filed or, you know, at times,
9 maybe even before the appeal is perfected in terms
10 of the bond, do you get any extensions of time, I
11 mean, these things are recurring new problems that
12 have not been addressed by our rules.

13 CHAIRMAN SOULES: Well, why don't we
14 put in something there about all other civil
15 actions or something about Rule 2 that has to do
16 with interrupted dockets. I don't know what term
17 you want to talk about but --.

18 MR. MCMAINS: Same thing with
19 removals. I mean, you know, you bring in a new
20 defendant, he removes, and you --

21 CHAIRMAN SOULES: Removal, transfer.

22 MR. MCMAINS: You fool around in
23 Federal Court for a while. And I'm sure most
24 everybody here has had experience with federal
25 judges not managing to get the case remanded or

1 even decided for, you know, 6, 8, 10 or 12, maybe
2 even longer, months.

3 PROFESSOR EDGAR: Rather than using
4 this as a -- I'm making this suggestion that we
5 recommend that, rather than using this comment,
6 what if there was simply a sentence in Rule 2 to
7 the effect that cases pending on the effective
8 date of these rules and cases which are transfer
9 cases -- I'm trying to think of some term to use
10 -- shall be treated as new cases.

11 Just simply make a statement, because
12 something has to be done about this. This is
13 going to be a genuine problem, and I think that we
14 could help the Court in making an expression of
15 policy here that they be treated as new cases.

16 MR. SPARKS (El Paso): Does everybody
17 then have 180 additional days on a five-year-old
18 case that somebody doesn't want to try?

19 PROFESSOR EDGAR: That's right.

20 MR. MCMAINS: No, no, no. He's
21 talking now about cases that are set for trial now
22 in less time. He doesn't want to give them any
23 more time when it says that they'll have at least
24 "X" period of time under these rules to do certain
25 things.

1 If you start saying it's going to be treated
2 as a new case -- the date of the passage of the
3 rules, then all of a sudden he says, "See, this
4 rule that says I've got 180 more days; I don't
5 have to go to trial." He's trying to avoid a
6 disruption of the docket.

7 PROFESSOR EDGAR: Well, I think that
8 that's just simply a policy decision that
9 somebody's going to have to make. What are you
10 going to do about those cases?

11 MR. MCMAINS: Well, I think that,
12 obviously, any scheduling that has already
13 occurred or any, you know -- these rules should
14 not be intended to have any impact on any case
15 that is on a faster track than is already here.

16 PROFESSOR DORSANEO: These rules would
17 not be a basis for a Motion for Continuance in any
18 case that's set.

19 MR. MCMAINS: Right.

20 JUSTICE WALLACE: How do you-all
21 interpret that sentence, that last sentence,
22 starting on the bottom of Page 2 there, on Rule 3,
23 "Nothing in this rule shall be interpreted to
24 prevent a Court in an individual case from issuing
25 an exception order based on the specific finding

1 that the interest of justice requires who a
2 modification of the routine processes as
3 prescribed."

4 Would that be broad enough to cover these
5 transfer cases of stay orders of bankruptcy court
6 and things like that?

7 MR. SPARKS (EL PASO): It should, and
8 that's why it's in there.

9 JUSTICE WALLACE: We discussed it, and
10 I thought that it covered it.

11 MR. SPARKS (EL PASO): You know,
12 another related problem --

13 MR. MCMAINS: It could be. The
14 problem is, what happens if the judge doesn't want
15 to do it?

16 PROFESSOR DORSANEO: Maybe you ought
17 to go on what's proposed to be Rule 2 rather than
18 to Rule 3 as applicable to a particular segment of
19 the case.

20 MR. MCMAINS: For one thing -- of
21 course, I suspect that the reason they didn't want
22 to do that is because they don't want to make all
23 the rules subject to the judge modifying them.
24 And I don't know.

25 MR. SPARKS (EL PASO): Another rabbit

1 trail that we could talk about, but one that I
2 think is more practical and that is, you go in,
3 you get your orders under these rules, and the
4 270th day comes by and the case is continued
5 because he can't get it to trial, the judge can't
6 get it to trial, and then the rules just leave
7 you. You've completed discovery. The only phrase
8 we have in there that protects you is further
9 discovery by agreement or good cause shown with a
10 court order. But the rules just leave it.

11 The rules are theoretically resolved, in that
12 270 days away you're going to get a trial date,
13 and that's, of course, the biggest problem that I
14 see that these judges are going to have with
15 them. But that's not a conflict with the Rules of
16 Procedure, but that's another area.

17 CHAIRMAN SOULES: Well, let's go to
18 what was Rule 2.

19 MR. SPARKS (EL PASO): It's Rule 3
20 ~~now.~~

21 MR. MCMAINS: There is just a task of
22 the Administrative Judge. I'm sure there's a bunch
23 of judges that aren't going to like that.

24 MR. SPARKS (EL PASO): County
25 Commissioners and clerks are going to dislike it

1 more.

2 PROFESSOR EDGAR: Does that conflict
3 -- let's look at Rule 165A for just a minute.

4 MR. DORSANEO: I don't think Rule 2
5 conflicts anything, does it?

6 PROFESSOR EDGAR: Rule 246, "The clerk
7 shall keep a record in his office of all cases set
8 for trial, and it shall be his duty to inform any
9 non-resident attorney of the date of settings upon
10 request by mail accompanied by return mail.
11 Failure of the clerk to furnish such information
12 shall be a proper ground for continuance." Is
13 there any conflict between that rule and this
14 Rule?

15 MR. MCMAINS: This is just a reporting
16 of Rule 2.

17 PROFESSOR EDGAR: Okay. All right. I
18 just wanted to make sure of that. Yes, but I
19 think it might affect us somewhere down the line.

20 PROFESSOR DORSANEO: So I suggest we
21 go to 3.

22 CHAIRMAN SOULES: Okay. Go all the
23 way just skip through 2 because it's reporting and
24 go to 3, "Control of the flow of non-probate civil
25 cases."

1 MR. MCMAINS: Okay. The initial
2 problem, I think, that was noted by Bill is that
3 we don't really have an adequate definition or
4 instruction on what a non-probate case is. That
5 is a term undefined in these rules.

6 MR. SPARKS (EL PASO): And you think
7 you know exactly what it is until you try to
8 define it.

9 PROFESSOR DORSANEO: Most of the ones
10 that are not defined have that problem
11 inherently. In specific things, though, in terms
12 of -- if I can just jump in, things that conflict
13 or relate to matters in the Rules of Civil
14 Procedure, I note, basically, the following:

15 In Paragraph C of Proposed Administrative
16 Rule 3, the term "initial pleading" is more than
17 merely an undefined term. It is a troublesome
18 term because we do have a system that has terms in
19 it in the Texas Rules of Civil Procedure.

20 Under Rule 45 of the Texas Rules of Civil
21 Procedure our pleading system is by petition and
22 answer. Those are not, in Texas, merely labels
23 for things.

24 Everything the defendant files is technically
25 an answer and everything the plaintiff files is

1 technically a petition. The remaining rules, for
2 example, Rule 78 and 45, define petition and
3 answer in more refined terms. And I do not think
4 it would be advisable to insert a new word,
5 "initial pleading," that is not defined anywhere
6 because it will impair the integrity of our Texas
7 system and the definitional scheme contained in
8 the Rules of Civil Procedure.

9 I would suggest that we use the terms used in
10 the Rules of Civil Procedure. If we're talking
11 about a defendant, we're talking about an answer;
12 that's what defendants file. And everything that
13 they file is considered to be an answer, although,
14 I would recognize that there is some problem that
15 people have with something that's a motion being
16 thought of as an answer.

17 MR. SPARKS (EL PASO): Is it
18 technically an answer, Your Honor?

19 PROFESSOR DORSANEO: I think
20 technically it is.

21 PROFESSOR EDGAR: Well, Rule 84
22 excepts special appearances, motions to transfer
23 venue from the answer.

24 PROFESSOR DORSANEO: No, it doesn't.

25 PROFESSOR EDGAR: It says it may be

1 excepted therefrom, 84.

2 PROFESSOR DORSANEO: But that's just
3 excepted from the order. Rule 84 indicates what
4 the defendant may put in his answer, and it
5 indicates that the Court shall dispose of these
6 matters in the order that the Court wants to,
7 except that the Court cannot decide to consider a
8 special appearance or a motion to transfer venue
9 out of order. That's the way I read it.

10 Now, maybe we would have some -- instead of
11 saying "answer in lieu of initial pleading" in 3C
12 of the proposed Administrative Rules, we'd say
13 "answer or motion -- first motion."

14 CHAIRMAN SOULES: Can a party appear,
15 other than by the filing of the pleading, and be
16 held to an appearance?

17 JUSTICE WALLACE: Yes, if you just
18 show up in person.

19 PROFESSOR DORSANEO: Yes.

20 MR. MCMAINS: Yes.

21 PROFESSOR EDGAR: When you appear in
22 open court.

23 JUSTICE WALLACE: Special appearances
24 is about the only thing, and if it's sustained,
25 then it's over with. Then if it's not sustained,

1 then he's assumed to have answered 20 days
2 afterwards.

3 MR. SPARKS (EL PASO): Motion to Quash
4 is the same.

5 PROFESSOR DORSANEO: Maybe making an
6 appearance would be the appropriate thing to use.

7 MR. SPARKS (EL PASO): But you don't
8 make an appearance for the special --

9 PROFESSOR EDGAR: What if you just say
10 "a general appearance?"

11 MR. SPARKS (EL PASO): Or "special" if
12 you need discovery.

13 PROFESSOR EDGAR: Well, but that's one
14 thing I had a -- and this goes back to what Bill
15 was saying a minute ago. What if you file a
16 special appearance? Is that embraced within the
17 term "initial pleading" here? That's the
18 question, you see.

19 MR. SPARKS (EL PASO): Yes.

20 CHAIRMAN SOULES: W're talking about
21 all these kinds of pleadings.

22 PROFESSOR DORSANEO: Well, I just
23 point out --

24 PROFESSOR EDGAR: And when we mean
25 general appearance, within 30 days after a general

1 appearance by the last defendant to appear, is
2 that what we mean?

3 MR. SPARKS (EL PASO): We have a
4 general appearance concept.

5 PROFESSOR DORSANEO: Every appearance
6 is a general appearance if it's not a special
7 appearance.

8 MR. SPARKS (EL PASO): Well, but does
9 it say that?

10 PROFESSOR DORSANEO: Yes.

11 PROFESSOR EDGAR: The reason I put
12 "general" there is because if you just say
13 "appearance," then the question would be, do you
14 mean a "special appearance" as well as a "general
15 appearance," and that's why it just seems to me
16 that we should just say "a general appearance."

17 MR. SPARKS (EL PASO): I think that's
18 a good suggestion.

19 CHAIRMAN SOULES: The party that shows
20 up for a temporary injunction hearing, without
21 ever having filed a pleading, makes a general
22 appearance just by showing up in open court?

23 MR. SPARKS (EL PASO): Yes.

24 PROFESSOR EDGAR: Subjects himself to
25 the general jurisdiction of the court.

1 CHAIRMAN SOULES: And what if he wants
2 to file a special appearance?

3 PROFESSOR EDGAR: He better file a
4 special appearance.

5 CHAIRMAN SOULES: Before he shows up
6 in open court?

7 PROFESSOR EDGAR: You'd better believe
8 it.

9 CHAIRMAN SOULES: Before he opens his
10 mouth.

11 PROFESSOR EDGAR: Before he says a
12 word.

13 MR. MCMAINS: In response to the show
14 Cause order, I'm not certain that he has waived a
15 general appearance.

16 MR. SPARKS (EL PASO): I'm not either,
17 but I sure file them.

18 PROFESSOR DORSANEO: I'm not either,
19 but if we go through on this proposed
20 Administrative Rule 3C, I see the term "initial
21 pleading" as being an unsatisfactory term and one
22 that conflicts with at least Texas Rules of Civil
23 Procedure 45, 78, 84, 85, and 120A.

24 MR. MCMAINS: Well, I have another
25 problem with that sentence, too, because -- in two

1 respects. First, it says "the last defendant --
2 the initial pleading of the last defendant."

3 PROFESSOR DORSANEO: Who is the last
4 one?

5 MR. MCMAINS: Well, it says "the last
6 defendant to appear."

7 CHAIRMAN SOULES: He may not have
8 appeared yet.

9 MR. SPARKS (EL PASO): That's the way
10 we do it.

11 MR. MCMAINS: Well, one of the
12 problems that I have is that --

13 MR. SPARKS (EL PASO): A way around
14 it; we've got it.

15 MR. MCMAINS: Okay. Wait a minute.
16 As a co-defendant, you don't know what time the
17 other defendant has -- I mean, he doesn't know who
18 to send it to, to send his answer to, if you're
19 filing answers in the same thing. You file
20 answers to the plaintiff. I mean, the defendants
21 don't know what their times are. They don't know
22 when anybody respectfully got served initially,
23 and they don't get told by the Court, the Court
24 doesn't ever communicate with them about, you
25 know, that an answer has been filed by anybody.

1 You don't know whether you're the first defendant,
2 the only defendant or all the defendants until you
3 go over there and check.

4 CHAIRMAN SOULES: You're supposed to
5 get served.

6 MR. MCMAINS: But not necessarily by
7 the -- when I mean, the plaintiff serves you, he
8 doesn't tell you who the -- at the same time, if
9 he serves five defendants --

10 MR. SPARKS (EL PASO): Luke is right.

11 MR. MCMAINS: -- you don't know who
12 those other defendants are.

13 CHAIRMAN SOULES: It should be in the
14 petition.

15 MR. MCMAINS: Yes, but you don't have
16 to serve them.

17 CHAIRMAN SOULES: I think you do under
18 rules. I never thought about it until you just
19 said it, but you now have to serve answers.

20 MR. MCMAINS: I don't disagree that
21 you're supposed to serve them, but what I'm saying
22 is, it doesn't always happen.

23 CHAIRMAN SOULES: It doesn't happen,
24 that's true, a lot of times.

25 MR. MCMAINS: Because all they know is

1 who the parties are to serve. All right. And
2 what is a co-defendant who may actually be served
3 by a defendant's answer before he gets served by
4 the petition? He's sitting there not knowing what
5 the hell that -- you know, what does this have to
6 do with me? This is an answer by somebody that
7 hasn't sued me and what do I with that?

8 CHAIRMAN SOULES: I think that
9 Hadley's suggestion that 30 days after the filing
10 of the general appearance --

11 PROFESSOR EDGAR: No, within 30 days
12 after the general appearance of the last --

13 CHAIRMAN SOULES: The general
14 appearance -- now then, we're worried about the
15 last --

16 MR. MCMAINS: General appearance of a
17 --

18 PROFESSOR EDGAR: By the --

19 MR. MCMAINS: That's the other thing,
20 is who's the defendant? What's the third party
21 defendant?

22 MR. SPARKS (EL PASO): I was going to
23 ask that myself. They claim in the task force --
24 the drafters claim that that term clearly
25 indicated the third-party defendant, and then

1 there was a tremendous argument thereafter that
2 kind of lead some doubts on that statement.

3 CHAIRMAN SOULES: Why does it have to
4 be that anyway? Why can't it be the last party to
5 appear. Suppose there's an intervenor. Suppose
6 there's a new --

7 MR. MCMAINS: I don't disagree with
8 that at all. I'm just saying that we don't know
9 what this is.

10 CHAIRMAN SOULES: Why shouldn't it be
11 the last filing within 30 days after the general
12 appearance by the last party to appear? I still
13 realize that has a problem "to appear," "the last
14 to appear."

15 MR. MCMAINS: All I'm saying is there
16 is a considerable lack of definition here as I
17 think what we are getting at, and they don't
18 really comport with our rules of practice, if not
19 the rules of procedure.

20 MR. SPARKS (EL PASO): I'm not
21 supporting the premise, but the argument by Dean
22 Friessen in this case was that he wanted the time
23 frame to run from answer date of the original
24 defendant's suit, whether it be one defendant or
25 five defendants, and that the time frame then had

1 to go at that point.

2 CHAIRMAN SOULES: That's not even what
3 this says, though.

4 PROFESSOR DORSANEO: No.

5 CHAIRMAN SOULES: Because this says
6 "the last defendant to appear." It could be an
7 after added defendant.

8 MR. SPARKS (EL PASO): I understand
9 that that was changed.

10 PROFESSOR DORSANEO: It's very sloppy
11 because the last defendant to appear in this --
12 suppose the defendant doesn't appear on time but
13 appears long after there's been a default and they
14 have filed a motion for new trial having now the
15 default is set aside. That's not necessarily a
16 short time, the last defendant to appear. It
17 could appear --

18 MR. MCMAINS: It's a question of what
19 you're appearing to.

20 PROFESSOR EDGAR: Well, if he doesn't
21 appear, of course, I guess he'd be severed and
22 take a default judgment against him.

23 PROFESSOR DORSANEO: They're not even
24 meant to be severed in order to make it a default
25 judgment filed; it's not meant to happen.

1 MR. SPARKS (EL PASO): You know, I
2 asked this question on one of the Saturdays and
3 nobody -- Friessen didn't seem to answer it. Of
4 course, he had his hands full answering some other
5 things.

6 What happens seven months into a case and the
7 plaintiff sues an additional defendant, does the
8 process start over again? I never could find the
9 solution in these rules for that. Do you then --
10 and his idea at that time was, "yes, you then have
11 to propose a new plan," but that didn't ring.

12 PROFESSOR DORSANEO: I suggest we
13 leave this thing because we could talk about it as
14 an item and go on to other conflicts.

15 CHAIRMAN SOULES: Well, let's at least
16 talk about -- do we want to put in "within 30 days
17 after the general appearance by the last party to
18 appear." Do we want to suggest at least those
19 two?

20 MR. MCMAINS: Not "last party."
21 Because as you -- well, unless you want to do what
22 you were saying.

23 PROFESSOR EDGAR: By the last original
24 defendant.

25 MR. MCMAINS: Because if you got a

1 subrogation case and the intervenor appears 12
2 months down the road --

3 CHAIRMAN SOULES: Doesn't he have the
4 right for some time to get ready for trial?

5 MR. MCMAINS: Well, I'm not agreeing
6 with that, but if the idea of this is that you're
7 moving on down the way, you don't want -- you're
8 moving on down the road, you don't want to be
9 putting everything off automatically until the
10 intervenor or somebody else appears.

11 CHAIRMAN SOULES: Well, I think you
12 got a better chance of justice if it says "the
13 last party," because the judge can always strike
14 and sever and separately try parties and say,
15 "Okay. We were interrupted but now we're going to
16 get back on track, and I'm not going to give you
17 much time."

18 MR. MCMAINS: Luke, I don't disagree
19 with the philosophy of that, and I'm not going to
20 prejudice the judge here. He's got a pending case
21 in front of the Court right now in which the
22 argument is being made that ^{we} you got to have
23 everybody in sight in the lawsuit before you can
24 even try the lawsuit.

25 PROFESSOR DORSANEO: All this talks

1 about -- it does not talk about that. It just
2 talks about, the parties may, without waiver, file
3 a proposed plan for completion and it was 21 days
4 after.

5 MR. MCMAINS: Well, except for 4. It
6 says, "after the time period for responding to the
7 proposed plan has as elapsed, the Court shall
8 enter its order."

9 PROFESSOR DORSANEO: It says we'll do
10 it now.

11 MR. SPARKS (EL PASO): Well, you know
12 we're sitting there --

13 PROFESSOR EDGAR: With all that so
14 prefaced on A, though, that nothing in this rule
15 shall be interpreted to prevent the Court in an
16 individual case from issuing an exception based on
17 a specific finding that the interest of justice
18 requires a modification.

19 MR. MCMAINS: Okay, now, I don't
20 disagree with that either, except that again, the
21 problem you have there is because the fast track E
22 doesn't refer to A.

23 MR. SPARKS (EL PASO): Well, wait a
24 minute. We're just not reading. You talk
25 defendant -- look at C-3. It says additional

1 parties are joined after the order, then they have
2 21 days to request a proposal.

3 MR. MCMAINS: Yes. It says "such
4 additional parties," but it doesn't say the party
5 joining has any time. That's what I mean.

6 PROFESSOR EDGAR: Well, but why should
7 he?

8 MR. SPARKS (EL PASO): He may need a
9 deposition.

10 MR. MCMAINS: Because how many times
11 --

12 PROFESSOR EDGAR: But he made that
13 decision, though.

14 MR. MCMAINS: Well, because the
15 plaintiff, in so many cases, has sued a party
16 which decides to change its organizational
17 structure, or has decided, from the time that the
18 cause of action arose until the time that you have
19 filed the suit, and/or decides to identify that,
20 "I'm not really the defendant who sold the
21 product; it's Y defendant." And you're trying to
22 bring in parties who are potentially responsible.

23 Now, we do our best to do that. The good
24 lawyers I think do their best to do that the first
25 time that they are out of box. But sometimes you

1 can't do it any other way than filing suit and
2 getting the information.

3 And when you limit the ability to change a
4 plan on the scheduling of trial to the party
5 brought in, it is to the great disadvantage of the
6 party initiating the suit. You didn't know the
7 party existed until then.

8 PROFESSOR EDGAR: You suggest then
9 that any party may propose a change?

10 MR. SPARKS (EL PASO): Right. That's
11 an easy change.

12 MR. MCMAINS: Any party or any
13 affected party but it seems to me that any party
14 should be able to because, you know, a
15 co-defendant may decide that he needs some more
16 discovery.

17 CHAIRMAN SOULES: Well, let me just
18 say, I think it conflicts with Rule 38, and that's
19 just a specific statement. I think the first
20 sentence conflicts with Rule 38.

21 It says I can join a third party within 30
22 days without any leave. Now that I've made that
23 person a party and didn't require leave, he is a
24 party; he's not a defendant; he's a third-party
25 defendant.

1 MR. MCMAINS: Yes.

2 CHAIRMAN SOULES: So I think it ought
3 to be "the last party to appear." Now, somebody
4 who isn't a party, isn't a party to appear; he
5 isn't a party for anything. So if you use the
6 word "party," we're just talking about parties,
7 that is, people who have been named in the suit by
8 somebody else or chose to come in as intervenors.
9 But the minute they come in, they are a party at
10 that juncture. But whatever may be their status
11 as a party, we don't start this until everybody
12 who is a party has appeared, generally.

13 MR. SPARKS (EL PASO): You know, I've
14 sued some awful young children as involuntary
15 plaintiffs before.

16 CHAIRMAN SOULES: That would help try
17 to resolve maybe some of those complex things that
18 trial judges are going to have to look at.

19 PROFESSOR EDGAR: All right. You
20 would say, C then, "within 30 days after the" --
21 after what now?

22 CHAIRMAN SOULES: Within 30 days after
23 the general appearance or a general appearance.

24 PROFESSOR EDGAR: Of the "last party
25 to appear."

1 CHAIRMAN SOULES: Right. I'm not
2 saying I like the language necessarily, but the
3 concept is there.

4 MR. MCMAINS: Do you want to say "the
5 party that last appeared?"

6 CHAIRMAN SOULES: The last party to
7 appear.

8 MR. SPARKS (EL PASO): Of course, then
9 when do you decide that no more parties are going
10 to be made?

11 CHAIRMAN SOULES: Well, I'm going on
12 the premise that he's not a party until he's a
13 party to the lawsuit.

14 MR. SPARKS (EL PASO): I understand.

15 CHAIRMAN SOULES: Somebody who is out
16 there in the world is not a party, and you have
17 the last party to appear when everybody that's
18 named in the lawsuit is present. Somebody may
19 come in later, so you get sued. And then they
20 become a new party and then you get into this
21 additional party aspect of it but that does not
22 address what Rusty's problem is.

23 Now, do we all get to start over, at least,
24 as to the new party? And I just hadn't gotten
25 there with you; I was dragging behind, Rusty. Now

1 I'm with you, finally.

2 PROFESSOR EDGAR: All right. So then
3 within 30 days after the general appearance of the
4 last party to appear, is that what you're saying?

5 CHAIRMAN SOULES: Yes, sir, or a
6 general appearance.

7 PROFESSOR EDGAR: Well, it would be
8 the general appearance of the last party.

9 CHAIRMAN SOULES: To appear, yes.

10 MR. SPARKS (EL PASO): I'm still
11 dragging. I have not reached Rusty, but then I
12 never have.

13 MR. MCMAINS: Well, if my discovery
14 order resumed tomorrow and I joined you --

15 CHAIRMAN SOULES: Sir?

16 MR. MCMAINS: If my discovery order
17 with everybody else's is over tomorrow, my
18 original one, and I joined you today, you've got a
19 right to change the plan, but I don't under these
20 rules.

21 MR. SPARKS (EL PASO): No, no. I
22 don't even have a right. I have a right to
23 propose it.

24 MR. MCMAINS: Well, that's right.
25 You've got a right to propose it. Now, why would

1 you propose it if I didn't have any discovery?

2 MR. SPARKS (EL PASO): But on C here,
3 I went along with your change there. Any party
4 should have that right.

5 MR. MCMAINS: That's what I mean.

6 MR. SPARKS (EL PASO): I'm not so sure
7 that the initial running shouldn't be
8 defendant's.

9 MR. MCMAINS: Oh, I don't --

10 PROFESSOR EDGAR: All right. Then on
11 C-3, you would recommend, Rusty, that it would
12 just say then "any party"?

13 MR. SPARKS (EL PASO): Yes. That has
14 to be C-3.

15 PROFESSOR EDGAR: All right, then any
16 party.

17 MR. SPARKS (EL PASO): It's Luke's
18 party up in the first sentence of C that I'm
19 afraid should be defendant. I just think you
20 don't really know what that's going to be. But
21 it's interpreted like you're thinking; that's
22 right. But "any party" is a lot of things.

23 I think if you put it that way, Luke, every
24 time you add a new party, you have, as a matter of
25 right, 21 more days to propose a new order,

1 whereas under C-3, if you add a new party, you can
2 request it but the Court controls it. So it's not
3 a matter of right; it's more of the management of
4 the presiding judge.

5 CHAIRMAN SOULES: Well, let's get that
6 all on the table.

7 PROFESSOR DORSANEO: One last
8 comment: Whatever anybody decides the time table
9 is going to be for starting and restarting the
10 clock, someone with familiarity with the Texas
11 Rules of Civil Procedure needs to write that in
12 the same language used in the Texas Rules of Civil
13 Procedure, by speaking in terms of petitions,
14 answers and motions, and not in some other
15 undefined way. Otherwise, we're going to create
16 conflicts that the courts are going to have to
17 resolve and a lot of trouble on this very
18 important matter.

19 CHAIRMAN SOULES: Where do you see
20 the --

21 PROFESSOR EDGAR: Specifically, what
22 part --

23 PROFESSOR DORSANEO: Well, I'm not
24 getting into the details of it, whether it should
25 be defendant or party, but the term "initial

1 pleading" is an unsatisfactory term. If it's
2 going to be last party to appear, then we need to
3 talk about petition or the answer --

4 PROFESSOR EDGAR: We change that to
5 read "general appearance."

6 PROFESSOR DORSANEO: Well, yes, that
7 would be fine, assuming that this all stays the way
8 it is. As I understood, our charge was to point
9 out the conflicts. And I'm not sure it's going to
10 come out this way.

11 MR. MCMAINS: I will make one other
12 observation in terms of the change that you made
13 to the appearance of the last party. Is that what
14 you --

15 PROFESSOR EDGAR: General appearance
16 of the last party.

17 MR. MCMAINS: Well, you know, suppose
18 that I find out about a -- I've got a wrongful
19 death claim, and I find out about a father, that I
20 didn't know about, of my decedent, and I add it.
21 Does it start all the times over again? He
22 appears for the first time in my amended petition.

23 PROFESSOR EDGAR: No. It simply means
24 that any party may then propose a change in the
25 schedule.

1 MR. SPARKS (EL PASO): But you see,
2 then you've fallen into the trap, and that's why
3 defendant probably should be right on the first
4 paragraph. It should read, I think, "Within 30
5 days after filing of the general appearance of the
6 last defendant to appear and thereafter any
7 additional parties, everybody has the option of
8 requesting a change in the discovery."

9 CHAIRMAN SOULES: So you're saying
10 third parties should be controlled by C-2 to C-3?

11 MR. SPARKS (EL PASO): C-3, yes. And
12 Rusty's change is an excellent one. Anybody
13 should have the right to propose it, not just the
14 ones who --

15 PROFESSOR DORSANEO: And intervenors
16 or plaintiffs that try to come in later are just
17 good luck.

18 MR. MCMAINS: Well, there are people
19 who can propose a change, propose the order under
20 3.

21 MR. SPARKS (EL PASO): Sure.

22 PROFESSOR DORSANEO: I don't know --
23 "that are joined." I don't know what that means.
24 Does that mean "who joined."

25 MR. MCMAINS: That's a good point. If

1 you're going to have "appearance" up there,
2 wouldn't you want to say, "in the event additional
3 parties appear or are joined"?

4 PROFESSOR DORSANEO: I'd say, in the
5 event additional persons become parties.

6 CHAIRMAN SOULES: No.

7 PROFESSOR DORSANEO: In the event
8 additional persons become parties after the order
9 is scheduled. That would be consistent with
10 everybody; somebody intervening, your additional
11 father, in effect, intervening because of hiring
12 the same lawyer.

13 MR. MCMAINS: You could hire a
14 different lawyer to intervene.

15 MR. SPARKS (EL PASO): Couldn't you
16 just say, "in the event of additional parties
17 after the order of discovery"?

18 PROFESSOR DORSANEO: What's wrong with
19 the language that I suggested?

20 CHAIRMAN SOULES: "Persons" is
21 bothering me.

22 PROFESSOR DORSANEO: Why? "Persons"
23 is defined in --

24 JUSTICE WALLACE: It's a
25 corporation --

1 MR. MCMAINS: It's defined in the
2 rules, yes.

3 PROFESSOR DORSANEO: Is this going to
4 be subject to the Code Construction Act?

5 CHAIRMAN SOULES: We haven't said that
6 yet.

7 PROFESSOR DORSANEO: If it is, then I
8 can tell you, there's a definition in there that
9 is very comprehensive.

10 JUSTICE WALLACE: That would include
11 corporations and partnerships and even estates.

12 MR. SPARKS (EL PASO): Associations.

13 PROFESSOR DORSANEO: And anybody you
14 can think of.

15 CHAIRMAN SOULES: In the event
16 additional parties "join" or "are joined"?

17 MR. MCMAINS: No, "appear." I mean,
18 I'm not sure that -- are you saying "join or are
19 joined"?

20 MR. SPARKS (EL PASO): I like the word
21 "appear." It just seems like they just all of a
22 sudden --

23 MR. MCMAINS: Appear or materialize.

24 PROFESSOR DORSANEO: At any rate, we
25 want do include "intervenors" in C-2.

1 CHAIRMAN SOULES: C-3.

2 PROFESSOR DORSANEO: I mean, C-3,
3 include intervenor or make sure they're covered.

4 CHAIRMAN SOULES: Intervenors or
5 third-party defendants?

6 MR. SPARKS (EL PASO): They're all
7 parties. I don't know why you couldn't just say,
8 "in the event of additional parties after the
9 order for the schedule of the completion of
10 discovery and preparation of trial has been
11 entered, then any party may within 20" --

12 MR. MCMAINS: You say, "additional
13 parties" or people who are added?

14 MR. SPARKS (EL PASO): No. I skipped
15 it all just by saying, "in the event of additional
16 parties after."

17 CHAIRMAN SOULES: I think what Rusty
18 said, though, "in the event of additional parties
19 appear." The more I think about it, I don't see
20 any real problem with it.

21 PROFESSOR DORSANEO: Now, 97-F of the
22 Rules of Civil Procedure says "Persons, other than
23 those made parties in the original action, may be
24 made parties, et cetera." So I never understood
25 that anybody can make the argument that

1 corporations are not persons.

2 MR. MCMAINS: Well, since the TBCA
3 says they're persons.

4 PROFESSOR EDGAR: The TBCA takes care
5 of it.

6 CHAIRMAN SOULES: "In the event
7 additional persons become parties," is that what
8 you're saying there? "After"?

9 PROFESSOR EDGAR: I don't see anything
10 wrong with that language, in the event additional
11 persons become parties after."

12 MR. MCMAINS: It probably reads
13 better.

14 MR. SPARKS (EL PASO): Yes.

15 MR. MCMAINS: You prefer to
16 prepositional phrases, I notice.

17 MR. SPARKS (EL PASO): That's true, I
18 do. But I just know some judges that aren't going
19 to say, "Well, that just says person; that doesn't
20 mean corporation."

21 PROFESSOR EDGAR: "In the event any
22 such additional party may" -- okay. Now, go back
23 up to the C, though, "Within 30 days after the
24 general appearance of the last defendant." Have
25 we decided to go back to that or are we going to

1 say the last time?

2 CHAIRMAN SOULES: I think "defendant"
3 is right. But I don't know which defendant is the
4 last defendant. I don't know if that's a new
5 defendant or a third defendant.

6 PROFESSOR EDGAR: Now, what about the
7 definition of non-probate civil cases, though?
8 Should we deal with that? Should we try and talk
9 about non-probate civil cases?

10 CHAIRMAN SOULES: You mean, what does
11 it mean?

12 MR. MCMAINS: I thought we just kind
13 of left it open, the fact that it's an undefined
14 term.

15 JUSTICE WALLACE: It's not criminal
16 and it's not probate in discovery so I guess
17 that's the only way to look at it.

18 MR. SPARKS (EL PASO): Or family.

19 CHAIRMAN SOULES: Bill, did you say
20 defendant has a meaning --

21 MR. SPARKS (EL PASO): I think we
22 ought to leave that alone. We could talk about
23 it forever.

24 PROFESSOR DORSANEO: I don't think --
25 that's a lawyer professor's refinement. I think

1 technically under Federal and Texas Rules, a
2 third-party defendant is different from --

3 PROFESSOR EDGAR: Why don't you say
4 "last original defendant"?

5 MR. MCMAINS: Well, the only problem
6 with that is, if by "original defendant," you mean
7 defendant to the original petitioner, if that's
8 what you were going to say.

9 CHAIRMAN SOULES: Yes.

10 MR. SPARKS (EL PASO): It's the only
11 way it makes sense.

12 MR. MCMAINS: I mean, because it's
13 frequent that we would file an amended pleading
14 almost overnight when somebody comes in and says,
15 "That's not us; who you want to sue is "X."

16 PROFESSOR EDGAR: Well then, why don't
17 you say, "The appearance of last defendant,
18 excluding third-party defendants, to appear"?

19 CHAIRMAN SOULES: That's not the
20 problem I have. Where I'm coming from is that six
21 months into the case, you amend and add
22 defendants. Plaintiff amends and adds
23 defendants. See, I don't think it speaks to that
24 eventuality.

25 I think we are talking about original

1 defendants, like you were using Hadley. In other
2 words, the first group that really gets pulled
3 together, whether they do it in the amended in the
4 original or amended petition. But I don't know
5 how to define that group of people or persons.
6 Maybe just use "defendant"; see how it works out.

7 PROFESSOR DORSANEO: Quite frankly,
8 our Texas Rules of Civil Procedure that don't take
9 any of these matters into account are not time
10 conscious. We allow amendments, free amendments,
11 forever. We don't require a leave of court.
12 There's not a division between permissive
13 intervention and intervention as of right. We are
14 just not concerned with time in the Rules of Civil
15 Procedure. Just --

16 MR. SPARKS (EL PASO): Well, we're
17 going to change that.

18
19 (Recess - lunch.)
20
21

22 CHAIRMAN SOULES: We have identified
23 here that Rule 3-C and D contain conflicts with
24 Rule 166 of the Rules of Civil Procedure, and
25 particularly, Rule 3-C4, that conflicts with Rule

1 166-G. Also, back over on Page 5 under Rule 3-E.
2 Too, we've identified that the 45-day provision
3 conflicts with the 30-day provision concerning
4 experts and other discovery under Rule 166-B.

5 Now, those specifics have been identified.
6 And the general discussion has been that the
7 discovery track under Rule 3 is inconsistent with
8 Rule 166-B of the Texas Rules of Civil Procedure
9 and other rules that pertain to discovery and that
10 those need a lot of attention in order to get them
11 in harmony, whichever changes.

12 MR. MCMAINS: They are also
13 inconsistent with the amendment rules, in terms of
14 your time limits on how late you can amend.

15 CHAIRMAN SOULES: That's right, with
16 the name of the pleadings.

17 MR. MCMAINS: Right. Same thing with
18 regards to, you know, the discovery time frames,
19 in the entire discovery rules, really aren't
20 geared to tell you that you have so much time and
21 you get to respond and so on. And if the request
22 is made within the time that your discovery is due
23 before the time, there is nothing, of course, in
24 these rules showing you how you get that done or
25 coordinated.

1 CHAIRMAN SOULES: Just as a matter of
2 fact, discovery is cut off by the Administrative
3 Rules under this scheme before the parties have a
4 duty to supplement under the Rules of Civil
5 Procedure, so new information would be coming out
6 deliberately or otherwise.

7 MR. SPARKS (EL PASO): But that's not
8 necessarily true because the rule -- I agree that
9 there is conflict, but the rule -- the order
10 entered by the Court should require the parties to
11 exchange that information by a certain date. So
12 in that sense, any order on the discovery and the
13 management of the trial supercede one Rule 166-B.

14 CHAIRMAN SOULES: Rule 166-B5 allows
15 you to get right up against 30 days prior to trial
16 before you have to supplement when you know
17 information was wrong when it was given.

18 MR. SPARKS (EL PASO): Yes, but if you
19 have an order that says interrogatories should be
20 supplemented 90 days before trial, and
21 particularly in light of this Dallas case that has
22 had, what, 60 days, wasn't it, in the local rule
23 in Dallas, 60 days? And they excluded an expert
24 witness which was upheld. And maybe, that's --
25 was that you-all's case or the Court of Appeals in

1 Dallas?

2 JUSTICE WALLACE: I think it was the
3 Court of Appeals.

4 MR. SPARKS (EL PASO): It must not
5 have been your court. But in any event, if it's
6 covered in the order entered by the judge in the
7 management of this particular case, the question
8 is, does that supercede the conflict in the Rules
9 of Civil Procedure?

10 CHAIRMAN SOULES: But, Sam, I guess
11 the point that Rusty was making earlier is that
12 Rule 3-E2 says discovery is to be completed 45
13 days before the date it's set for trial, and you
14 don't have to have an order.

15 MR. MCMAINS: Right, that's right.

16 CHAIRMAN SOULES: It says the final
17 limits shall take affect.

18 MR. MCMAINS: That's right. The fast
19 track is definitely inconsistent with current
20 rules.

21 MR. SPARKS (EL PASO): They're
22 definitely in conflict, that's right.

23 CHAIRMAN SOULES: They have to be
24 harmonized. Okay, 3-E contra to 166-B. And
25 what's the pleading rule, Rusty? Do you got that

1 reference in your mind?

2 MR. MCMAINS: Anybody figured out what
3 this does to trial amendments?

4 (Off the record discussion
5 ensued.)

6
7
8 MR. MCMAINS: Rule 63 says parties may
9 amend their pleadings, file suggestions of death,
10 et cetera, at such time so as not to operate
11 surprise provided that any amendment offered
12 within seven days or thereafter, as may be ordered
13 by the judge under Rule 166, shall be filed only
14 after leave of the judges is obtained.

15 PROFESSOR EDGAR: What rule is that,
16 Rusty?

17 MR. MCMAINS: Rule 63.

18 CHAIRMAN SOULES: Okay. Let's go to
19 Rule 4 which is now 5. That reference was to Rule
20 63 and the fact that the provisions of 3-E and
21 other provisions of Rule 3 also conflict with Rule
22 63 governing amendments and pleadings.

23 MR. SPARKS (EL PASO): Are you going
24 to skip H?

25 PROFESSOR EDGAR: Yes. But what about

1 motions for continuance now?

2 CHAIRMAN SOULES: Okay, H?

3 MR. SPARKS (EL PASO): Yes.

4

5

6

(Off the record discussion
ensued.)

7

8

CHAIRMAN SOULES: I think that by
9 certified mail is about as insulting as something
10 could get. I mean, it really does rub my fur that
11 I can't certify to a judge that I've mailed
12 something to my client and be believed.

13

14

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17

It says a copy mailed, a copy of the
contingency. If they want to do that, that's
fine, but to charge officers of the court by
sending it by certified to their own clients is an
affront.

18

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23

PROFESSOR EDGAR: Well, I think that's
the same commentary on the manner in which some
lawyers practice law. And I think this is
necessary simply because some lawyers won't do
what they have stated to the Court that they have
done.

24

25

CHAIRMAN SOULES: When caught, they
can be disbarred.

1 PROFESSOR EDGAR: Well, the problem is
2 that they are not disbarred. They're not even
3 reprimanded in many instances, and this is just an
4 affront to everybody because of the quality of
5 lawyers that appear before the courts.

6 CHAIRMAN SOULES: Some lawyers.

7 PROFESSOR EDGAR: Well, I mean, some
8 lawyers, that's right. And everybody, I think, is
9 -- and I think you can justify the way we do it
10 but I think that's just the way it is.

11 CHAIRMAN SOULES: Well, it may be the
12 way it is, but I don't think we should be required
13 by rule to prove to the Court that we did
14 something that we tell the Court we did until a
15 question arises.

16 (Off the record discussion
17 ensued.)

18
19 CHAIRMAN SOULES: Does it conflict
20 with the motion for continuance rule?

21 PROFESSOR DORSANEO: I think that
22 motions for continuance, as Pat Beard said, ought
23 to be put in Texas Rules of Civil Procedure. I
24 think that there are a lot of formal requirements
25 in the Texas Rules of Civil Procedure that are

1 probably directed at the same kind of problem that
2 Professor Edgar was talking about and I would
3 suggest that the entire matter of continuances be
4 dealt with.

5 I agree with you, Luke, that imposing a lot
6 of technical, specific requirements on lawyers as
7 a basis for precluding them for arguing that the
8 motion for continuance denial was an abuse of
9 discretion is something that I always found to be
10 offensive.

11 Why should we be treated differently from
12 other witnesses or persons when presenting
13 information to the Court? And why should there
14 be a presumption that we don't tell the truth?
15 And I find that that is a peculiar way to deal
16 with the profession.

17 PROFESSOR EDGAR: It's a sad
18 commentary.

19 CHAIRMAN SOULES: I'm not treated that
20 way in the courts and I don't want to be treated
21 that way in this rule. If I am, I am; but I don't
22 want to be.

23 PROFESSOR DORSANEO: It's one thing to
24 have the motion say that the thing has been
25 presented to the client, et cetera, et cetera.

1 It's another thing -- I mean why shouldn't I have
2 to get a letter from the client or have the client
3 sign it, or have the client sign it within the
4 presence of another lawyer who has advised the
5 client what prejudice there might be.

6 CHAIRMAN SOULES: What does certified
7 mail do for you? It doesn't say "return receipt
8 requested." You don't have to go to court with a
9 green card. Well, I think that if these
10 requirements are going to affect the validity of
11 the motion and have to do with the review of the
12 motion, that they certainly ought to be in the
13 Rules of Civil Procedure.

14 MR. SPARKS (EL PASO): I've got a
15 question. Rule 251 --

16 CHAIRMAN SOULES: And some reference
17 could be made here about continuances.

18 MR. SPARKS (EL PASO): I don't think
19 I've read it before. But does that read that if
20 the parties consent, continuance is automatically
21 granted?

22 MR. MCMAINS: I have taken that
23 position before and was overruled. But the
24 continuance rule, as it has existed throughout the
25

1 history of Texas practice, has assumed that if the
2 parties agreed, that there was no discretion in
3 the trial judge to do otherwise.

4 MR. SPARKS (EL PASO): That's the way
5 I read it.

6 MR. MCMAINS: The most recent movement
7 in the area, however, would by the cases appear to
8 have limited that to where the Court has some
9 independent interest in the management of its
10 docket, and if it finds that it would be
11 disruptive to its docket, then that affirmed.

12 PROFESSOR DORSANEO: In some cases it
13 suggests that that rule lets there be one of
14 these.

15 MR. SPARKS (EL PASO): And that's
16 correct. But in any event, there's a conflict
17 between Rule 251, as written, and 4-H.

18 MR. MCMAINS: There is a conflict also
19 between 254.

20 MR. SPARKS (EL PASO): That's
21 legislative.

22 MR. MCMAINS: No, not 254, not 252
23 which is the application, which is actually much
24 more specific in many respects as Bill notes.

25 When you get right down to the crux of these

1 entire rules, by and large, at least in Rule 3, it
2 is going to depend on where you put and what the
3 limitations are in the continuance. Well, there
4 isn't anything else going to work if you just give
5 -- I mean, if the cart blanche decision is, issue
6 continuance rests in the discretion of the trial
7 judges, then there isn't anything in these rules
8 that's going to change anything, in my opinion,
9 which, I guess, is where you get down to the
10 bottom line.

11 I don't have near as much trouble getting
12 trial settings as I do a trial. I get trial
13 settings almost everywhere without too much
14 problem, but getting to the courthouse is another
15 story. And I'm not sure these rules are going to
16 help that.

17 PROFESSOR EDGAR: Also, Rule 254 makes
18 a legislative continuance mandatory, and this
19 makes it discretionary.

20 CHAIRMAN SOULES: The only answer we
21 found to that in San Antonio is to discharge, at
22 the will of the voters, the abusers, and they did.

23 PROFESSOR EDGAR: I know, but I'm just
24 saying there's a conflict here between this. This
25 makes it discretionary; Rule 254 makes it

1 mandatory.

2 CHAIRMAN SOULES: Sure.

3 PROFESSOR EDGAR: Something has to
4 give there.

5 CHAIRMAN SOULES: It has to give. And
6 it's not going to be discretionary, because those
7 guys over there got the reigns on that.

8 MR. MCMAINS: There's another question
9 here in terms of definitions in this entire
10 section when we are talking being set for trial
11 because -- and I'm in situations now where a judge
12 says, "Well, for all purposes of any other court,
13 you are in trial. Now, you go home and I'll call
14 you whenever we're ready."

15 Now, I don't know what this means when we're
16 talking about, you know, it's got to be set for
17 trial within 270 days. Does that mean that that's
18 supposed to be the first day of trial?

19 MR. SPARKS (EL PASO): No. That was
20 the original proposal, Rusty, and that was our big
21 fuss in the Task Force, was a cut-off date is
22 initiated by the initial pleadings. And so we
23 reversed the order saying the only thing that
24 moves cases are trial settings.

25 So in these cases which are to be managed,

1 then you ought to be working off the trial
2 setting, much like the Colorado system, which, you
3 know, when you answer, you get a trial date, and
4 you make it unless you die. And they used to be a
5 year; now they're about 16 months. But the point
6 is, you're supposed to have a trial setting which
7 is the strength of the rule if it's enforced. The
8 weakness of the rule is, I don't know how in the
9 world they're going to do it.

10 MR. MCMAINS: Yes. The question I
11 have, though, is, I get a trial setting, for
12 instance, on the Nueces County practice, but the
13 only trial setting I can get in less than a year
14 is a number 6.

15 MR. SPARKS (EL PASO): I don't know
16 how they are now operated.

17 MR. MCMAINS: There aren't but 365
18 days in the year, you know, so a given court can't
19 give you more than 365 settings if he thought he
20 was going to try us all in one day, if you're
21 talking about a number one. Now if you're talking
22 about a week, you're talking about, roughly, what,
23 48 trial weeks probably, at the most, that you
24 have in a given year. You know, I would be
25 delighted to crown most of the trial judges who

1 try 48 trials, at least in the jury fashion, if
2 you try 48 jury trials in a year.

3 And you cannot physically keep the trial
4 setting the first time around if every one of
5 those cases goes to trial. You have to,
6 obviously, depend on some of them being disposed
7 of and some are. But it's very seldom that any of
8 our cases set below number 4 -- I mean, above
9 number 4 go to trial; very rare. And if all of
10 this relates to that and your trial setting moves
11 another year or another -- I mean, what happens on
12 the second trial setting, I guess, I'm saying?

13 MR. SPARKS (EL PASO): Of course, my
14 problem is, how do you get the second trial
15 setting if it's not covered by the --

16 MR. MCMAINS: Yes, well, that's what I
17 mean. What I'm saying is, this all assumes that
18 you get to go to trial when it's set for trial.
19 And that's an assumption that is simply
20 insupportable as a physical fact, especially if
21 you apply these rules to existing cases.

22 CHAIRMAN SOULES: Absolutely.

23 MR. MCMAINS: Now, if you don't apply
24 them to existing cases, then you're giving
25 preference to the new cases, and that doesn't make

1 any sense.

2 CHAIRMAN SOULES: Unless you run in
3 tandem with the new cases, something like that San
4 Antonio operation.

5 MR. MCMAINS: Well, even so, though,
6 you still prioritize the new cases if you follow
7 this, if you say every other week will be a new
8 case.

9 CHAIRMAN SOULES: Okay. Well, let's
10 go to the family law. I'm sure we are going to
11 have new observations from others as we go through
12 these in the committee as a whole.

13 MR. MCMAINS: Don't these rules on the
14 setting for trial, all up to what I was getting
15 at back on the conflicts, conflict with our
16 current -- there are some current rules on setting
17 of cases.

18 PROFESSOR EDGAR: Only the precedence
19 in which cases ought to be tried.

20 MR. MCMAINS: Now there are rules on
21 notice of trial settings.

22 PROFESSOR DORSANEO: 245 needs to be
23 dealt with.

24 MR. MCMAINS: Assignment of Cases For
25 Trial, "may set contested cases on motion of any

1 party or on the court's own motion with reasonable
2 notice of not less than 10 days."

3 PROFESSOR EDGAR: Rule 245.

4 PROFESSOR DORSANEO: Which, of course,
5 has been a problem, is a current problem.

6 CHAIRMAN SOULES: Anybody got anything
7 on this family law that's different from the
8 problem we've identified before.

9 MR. MCMAINS: I'm interested in what
10 -- this says, "control of the flow of divorce
11 cases." Does that define divorce cases to include
12 child custody or other matters relating to that,
13 child support?

14 PROFESSOR EDGAR: Ask Harry. Harry
15 was involved in that. Rule 4, on the flow of
16 divorce cases; was that intended to cover just
17 divorces or --

18 MR. TINDALL: It's not defined.

19 PROFESSOR EDGAR: I know. What was
20 the intent, though? I know it's not defined;
21 that's the problem.

22 MR. TINDALL: I think, truthfully, the
23 way it's written, it's designed to cover the
24 traditional divorce case and not include the child
25 custody case or the modification of support and

1 visitation, establishment of support, paternity,
2 ostensibly, but it's not clear.

3 MR. SPARKS (EL PASO): If you look on
4 Page 7, it sets out what the disposition proposal
5 is supposed to include.

6 MR. MCMAINS: It's got child support
7 orders.

8 MR. SPARKS (EL PASO): It's got
9 orders.

10 PROFESSOR DORSANEO: There tends to be
11 confusion. If you look back at Rule 1, that uses
12 the term "domestic actions."

13 MR. TINDALL: The term, generically,
14 should be family law matter just for style
15 purposes, but you can break them out.

16 PROFESSOR DORSANEO: Rule 4 uses the
17 parenthetical "family," which I suppose means
18 something other than -- and broader than the term
19 "divorce;" otherwise, it's pretty ridiculous.

20 MR. TINDALL: Sure.

21 PROFESSOR EDGAR: Well, what's the
22 proper term to use here then? What would be the
23 proper descriptive term instead of "divorce"?

24 MR. TINDALL: On those points, on Rule
25 1, instead of saying "domestic," that's a word

1 that's very archaic anymore. I'm not trying to go
2 back. It ought to be "family law actions." And
3 then you could pick up on Rule 4 and say "the
4 control of family law cases."

5 PROFESSOR EDGAR: "The control of the
6 flow of" --

7 MR. TINDALL: "The control of the flow
8 of family law cases shall be subject to the
9 following."

10 PROFESSOR DORSANEO: So that would be
11 a change in both Rule 1 and Rule 4.

12 MR. TINDALL: Rule 4, just purge the
13 term "domestic" or the term "divorce." And while
14 you're on that, there are some other terms that
15 you might purge from this, too. On the bottom of
16 page -- are you on the 37 revision; is that
17 right?

18 PROFESSOR EDGAR: We're looking at our
19 big book, the big book. Rule what?

20 MR. TINDALL: It should be 4-B3. It
21 should be "a conservatorship order," not "child
22 custody."

23 PROFESSOR EDGAR: It's C-3. A
24 proposed conservatorship order?
25

1 MR. TINDALL: Conservatorship order.
2 I believe those are the style changes required.

3 CHAIRMAN SOULES: Would that be every
4 place that that appears, like also in 2?

5 MR. TINDALL: I didn't catch it in 2.
6 If it's in 2, it should be obviously --

7 PROFESSOR EDGAR: A proposed child
8 support order there.

9 CHAIRMAN SOULES: No child support
10 order?

11 MR. TINDALL: Child support is fine.
12 It should be conservatorship.

13 PROFESSOR EDGAR: Instead of child
14 custody.

15 MR. TINDALL: That's right.

16 CHAIRMAN SOULES: Okay.

17 MR. MCMAINS: Not being a family law
18 practitioner, can you still oppose a divorce?

19 MR. TINDALL: No. There's one case
20 that says if you want a divorce and your wife
21 doesn't, that proves right there that they are
22 insupportable.

23 MR. SPARKS (EL PASO): We've had two
24 trials in El Paso.

25 PROFESSOR EDGAR: But you get them on

1 whether or not you can reach separate property or
2 something in the event of infidelity or
3 something.

4 MR. TINDALL: You can't touch separate
5 property.

6 PROFESSOR EDGAR: You can invade the
7 share of your -- you can get a disproportionate
8 share of the community estate.

9 MR. TINDALL: Based on fault.

10 PROFESSOR EDGAR: Shares on fault.
11 And so then you have the right to a jury trial on
12 that.

13 MR. MCMAINS: You're saying the trial
14 --

15 MR. SPARKS (EL PASO): One was a
16 lawyer and it didn't take the jury long to rule.

17 MR. TINDALL: That's right. You're
18 entitled to a finding of fact on whether their
19 marriage is insupportable.

20 MR. MCMAINS: Suppose there is a
21 finding that it is not insupportable.

22 MR. SPARKS (EL PASO): You can't get
23 it.

24 PROFESSOR DORSANEO: You can't get a
25 divorce. An example is the husband who decides

1 that he wants to go out with younger women, and
2 his wife says that, "He's not insupportable; he's
3 just fooling around. You know, he'll get over
4 it."

5 MR. MCMAINS: Well, the only reason I
6 was curious is because C on the disposition
7 proposal presupposes that there will be a divorce,
8 and I just thought that if there was at least an
9 argument, that there might not be, or if that was
10 a contested issue at trial.

11 MR. SPARKS (EL PASO): You know, one
12 of the things I don't understand that maybe,
13 Harry, you can give me some help on it is, this is
14 the only time where paragraphs F and G in Rule 4
15 all of a sudden start talking about local rules
16 again.

17 MR. MCMAINS: No. There are some
18 local rules in 3, as well. But it's on what you
19 call or how you decide a disposition conference.

20 MR. WALLACE: I suppose that was put
21 in at Ken Fuller's request the last time we met,
22 wasn't it?.

23 MR. TINDALL: Well, Ken talked to Dean
24 Friessen about that and that's where some of that
25 came in.

1 MR. MCMAINS: See right here.

2 MR. TINDALL: I don't have any problem
3 with that.

4 JUDGE THOMAS: I think it came about
5 as a result of our having some concern that there
6 are particular family law cases where, frankly,
7 the process should be speeded up in that in the
8 suits to establish paternity and in child support
9 enforcement, and I think that was the sort of
10 proposal that would give us some leeway in those
11 areas.

12 JUSTICE WALLACE: This really requires
13 local rules in family law matters.

14 CHAIRMAN SOULES: Why do we need local
15 rules for that?

16 MR. TINDALL: Well, let me read
17 through this and I'll see if I can respond.

18 CHAIRMAN SOULES: Okay.

19 MR. TINDALL: Are you referring to F
20 now?

21 JUSTICE WALLACE: F and G.

22 MR. TINDALL: I think, to me, as I
23 read G. from Dean Friessen's revision, it adds
24 nothing other than it would give the trial judge
25 the right at the local level to say, "I am going

1 to try certain matters on a speed-trial basis"
2 which really, I think, in drafting this, should be
3 part of Rule 1. I'll talk about that to the
4 committee at large. I think that's all it's
5 getting at, that you deal with an incredible
6 number of hearings and divorce cases.

7 The hearing on temporary orders can last for
8 days. The motions for enforcement of an order can
9 last for a good long time. And so it would give
10 the trial judge the discretion to hear those at an
11 earlier date than he would a scheduled divorce
12 case.

13 CHAIRMAN SOULES: Let me back up just
14 one minute. Where in Rule 3 do we talk about
15 local rules? I just can't find it.

16 MR. MCMAINS: 3-E5.

17 MR. SPARKS (EL PASO): Page 5.

18 MR. MCMAINS: I mean 4. Yes, 4. 3-E4
19 on the disposition conference talks about "as
20 prescribed by local rule."

21 CHAIRMAN SOULES: Why don't we just
22 say what kind of report that is?

23 MR. MCMAINS: I guess they just didn't
24 want to get into the details of what's supposed to
25 be in it, but I don't know.

1 MR. CHAIRMAN: Why not?

2 MR. MCMAINS: But when you start
3 opening up local rules, that appears to require a
4 local rule, too.

5 MR. SPARKS (EL PASO): What if you
6 don't have one?

7 CHAIRMAN SOULES: Okay. Local Rule
8 4-F, Harry, what does that bring to the table?
9 What does that add?

10 MR. TINDALL: Let me look.

11 CHAIRMAN SOULES: "A process for
12 ruling on the motion to enlarge time." The judge
13 has got that inherent power. You have to have a
14 local rule on how that process works. He's got
15 the right to do that from the bench, doesn't he?

16 MR. TINDALL: Well, I think what we
17 were getting at here is -- and it's a major
18 problem -- is you have these discovery deadlines
19 and disposition deadlines. Does this allow by
20 local rules to permit the litigants to mail in an
21 agreement to extend time without having to go to
22 the courthouse and take the time of the Court to
23 stand before the judge and say, "Judge, we all
24 agree upon a 90-day extension. We don't have the
25 real estate appraisals done." This would sort of

1 let the local judges say, you know, "It's signed
2 on by the attorneys and mailed in and that will
3 grant a 90-day extension." I think that's what
4 that was getting at.

5 PROFESSOR DORSANEO: I guess it could
6 even up this process and by local rule could say
7 if somebody files a motion that the process can
8 be to grant it if somebody files.

9 MR. TINDALL: It is stayed. If
10 deadlines are stayed till there's a hearing on it,
11 I didn't think that was envisioned, but I think it
12 was to permit local opt out on these disposition
13 and discovery deadlines by local rule.

14 MR. MCMAINS: Incidentally, back to what
15 you were first talking about, about the use of
16 divorce instead of the other matters, G in the
17 rule, of course, says that, "All family law
18 matters other than divorce will be the subject of
19 local rules to assure their timely disposition,"
20 which sounds like that they're taking them out of
21 it. I don't know what that is.

22 PROFESSOR DORSANEO: No, it would
23 still be in the rule; it just would be dealt with
24 in paragraph G and rather than paragraphs A
25 through F.

1 MR. TINDALL: I know the history of G
2 was to get at what concerns us is, and that is, we
3 want these courts to have expedited deadlines for
4 getting rid of postjudgment enforcements because
5 we have got some fed mandates that we have to deal
6 with, or paternity actions, or temporary
7 hearings. It's the law of the jungle until we get
8 an order entered. And right now that's the
9 problem that faces most courts, not these final
10 dispositions.

11 JUDGE THOMAS: Or writs.

12 MR. TINDALL: Yes. Writ of habeus
13 corpus, kids not returned. How do you deal with
14 those in here? It would take a day to try one of
15 those.

16 PROFESSOR DORSANEO: Do we have any
17 statistics on that? We're getting out of the
18 conflict area. Do we have any statistics on how
19 many divorce cases and how many suits affecting
20 the parent/child relationship that aren't divorce
21 cases and how many motions to modify or anything
22 like that?"

23 MR. TINDALL: Yes. I can give you the
24 figures in Harris County because I just did a
25 report on that. If you include all the tax cases

1 in Harris County, the divorces comprise 40 percent
2 of the litigation. If you throw out all the tax
3 cases, the ad valorem tax cases, we comprise 60
4 percent of all litigation in Harris County as
5 family law cases.

6 Now, if you take that 60 percent and make it
7 100 percent, 25,000 of them each year are divorces
8 and another 13,000 cases involve modification each
9 year. And you have another 8,000 that involve
10 enforcement of existing orders.

11 PROFESSOR DORSANEO: So it would be
12 possible to read this Rule 4 as dealing with the
13 divorce cases only with a specific proposal and
14 the other family law cases --

15 MR. TINDALL: No, I don't think it
16 was --

17 PROFESSOR DORSANEO: I don't care
18 what's intended. I'm just reading what it says.

19 MR. TINDALL: Yes.

20 PROFESSOR DORSANEO: And there might
21 be good reason to do this at this point in time
22 because we don't have any scheme devised for
23 enforcement cases and suits affecting the
24 parent/child relationship and these other matters
25 that involve entirely different considerations.

1 MR. SPARKS (EL PASO): That's what it
2 says.

3 PROFESSOR DORSANEO: Now, the question
4 that I would have, should those other cases be
5 dealt with under Rule 3 as other civil cases, or
6 should they be put out under Rule 4-G and dealt
7 with in some local matters?

8 MR. TINDALL: Well, I think, Bill, the
9 way we had proposed and I think -- it can all be
10 dealt with in Rule 1 in terms of disposition
11 deadlines, but enforcement and paternity and
12 temporary order hearings, which are really trials
13 in many instances, should be treated separate and
14 apart from a divorce.

15 MR. MCMAINS: And writs.

16 MR. TINDALL: And writs.

17 JUDGE THOMAS: I know the counsel did
18 not intend for those actions to be handled under
19 local rules, but rather our proposal was that it
20 go back under Rule 1 in a certain time light,
21 because we didn't want to be in the position where
22 that the Dallas rule is different from Fort Worth
23 is different from Houston. So our proposal was to
24 handle the cases differently but do it under Rule
25 1 with specific time limits.

1 PROFESSOR DORSANEO: That's how I read
2 this as how it would work, especially with Harry's
3 suggestion on changing the titles. Rule 1 applies
4 to family law actions. Rule 4 applies to family
5 law actions, too, but A and B and C --

6 MR. TINDALL: A through F, really.

7 PROFESSOR DORSANEO: -- apply to
8 divorce cases in all -- maybe G should say all
9 other family law matters. All family law matters
10 other than divorce will be subject to local rules
11 and, of course, to Rule 1.

12 CHAIRMAN SOULES: Judge Thomas has
13 raised a point about the differences between
14 "local rules," but in Harris County there are many
15 many sets of local rules. Every judge has taken
16 it upon himself to have his own local rules.

17 If I'm on 11th court and I'm, you know --
18 Judge Blanton may have to sit there; I'm not
19 trying to blame anybody, and I don't agree with
20 Judge Solito on how I want to run my court. We
21 just have it different, and Judge Phillips -- we
22 all just do our own thing.

23 Now, of course, the Supreme Court has refused
24 to approve those and that's a hard thing to come
25 to grips with. But these, to me, should not direct

1 the courts that they follow local rules. It ought
2 to direct the courts to either find other rules
3 here or Rules of Civil Procedure to dispose of
4 those cases with, period.

5 MR. TINDALL: I think that's sound.

6 CHAIRMAN SOULES: And the local rule
7 aspects of this ought to be deleted everywhere.

8 MR. SPARKS (EL PASO): It doesn't mean
9 anything.

10 CHAIRMAN SOULES: Well, it may empower
11 the judges to do things that we know that the
12 Supreme Court doesn't intend them to be empowered
13 to do right now.

14 MR. SPARKS (EL PASO): That's true.

15 CHAIRMAN SOULES: In other words, it
16 may give them something in which we don't really
17 want.

18 MR. MCMAINS: Except that the whole
19 thing with local rules is that any local rules
20 right now would be promulgated under the Texas
21 Rule and that would be pretty much Supreme Court.
22 So you would indulge some assumption that the
23 Supreme Court wasn't going to rubber-stamp
24 something that it didn't want happened.

25 CHAIRMAN SOULES: But it is already

1 said here. You know, if it promulgates this, you
2 have got to get some local rules on this.

3 PROFESSOR DORSANEO: I guess what I'm
4 thinking about, all these cases, is they ought to
5 be dealt with under different rules.

6 CHAIRMAN SOULES: Under Rule 1 or some
7 of them.

8 PROFESSOR DORSANEO: Because they are
9 different; they're not like divorce cases.

10 CHAIRMAN SOULES: Let's try to
11 approach that with the committee as a whole, but
12 if we're more or less in agreement that we're
13 going to take the local rule references out and
14 find another way to deal with these other
15 problems, then we can get that to the committee as
16 a whole and go on down to Rule 5 which is
17 Liquidated Monetary Claim. Bill, you've addressed
18 that quite a bit, I know, in the Task Force. What
19 problems do you see there, anybody?

20 PROFESSOR DORSANEO: Well, I would
21 say, we have -- you know, I wouldn't call it a
22 conflict, but we ought to cross-reference Rule 185
23 in some respect or another. Of course, there are
24 other conflicts and in titling these things
25 "original petition and a suit on a debt." I don't

1 know whether we would call that a conflict, but
2 Rule 78 in the Texas Rules of Civil Procedure
3 talks about how things are entitled and that's a
4 new deal. But beyond that, I don't really have
5 any comment on it. There's 165-A, cross-reference
6 was put in here.

7 MR. SPARKS (EL PASO): F.

8 PROFESSOR DORSANEO: And F.

9 PROFESSOR EDGAR: In B-3 on Page 9,
10 "the 'suspense docket', for cases where the
11 parties have made application to defer entry of
12 judgment," or rendition of judgment.

13 PROFESSOR DORSANEO: It must mean
14 rendition.

15 PROFESSOR EDGAR: I would think so.

16 MR. SPARKS (EL PASO): No. I don't
17 remember this. Apparently, there's a lot of
18 agreements where it's agreed that a judgment will
19 be entered if a party does not make certain
20 payments.

21 PROFESSOR DORSANEO: They mean render.

22 PROFESSOR EDGAR: You're not talking
23 about the clerical entry; you're talking about the
24 Court's pronouncement of judgment, which is
25 rendition, I think.

1 JUSTICE WALLACE: Well, I think that
2 was just the opposite. The Court has rendered
3 ruling, the judgment, he's signed it. It is just
4 not -- the clerk does not enter it.

5 PROFESSOR EDGAR: Okay. All right.

6 MR. SPARKS (EL PASO): What it is, it
7 is a judgment for \$100,000 and if they pay five
8 years at \$45,000, they won't enter the \$100,000,
9 if they break their --

10 MR. MCMAINS: But entry doesn't make
11 any difference.

12 PROFESSOR DORSANEO: It doesn't make a
13 bit of difference.

14 CHAIRMAN SOULES: Let's look at it.
15 There's three things. Of course, we all know
16 that. There's rendition of judgment, that's when
17 he says what it is; and a signing of a judgment,
18 that's when he signs the written judgment; and
19 then entry of a judgment by the clerk into the
20 minutes. And actually, what it deferred is both
21 signing and entry; isn't that right? The parties
22 agree that they enter into an agreement, that the
23 attached judgment will be signed by the Court if
24 default occurs in the following agreement, which
25 agreement is as follows.

1 MR. MCMAINS: If the purpose of it is
2 to defer signing of the judgment, that's the only
3 thing that stops any of the enforcement processes
4 of the judgment.

5 CHAIRMAN SOULES: Is signing it.

6 MR. MCMAINS: Is the signing it,
7 because that's what activates the periods in which
8 to take any post judgment steps. If it is signed,
9 the deference of entry of the judgment has no
10 legal impact at all to the enforcement of the
11 judgment through ordinary means, nor the loss of
12 your right of appeals.

13 CHAIRMAN SOULES: So what ought to be
14 signed?

15 MR. MCMAINS: So if it is going to be
16 anything, it ought to be signed.

17 MR. SPARKS (EL PASO): Well, it's my
18 understanding that that whole rule was put in so
19 that if you announced you had an agreement, they
20 could remove that off the active docket and they
21 wanted the case pending because they didn't want
22 to have a final judgment in the case entered. But
23 as long as they had an agreement and was on a
24 active docket, they had to make monthly
25 reporting. So they wanted the suspense docket

1 where you could, in effect, put this case in limbo
2 to see if the guy made his payments in five years.

3 PROFESSOR EDGAR: It's signing.

4 MR. MCMAINS: It's signed. That's the
5 only thing that can start it and still keep it
6 pending.

7 PROFESSOR DORSANEO: Because once it's
8 signed, the clock has started.

9 PROFESSOR EDGAR: To that should be
10 the signing of judgment.

11 CHAIRMAN SOULES: To defer signing of
12 judgment.

13 PROFESSOR EDGAR: And also down in
14 C-1.

15 MR. SPARKS (EL PASO): Good point.

16 CHAIRMAN SOULES: C-1.

17 PROFESSOR EDGAR: "Or has been
18 disposed of and is awaiting signing of judgment."
19 Is that what's meant there as well? Is that the
20 same thing?

21 MR. MCMAINS: Yes. Luke, these rules
22 do provide for the so-called bankruptcy docket in
23 these cases. But you see, what I was getting at
24 is that there is nothing, either in the section
25 three or in any of our Rules of Civil Procedure,

1 that has to do with the interruption of the trial
2 process by a bankruptcy proceeding. If you
3 haven't got one of those, you aren't handling as
4 much litigation as I think you are.

5 It took us two years to get out of bankruptcy
6 court in one of our cases. We had bankruptcy
7 court in Massachusetts. It was two years before
8 they would let us -- I mean, even though they have
9 five million in insurance coverage, we're the only
10 claim; just couldn't get it done.

11 CHAIRMAN SOULES: We need to provide a
12 means by which all cases can be carried on a
13 bankruptcy docket, not just suits for debt because
14 all cases may wind up on the bankruptcy docket.

15 JUSTICE WALLACE: You can get divorce
16 cases on a bankruptcy docket.

17 MR. TINDALL: Divorce is a real mess.

18 MR. MCMAINS: Yes. Divorce is just as
19 bad as any of them.

20 CHAIRMAN SOULES: There is no kind of
21 case that can't become a subject of a bankruptcy
22 proceeding because any party that becomes subject
23 to a bankruptcy proceeding involves every aspect.

24 MR. TINDALL: Yes. I'm hearing about
25 estates going into bankruptcy. Let the heirs hold

1 on to the money a little bit longer.

2 CHAIRMAN SOULES: Let's make a note
3 there then beside B-4 that we provide a bankruptcy
4 docket for all cases --

5 MR. TINDALL: Shouldn't that be in
6 Rule 1?

7 CHAIRMAN SOULES: Somewhere.

8 MR. MCMAINS: Yes, it needs something.

9 CHAIRMAN SOULES: And I'm going to put
10 this word, I'm going to put "interruption?" How
11 broad? Do we just want to put "call for an
12 interruption docket"? It could be bankruptcy. It
13 could be death of a party wherein -- don't the
14 statutes delay everything for a year if somebody
15 dies and give them --

16 MR. MCMAINS: Or you could have an
17 abatement fight.

18 CHAIRMAN SOULES: You could have an
19 abatement; you could have a transfer that gets
20 fooled around with by the clerks, and maybe we
21 would want to create a new "interruption docket."
22 I don't know what to call it, and then try to
23 define a bunch of things like, we have affirmative
24 defenses and in all others, try to say so that we
25 don't have parties rights terminated by

1 Administrative Rules when they can't get their
2 rights heard, for reasons that they are prohibited
3 from being heard. Okay. I'll put that here
4 then.

5 MR. MCMAINS: Now, there is one other
6 general comment that I have that's not on there;
7 it's on the same order. What do we do with the
8 Bill of Review? The reason I ask is because the
9 Bill of Review is an attack on the underlying
10 judgment, and if successful, is then tried on the
11 merits; and therefore, it becomes a trial. And it
12 is docketed as an independent claim, and I don't
13 know what it is for purposes of these rules. Is
14 it just another civil action and we dispose of it
15 in the same --

16 CHAIRMAN SOULES: Can it be handled
17 that way?

18 JUSTICE WALLACE: Sure.

19 MR. TINDALL: Is this part of the
20 mandate for this committee? Linda asked me
21 whether Rule 3 was an overlay on Rule 4 for family
22 law. Do we have to --

23 MR. MCMAINS: Since it talks about --

24 MR. TINDALL: Do we read them
25 together? Or is Rule 4 exclusive and apart from

1 all those matters covered by --

2 MR. MCMAINS: It was explained to us
3 that in an appropriate case in the family law
4 area, you could request the Court to be handled
5 under Rule 3 and go through the discovery and the
6 management order as a complicated case.

7 MR. TINDALL: Shouldn't that be in the
8 part of Rule 4 then that it can be moved out and
9 placed over in --

10 PROFESSOR EDGAR: It certainly doesn't
11 give you that feeling right now. I'll agree with
12 you, yes.

13 MR. SPARKS (EL PASO): But that was
14 how it was explained, wasn't it, Judge? I
15 remember him saying that you could do that.

16 MR. TINDALL: There's a memo from Dean
17 Friessen about how you could do it, something
18 about, you could have it certified as a complex
19 case.

20 MR. MCMAINS: Except the problem with
21 that is, it deals with what is forensically in
22 Rule 3 only because of certification on complex
23 cases.

24 CHAIRMAN SOULES: Rule 6, governing
25 the presiding judges of the administrative

1 regions. I don't see that that's got any
2 problem. I think maybe the only place they
3 referred to in the rules is in Rule 18-A. I can't
4 think of any place else you could even refer to
5 the presiding judges of administrative regions.

6 MR. MCMAINS: I don't want to say
7 anything, but do the administrative judges take
8 any offense to what we say is -- Rule 6-C says
9 "review each month." We're not asked to do
10 anything; we're instructing him to.

11 JUSTICE WALLACE: Jim Clawson and his
12 two administrative judges wrote it, so I guess
13 they're happy with it.

14 PROFESSOR EDGAR: I guess they're
15 satisfied with it, because the committee didn't
16 have anything to do with this. The judges
17 themselves wrote it.

18 JUSTICE WALLACE: That entire
19 subcommittee was made up of administrative judges.

20 CHAIRMAN SOULES: We need to change
21 18-A to say "region" instead of "district."

22 PROFESSOR EDGAR: Page what?

23 CHAIRMAN SOULES: Rule 18-A. When
24 18-A was written, the people were called Presiding
25 Judges of Administrative Judicial Districts, and

1 now they're called Presiding Judge of
2 Administrative Regions under the Court
3 Administration Act.

4 MR. TINDALL: Also, back on Rule 6,
5 isn't 200a-1 now folded in to --

6 PROFESSOR DORSANEO: No, that's
7 200a-1. It will be; it's 200a-1.

8 MR. TINDALL: Now? I thought they had
9 folded it into the -- under the government code.

10 CHAIRMAN SOULES: The Administrative
11 Act.

12 MR. WALLACE: Yes, government code; it
13 got a new number, whatever it might be.

14 PROFESSOR DORSANEO: It's 200a-1.
15 200a is in the Government Code, and that's been
16 superceded by House Bill 1658, which was 200a-1,
17 the Court Administration Act.

18 MR. MCMAINS: The Court Administration
19 Act is supposed to be put in the Government Code.
20 That's why it's still in session.

21 PROFESSOR DORSANEO: But that's the
22 same session, so it didn't get there yet.

23 MR. TINDALL: This reference here,
24 should it not be referenced to as defined in the
25 Government Code?

1 CHAIRMAN SOULES: Right now you've got
2 two codes. You've got the Government Code, which
3 has got a lot of things in it. Then you've got
4 the Court Administration Act, which is that little
5 separate white pamphlet that hasn't rolled into
6 the Government Code if it's going to --

7 MR. TINDALL: Right. I know.

8 CHAIRMAN SOULES: But where is that
9 "as defined"?

10 JUSTICE WALLACE: It's in the main
11 part of Rule 6.

12 MR. SPARKS (EL PASO): Page 11.

13 PROFESSOR EDGAR: Third line of Rule
14 6.

15 CHAIRMAN SOULES: We need to revise
16 the statutory reference.

17 MR. MCMAINS: Well, except that is --
18 I mean, it is correct the way it is now.

19 CHAIRMAN SOULES: That's what it's
20 called.

21 PROFESSOR DORSANEO: You might call it
22 the Court Administration Act.

23 MR. TINDALL: This is what West tagged
24 the Court Administration Act, this 200 -- I'm
25 sorry. I thought this was referring to the

1 apportionment of all the district and county
2 courts.

3 MR. MCMAINS: No. In fact, it's what
4 the legislature defined.

5 MR. TINDALL: No. It's a whole
6 clause; it's not a statutory reference.

7 CHAIRMAN SOULES: Okay, 7 reports to
8 the region; regular meetings of the judges;
9 qualifications of administrative personnel;
10 minimum qualifications; procedures for submitting
11 budgets; control of the content, adoption and
12 issuance of rules and standing orders by the
13 courts; adoption of local administrative rules;
14 and regular meetings. I don't see that those have
15 anything, really, to do with the Rules of Civil
16 Procedure.

17 PROFESSOR DORSANEO: No.

18 CHAIRMAN SOULES: "Control of the
19 content, adoption and issuance of rules in
20 standing orders" may deal with local rules, but
21 they don't deal in such a way as to conflict with
22 the Rules of Civil Procedure.

23 MR. MCMAINS: Let me ask you this: In
24 K, that -- you're in Rule 8?

25 CHAIRMAN SOULES: Well, I'm just

1 getting to 8; I'm ready. What do you see, Rusty?

2 MR. MCMAINS: Oh, that's the -- okay.
3 This is on the local administrative judges.

4 CHAIRMAN SOULES: B has to do with
5 local rules again, but that's all.

6 MR. MCMAINS: I'm just curious about
7 -- I guess I'm talking about E in Rule 7. E in
8 Rule 7 is talking about supervising budgetary
9 requests. That is, procedures for determining and
10 submitting budgetary requirements to the county
11 governments. I'm just wondering if we have a
12 statutory overlap problem in terms of giving power
13 to administrative region judges with regards to
14 budgetary requests that are directed to specific
15 counties.

16 CHAIRMAN SOULES: I don't know.

17 MR. MCMAINS: I don't know; I'm
18 just --

19 JUSTICE WALLACE: And I don't recall.
20 Judge Wood or Judge Tunks -- whatever statute it
21 is, that the portions of administrative costs
22 between the counties based on population. Do you
23 recall that Statute 8? That's the only one it
24 is. And it just says that the administrative
25 judge shall determine what the cost for his

1 district is going to be for next year and he
2 should notify each of the counties of how much
3 they're going to pay. So I don't think there's
4 any conflict here.

5 MR. MCMAINS: Okay. And that's the
6 administrative judge for the region?

7 JUSTICE WALLACE: Right.

8 MR. MCMAINS: That's not the local
9 administrative judge?

10 JUSTICE WALLACE: Local, they're
11 talking about such things as furniture, space,
12 supplies, and that sort of stuff, and whatever
13 else they can talk the County Commissioners out
14 of.

15 CHAIRMAN SOULES: That's budgetary
16 requirements for operating the administrative
17 region?

18 JUSTICE WALLACE: Administrative
19 region, now that's set by statute. It's not in
20 the rules but it is a statute.

21 CHAIRMAN SOULES: But is this E,
22 Judge, talking about budgetary requirements for
23 operating the administrative region? Do the
24 counties share that? In fact, it's on top of page
25 30.

1 JUSTICE WALLACE: Yes, administrative
2 regions, yes. All this Rule 7 applies to what the
3 administrative region judge shall do, the
4 presiding judge of each administrative region.

5 MR. MCMAINS: Okay.

6 CHAIRMAN SOULES: I think we were
7 concerned that that might say, "I'm the 11th
8 District Court and the presiding judge of the
9 administrative region is telling me how to submit
10 my budget to the county government."

11 MR. MCMAINS: That's what I was just
12 curious about.

13 CHAIRMAN SOULES: And this is talking
14 about how to submit the budgetary requirements of
15 the administrative regions in various counties.

16 JUSTICE WALLACE: All of it applies to
17 the administrative regions.

18 CHAIRMAN SOULES: Okay.

19 MR. MCMAINS: But the rule itself,
20 though, just says that he "shall adopt and publish
21 rules relating to the following matters," and one
22 of them is "procedures for determining and
23 submitting budgetary requirements to the county
24 governments."

25 All I was saying is that a lot of the local

1 administrative judges are the ones that have to
2 actually do that, and this could be interpreted as
3 an administrative region judge having to
4 promulgate rules of procedures for what the
5 contents of those requests are. I'm not
6 suggesting that was what was intended.

7 CHAIRMAN SOULES: Well, the Court
8 needs to determine whether 7-E means procedures
9 for determining and submitting budgetary
10 requirements of all courts to the various county
11 governments, or whether it means procedures for
12 determining and submitting budgetary requirements
13 of the administrative region to the various
14 county governments. I don't know which it means.

15 JUDGE THOMAS: Well, it looks like if
16 you look at 8-K, they're giving the local
17 administrative judge the control over the
18 budgeting within, for instance, Gerry Meier would
19 have it in Dallas County as the local
20 administrative judge. She now has to supervise
21 and prepare all of our budget requests.

22 MR. MCMAINS: Correct.

23 JUSTICE WALLACE: You see in 8-K where
24 it speaks to the local administrative judges they
25 had the same, supervised the preparation of budget

1 requests and the presentation thereof to
2 appropriate authorities and expenditure of funds
3 on behalf of the courts.

4 MR. MCMAINS: Judge, I'm not
5 disagreeing with who has the responsibility to
6 present it. What I'm saying is, 8 says the
7 responsibility to present it, and supervise the
8 preparation of it is on the local administrative
9 judges. 7 says that the administrative regions
10 have to prepare rules setting out procedures for
11 budgetary requests.

12 My question was, is that 7 supposed to have
13 the administrative region judges saying, "Your
14 budgetary requests, Administrative Judge, shall be
15 in the following form by rule." I don't know
16 either, A, whether they have the power, or B,
17 whether they want it.

18 CHAIRMAN SOULES: They have the power
19 if the rule gives them that, and it may be --

20 MR. MCMAINS: I'm talking about the
21 statute, though.

22 CHAIRMAN SOULES: -- that that's
23 intended because this -- some of the concept of
24 this is court coordinators and how you're going to
25 be staffed, and it may be that they expect for the

1 presiding judge to the administrative region to
2 say, "This is the way the court is going to be.
3 There's going to be a judge, coordinator, the
4 court reporter, and the secretary and the clerk.
5 And you're going to have to budget all those
6 items." I mean, but anyway, I can't read it and
7 know now what it means. It either means the
8 budget for the administrative region or it means
9 that he is going to have some uniformity in what
10 he requires district judges and local
11 administrative judges to submit to their county
12 commissioner and courts.

13 MR. MCMAINS: That's all I was
14 pointing out. I'm not saying that it --

15 JUSTICE WALLACE: Whatever it means,
16 there's no conflict with the present rules that I
17 know of.

18 MR. MCMAINS: Oh, I agree.

19 PROFESSOR DORSANEO: That's right. It
20 appears to be purposefully ambiguous.

21 CHAIRMAN SOULES: Rule 8, E augments
22 our local rule provision under the Rules of Civil
23 Procedure. They go through the region and then to
24 the court, Supreme Court, which Judge Morris
25 talked about earlier.

1 MR. MCMAINS: 8-B is little bit
2 strange. I don't know what that --

3 CHAIRMAN SOULES: It gives them a
4 hammer. We're going to have a single set of rules
5 in each --

6 JUSTICE WALLACE: Tell that local
7 judge that he's going to have to get all his
8 Harris County judges working under one set of
9 rules is what it says.

10 CHAIRMAN SOULES: The local
11 administrative judge is going to have to get one
12 set of rules for the local administrative area.
13 And if he can't get it, he declares the rules.

14 MR. MCMAINS: Well, now, I understand
15 that, but what I'm saying is that it sounds like
16 that those rules become effective immediately.

17 CHAIRMAN SOULES: When they're
18 approved by the Supreme Court. See, then you've
19 got to read it. If you look at C --

20 PROFESSOR EDGAR: Look at C following
21 that.

22 MR. MCMAINS: Then you send them to
23 the administrative region judge and then he
24 transmits them to the Supreme Court.

25 PROFESSOR DORSANEO: I think "declared

1 the rules to be in effect" is probably bad
2 wording.

3 PROFESSOR EDGAR: Where does it say
4 here under Rule 9 that the local rules will not go
5 into effect until they have been approved by the
6 Supreme Court? I don't think it says that.

7 MR. MCMAINS: 8-B, no it doesn't. 8-B
8 specifically says, "the judge shall declare the
9 rules to be in effect." And I think I know what
10 they were trying to do there, but I don't think
11 they did it, because it sounds to me like that he
12 doesn't have to go through the Supreme Court.

13 JUSTICE WALLACE: I think it would be
14 more accurate to say "shall determine the rules
15 which he believes most clearly implements
16 administrative rules."

17 MR. MCMAINS: And which shall be
18 submitted to the Supreme Court for approval,
19 something like that.

20 CHAIRMAN SOULES: Help me; run through
21 that again.

22 JUSTICE WALLACE: Local administrative
23 judge shall declare the rules -- shall determine
24 the rules which he believes most clearly
25 implements the administrative rules of the Supreme

1 Court. Strike out "to be in effect."

2 PROFESSOR DORSANEO: Maybe, Your
3 Honor, that local administrative judges shall
4 adopt the rules.

5 JUSTICE WALLACE: I don't want them to
6 adopt them whether they're approved by the
7 court --

8 CHAIRMAN SOULES: Where is that local
9 provision in the Rules of Civil Procedure?

10 MR. TINDALL: It's up near the front.

11 MR. MCMAINS: We moved it.

12 CHAIRMAN SOULES: Copies of rules of
13 amendments so made shall, before their
14 promulgation, be furnished to the Supreme Court of
15 Texas for approval.

16 PROFESSOR EDGAR: Where is that?

17 CHAIRMAN SOULES: It's in the last
18 sentence to Rule 3-A which was put in there
19 effective April 1, '84.

20 MR. MCMAINS: It was also moved.

21 CHAIRMAN SOULES: And the rest of it
22 was moved from 895 or something.

23 PROFESSOR EDGAR: Why don't we say
24 then -- look over here then on page 14, paragraph
25 C, and then just say at the end of that, "and

1 approval before they are transmitted to the
2 Supreme Court pursuant to rule so and so, Texas
3 Rules of Civil Procedure," or something like
4 that.

5 CHAIRMAN SOULES: Before they are
6 furnished, which is the rule of 3-A, to the
7 Supreme Court for approval pursuant to --

8 PROFESSOR EDGAR: Yes.

9 CHAIRMAN SOULES: Does that get the
10 rest of 8?

11 PROFESSOR EDGAR: 9-A, why don't we
12 just say "provisions for the assignment,
13 docketing, transfer and hearing of all cases,
14 subject to jurisdictional limitations." Because
15 you see district courts and statutory county
16 courts, yet there are some constitutional county
17 courts that have trial court jurisdiction. And I
18 don't know why we put statutory county courts in
19 there deleting constitutional county courts. I
20 don't remember why this was done, do you Judge
21 Wallace?

22 JUSTICE WALLACE: Ask Judge Casseb.

23 PROFESSOR EDGAR: Why, Judge Casseb?

24 JUDGE CASSEB: They're not applicable.
25 They don't come under these rules.

1 PROFESSOR EDGAR: The constitutional
2 county courts don't?

3 JUDGE CASSEB: Like you take, say, in
4 Bexar County, we have two of them which is probate
5 and they just handle probate matters. That's, I
6 believe, one reason why the language was put this
7 way.

8 CHAIRMAN SOULES: Could they handle
9 other matters?

10 JUDGE CASSEB: What?

11 CHAIRMAN SOULES: Are they empowered
12 with jurisdiction to handle other matters?

13 MR. WALLACE: They are in the Millie
14 Hills (phonetic) docket for one thing. At least
15 particular probate courts in Harris County handle
16 the Millie Hills dockets. They did. I guess they
17 still do, don't they Harry?

18 PROFESSOR EDGAR: I guess my question
19 is: Let's assume we have rural county that doesn't
20 have a statutory county court; it has simply a
21 constitutional county court. Why would they not
22 fall under these rules?

23 CHAIRMAN SOULES: For nonprobate
24 matters.

25 PROFESSOR EDGAR: For nonprobate

1 matters.

2 MR. TINDALL: Luke, before you tread
3 into that thicket, you know, the constitution was
4 very quietly amended last November that just
5 rewrites that whole Article 5 with respect to
6 jurisdiction of the courts and what the
7 legislature may now prescribe, so there may be
8 greater freedom here than initially thought to
9 make it applicable to county constitutional
10 courts.

11 CHAIRMAN SOULES: Well, let's put it
12 in there. It's not going to be altogether
13 unconstitutional. If it's unconstitutional as it
14 applies to those courts, that will be all. If we
15 can get them, let's get them. If not, then not.
16 I mean, I'm not saying that these rules ought to
17 be applied everywhere, but if they're going to be
18 applied someplace, they probably ought to be
19 applied.

20 PROFESSOR EDGAR: I just want to make
21 sure that we don't run afoul of anything, Judge
22 Casseb. Would you tell me again why?

23 JUDGE CASSEB: Well, let me tell you.
24 This Rule 9 applies to the local courts in the
25 county to have their own rules, okay? All right.

1 In Bexar County -- the only one I know and study
2 and have -- the only ones that these rules will
3 apply is to the district courts and the statutory
4 county courts. The two constitutional courts
5 don't even attend the meetings. They feel that
6 they're to themselves. Now, that's the only
7 reason I'm bringing it out.

8 MR. MCMAINS: Because they haven't
9 been counseled respectively.

10 JUDGE CASSEB: No. They had
11 themselves excluded out they contended.

12 JUSTICE WALLACE: They are strictly
13 special probate courts, aren't they?

14 JUDGE CASSEB: Correct.

15 PROFESSOR EDGAR: Yes. But we have a
16 number of constitutional county courts. I mean,
17 out in the country, for example, you have a lot of
18 constitutional county courts that try cases within
19 the limit of their monetary jurisdiction.

20 JUSTICE WALLACE: And they try
21 condemnation cases.

22 PROFESSOR EDGAR: They try all kinds
23 of cases. Now, why aren't they included within
24 the rules, if that's what -- are they intended to
25 be excluded from these rules or just local rules?

1 It says the rules adopted by the courts of each
2 county shall be in writing. Now, those the are
3 local rules?

4 JUDGE CASSEB: That's right; that's
5 correct. That's what this implies, to just the
6 local rules.

7 MR. TINDALL: Local rules for county
8 court, or does that mean in district court too?

9 PROFESSOR EDGAR: What I'm trying to
10 find out is what rule --

11 JUDGE CASSEB: District courts and
12 county courts.

13 JUSTICE WALLACE: Of course, they were
14 attempting to exclude the county judge in
15 metropolitan areas from being included in it
16 because, clearly, his activities don't come within
17 this category, I think was the reason for saying
18 statutory county courts as opposed to county
19 courts because they wanted to exclude, well, like
20 I say, in Harris County, Dallas County, Bexar
21 County, the county judge presides over the
22 Commissioner's Court and runs the county
23 administrative business.

24 PROFESSOR EDGAR: Right.

25 JUSTICE WALLACE: But some of them

1 will under the constitution, have authority to
2 handle certain legal matters.

3 JUDGE CASSEB: We had suggested to
4 include in there district courts and county courts
5 where applicable.

6 PROFESSOR EDGAR: Well, maybe I'm not
7 getting my question across. Should we say, then,
8 that this rule then be entitled to local rules
9 adopted by the courts of each county or such --
10 you see, it says "each county," which makes you
11 believe that each county is required to have local
12 rules.

13 MR. MCMAINS: They are under this
14 proposal.

15 PROFESSOR EDGAR: Well, you don't have
16 to have local rules. If you don't have any local
17 rules, then you just fall under the general rules.

18 MR. MCMAINS: We've already pointed
19 out that the document is currently proposed.

20 JUSTICE WALLACE: You say, change
21 "each" to "a" maybe?

22 PROFESSOR EDGAR: Well, first of all,
23 is this rule talking only about local rules?

24 JUSTICE WALLACE: Yes.

25 PROFESSOR EDGAR: Why don't we say,

1 "the local rules adopted by the court of a county
2 shall be in writing and shall include the
3 following." It seems to me that that gives us a
4 little different connotation.

5 JUSTICE WALLACE: I think it covers
6 that quite a bit.

7 MR. MCMAINS: Or of any county; it
8 doesn't matter.

9 PROFESSOR EDGAR: Or of a county.

10 CHAIRMAN SOULES: What about multiple
11 county districts? That's a more grammatical
12 matter than substance.

13 PROFESSOR EDGAR: So then, this then
14 means, Judge Casseb, does it not, that
15 constitutional county courts are exempted from
16 having any local rules?

17 JUDGE CASSEB: That's my understanding.

18 PROFESSOR EDGAR: All right. But now
19 as far as being subject to the rest of these rules
20 as far as voluminous cases are concerned, they
21 will be subject to that.

22 JUDGE CASSEB: That's correct.

23 PROFESSOR EDGAR: Well then, I think
24 we've done that then by leaving the language of A
25 as it is.

1 CHAIRMAN SOULES: Leave that last
2 sentence out, or the last line.

3 JUDGE CASSEB: As you recall, at the
4 beginning you got the control of non-probate
5 cases.

6 PROFESSOR EDGAR: Yes.

7 PROFESSOR DORSANEO: Probate cases are
8 left out of Rule 1, I had thought, because they're
9 so different, in terms of their breadth, that they
10 hadn't had a system devised for them yet.

11 JUSTICE WALLACE: No. They had gone
12 to the legislature and got an administrative
13 system for probate judges. Pat Gregory in Houston
14 is the state probate judge administrator and they
15 have their own bailiwick.

16 JUDGE CASSEB: Their own time
17 schedule, too.

18 MR. MCMAINS: What's Rule 9 read now?

19 PROFESSOR EDGAR: The local rules
20 adopted by the courts of a county shall be in
21 writing.

22 MR. MCMAINS: That's what I'm saying,
23 though. It hasn't changed the content because it
24 says "shall include the following."

25 PROFESSOR EDGAR: If they do have

1 local rules, then it shall include the following.

2 MR. MCMAINS: No, that doesn't say
3 that.

4 PROFESSOR EDGAR: It doesn't say they
5 shall have local rules.

6 MR. MCMAINS: It means if they have
7 any local rule at all they have to have all of
8 them.

9 PROFESSOR EDGAR: No. It says it has
10 to be in writing and shall include the following,
11 and then A through H, that's right; that's what it
12 says.

13 MR. MCMAINS: The rules themselves
14 contemplate that they are going to have local
15 rules.

16 CHAIRMAN SOULES: The administrative
17 judge of the region is responsible for the
18 adoption of local rules.

19 PROFESSOR EDGAR: If they have local
20 rules.

21 CHAIRMAN SOULES: It says he shall be
22 responsible for the adoption of local rules.

23 PROFESSOR EDGAR: All right.

24 CHAIRMAN SOULES: That's 8-B.

25 MR. MCMAINS: That's all I was

1 saying. There's no question that this document,
2 as it currently stands, requires local rules for
3 every county.

4 PROFESSOR EDGAR: Under 8-B, that's
5 right.

6 MR. MCMAINS: Well, I mean, in
7 addition to all the other references that we got
8 in there, which requires things to be handled by
9 local rules.

10 CHAIRMAN SOULES: We've taken all that
11 out except --

12 MR. MCMAINS: Did you take it out of
13 3?

14 CHAIRMAN SOULES: Yes, I think. Let
15 me see. I don't see any need for it in 3-E4.

16 MR. MCMAINS: It was in 3-4, 3-E4.

17 CHAIRMAN SOULES: "As prescribed by
18 local rule," that phrase doesn't add anything,
19 does it?

20 MR. MCMAINS: Well, the only thing it
21 is, is that it's trying to tell you that somebody
22 is supposed to get -- since you can get your case
23 dismissed if you don't comply with the disposition
24 and the report in the form that they require it,
25 it would be nice to know what form they require.

1 But they don't tell you here.

2 JUSTICE WALLACE: But it says each
3 county must have a set of rules. They must be
4 approved by the regional administrative judge and
5 send them on up to us, and we approve them to make
6 sure that everybody --

7 MR. MCMAINS: I don't have any problem
8 with that. What I'm saying is, though, under
9 those circumstances, we ought to leave it in in
10 the earlier places because they're there for a
11 reason.

12 PROFESSOR EDGAR: To let people know.

13 MR. MCMAINS: They are there for,
14 because since they're going to penalize you if you
15 don't comply with doing a report that has
16 everything in it that they require you need to
17 know what that is ahead of time.

18 CHAIRMAN SOULES: The thing that I
19 don't see in Rule 9 as a mandatory requirement of
20 local rules is a form of disposition report.

21 MR. MCMAINS: No, that isn't in
22 there.

23 CHAIRMAN SOULES: That's required by
24 Rule 3-E4.

25 MR. MCMAINS: Well, it's D; it's

1 specific forms and procedures.

2 JUDGE CASSEB: Because it says in
3 compliance with Rules 3, 4 and 5.

4 CHAIRMAN SOULES: All similar cases.

5 MR. MCMAINS: Well, it says any form
6 and procedure.

7 CHAIRMAN SOULES: To be used by the
8 courts for all similar cases.

9 MR. MCMAINS: Yes. "To the end that
10 the courts shall take control of a case when it is
11 filed and maintain control of the case until
12 finally disposed in compliance with Rules 3, 4 and
13 5."

14 PROFESSOR EDGAR: And now it will be
15 4, 5, and 6.

16 CHAIRMAN SOULES: Okay. Shall we take
17 5 or 10 minutes?

18
19 (Brief recess.)
20

21
22 CHAIRMAN SOULES: It's a little after
23 2. It took us a little bit longer than we thought
24 to get through these. I apologize for delaying to
25 this point, but we have gone through the nine

1 rules and are ready to report back to you-all
2 where we feel that there is some need to make
3 adjustment for the Rules of Civil Procedure.

4 Let me get the wishes of the committee
5 whether we take both the Civil Procedure Rule
6 problems and the philosophical problems together,
7 or whether we go through them first with rules'
8 problems and then come back, or do we start with
9 the philosophical problems? To me, well, it
10 doesn't really matter. What are the wishes?
11 Anybody want to suggest an approach?

12 JUDGE CASSEB: We've been waiting for
13 your subcommittee to report; let's get their
14 report. Then we at least got the Chief Justice
15 requirement complied with and then we'll move over
16 to Justice Wallace's.

17 CHAIRMAN SOULES: Does that satisfy
18 everybody? Okay. Opening up here on Page 12 of
19 your materials.

20 There was a feeling that we ought to have the
21 purpose be Rule 1, and then all of the other rules
22 numbered successively after that, so 1 would
23 become 2, 2 would be 3, 3 would be 4, and go along
24 with me because I'm going to refer to them that
25 way with their new numbers.

1 Rule 4, on Page 6, would become Rule 5. Rule
2 5 on Page 8, would become Rule 6, Rule 6 on 11
3 will become 7. And Rule 7 on Page 12 becomes 8.
4 Rule 8 on Page 11 becomes Rule 9. And Rule 9 on
5 page 15 would become Rule 10.

6 In Rule 1, in order to make it clear that the
7 Rules of Civil Procedure should be regarded as the
8 dominant rules, the second sentence would end at
9 word "procedure." It would simply say, "It is
10 intended that these rules be consistent with the
11 Texas Rules of Civil Procedure," and strike "which
12 shall govern all matters not specifically covered
13 by these rules" because it's not clear from that
14 whether that means -- you could argue that these
15 rules, these administrative rules, would govern
16 over the Rules of Civil Procedure, where specifics
17 are mentioned. And then from the balance of our
18 work, we tried to reconcile any differences.

19 The third sentence, "In the execution of
20 these rules, telephone hearings or conferences in
21 lieu of court appearances are encouraged," the
22 subcommittee felt that that should be made a part
23 of a general Rule of Civil Procedure that made it
24 permissive to hold telephone hearings in lieu of
25 court -- in court hearings wherever hearings are

1 required under the Rules of Civil Procedure.

2 There was some questions; or there was a
3 question raised by Rusty, and I don't know -- of
4 course, we didn't get everything resolved. We
5 really more identified problems than anything else
6 -- that matters that require the taking of
7 evidence not be heard by telephone, and then on
8 the other hand, we recognized the fact that we do
9 take depositions by telephone now, or are
10 permitted to, and those support summary judgments.
11 The transcripts can be put into evidence and so
12 forth. So I guess the same way you could have a
13 Notary swear in a witness over the telephone and
14 have a hearing involving an evidentiary matter.

15 But however that is to be approached, it was
16 the subcommittee's view that the third sentence of
17 this now Rule 1 be put into Rules of Civil
18 Procedure and govern procedure in cases rather
19 than these set forth here. And that there not be
20 any preferential treatment; in other words, that
21 it not be suggested that phone hearings are
22 preferred, which is one way you could read that
23 third sentence.

24 Any discussion so far? That's all we had on
25 Rule 1.

1 JUSTICE WALLACE: Mr. Chairman, in
2 that change on which rules govern, I'll throw this
3 out for the committee to consider, after
4 "procedure," add "which shall govern in the event
5 of conflict," which makes it clear that the Rules
6 of Civil Procedure shall be the dominant.

7 CHAIRMAN SOULES: I think I'll sure go
8 for that.

9 JUSTICE WALLACE: "Which shall govern
10 in the event of conflict."

11 PROFESSOR BLAKELY: Which could refer
12 to these rules or could refer to Texas Rules of
13 Civil Procedure.

14 JUSTICE WALLACE: Well, wouldn't it
15 refer back to the nearest --

16 CHAIRMAN SOULES: Buddy Low.

17 MR. LOW: It refers back to the thing
18 that modifies Texas Rules of Civil Procedure.

19 PROFESSOR EDGAR: Or which shall
20 govern.

21 MR. BRANSON: That's sure going to be
22 a lot harder to argue in trial cases than it would
23 be to just make it clear now.

24 MR. SPARKS (EL PASO): Why don't you
25 just change it around and say, "It is intended

1 that the Texas Rules of Civil Procedure shall
2 control in the event of conflict?"

3 JUSTICE WALLACE: Well, it is intended
4 that the Texas Rules of Civil Procedure shall
5 govern in event of conflict with these rules?

6 JUDGE CASSEB: He said leave out "it
7 is intended."

8 PROFESSOR EDGAR: Leave "Rules of
9 Texas."

10 CHAIRMAN SOULES: I think they want to
11 state that it's intended that these rules be
12 consistent with the Rules of Civil Procedure. I
13 think we ought to just break that into two
14 sentences. Leaving in, "It is intended that these
15 rules be consistent with the Texas Rules of Civil
16 Procedure." And then say, "The Texas Rules of
17 Civil Procedure shall govern in event of
18 conflict."

19 JUSTICE WALLACE: That ought to make
20 it crystal clear.

21 CHAIRMAN SOULES: Okay. And move to
22 TRCP. Now, exactly where we move -- permission to
23 have telephone hearings, I don't know where in the
24 rules --

25 PROFESSOR EDGAR: I was looking at

1 that earlier and it might fit in Rule 21, but I'm
2 really wondering whether we should take the time
3 with the committee now to find an appropriate
4 place or maybe do that later.

5 CHAIRMAN SOULES: The only reason I'm
6 even touching on it is to try to decide which
7 standing subcommittee to assign the responsibility
8 to.

9 PROFESSOR DORSANEO: Mr. Chairman, I
10 think it would logically go in Section 1 of Part 2
11 of the Texas Rules of Civil Procedure beginning
12 at, I think, Rule 15 and going through Rule 21.

13 CHAIRMAN SOULES: All right.

14 PROFESSOR DORSANEO: Maybe it's 1
15 through 21.

16 CHAIRMAN SOULES: I'll get those.

17 MR. BEARD: Luke, do we have to
18 provide that telephones hearings will be
19 considered as having been conducted in open
20 court?

21 CHAIRMAN SOULES: We're not going to
22 be able to get that done, I don't think, in this
23 series of meetings. That's probably going to be
24 in our September meeting, but I need to get it
25 assigned because all those kinds of things need to

1 be thought through. And that will be assigned to
2 El Paso Sam. Okay. El Paso Sam?

3 MR. SPARKS (EL PASO): I've got it.

4 CHAIRMAN SOULES: Okay, thanks. Rule
5 2 then, "It shall be the policy to manage their
6 work load." There is feeling that we need to --
7 and I guess maybe the sentence we've just added to
8 Rule 1 makes it clear that Rule 1 of the Texas
9 Rules of Civil Procedure is going to dominate 2,
10 and that is to be administered in the interest of
11 justice, and Rule 2, that these rules shall govern
12 procedure in the justice county and district
13 courts and so forth.

14 If we've got that covered, we don't need to
15 say it again. But these time standards, of
16 course, could work to violate Rules 1 and 2 if
17 they are too slavishly followed. The time
18 standards only deal with the cases in gross, all
19 the cases that the judge has. They don't apply to
20 any single case according to the history of the
21 promulgation of that Rule 2.

22 MR. BRANSON: Mr. Chairman, would it
23 be all right to put in there then that these rules
24 should be applied consistent with Rules 1 and 2
25 since there is such an apparent potential

1 conflict?

2 CHAIRMAN SOULES: We certainly can do
3 that.

4 PROFESSOR EDGAR: We thought we
5 covered that in Rule 1 by stating that the Texas
6 Rules of Civil Procedure shall govern.

7 MR. BRANSON: Well, I understand, but
8 if you specifically refer them back to Rule 1 and
9 2, which is the equitable provisions in the rule,
10 you at least -- the Court has reminded the trial
11 judge specifically of those provisions when
12 interpreting it at the time.

13 CHAIRMAN SOULES: All right. If we
14 inserted after "within the periods of times
15 listed" something to the effect "consistent with
16 TRCP 1 and 2. Would that do then?

17 MR. BRANSON: Yes.

18 CHAIRMAN SOULES: Can we have a
19 consensus? How many, show by hands, favor that
20 insertion? Okay. Opposed? That is the consensus
21 that we suggest that insertion then.

22 Down where it says "domestic actions," that
23 should be changed to "family law."

24 MR. TINDALL: "Family law actions."

25 CHAIRMAN SOULES: Yes. Domestic would

1 replaced with "family law," that's right. And it
2 would say "family law actions." Now, we get to
3 where we need some input here. We wanted to add
4 something into Rule 2 or 3. We could take it now,
5 that deals with something that would be like an
6 interruption docket. Maybe that goes better in
7 Rule 3 where we set the more specific times, I
8 guess, or where, in event of bankruptcy,
9 abatement, where you get, like, one-year
10 interruption due to a death, where a party cannot
11 proceed with the case that the time periods don't
12 run. But I guess that we'll get to that under
13 Rule 3.

14 MR. TINDALL: I think it should be in
15 Rule 2, Luke, because it applies to all actions,
16 wouldn't it, whether it's a dead action, a family
17 action, a complex action?

18 CHAIRMAN SOULES: Well, now, that's
19 true. But Rule 3 --

20 MR. TINDALL: Doesn't apply to cases
21 under 4 or 5 unless you certify them to be.

22 MR. BRANSON: Mr. Chairman, can you
23 explain to me what the comment means there in Rule
24 2?

25 CHAIRMAN SOULES: Well, I'm going to

1 get to that when that's a problem. The next
2 conceptual problem I want to deal with is, how do
3 we feel about applying this rule to pending
4 cases? And that's the very next thing that's
5 here. And I believe that those two matters will
6 resolve what we made notes on.

7 Sam, if we make an interruption docket, how
8 should we -- are you still with me on that feature
9 of it?

10 MR. SPARKS (EL PASO): Yes. The more
11 I got to thinking about the problem, pretrial or
12 prejudgment on an interruption docket like
13 bankruptcy, I kept wondering why the third
14 sentence in 3-A, or your now 4-A, on Page 2, why
15 does it come into play on that sentence? "Nothing
16 in these rules should be interpreted to prevent a
17 court in an individual case in issuing an
18 exception order," et cetera.

19 CHAIRMAN SOULES: If that does it,
20 then it does; I mean, maybe it does. How many
21 feel that that third sentence in Rule 4-A, the
22 bottom of Page 2, "Nothing in this rule shall be
23 interpreted to prevent a court in an individual
24 case in issuing an exception order based on a
25

1 specific finding and that the interest of justice
2 requires a modification under routine
3 processes" --

4 PROFESSOR EDGAR: That's something
5 different.

6 MR. MCMAINS: That's a different
7 problem. It's not a question as to whether or not
8 the Court should perceive on its active docket,
9 those things that aren't really active by virtue
10 of some other impediment.

11 CHAIRMAN SOULES: Bill Dorsaneo?

12 PROFESSOR DORSANEO: I've been
13 thinking about that. In terms of the bankruptcy
14 problem and related kinds of problems, we could
15 devise a sentence or two to go to this new Rule 2
16 that indicates that when an action is abated, and
17 we have that concept, that it is not running on
18 the clock, or it's off the clock, or something
19 like that, that it's put in some status that as it
20 not been counted for these time table purposes.
21 And I'm thinking the concept of abatement,
22 temporary suspension, while there is some outside
23 problem, would be a Texas concept we could use.
24 And someone could ask for that relief by filing a
25 plea of abatement. We could fit it in, and I

1 think really the plea of abatement, the idea is
2 that it is suspended rather than dismissed.

3 CHAIRMAN SOULES: But could you even
4 file a plea of abatement if a bankruptcy order had
5 been entered?

6 PROFESSOR DORSANEO: That's the
7 problem.

8 MR. MCMAINS: See, that's what I was
9 getting at. You know, our problem is not just
10 applying for relief or even being able for a judge
11 to individually grant relief, but it's how it
12 bears on the total use of the statistics. It
13 really bears on the reporting as well, whether or
14 not it should be classified differently for
15 reporting purposes.

16 I venture to say that I would be surprised if
17 there aren't at least two percent, since that's
18 the only latitude we got here in this time table.
19 Ninety-eight percent of most trial court's docket
20 probably are affected by bankruptcy or something
21 similar in major metropolitan areas.

22 CHAIRMAN SOULES: Do the terms "stay"
23 and "abate" embrace all these? Because we call
24 bankruptcy stays. I don't know what a removal
25 does; I don't know whether that stays or abates

1 the trial court process of the state courts.

2 MR. MCMAINS: Yes. It comprises the
3 jurisdiction.

4 CHAIRMAN SOULES: Well, do you call it
5 stay or abate? Well, I guess if it comprises the
6 jurisdiction, it's no longer a pending case, is
7 it? It's been disposed of under the statistics.

8 MR. MCMAINS: Well, no. If it gets
9 remanded, it goes right back into it, and it
10 doesn't get refiled, and they don't lose their own
11 individuality in terms of where they are.

12 CHAIRMAN SOULES: Stay, abate or
13 removed, -- does that get them all?

14 MR. LOW: The court doesn't have
15 jurisdiction during that time.

16 MR. MCMAINS: Use three words.

17 CHAIRMAN SOULES: Stay, abate or
18 removed. That's what I'm trying to do, trying to
19 get as general terms as we can.

20 MR. MCMAINS: Until such impediment is
21 lifted or something?

22 CHAIRMAN SOULES: Yes.

23 MR. MCCONNICO: We might ought to have
24 "enjoin." Sometimes you'll enjoin a party from
25 proceeding with a suit in another jurisdiction.

1 CHAIRMAN SOULES: All right. If
2 that's not embraced by "stay," we need to put it
3 there.

4 MR. MCCONNICO: What?

5 CHAIRMAN SOULES: If it is not
6 embraced by "stay," then I don't think it would.
7 Stay, enjoined, abated or removed.

8 MR. BRANSON: How about saying "or in
9 any other manner, suspended by court order." That
10 would cover all of those.

11 CHAIRMAN SOULES: Okay.

12 MR. SPARKS (SAN ANGELO): What, sort
13 of, we're saying is like -- comes under the
14 Soldiers' and Sailors' Relief Act, bankruptcy just
15 not counted in these statistics.

16 MR. MCMAINS: Or subject to the
17 rules.

18 MR. MORRIS: This is your subcommittee
19 report, and is this having to do with making this
20 not inconsistent with the Rules of Civil
21 Procedure? Is that what we're doing right now?

22 CHAIRMAN SOULES: Yes. And we're
23 trying to recognize problems that would come up
24 under the Rules of Civil Procedure if it did
25 apply. Now, again, this interruption docket, you

1 know, I guess, is arguably in or outside the scope
2 of that.

3 MR. MORRIS: I guess part of my
4 inquiry is -- we're not supposed to sit here and
5 amend this to where it's acceptable to us, as I
6 understand it, just make it comply with or what
7 would be consistent with the Rules of Civil
8 Procedure and say we do or don't like it, I
9 guess.

10 CHAIRMAN SOULES: I guess that then
11 we're going to take up the philosophical
12 problems. But there's pleas and abatement and
13 things that are provided for in the Rules of Civil
14 Procedure and we need to recognize that when we
15 set time standards. And then when we got into
16 that, we also realized that back in the suits for
17 debt, monetary claims, we've got a bankruptcy
18 docket that suspends things, and, really, every
19 kind of case may be suspended by bankruptcy,
20 domestic relations case or any other kind of case,
21 or a suit against a doctor or whatever.

22 MR. BRANSON: Would there be some
23 merit, not to take things out of order -- but
24 would there be some merit to seeing whether or not
25 this committee, as a whole, is in favor of these

1 rules as a whole? Because if they're not, it
2 seems like we might be wasting a lot of time going
3 through and making something better we don't like
4 anyway.

5 CHAIRMAN SOULES: Well, Frank, fine.
6 I'll take a consensus on that, but this committee,
7 as many of us as are willing to stay and work, are
8 going to stay here and go through these today and
9 find out if they agree with the Texas Rules of
10 Civil Procedure. Because that is the reason that
11 we are here. The Chief Justice asked me to have
12 an extra day's meeting today. We were only going
13 to meet Friday and Saturday when we left here the
14 last time -- to meet today to see if these met
15 with the Rules of Civil Procedure and we've got to
16 do that.

17 JUDGE CASSEB: I can see where we're
18 getting off what we're supposed to be doing.
19 Instead of trying to write into these rules what
20 we feel may be in conflict with the Texas Rules of
21 Civil Procedure, I think maybe what we ought to do
22 is just make mention and point it out and then let
23 these who are going to finally draft these rules
24 tackle that problem.

25 CHAIRMAN SOULES: Well, I don't know.

1 whether it will or won't happen.

2 JUDGE CASSEB: Because what we're
3 doing now, you're finding yourself -- you're
4 actually changing these rules, which I don't think
5 that's the prerogative of this committee.

6 MR. SPARKS (SAN ANGELO): I perceive
7 our instructions is to go amend the Rules of Civil
8 Procedure, that is, to go along with it.

9 CHAIRMAN SOULES: No. That's not
10 right.

11 JUDGE CASSEB: It's to point out where
12 they may be in conflict. And I think that's what
13 we should do and that's all we should do.

14 CHAIRMAN SOULES: Well, I'm just going
15 to overrule you, Judge. We're going to find out
16 where they are in conflict, and we're going to
17 suggest to the Court how to resolve the conflict.

18 JUDGE CASSEB: That's all right. But,
19 I mean, we're saying, "Let's rewrite, and put this
20 and put that."

21 CHAIRMAN SOULES: Well, that's what we
22 are trying to do, is how to solve it, and we have
23 a benefit of these minds here today to do it.

24 JUDGE CASSEB: Okay.

25 CHAIRMAN SOULES: And that's what I'm

1 trying to do, is get the solution. And that's
2 what the Chief has asked us to do, and so we want
3 to try to do that.

4 MR. LOW: I was just going to say that
5 I think it would make it easier if we just assume
6 that we had all voted and these are the rules that
7 we want, even though that might be a false
8 assumption. And then as best we can, it would be
9 our duty to try to feed those into the Texas Rules
10 of Civil Procedure, as I understand it; not making
11 substantive changes, but just making such
12 changes. So, I think if we operate on that
13 assumption, we have apparently done our charge;
14 then our duty would be pretty well spelled out.

15 CHAIRMAN SOULES: Right. And it may
16 be that as we go through these rule by rule, when
17 we get down to now what is 10, that the comments
18 that we make about the rules, philosophically, may
19 have more substance. I don't know.

20 JUDGE CASSEB: The only thing I was
21 thinking about, just like you were pointing out
22 right now, it does not address to that issue;
23 stays or bankruptcies or anything of that nature.

24 CHAIRMAN SOULES: Well, it does to the
25 extent that we have pleas in abatement, Judge,

1 under our rules, that abate cases and don't permit
2 them to go forward on these time standards. All
3 we're trying to do is expand pleas in abatement.
4 There are other things that have the same effect.

5 MR. TINDALL: We would have mandamus
6 actions?

7 CHAIRMAN SOULES: Well, they don't
8 stop anything, unless the Court -- of course, the
9 stays, that would be a stay. That would be a
10 mandamus .

11 MR. TINDALL: Interlocutory appeals.

12 MR. LOW: Motions to disqualify until
13 they are heard and so forth. They don't last that
14 long. So I guess you're really talking about any
15 proceeding that, through that legal action or some
16 other, is prohibited or stayed from going forward.

17 CHAIRMAN SOULES: Right. What I've
18 got here now is: Stayed, enjoined, abated,
19 removed or in any other manner suspended from
20 proceeding.

21 MR. SPARKS (SAN ANGELO): That covers
22 it. And under Rule 3, are you going to require
23 another Section F to report those types of cases?

24 CHAIRMAN SOULES: We're going to have
25 to do something about that, yes, when we get to

1 the reporting. But in Number 2, now, we would
2 have the policy where we would say it has got to
3 be consistent with Rules 1 and 2. We're going to
4 change "domestic" to "family law actions," and
5 we're going to add a sentence that says, "That
6 these time standards shall not apply to actions
7 which are stayed, enjoined, abated or removed or
8 in any other manner suspended from proceeding."

9 MR. MCMAINS: During the period of
10 such suspension.

11 CHAIRMAN SOULES: "During the period
12 of any such suspension." Now we got to get to the
13 issue of dealing with --

14 JUDGE CASSEB: Does that include
15 taking it under advisement?

16 CHAIRMAN SOULES: Well, as was pointed
17 out in our discussion, there's not anything in
18 here that says that your judge has got to give you
19 a trial or render or assign a judgment; it just
20 says he's got to set the case.

21 JUDGE THOMAS: Luke, would you read
22 the language, just that last sentence, one more
23 time? "These time standards shall not apply for
24 actions" --

25 CHAIRMAN SOULES: "These time

1 standards shall not apply to cases which are
2 stayed, enjoined, abated, removed or in any other
3 manner suspended from proceeding during the period
4 of any such suspension." Maybe that can be more
5 artfully written, but that's the concept of it,
6 Judge.

7 While that's sinking in, let's talk about the
8 second issue, which is a big issue, which Frank
9 Branson recognized a moment ago, and that is, what
10 are we going to do about pending cases?

11 JUDGE CASSEB: That's right.

12 MR. BRANSON: I move we exclude them
13 from these rules. Make them prospective only if
14 additional cases are --

15 CHAIRMAN SOULES: Well, that's
16 certainly not a bad approach to it, and I mean as
17 a whole practical matter. The process that is
18 being used in Bexar County and going to be used in
19 Webb County and going to be used in El Paso, too,
20 if George Thurmond has his way, he's told me, is a
21 way to clean up the old cases, and an effective
22 way.

23 MR. LOW: What would be wrong with
24 having each -- the judges who know what the policy
25 is, the judges shall, as they deem appropriate,

1 make fair -- and make pending cases, make this
2 applicable as they deem appropriate. I mean, each
3 judge would have a little latitude, but he
4 wouldn't just have to say, "You know, here's a
5 case that's been on file two years and now it's
6 already 30 days old."

7 CHAIRMAN SOULES: The history of this
8 was, the pending cases were not addressed. Then
9 it got to be a quarrel about how are you going to
10 address pending cases? The way that got resolved
11 was that Freissen said, "Well, I'll tell you,
12 let's just put a comment in there and let's talk
13 about what attitude we ought to have towards
14 pending cases." And that's the reason that this
15 word "attitude" is in this comment and the reason
16 there's a comment instead of some provision. But
17 that may or may not work.

18 And something that I have not heard discussed
19 until today is this, that we, as fiduciaries, and
20 nobody has a higher fiduciary responsibility and
21 liability for violating that fiduciary
22 responsibility than we have to our clients. We
23 have set our dockets, taken cases, become
24 obligated to clients pursuant to a fiduciary duty
25 and with real heavy liabilities without having any

1 of these rules in place that affect our clients'
2 rights and with the plan to achieve those rights
3 and protect and pursue those rights, without these
4 rules being in place, and now the rules are
5 changing. And our clients' rights are going to be
6 affected and our responsibilities are vastly
7 affected, whether we like it or not.

8 MR. BRANSON: That's the basis of the
9 motion -- if you're practicing bar, I don't
10 perceive practicing bar can accommodate these
11 rules if they were passed without tripling their
12 current office staff and lawyer force. I think
13 you're going to have to give them some leeway,
14 some time to gear up, or you're going to end up
15 with just a mass of lawsuits on legal
16 malpractice.

17 CHAIRMAN SOULES: Yes. You would be
18 substituting plaintiff's cases against drunk
19 drivers for plaintiff's cases against lawyers, who
20 necessarily do or don't do that sort of thing.

21 MR. BRANSON: Right. In all candor, I
22 have some philosophical problems with the rules as
23 a whole, but if they're going to pass you've got
24 to give the trial courts and the district courts
25 an opportunity to set up a mechanism for all these

1 millions of papers they're going to have to count,
2 but the trial lawyers are going to have to have
3 some leeway also.

4 MR. MORRIS: I second Frank's motion.

5 CHAIRMAN SOULES: Thank you, Lefty.
6 Mr. McMains, you've had your hand up.

7 MR. MCMAINS: I perceive, however, a
8 problem if you honestly believe that these rules
9 are going to come into effect. And I honestly
10 believe, as well, that our advice that they not
11 apply to family cases is going to be taken, both
12 of which I have some concern about, is that these
13 rules require the new cases to get set.

14 Now, I'm looking at the fiduciary duties and
15 other obligations I've got to clients I've got
16 now. And I don't want the new cases to get
17 preference over cases that may be real close to
18 being to trial, or being ready for trial, subject
19 to me getting a trial setting, which is a more
20 fundamental problem we have, in that all these
21 rules do is guarantee you a trial setting. They
22 don't guarantee you a trial.

23 But if, as I anticipate, when they ultimately
24 finish the process, if they ever do get passed,
25 it's going to be passed with an expectation that

1 the cases that are subject to these rules do, in
2 fact, get an opportunity to be tried.

3 If that happens, I don't want new cases that
4 are six months old going to trial ahead of mine
5 that are two-and-a-half years in the works.

6 MR. BRANSON: I amend my motion to
7 include that the effective dates of these rules be
8 540 days from the date the rule was passed,
9 thereby taking care of 98 percent of the cases
10 according to Dean Friessen.

11 MR. O'QUINN: Second.

12 MR. SPARKS (EL PASO): You know, Frank
13 makes some humor, and yet that has been the
14 biggest suggestion I have heard from practicing
15 lawyers, and that is, if these new rules are to be
16 applicable to pending cases, make them applicable
17 to all cases and put an effective date on new
18 filings for 12 months. Many of you, I'm sure,
19 received the same letters I have. But that
20 suggestion was made far more than any others.

21 MR. MCMAINS: Well, I think an
22 accommodation, frankly, is what I was getting at,
23 has to be made between providing an opportunity to
24 expeditiously move new filings, but at the same
25 time, allowing the dockets to proceed as they have

1 on cases that are already jammed and carte blanche
2 exclusions.

3 It just concerns me in terms of what I
4 perceive, as do you, as to what might ultimately
5 become of these rules if they get passed. There
6 is going to be some anticipation that they're
7 going to work in giving people an opportunity to
8 get tried within the 360 days, or whatever. And
9 if that's true, the only way they are going to do
10 that is to push back cases that are already
11 planning on being tried at that same time. And
12 that's a disruption to the process that is not
13 going to be solved by this problem by these
14 rules. I don't have an answer; I have big
15 questions.

16 MR. SPARKS (EL PASO): I think it is
17 unlikely, though, that Dean Friessen's advice to
18 the Court is going to be anything like that,
19 because his whole premise is, if you force these
20 rules, strictly all of these cases will evaporate
21 and that's what the whole premise is, that 90
22 percent settle, and they only try two and only
23 really have to deal with four to six percent of
24 all the cases filed.

25 So when we think about that, I really view

1 that to be more of a problem with the Court than
2 our function or the individual judges. But I
3 don't know how you can exempt all pending cases.
4 I kind of favor the concept of delaying for 12
5 months all cases filed after a date, and then
6 generally applying these rules however they come
7 out to the pending cases.

8 MR. LOW: As I understand, the Chief
9 Justice, he's pretty dedicated to these rules
10 going into effect fairly soon. Maybe I've
11 misinterpreted him. So I doubt that anything that
12 we say is going to delay it a year or something
13 like that.

14 I would think the most that we could hope for
15 that he might go along with, and might not, would
16 be that these rules are effective now, but have
17 some clause in there giving the trial judge for,
18 say, a year's period, a chance to apply these
19 rules as he sees fit, but not to the detriment of
20 the older cases, giving the older cases priority,
21 but so that the older cases aren't shuffled back;
22 that then the rules would be applied then. And
23 then after a year, they will be applied
24 literally. In other words, now they apply the
25 rule, but precedent would go to older cases.

1 He might suspend the applying of the rule for
2 a period of time, so as to work in older cases. I
3 don't have the language. But something like that,
4 I think, would come near working with him than
5 saying we just are not going to do it.

6 MR. MORRIS: I'm kind of alluding to
7 what Judge Casseb did when I was in the Task Force
8 everytime this ever came up. It was my
9 understanding that all we were going to do now is
10 deal with this Task Force report that's before us,
11 it really doesn't tell us what to do with the old
12 cases, and I don't think our charge today is to
13 tell the Court what we recommend they do with the
14 old cases.

15 I think that is for another problem that I
16 understand Dean Friessen is going to work with
17 them to help them solve. If we go in and
18 start -- for example, I think this whole rule
19 ought to be deleted.

20 But that's not my charge today, at this
21 moment, anyway. And I think for us to venture off
22 out into, "Well, let's tell the Supreme Court how
23 we think they ought to handle old cases," it is
24 really getting too far afield. I think we should
25 be saying whether or not there are inconsistencies

1 with the Rules of Civil Procedure, and if there
2 are, how we recommend they deal with those. And
3 then, what I understand, we'll have a
4 philosophical vote.

5 CHAIRMAN SOULES: Well, we have Rule
6 165-A that has dismissals for want of
7 prosecution. I mean all kinds of problems can --
8 there all sorts of tools that the trial judges can
9 find in the Texas Rules of Civil Procedure to
10 achieve Rule 2, if it applies to everything. And
11 the comment says the same attitude applies.

12 MR. MORRIS: Well, I hear you. But it
13 was my understanding that they were going to come
14 up with a Task Force or something else to deal
15 with pending cases like to send a battalion of
16 judges to Harris County or something like that. I
17 mean, that was what I was hearing.

18 CHAIRMAN SOULES: Well, I haven't
19 heard that.

20 MR. BRANSON: Maybe I misunderstood
21 our charge, also. I didn't necessarily understand
22 that we were charged for satisfying the Chief
23 Justice's request, but we were satisfying the
24 Court as a whole. And I don't think that we need
25 to necessarily direct our attention to merely

1 negotiating the Chief Justice over his position.
2 Is that wrong? I mean, is that what we're doing?

3 CHAIRMAN SOULES: No. I don't think
4 it's wrong or right. Some of these things are
5 instructive and policy-sort of statements. And
6 I've just jotted a couple of things down and tried
7 to cover both of these. Say, "These time
8 standards may be applied to pending cases in the
9 interest of justice." Lay it out there just like
10 that. "And preference in trial settings shall be
11 given to pending cases in the interest of
12 justice."

13 MR. BRANSON: With regard to your
14 fiduciary duties to your clients that we discussed
15 earlier, how are you going to know which of those
16 have been violated?

17 MR. LOW: Just the same way, Frank,
18 how do you decide now when you get two cases --

19 MR. BRANSON: I mean, but how are you
20 going to know which cases to put on the front
21 burner in your office, and which ones are going to
22 get dismissed because someone decided to apply
23 these rules without you being informed?

24 CHAIRMAN SOULES: Well, I'm not sure
25 that that's a different problem than we have

1 today, particularly, in San Antonio, where by year
2 end every case filed prior to 1984 that hadn't
3 been tried will probably be dismissed.

4 MR. BRANSON: You could be put to
5 trial the day these rules come out and stay in
6 trial for six months and come back and your entire
7 office will be dismissed because someone decided
8 in the interest of justice these rules are going
9 to be applied along with the contentions.

10 CHAIRMAN SOULES: Well, I'm hoping
11 that the "interest of justice" comment imposes
12 some degree of fairness, and that's why I use
13 those words. I'll use any words that will work
14 better.

15 JUDGE WOOD: There is a place in here
16 that says that the Court can accept a case from
17 the provisions of these rules for various reasons,
18 as I understand.

19 CHAIRMAN SOULES: Let me follow you,
20 Judge.

21 JUDGE WOOD: We've got a provision in
22 here somewhere that the Court in a given case can
23 grant a special exception and excuse it from the
24 operation of the rules.

25 CHAIRMAN SOULES: Yes, sir.

1 JUDGE WOOD: All right. Why don't we
2 just say, "All cases pending at the time of the
3 adoption of these rules shall be regarded as
4 accepted from the operation of these rules as for
5 scheduling and trial"?

6 CHAIRMAN SOULES: That gets to Rusty's
7 problem; you may want that schedule. You may want
8 a pending case to come under the schedule.

9 MR. BRANSON: Why not exclude those
10 pending cases, and then give you 12 months during
11 which the trial bar and the trial courts and the
12 district clerks can regear or remachine or
13 whatever they're going to have to do to
14 accommodate these things.

15 CHAIRMAN SOULES: Rusty wants a case
16 tried in six months though; he doesn't want it
17 delayed.

18 MR. BRANSON: But he can try it within
19 six months under the existing rules if it is
20 already pending. And according to everything I
21 can see out of the Task Force, that can be done in
22 98 percent of the counties in Texas now. It's
23 only in Harris County, apparently, that there is a
24 major problem anyway.

25 CHAIRMAN SOULES: Well, that was

1 Buddy's point, is whether we are to say, "These
2 rules shall not apply to any cases until six
3 months after their effective date."

4 MR. BRANSON: I would urge a year. In
5 all the correspondance that the Task Force members
6 got was a year minimum.

7 CHAIRMAN SOULES: All right.

8 MR. TINDALL: I want something to
9 apply right away. A lot of family law cases
10 it's -- I think to delay the suspension of these
11 rules is just cutting the heart out of them. And
12 if you go by that, then you've got this great
13 backlog. I mean, the whole idea is that if these
14 rules have any validity is that we are going to
15 start imposing stringent deadlines on lawyers and
16 litigants and judges to get rid of this.

17 And if you start accepting out everything
18 that's pending in the courts of Texas today, then
19 the rules will never come to fruition because the
20 trial court and the lawyers are all going to say,
21 "Well, we've got these old cases that we have got
22 to get rid of before we ever reach the
23 millennium."

24 JUDGE THOMAS: I have one question and
25 that is, as we're talking right now, are we saying

1 when you say "these rules," you know, old cases
2 shall be excluded or so forth, are we just saying
3 on this disposition or the entire group of rules?

4 CHAIRMAN SOULES: I'm talking about
5 these time standards that are in Rule 2; I'm not
6 talking about the rest of them. Now, we haven't
7 gotten to those. We may have the same problems.
8 Well, let me see if I can get a consensus. Now, I
9 don't know whether these are all the options.
10 Number one, is that we just say that may be
11 applied in the interest of justice; two, that we
12 try to get them an arbitrary six-month extension
13 before they apply to pending cases; or three, that
14 we try to get an arbitrary year extension before
15 they apply to pending cases. And I know there are
16 competing interests. Some people want them to
17 apply right now to all their cases. Some people
18 don't want them to apply for a year to any of
19 their cases.

20 Rusty, do you want to speak to the
21 possibility of that consensus?

22 MR. MCMAINS: Well, in terms of your
23 suggestions, though, one of the other alternatives
24 I was talking about was, or least as I understood
25 what Frank was talking about, was that these rules

1 do not apply to new cases for a period of time.

2 MR. BRANSON: For a year.

3 MR. MCMAINS: Not that they not apply
4 to pending cases alone, but that they not apply to
5 new cases.

6 MR. BRANSON: That's going to give the
7 trial courts a year to dispose of their existing
8 dockets, or if you use Dean Friessen rules, you
9 have 560 days.

10 (Off the record discussion
11 ensued.)

12
13 CHAIRMAN SOULES: All right, there is
14 a fifth one. And maybe the suggestion that I was
15 hearing there is that the rules -- our suggestion
16 be that the effective date of these rules be one
17 year after they are promulgated, period, forever.
18 Now, that certainly is an easy way to do it, if
19 that is acceptable.

20 MR. BEARD: The Court is going to give
21 us a notice that we're on track or are we going to
22 have to -- you know, we have got cases -- I've
23 been practicing law a long time. I get motions
24 dismissed where -- I got one that's 12 years old.
25 I'm representing the defendant. I almost didn't

1 find the file. Are we going to get some notice?

2 CHAIRMAN SOULES: Yes.

3 MR. BEARD: Because some of us don't
4 know all the cases that we got pending out
5 there.

6 CHAIRMAN SOULES: Yes. 165-A still
7 has to be followed. 165-A still controls.

8 MR. O'QUINN: One advantage to a
9 delayed starting date would be, for one thing, to
10 get everybody -- the judges -- now, there are two
11 principle areas where the judges get their CLE,
12 that's in regional judicial conferences held in
13 the spring, and then the state-wide judicial
14 conference in September. You've got your CLE
15 programs going on continuously for the lawyers.
16 And a delayed starting date would at least give
17 everybody chances to get to some of these CLE
18 programs, find out exactly what the rules say, and
19 what can be expected of them. That would be one
20 advantage to a delayed date.

21 JUDGE CASSEB: May I suggest
22 something?

23 CHAIRMAN SOULES: Yes, sir.

24 JUDGE CASSEB: I think you ought to
25 put a caveat in the report that would go back to

1 the Court concerning the comment, as stated herein
2 is that, the suggestion is that the effective date
3 of the rules shall not be put into operation for
4 at least a year, and then you answer that and then
5 go on.

6 CHAIRMAN SOULES: All right. Maybe
7 we've got a consensus now. How many feel that the
8 way to handle the pending-case problem and the
9 preferential setting -- perhaps preferential
10 settings to new cases if we don't do them all at
11 the same time, the way to handle that is, just
12 simply to ask the Court to delay effective date
13 one year from enactment? How many? Show by
14 hands.

15 MR. BRANSON: Mr. Chairman, may I
16 raise a point before this? Aren't you going to
17 meet yourself coming back in one year from that
18 date? Aren't you then going to have all pending
19 cases automatically in violation of these
20 Administrative Rules?

21 MR. LOW: No. Because you have a
22 provision that says, "any case pending shall be
23 construed as having been filed on the effective
24 date." And it might be a lot of them at that
25 time. And then you start building, so you know

1 what your docket is. But any case already pending
2 shall be considered as having been filed the
3 effective date of these rules.

4 CHAIRMAN SOULES: Being filed on the
5 effective date of the rules.

6 JUSTICE WALLACE: One advantage, too,
7 of this effective date is that that judge knows
8 those dockets are going to have to be cleared up
9 in a year's time. The administrative judges know
10 that. And whatever it takes to get visiting
11 judges in and operate the drop docket, like Judge
12 Casseb is doing in San Antonio now, give them time
13 to do that and work off all this backlog they can
14 before this would become effective.

15 CHAIRMAN SOULES: And it would give
16 the lawyers that want to refer, that don't want to
17 try certain cases -- they've got an opportunity to
18 clear with their clients or refer all of those
19 cases to other lawyers. I guess that's one way to
20 put it.

21 Okay. Are we ready that we would say that,
22 "cases pending would be deemed filed on the
23 effective date of the rules." And that "the
24 effective date of the rules be one year after they
25 are promulgated by the Court to final form"?

1 How many so feel? How many opposed? Okay. There
2 are three opposed.

3 Let me see the hands for, again, so I can
4 count them.

5 JUDGE THOMAS: Here, again, we're
6 assuming in this vote that we like the rule.

7 CHAIRMAN SOULES: Well, we're assuming
8 that they are going to be rules anyway.

9 JUDGE THOMAS: Okay.

10 MR. O'QUINN: May I ask a question?

11 CHAIRMAN SOULES: Yes, sir.

12 MR. O'QUINN: Is your motion that the
13 rules apply to all cases, the existing as well as
14 new ones? We had a discussion as to whether they
15 ought to apply to the old ones, as well as the new
16 ones. So, which way are we going on this vote?

17 CHAIRMAN SOULES: The consensus is
18 that, are we willing to have -- assuming we're
19 going to have rules. We've kind of been by that
20 in all this discussion. Are we willing to have
21 the rules applied to all cases with a one-year
22 delay and effective date? And that may be all we
23 can get. We're trying to solve a very practical
24 problem here. How do we handle this, and suggest
25 to the Court a way that would be fair?

1 Okay. Those in favor, show your hands again
2 and let me count them. Opposed? 12 for and 4
3 opposed.

4 MR. SPARKS (EL PASO): Luke, as a
5 practical matter, do you think we ought to have an
6 alternate consensus? The reason I'm opposed to it
7 is, I think is, a practical matter. We've got a
8 better chance, and it may work out better, to have
9 the rules imposed on pending cases with a year
10 effective date on all cases filed after the
11 passage of the rule.

12 MR. LOW: Within a year you still have
13 the same problem Rusty is talking about.

14 MR. SPARKS (EL PASO): It's just a
15 steppingstone, but at least it gives you a year to
16 get rid of some of the older cases.

17 MR. O'QUINN: Luke, I want to echo
18 what Sam said. One reason I voted against the
19 last motion, and that's why I asked you the
20 question is, and I'm not speaking just for myself,
21 but for a lot of lawyers in Houston on both sides
22 of the docket, and this echos something you said
23 earlier.

24 We're sitting down there with dockets that --
25 you know, if I just did nothing but stay in trial,

1 subtracted my entire life away, and some of those
2 lawyers over at Fulbright and Jaworski who are
3 carrying 150 cases, or however many cases they've
4 got, they don't know how they're going to be able
5 to live on this. Of course with a year that may
6 help. But, you know, it has been similarly
7 expressed today about exempting the existing
8 cases.

9 So, my concern is applying it to the existing
10 cases. That was some of my concern. Okay.
11 That's why I voted against that. Because of our
12 present commitments and those things of that
13 nature. And I'm very much concerned about it.

14 You've been down in Harris County recently
15 trying a case, and I don't know whether you kicked
16 this around with anybody, but I think if you were
17 down there practicing law, I think you would find
18 that there's a lot of concern on the part of both
19 sides of the docket about how you could even take
20 a new case.

21 I mean, I hear people talking about, well
22 there would be no way I could even take a new case
23 if they put this rule in effect, because I've got
24 so many now. If they put it on this kind of fast
25 track I'm going to be lucky to grapple

1 successfully and not drop the ball. There could
2 be so many balls in the air, in my firm, that I
3 don't see how you can get another ball in the
4 air. I don't care if it's a good client that
5 comes to me with something else. I've just got a
6 major problem, or else I'm going to have to hire a
7 whole bunch of lawyers.

8 MR. SPARKS (SAN ANGELO): You pick
9 out the five cases you want and give the rest of
10 them to back.

11 MR. O'QUINN: Well, I'll guess I'll
12 send them to Sparks or San Angelo.

13 MR. SPARKS (SAN ANGELO): I'll take
14 them.

15 MR. O'QUINN: But anyway, what Sam is
16 saying, he'd like to have an alternative to exempt
17 the existing cases, but that's what he's saying,
18 and maybe he's not.

19 MR. SPARKS (EL PASO) El Paso. That's
20 just the opposite. No I would think that the
21 rules could apply to all pending case as if they
22 were filed at the time the rules are enacted, but
23 have a years delay for all cases filed within the
24 next year.

25 MR. SPARKS (EL PASO): It's just the

1 opposite.

2 MR. O'QUINN: You don't want to exempt
3 anything?

4 MR. SPARKS (EL PASO): No. I would
5 think that the rules could apply to all pending
6 cases as if they were filed at the time the rules
7 are enacted, but have a year's delay for all cases
8 filed within the next year.

9 MR. LOW: What you're saying, a stage
10 -- the effective date that all cases -- then the
11 next year the whole thing goes into effect and
12 those that are pending between that year then
13 would be effective and then you strike out from
14 there.

15 MR. SPARKS (EL PASO): It's just a two
16 step rather than a one step or a no step.

17 MR. LOW: In other words, you work one
18 year on the old cases on this --

19 CHAIRMAN SOULES: Okay. Well, let's
20 see how many favor that as an alternative.

21 PROFESSOR EDGAR: Well, Harry just
22 pointed out, though, that in the family area they
23 need relief immediately.

24 MR. TINDALL: We want certain actions
25 heard. That's where they get to the substance --

1 CHAIRMAN SOULES: I don't think
2 there's anything new to be said on it. I mean,
3 everybody has heard Harry. He feels like he has
4 got to rejoin and give a rejoinder to what John
5 said. We know that there's a feeling here of some
6 that they want all cases treated the same, either
7 all in or all out because they want them all on
8 the same track whether it's this track or the old
9 track.

10 MR. TINDALL: Hadley, I don't have any
11 trouble with that, Sam's idea.

12 CHAIRMAN SOULES: There are others
13 that say they want to delay application to old
14 cases because of the heavy dockets, and some that
15 want to have a delay application to the new cases
16 because it gives the old cases a chance to be
17 disposed of. I guess those are the positions that
18 have been taken, and we have gotten a pretty
19 strong consensus that to delay one year and have
20 it apply to everything is the first alternative
21 that this committee would recommend.

22 Do we want to have a second alternative? How
23 many feel like there should be any alternatives
24 submitted to the Court? In other words, how many
25 feel that we ought to just go with the one we've

1 got and not submit any alternatives? Show your
2 hands. And how many feel that we should submit
3 the alternative that Sam suggested? Okay. There
4 are really not many votes either way on that.

5 JUDGE CASSEB: Luke, I think you ought
6 to give it to them so they could study it and work
7 it out, seriously. Actually, I go back to the
8 fact that this is not on the agenda for us to do
9 anything about.

10 CHAIRMAN SOULES: Well, Judge, I
11 believe it is. You and I just disagree about
12 that.

13 JUDGE CASSEB: That's why you're the
14 Chairman.

15 JUDGE WOOD: You know, it occurs to
16 me, basically, there's no doubt that awfully good
17 points have been made and some lawyers are
18 genuinely concerned about what is going to happen
19 to their case load and their cases. Any way we
20 write some proviso aren't we going to have to
21 depend upon the common sense of the trial judges
22 and not just dismiss a bunch of a man's cases
23 because they happen to not be ready on the 160th
24 day, or whatever it is, and he knows that lawyer
25 has been busy trying to dispose of the case as

1 fast as he can. We have got to give him some
2 opportunity to get those things put on some
3 exception list and reset them.

4 I can't imagine that we're going to have
5 wholesale dismissal of cases represented by
6 lawyers like are on this committee. Maybe I just
7 can't believe that will happen. If so, then I
8 would be against the whole thing.

9 CHAIRMAN SOULES: Well, there have
10 been some harsh statements made in those Task
11 Force committee meetings, Judge, about that, and,
12 well, those lawyers will just get all those cases
13 and won't be able to take all those cases, and
14 some other lawyers will get some cases. There
15 have been some harsh comments made along those
16 lines. And I don't know if you read everything
17 that has been said. It's a real mixed bag about
18 the attitudes of how these rules will apply.

19 JUDGE WOOD: It's scary.

20 CHAIRMAN SOULES: It really is, Judge.
21 But there are some scary things about it in the
22 history behind them. And whoever the speakers
23 were may or may not have known really what the
24 philosophy is, but there's an awful lot of
25 background on the things already and some of them

1 are all right.

2 Okay. Well, we will submit the
3 one-year delay and then schedule a phase-in of old
4 cases first, then new cases. I think, I had a
5 pretty even spread of the house on that because
6 Harry doesn't want all the new cases delayed.

7 MR. TINDALL: I don't mind that, as
8 long as we never get to some subsidy changes on
9 Rule 2 that may ameliorate the problems of family
10 law cases. But I think what Sam proposed makes
11 good sense, because I don't think in a year's
12 time, based on the data I've seen, that we are
13 going to have the backlog cleared out.

14 CHAIRMAN SOULES: You do not --

15 MR. TINDALL: Not when I hear about
16 cases in '72 and '73 still pending on the docket.
17 That's what Judge Casseb said he discovered down
18 in Webb County last week.

19 CHAIRMAN SOULES: Well, we discovered
20 that in San Antonio, too, but we've gotten rid of
21 them. There just wasn't many cases and we haven't
22 had any appeals -- 12,000 of them.

23 What has happened in the past -- we
24 discovered this as far as those old cases are
25 concerned -- they come up on a drop docket and the

1 lawyer that handles them comes over and says,
2 "Judge, we don't want it dropped; we want a
3 setting." It gets set. Then the lawyers, by
4 agreement, agree to drop the setting and the case
5 goes dormant. Then it comes up on drop docket
6 again. That's the first time it is looked at
7 again.

8 So these old cases have been on several drop
9 dockets, but you never had a disposition order
10 that said a case that's on a drop docket has to be
11 disposed of. So a lot of those old cases are now
12 being dismissed for the first time because the
13 lawyers don't want to try them now and never
14 really did, but they always kept them from being
15 dropped because they would come and appear at the
16 drop docket and preserve them.

17 So in some cases, I think one district court
18 just didn't hold drop docket, just never did worry
19 about them. He didn't figure it was anything more
20 than a statistical problem, which is true. Others
21 did, but they would continue any case a fellow
22 showed up for. And now then both of those have
23 been wiped out, we're having drop dockets. If you
24 show up, you're going to have to go to trial and
25 we're disposing of all those ancient cases, and

1 they're going away. That's probably going to be
2 most of what Webb County shows, too, and I bet
3 Harris County is bound to have some old cases.

4 MR. TINDALL: As I understand Sam's
5 alternative, all these rules would not apply to
6 any case now on file for one year. But with
7 respect to any case filed after the rule became
8 effective, the disposition of rules would not
9 become operative for one additional year from the
10 date each new suit is filed.

11 CHAIRMAN SOULES: That's not what I
12 heard. It was effective as to old cases on the
13 effective date and new cases a year later. So
14 we're not going to get two years. If the rule is
15 going to be effective, they're going to be
16 effective before two years from now on new cases.

17 Well, I'll say as an alternative, generally,
18 that where there would be some phase in period
19 where the rules would apply to old cases on some
20 effective date and new cases on a subsequent
21 effective date.

22 MR. TINDALL: Which I understood to be
23 one year from the date they are filed, so if you
24 filed tomorrow, these rules would be applied to
25 every new case a year from the date they're

1 filed. But it gives some priority to the
2 tremendous backlog that people are complaining of.

3 CHAIRMAN SOULES: That is right. But
4 if they are effective on the 1st of January, all
5 pending cases would be under those rules right
6 then, 1 January '87. Cases filed in the year of
7 1987, though, would not come under the rules until
8 January 1 of 1988, at which point, all cases would
9 be under, including the '88 cases and all others.

10 Now, that's Sam's proposal with a
11 hypothetical effective date of whenever the rules
12 do first become effective. There will be no delay
13 in the applications to old cases.

14 MR. TINDALL: Well, I'll withdraw my
15 support of Sam's. I understood it to be the more
16 delay -- one year as each case is filed for new
17 cases to give a preference to the old cases.

18 CHAIRMAN SOULES: Okay. Now, let's go
19 to Rule 3, and this is just a reporting
20 requirement. The clerks have fussed about this a
21 good bit, but according to Judge Stovall, most of
22 these statistics are being kept already and being
23 reported to the Ray Judice's committee. What's
24 that thing called, Judge?

25 JUDGE CASSEB: Court of

1 Administration.

2 JUSTICE WALLACE: Office of Court
3 administration.

4 CHAIRMAN SOULES: Office of Court
5 Administration. And there were going to be some
6 changes in the way they're presented, but
7 apparently, the data that underpins most of this
8 is already being gathered by the clerks in most
9 cases, isn't it, Judge? So maybe if the clerks
10 understand it, they won't be quite as adverse.
11 Does anyone have any suggestions on Rule 3?

12 JUSTICE WALLACE: Ray Judice has been
13 getting judges, clerks and coordinators in from a
14 particular area, about 30 or 40 at a time for a
15 full day's meeting. He already has the procedure
16 for doing this, a manual system, and a personal
17 computer system. He has the software up and he's
18 had about four or five groups so far and everybody
19 who has left said, "We got no problem. We can go
20 back home and do it with what we've got right
21 now." So, I don't think that's going to turn out
22 to be near as much a problem as some of the clerks
23 think it is now.

24 MR. TINDALL: Luke, I suggest that
25 Rule 2 be reinserted near the back, because the

1 way these rules read, Rule 2 now talks about your
2 disposition rates. To me, just the way my mind
3 works, we ought to then go into non-probate civil
4 cases, family cases, liquidated monetary cases,
5 because once you get past those three types of
6 cases, then you do get into a bunch of reporting
7 and administrative matters that do not involve the
8 litigants or their counsel on Rule 7 through the
9 end.

10 CHAIRMAN SOULES: So you suggest
11 moving Rule 3 back to the back somewhere.

12 MR. TINDALL: Following the rule
13 regarding disposition of monetary cases.

14 CHAIRMAN SOULES: Okay. I believe
15 your suggestion is an organizational matter.
16 Behind what is now Rule 6.

17 MR. TINDALL: That's correct. Behind
18 the monetary -- that's right.

19 JUSTICE WALLACE: So, it would make it
20 Number 6.

21 MR. TINDALL: Well, they would all be
22 moved up. It would be number 6; that's right.

23 CHAIRMAN SOULES: This would be 6, and
24 then we'd go back to these others. That's fine,
25 because, I tell you, Rule 3 is infamous as Rule 3,

1 so we probably want to leave it as Rule 3.

2 JUDGE CASSEB: Rule 2 will become --
3 what we have changed to Rule 2 will become Rule 6.

4 MR. TINDALL: No. Printed Rule 2
5 becomes Rule 6.

6 PROFESSOR EDGAR: That's correct.

7 CHAIRMAN SOULES: So 3 is the old 3.
8 Let's go ahead and go to that then, and see where
9 that leads us.

10 Well, the committee didn't have any changes
11 in the A and B part of that. There was some worry
12 about what is a non-probate civil case, but we
13 haven't tampered with that really. We have got to
14 see if we have some questions, so if anybody has
15 got anything in A or B or in the title, let's take
16 that up now.

17 MR. TINDALL: I would urge, if I
18 understand the way these are done now, is that
19 Rule 3, non-probate civil does not apply to family
20 law cases unless it's certified under Rule 4. So
21 we need to exclude under A, if that's the place,
22 Rule 3 shall not apply to family law cases unless
23 it is so certified by the judge handling the
24 family law case.

25 MR. EDGAR: Doesn't Rule B take care

1 of that over on Page 3?

2 MR. TINDALL: B?

3 MR. EDGAR: Yes. "This rule shall
4 apply to all non-probate civil cases filed in the
5 courts of Texas unless a more specific rule
6 covering a specific category or group of cases is
7 otherwise provided."

8 MR. TINDALL: Well, Linda said --
9 well, there are matters covered here that clearly
10 do not even be dealt -- that are not even dealt
11 with here in Rule 4, Hadley. So the question
12 would be, do you ever deal with Rule 3 on a family
13 law case in the absence of a trial judge saying
14 that Rule 3 applies?

15 PROFESSOR EDGAR: No.

16 MR. TINDALL: Then I would like it
17 clear.

18 JUDGE CASSEB: I think it's clear the
19 way it is.

20 MR. TINDALL: Do you?

21 PROFESSOR EDGAR: It seems like that
22 provision in Rule B automatically excludes it, and
23 then in Rule 4, it will be excluded unless the
24 court certifies it should be applied under Rule 3.

25 JUDGE THOMAS: My specific question

1 is, for instance, motions for continuance in
2 family law cases. I don't see anything about,
3 "motions for continuance" under 4, which is
4 supposed to be dealing with family law, therefore,
5 are we under 3?

6 PROFESSOR EDGAR: As I understood it,
7 you would not be under Rule 3, unless the court
8 certified that you fell under 3.

9 MR. TINDALL: Well, can we have that
10 stated.

11 PROFESSOR EDGAR: I'm just saying that
12 I think that was the intent.

13 MR. BRANSON: So then in a family law
14 case, as I understand it, the lawyers can still
15 agree on continuance.

16 MR. TINDALL: Yes, which is important.

17 MR. BRANSON: Would a family law case
18 include the death of the head of a household?

19 MR. TINDALL: I wouldn't think so. I
20 don't know if it goes under Rule 3, if that's my
21 understanding, we don't -- family law cases are
22 not touched by Rule 3, unless there's a judge who
23 says it's touched by Rule 3. And Linda has raised
24 a good instance of what we're talking about.

25 CHAIRMAN SOULES: Why wouldn't the

1 continuance provisions of this rule apply to the
2 family law cases. Why shouldn't they?

3 MR. TINDALL: Well, do you want to get
4 into that? I'm reluctant to get into those issues
5 if it's not proper agenda at this time other
6 than --

7 CHAIRMAN SOULES: My understanding of
8 B is that it really means, unless some more
9 specific rules provides otherwise, on a rule by
10 rule basis, these rules apply generally.

11 MR. SPARKS (EL PASO): Well, didn't
12 the subcommittee consensus adopt Bill Dorsaneo's
13 recommendation that the continuances be spoken to
14 on the Rules of Procedure 54.

15 CHAIRMAN SOULES: Yes, that's right.

16 MR. SPARKS (EL PASO): Then that would
17 make it applicable to all cases.

18 MR. SPARKS (SAN ANGELO): It would
19 seem to me that Rules 3, 4 and 5 ought to be in
20 the Rules of Civil Procedure instead of in these
21 rules anyhow. They really don't belong in here.

22 MR. BRANSON: Is there any reason to
23 exclude the family law practitioners from the
24 repressive nature of the continuances.

25 MR. TINDALL: Yes, because we have a

1 tremendous continuance rate.

2 PROFESSOR EDGAR: For good reason.

3 MR. TINDALL: Pardon?

4 PROFESSOR EDGAR: For good reason.

5 MR. TINDALL: For good reason. And I
6 think you're kidding yourself if you think you are
7 going to have people take off time and come down
8 to your office and sign a continuance. And that's
9 just not the world we live in.

10 MR. BRANSON: Same thing in the other
11 civil cases.

12 MR. TINDALL: It may be.

13 CHAIRMAN SOULES: Well, it was
14 somewhat shocking to me to perceive the policy
15 change from permitting divorce cases to stay on
16 file in hopes of salvaging the family to forcing
17 divorce cases to go to trial, but that changes
18 here.

19 MR. TINDALL: Well, I hope not.

20 CHAIRMAN SOULES: Well, it has
21 happened; it's here. It's right here in these
22 rules.

23 MR. TINDALL: We haven't talked about
24 that yet.

25 JUDGE THOMAS: We haven't gotten to

1 argue that one yet.

2 CHAIRMAN SOULES: It's been talked
3 about.

4 MR. BRANSON: Where?

5 CHAIRMAN SOULES: Over at the Task
6 Force.

7 MR. TINDALL: Well, I hope at some
8 point, Luke, we can talk about tht again at this
9 meeting.

10 CHAIRMAN SOULES: It's pretty
11 shocking, but that's a fact, that's just the way
12 it is. They are not going to exempt family law
13 cases from these time standards. And didn't --
14 when Justice Pope in court imposed the suggested
15 time standards, the first time, the ones that we
16 have now. So that road has been crossed. We may
17 argue it again but it's been --

18 MR. TINDALL: I hope this committee
19 can bring that issue up again, and as an advisory
20 committee, we can discuss that fully.

21 CHAIRMAN SOULES: As we go through the
22 balance of this Rule 3 in particular, we may see
23 that there are reasons to exempt actions from
24 monetary demands and family law cases in gross
25 from the operation of general provisions or we may

1 see that they're not. So I'd rather reserve that
2 issue for now and go to C.

3 JUDGE CASSEB: Pardon me one minute.

4 CHAIRMAN SOULES: Yes, sir, Judge.

5 JUDGE CASSEB: Read back Rule 4G, what
6 it says there. Have we now created a conflict by
7 changing the language from domestic actions to
8 family law matters?

9 CHAIRMAN SOULES: I'm sorry, Judge, I
10 missed your question.

11 JUDGE CASSEB: You know, we changed --
12 Rule 2 we got changed to Rule 6. We took out
13 "domestic actions" and put in there "family law
14 cases."

15 CHAIRMAN SOULES: Yes, sir.

16 JUDGE CASSEB: Well, is that going to
17 be in conflict now with our 4G, "All family law
18 matters, other than divorce, will be the subject
19 of local rules to assure their timely
20 disposition"? So I think what they're talking
21 about then should be just divorces.

22 CHAIRMAN SOULES: Well, this says
23 "domestic actions." It doesn't even say divorces.

24 JUDGE CASSEB: I know, but then you
25 see what this says.

1 CHAIRMAN SOULES: Well, we're going to
2 get to whether or not that G should be left in.
3 The committee feels that should be taken out. The
4 local rules should not be particularly referenced
5 to any family law.

6 JUDGE CASSEB: I agree with that.

7 CHAIRMAN SOULES: Okay. On C, "within
8 30 days," now, these words were somewhat confusing
9 to us. "Filing the initial pleading by the last
10 defendant to appear." Later on in the rule, it
11 takes care of parties that are added, and we've
12 done some changes to that, too, to make that fair
13 to both sides. But on C, we changed that to:
14 "Within 30 days after the general appearance by
15 the last defendant to appear."

16 PROFESSOR EDGAR: Of the last
17 defendant.

18 CHAIRMAN SOULES: Was it "of"? "After
19 the general appearance of"? You were sure that's
20 what we said?

21 MR. LOW: That should take care of
22 special appearances.

23 CHAIRMAN SOULES: And our Rules of
24 Civil Procedure don't talk about initial pleading
25 and those are kind of new words to use. "General

1 appearance" is something we all understand,
2 including the one, there in court appearance,
3 which our committee regarded as a part of this.
4 Then we didn't have anything in 1.

5 JUDGE CASSEB: C-1?

6 MR. CHAIRMAN: C-1 or C-2. Then in
7 C-3, "In the event additional persons become
8 parties," and that fits into Rule 38 where it
9 talks about joining additional persons as parties,
10 and "persons" means everything you can think of.
11 "In the event additional persons become parties,"
12 and strike "are joined," "after the order for the
13 schedule for the completion of discovery and
14 preparation for trial as been entered." "Enter"
15 is not the right word there, has been "rendered."

16 PROFESSOR EDGAR: Schedule has been
17 entered, the discovery schedule.

18 CHAIRMAN SOULES: It's order for the
19 schedule has been --

20 MR. EDGAR: It would be "ordered"
21 then, rather than "rendered."

22 CHAIRMAN SOULES: Well, order is
23 rendered. See, it says right here, "After the
24 order was scheduled for the completion of
25 discovery and preparation of the trial has been

1 rendered." I mean, if you put "rendered" there,
2 it solves the problem.

3 MR. ADAMS: Well, why don't you put
4 "filed"? Wouldn't it be better just to say
5 "filed"?

6 MR. SPARKS (SAN ANGELO): The order
7 has been filed; he filed the order.

8 CHAIRMAN SOULES: Well, there is some
9 question about whether orders are ever filed. And
10 whether judgements are ever filed -- it should
11 either be "rendered" or "signed."

12 MR. ADAMS: Let's put "signed."

13 PROFESSOR EDGAR: "Signed."

14 CHAIRMAN SOULES: All right. What if
15 it's done from the bench and no order is ever
16 signed?

17 MR. SPARKS (SAN ANGELO): If we say
18 "signed," then it ought to be signed. What if it
19 is done by telephone and the judge doesn't sign
20 it, he just makes an entry on his docket sheet?

21 CHAIRMAN SOULES: In the real world
22 "rendered" is what's going to happen. He's going
23 to render an order either signed or not signed.
24 But how many want to put in "signed" and how many
25 want to put in "rendered"? Let's see a show of

1 hands on "signed." Four. How many prefer
2 "rendered"?

3 JUDGE CASSEB: Do you want to put
4 "signed" or "rendered"?

5 CHAIRMAN SOULES: No, I want it to be
6 one or the other.

7 MR. MCMAINS: There is no question
8 that the Court doesn't enter the order.

9 CHAIRMAN SOULES: The Court does not
10 enter an order; that's true.

11 MR. MCMAINS: So, it has got be
12 changed.

13 CHAIRMAN SOULES: It's either got to
14 be "rendered" or "signed," and "signed" may be
15 misleading to some, because it may never get
16 signed and you may find that your case has been
17 dismissed because you didn't follow an order that
18 the judge rendered.

19 MR. MORRIS: I feel like I'm being
20 negative when I see you working so hard, Luke; it
21 makes me feel a little bit guilty, but I'm going
22 to do it anyway.

23 CHAIRMAN SOULES: No, that's fine.

24 JUDGE CASSEB: I'll change with you.
25 I'll make it rendered.

1 MR. MORRIS: The thing that concerns
2 me about what we are doing today is, it does not
3 really matter, particularly, because this isn't
4 the one that's being printed in the June Bar
5 Journal for publication purposes. And, as I
6 understand, you have to have the thing -- Judge,
7 you can tell me what the rules are, perhaps, but
8 it has to be published for a certain period of
9 time. This isn't just making things comport with
10 the Rules of Civil Procedure; this is rewriting
11 them. I mean, it's probably an improvement
12 because there was much room for improvement. But
13 I just am not sure that we're doing anything that
14 is going to matter much.

15 CHAIRMAN SOULES: The rules that are
16 being published in the June issue, according to my
17 understanding of what the Chief Justice has said,
18 are being published for information purposes and
19 for comment. They are not promulgated by the
20 Court as being published as promulgated orders
21 pursuant to a 60-day effective date. In other
22 words, these are proposed. Now, whenever they
23 promulgate, they have got to publish the
24 promulgated rules, I believe, twice before their
25 effective date, but at least once. So it's a

1 different kind of publication, Lefty, and they're
2 looking for input; at least, they say are.

3 JUDGE CASSEB: Luke, we were talking
4 about this "rendered or signed." My concern is
5 that I think there ought to be a written order
6 entered. That's the way we do it in federal
7 court, and I think that that is -- if we are going
8 to have this kind of procedure, that there ought
9 to be a written order entered on the thing. And
10 if we don't want to cover that right at this point
11 and you want to use the term "rendered," that's
12 fine. But I think at some point we ought to have a
13 provision that there would be a signed order that
14 the judge renders.

15 CHAIRMAN SOULES: I agree with that.
16 The problem with that is still the timing, though.
17 Suppose the judge renders the order on May the
18 15th and he thinks the times are running, but the
19 parties don't get the order approved as to form
20 and back to him until May the 30th and it's
21 signed.

22 MR. ADAMS: The way they do that in
23 federal court is, it's the judge's responsibility.
24 He has the clerk that types that order out and he
25 signs it and sends a copy to everybody and it's

1 effective.

2 CHAIRMAN SOULES: We're just not going
3 to get that done at the State level because of the
4 helm.

5 MR. ADAMS: I don't know why.

6 MR. BRANSON: What about making it
7 "order entered and parties notified"?

8 MR. ADAMS: Notified in writing?

9 MR. BRANSON: Yes, notified in
10 writing.

11 MR. SPARKS (EL PASO): There is too
12 much room for disagreement about what is done, if
13 it's just done orally and that sort of thing.

14 JUDGE CASSEB: If you render an order
15 you've got to make a notation of it somewhere
16 don't you?

17 CHAIRMAN SOULES: Yes. We're going to
18 get to that in 4 and maybe we can add something to
19 4 because that is where it actually talks about
20 the court acting. The important part of this,
21 though, was that under C-3, the only party who
22 could move for more time was the newly added
23 party, the way it's written right now. And we
24 want to change that to say, "then any party may
25 within 21 days from the date such parties are

1 required to answer," and that's a little bit
2 awkward.

3 PROFESSOR EDGAR: "Within 21 days from
4 the date, the additional party is required to
5 answer."

6 MR. BRANSON: Don't we need to go back
7 to a general period? What if the new party files
8 a special appearance?

9 CHAIRMAN SOULES: Such additional
10 persons --

11 MR. BRANSON: Make a general
12 appearance or enter a general appearance.

13 CHAIRMAN SOULES: Now, see that
14 changes the timing. We just can't think that this
15 work product is the best in the world because
16 we've got to talk about how certain things go from
17 general appearance, but then when we get down to
18 additional parties, it's required to answer.
19 That's the answer date. It doesn't say from the
20 time of general appearance. And I don't know if
21 we want the rules to run from the answer date or
22 from actual answer, but we treat different people
23 different ways in these rules.

24 MR. BRANSON: It ought to be
25 consistent with everybody, shouldn't it?

1 CHAIRMAN SOULES: : It should. It
2 ought to be consistent, but it's not, the way it's
3 written. And there's some problems with the rules
4 because of that.

5 MR. BRANSON: Is that part of our
6 commission to clean that up or do we leave it?

7 CHAIRMAN SOULES: Well, sure, I mean,
8 if we can, we should now. This is probably the
9 committee that's going to give this the closest
10 scrutiny from this day forward.

11 PROFESSOR EDGAR: It's frightening,
12 isn't it?

13 CHAIRMAN SOULES: Except for the
14 Court; the Court is going to give it a close
15 study.

16 MR. BRANSON: Having been on the
17 previous committee, it may be the one that gives
18 it the closest scrutiny in general.

19 CHAIRMAN SOULES: Well, it may, except
20 for the Court itself. And I think they are going
21 to listen, and probably most of them are going to
22 read the transcript of this meeting.

23 MR. LOW: I don't want to interfere,
24 but I got one other question about that when you
25 resolve that on that same provision. I have one

1 other practical matter that I'd like to raise.
2 But I don't want to interject that when we're
3 trying to resolve something else.

4 CHAIRMAN SOULES: My view is that we
5 ought to have "after such additional persons make
6 a general appearance." And I guess the point
7 there where I'm coming from on that is, if they
8 fail to answer and just take a default against
9 them -- discovery -- we would all probably like
10 more time. It really shouldn't be reopened
11 because the issues in the case haven't changed.

12 So if we're going to say that any party can
13 reopen discovery on the joinder of an additional
14 party, at least, that party ought to be required
15 to answer before that eventuality can take place.
16 So instead of keying it to "answer day," we ought
17 to key it to "making of appearance."

18 PROFESSOR EDGAR: Makes a general
19 appearance.

20 CHAIRMAN SOULES: Yes, makes a general
21 appearance.

22 CHAIRMAN SOULES: Does that make
23 sense?

24 PROFESSOR EDGAR: Yes.

25 CHAIRMAN SOULES: Does everybody agree

1 with that? Okay. This is way number 3 would
2 read. If I am going too fast, just somebody
3 squeak and I'll slow down. "In the event
4 additional persons become parties after the order
5 for the schedule for the completion of discovery
6 and preparation of trial has been rendered, then
7 any party may -- "

8 JUSTICE WALLACE: Wait a minute.
9 Didn't we have, "and the parties notified in
10 writing," was that put in?

11 CHAIRMAN SOULES: Well, we're going to
12 get down to Number 4 about how the judge handles
13 his order.

14 "Then any party may, within 21 days from the
15 day such additional parties --"

16 PROFESSOR EDGAR: Enters a general
17 appearance, or makes a general appearance. Let me
18 look at the rules.

19 CHAIRMAN SOULES: "-- makes a general
20 appearance -- additional persons make a general
21 appearance, proposed changes in such schedule."

22 MR. ADAMS: Well, then that excludes
23 anyone else from --

24 CHAIRMAN SOULES: This way, any party
25 can propose a change in the schedule, where, as it

1 was written, that only the added party can propose
2 a change.

3 PROFESSOR EDGAR: "Makes a general
4 appearance" is okay.

5 CHAIRMAN SOULES: "Makes" is okay?
6 Can we say, "From the date such additional persons
7 make a general appearance," since we've pluralized
8 it?

9 PROFESSOR EDGAR: Did you say
10 "persons" or "party" make?

11 CHAIRMAN SOULES: "Persons make."
12 That's just trying to pick up the same noun and
13 pluralization that we started the sentence with.
14 Okay, 4.

15 MR. LOW: Wait. I have a practical
16 question. Does that person, when he comes in, is
17 he supposed to check the docket and see if there
18 have been any orders? How's he going to know? Or
19 are the people already in it, are they obligated,
20 as soon as they get his answer, to let him know
21 that there has been such order already entered?

22 CHAIRMAN SOULES: He's on notice of
23 what's in the file. Unfortunately, that's the
24 law.

25 MR. LOW: That's the general rule

1 but --

2 CHAIRMAN SOULES: I guess we're going
3 to have to get used to the fact that there are
4 time standards and there are pretrial orders
5 entered. I guess, it's kind of like federal
6 court. I mean, if you get in late, you know,
7 probably that there's a pretrial -- unfortunately,
8 too.

9 MR. LOW: I understand. I know the
10 problems.

11 CHAIRMAN SOULES: Okay. In 4, I have
12 no change except to change "entered" to
13 "rendered." But we are now hearing a good
14 suggestion that all parties be notified. Let's
15 see, do we get that anyway because -- no, it says,
16 "any or all parties may file a proposed plan."
17 Other parties may respond. New parties get a new
18 start date, and then finally what the Court does.
19 So it doesn't require the court to give notice.

20 "As soon as reasonably practical after the
21 time prepared for responding to a proposed plan
22 has elapsed, the Court shall render its order, or
23 if additional parties are added, its amended order
24 for completion of discovery and in preparation for
25 trial and trial setting."

1 It does not say anything anywhere in there
2 that the parties are to be notified.

3 JUDGE WOOD: "And notify the parties
4 in writing."

5 CHAIRMAN SOULES: "Render its order
6 and notify the parties in writing."

7 PROFESSOR EDGAR: It should be "in
8 writing." I think that ought to be required. And
9 I think that was the intent. I don't think that
10 anybody intended that that order should be
11 anything other than in writing.

12 CHAIRMAN SOULES: "The Court shall
13 render and sign."

14 PROFESSOR EDGAR: "And enter his order
15 in writing."

16 CHAIRMAN SOULES: "Shall render and
17 sign its order, or if additional parties are
18 added, its amended order, for completion of
19 discovery and in preparation for trial setting."
20 And then just add a sentence there. "The Court
21 shall mail or deliver a copy of the order to all
22 parties."

23 MR. BRANSON: Do you want to make
24 certified?

25 CHAIRMAN SOULES: We haven't gotten

1 there with the courts anywhere in these rules so
2 far.

3 JUDGE CASSEB: Shall be notified as
4 the rules provide. You want them in with your
5 Rules of Procedure.

6 CHAIRMAN SOULES: Judge, there's
7 really not a notification of anything other than a
8 final judgment of what a trial judge does in the
9 rules. There are rules that require notice by
10 final judgments of appealable orders, that is, not
11 necessarily final judgment, but appealable
12 orders. Other than that, the judge is not
13 required to give parties delivered or mailed
14 copies of any orders, that I know of.

15 PROFESSOR EDGAR: I think that's
16 right.

17 JUDGE CASSEB: Do you think this
18 should put the extra burden on the Court to
19 notify? '

20 CHAIRMAN SOULES: Mail or deliver
21 copied orders to all parties. That's what I'm
22 hearing from the committee, and I think it's
23 fair. You are now starting the time tables that
24 are going to dispose of parties' rights in short
25 order. What's the consensus on that, that the

1 court should deliver or mail an order? Let's see
2 a show of hands of who thinks the Court should be
3 required to do that.

4 JUSTICE WALLACE: There won't be any
5 trouble. He's going to make the lawyer do that
6 anyway.

7 CHAIRMAN SOULES: All right. Those
8 who feel that that should not be required? All
9 right. It's unanimous that that should be
10 required.

11 MR. LOW: We're talking about the
12 same kind of notice as 21-A then, right? That
13 whatever notice is required be in writing and so
14 forth.

15 CHAIRMAN SOULES: Right. Let me get
16 this last sentence and I'll reread it.

17 "The Court shall mail or deliver a copy of
18 its order or amended order to all parties" or "to
19 counsel for all parties." What should it say?

20 PROFESSOR EDGAR: Under the rule you
21 give notice to the parties by giving notice to the
22 counsel under Rule 21.

23 CHAIRMAN SOULES: It's optional.

24 PROFESSOR EDGAR: Go ahead.

25 MR. SPARKS (SAN ANGELO): Are you-all

1 satisfied that the filing of a plan with the court
2 under this -- in other words, up under C-1, okay.
3 I file a lawsuit, the other side answers, I file a
4 plan, I don't give him a copy, so he doesn't know
5 to file within 21 days. Is there any requirement
6 that you notify your opposition, is what I'm
7 asking?

8 CHAIRMAN SOULES: Yes. There's a rule
9 that now requires that everything that's filed has
10 to be served on the other parties.

11 MR. SPARKS (SAN ANGELO): By
12 certification or whatever.

13 CHAIRMAN SOULES: Correct.

14 MR. SPARKS (SAN ANGELO): That's one
15 of those Rules in Civil Procedure that existing.

16 CHAIRMAN SOULES: Correct. Served,
17 however, you know, in different ways. You can have
18 service -- up until that rule change was made in
19 '84, there was no requirement that an answer be
20 served. A party could go file an answer and just
21 have it on file and go away in the sunset.

22 PROFESSOR EDGAR: Why don't you say
23 "subject to Rule 21A"?

24 CHAIRMAN SOULES: Well, except Rule
25 21A is certified, isn't it?

1 PROFESSOR EDGAR: No. It just says,
2 "Every notice required by these rules," and so and
3 so on, like that."

4 MR. SPARKS (SAN ANGELO): There's no
5 notice required by this.

6 PROFESSOR EDGAR: "To be served by the
7 duly authorized agent or his attorney of record
8 and just refer the notice as provided by rule
9 21A."

10 MR. LOW: "Either in person or by
11 registered --"

12 CHAIRMAN SOULES: No, it does; it's
13 certified mail.

14 MR. LOW: No, it's certified mail.

15 JUDGE CASSEB: No, it's certified mail.

16 CHAIRMAN SOULES: "Either in person or
17 by registered mail."

18 JUDGE CASSEB: There's also a
19 provision that says it can be by certified mail.

20 CHAIRMAN SOULES: Well, 21-B says, "a
21 letter certified is as good as registered." 21-A
22 says, "registered." Well, let's just say counsel
23 for all parties.

24 MR. BRANSON: So the notification will
25 be either in person or by certified mail?

1 CHAIRMAN SOULES: I'm concerned about
2 the judge sending the notice to the parties
3 directly. So, I guess, we could say "to counsel
4 for all parties or directed to parties not
5 represented by counsel."

6 MR. LOW: Of course, we have the other
7 rule about -- I think it only applies to settings
8 where you send them a postcard and then they have
9 got to give you notice of settings.

10 CHAIRMAN SOULES: Isn't a prose person
11 his own counsel? Isn't that what the rule is? He
12 is his own counsel.

13 JUSTICE WALLACE: Yes.

14 CHAIRMAN SOULES: So he is counsel for
15 himself. We got into some kind of a discussion
16 about that recently. Counsel for a party would be
17 himself whenever he's prose. I don't where that
18 came up even.

19 MR. TINDALL: Why don't you say
20 service on the party. And then the rules cover
21 the fact that if a party has a lawyer, you always
22 serve the lawyer.

23 CHAIRMAN SOULES: No, the rules
24 don't. They give that optionally, I think. Let
25 me see. I think they just give that option.

1 Maybe I'm wrong about that.

2 PROFESSOR EDGAR: Well, I just have
3 never read the rule as you do, Luke. If you are
4 going to mail it to the person, then you've got to
5 send it registered mail, but advising counsel can
6 go out just by the U. S. Mail.

7 CHAIRMAN SOULES: No, sir, absolutely
8 not true. Service is service, and if you don't --
9 service is a technical concept in Texas and if you
10 don't send it --

11 PROFESSOR EDGAR: We're talking about
12 notice. Now, we're not talking about service;
13 we're talking about notice under Rule 21-A. We're
14 not talking about service of process. It says
15 that you send it either in person or by registered
16 mail to his last known address and, to me, that's
17 the person not the attorney.

18 CHAIRMAN SOULES: Well, the last five
19 words before you started "or in person," is "or
20 his attorney of record."

21 PROFESSOR EDGAR: Well, I know, but,
22 "at his last known address" is referring to the
23 person's last known address, not the attorney's
24 last known address.

25 CHAIRMAN SOULES: If I were trying to

1 give service on somebody --

2 PROFESSOR EDGAR: We're not talking
3 about service; we're talking about notice. Now,
4 service, you're right; I have no problem with
5 service. But there we're dealing with a different
6 ruling.

7 CHAIRMAN SOULES: Well, how do you
8 want to write it?

9 PROFESSOR EDGAR: I'd just say,
10 "pursuant to Rule 21-A." We'll let the lawyers
11 worry about it and let the judge worry about it.

12 MR. LOW: Right now, does a judge have
13 to send you a copy of the judgment as soon as he
14 enters it?

15 MR. MCMAINS: The clerk does that; the
16 judge doesn't.

17 MR. LOW: I mean, is the clerk
18 required to notify you? You know, you argue a
19 case for judgment and then the judge enters it.
20 He just enters it and files it with the clerk.
21 I've always operated on the premise that I've got
22 to double check and keep checking to be sure that
23 the judgment hasn't been entered against me.

24 MR. SPARKS (SAN ANGELO): They have
25 got to notify you, but they don't have to send you

1 a copy of it.

2 PROFESSOR EDGAR: 306-A.

3 MR. MCMAINS: Any appealable orders
4 you are supposed to give notice of where it totals
5 your time period until you receive actual notice
6 not to exceed 90 days. And you have three months
7 to do it.

8 MR. LOW: And this wouldn't be an
9 appealable order.

10 MR. MCMAINS: No, this not an
11 appealable order, so it doesn't apply.

12 CHAIRMAN SOULES: Well, let's just use
13 the language of 306-A(3), where it says, "notice
14 to the parties or their attorneys of record by
15 first class mail." And that says, "the clerk of
16 the court shall immediately give notice." Do we
17 want to put that in here? The "clerk of the
18 court" or "the court"?

19 MR. MCMAINS: It ought to be a clerk
20 function.

21 CHAIRMAN SOULES: "The clerk of the
22 court shall immediately give notice."

23 MR. TINDALL: Luke?

24 CHAIRMAN SOULES: Yes, sir.

25 MR. TINDALL: I want to be the devil's

1 advocate on this rule for a minute. Our marching
2 orders are to compare this rule with the Rules of
3 Civil Procedure, right? I mean, without getting
4 into the substance of it. It's obvious to me that
5 we are hopelessly over into the Rules of Civil
6 Procedure at this point. It has nothing to do
7 with the administrative handling of cases.

8 I mean, to me, this rule is 100 percent in
9 the Rules of Civil Procedure. Now, am I wrong?
10 This is getting into tedious service under rules
11 and by certified mail. All that is in the Rules
12 of Civil Procedure. What has that got to do with
13 the administrative handling of cases?

14 MR. LOW: Yes, but The Rules of Civil
15 Procedure don't apply. They provide pleadings,
16 motions, but they don't really pertain to this
17 because this is something new. This is a
18 different order. It's not appealable. Rule 306
19 doesn't apply.

20 MR. TINDALL: Who's going to write up
21 that order?

22 PROFESSOR EDGAR: That's one reason
23 why this really ought to be in the Texas Rules of
24 Civil Procedure.

25 MR TINDALL: Absolutely.

1 PROFESSOR EDGAR: That's something we
2 can recommend to the Court that it do, but I think
3 we ought to go ahead and prepare this so that it
4 can be implemented, whether it is in these rules
5 or in the Rules of Civil Procedure. But I think
6 it really belongs in the Rules of Civil
7 Procedure.

8 MR. BRANSON: Let's talk about the
9 appealability just a moment. Is there any
10 provision in here if some party is totally wronged
11 by one of these orders to give him any relief?

12 PROFESSOR EDGAR: No.

13 MR. BRANSON: Let's say the proposed
14 schedule is totally impossible for one party
15 because of death, illness, whatever, to
16 accommodate and the judge enters it anyway, and
17 the party is sitting there. What relief is
18 available?

19 PROFESSOR EDGAR: Mandamus.

20 MR. BRANSON: Is that adequate remedy
21 for this committee?

22 PROFESSOR EDGAR: No. But the only
23 way you're going to make it appealable is to have
24 an exception, probably by statute. Because under
25 Article 2249, only final judgments and other types

1 of certain enumerated interlocutory orders are
2 appealable. And this certainly would be an
3 interlocutory order, so you would have to cover it
4 by statute, I think because you couldn't do it by
5 the rules.

6 MR. BRANSON: Mandamus sure would be a
7 hard remedy --

8 PROFESSOR EDGAR: Well, it is just
9 like any discovery order. It is an onerous
10 burden, but you don't have to show up using
11 discretion or something like that.

12 PROFESSOR EDGAR: Luke, let me ask you
13 a question.

14 CHAIRMAN SOULES: Yes, sir.

15 PROFESSOR EDGAR: I really want to
16 come back just one more time and suggest that we
17 make it clear that this order be in writing.

18 CHAIRMAN SOULES: Okay.

19 PROFESSOR EDGAR: Now, you said
20 "rendered and signed."

21 CHAIRMAN SOULES: Yes, sir.

22 PROFESSOR EDGAR: But I really think
23 it ought to be "rendered in writing," or something
24 like that. I think there ought to be a little
25 more than the expressed burden imposed on the

1 trial court to enter a written order or something.

2 CHAIRMAN SOULES: Okay. I'll read it.

3 "The Court shall render and sign its written
4 order."

5 PROFESSOR EDGAR: Okay. That's fine.

6 CHAIRMAN SOULES: So it will read, "As
7 soon as reasonably practical after the time period
8 for responding to a proposed plan as elapsed, the
9 Court shall render and sign its written order, or
10 if any additional parties are added, its amended
11 order for completion of discovery, for preparation
12 of trial and for trial sitting. The clerk of the
13 court shall immediately give notice by copy of the
14 order to the parties or their attorneys of record
15 by first class mail."

16 JUDGE THOMAS: Luke, what about --
17 just so there's no question, why not put "amended
18 written order" also.

19 CHAIRMAN SOULES: Okay. "Its order or
20 amended order." -- "appeal the order or amended
21 order." Okay.

22 MR. SPARKS (SAN ANGELO): Luke?

23 CHAIRMAN SOULES: Yes, sir.

24 MR. SPARKS (SAN ANGELO): As long as
25 we're on C, I still think we should rectify our

1 conflicts between these Administrative Rules and
2 Rule of Civil Procedures. And I sure want to get
3 notice -- as I read these rules I can, one, not
4 file anything and I got a 270-day trial sitting,
5 or I can go under Class C or I can go under Class
6 D, right? I file a lawsuit and I just want to get
7 mine done in 270. The defense lawyer filed
8 something with the court and doesn't give me
9 notice of it, and I don't think he's required to.
10 And I think you have to conform Rule 72 of the
11 Rules of Civil Procedure, which states "Whenever
12 any party files or asks leave to file any
13 pleading, plea, motion of any character." Now,
14 either this has got to be any -- or pardon, made
15 without waiver of any rights filed with the Court
16 a proposed motion or completion of discovery or we
17 have to add the word "plan" over in Rule 72 to
18 make it absolutely clear that we're going to get
19 notice of these proposed completion of discovery
20 rulings.

21 CHAIRMAN SOULES: Sam, what civil rule
22 did you cite me?

23 MR. SPARKS (SAN ANGELO): Rule 72.

24 CHAIRMAN SOULES: Rule 72, okay.

25 MR. SPARKS (SAN ANGELO): Rule 72

1 doesn't contain the word "plan." We're dealing
2 with a new concept. So instead of calling this a
3 plan we can call it a motion for completion of
4 discovery or we can add the word "plan" to Rule
5 72. I just want the parties to give each other
6 notice of what to do -- they do.

7 PROFESSOR EDGAR: "Shall file with the
8 court a motion proposing a plan for completion of
9 discovery"?

10 MR. SPARKS (SAN ANGELO): No. I think
11 urged Rule C-1, if you're going to leave Rule 72
12 in effect, you don't call this a plan.

13 PROFESSOR EDGAR: No, I know. Just
14 listen to me.

15 MR. SPARKS (SAN ANGELO): Yes. A
16 motion for a plan.

17 PROFESSOR EDGAR: "File with the Court
18 a motion for a proposed plan for completion of
19 discovery."

20 MR. SPARKS (SAN ANGELO): That would
21 do it.

22 PROFESSOR EDGAR: Wouldn't that do
23 it?

24 MR. SPARKS (SAN ANGELO): Sure. That
25 would bring Rule 72 right into effect.

1 PROFESSOR EDGAR: "File with the Court
2 a motion for a proposed plan for completion of
3 discovery." And then you have a motion tying you
4 with Rule 72.

5 MR. SPARKS (EL PASO): It may be
6 better to file a plea.

7 MR. SPARKS (SAN ANGELO): But you
8 might just want to change the Rule 72 and add the
9 word "plan."

10 PROFESSOR EDGAR: The problem is
11 sometimes you forget to do those things. If we
12 could do this in this rule while we've got it
13 here, then we don't have to worry about maybe
14 forgetting about adding something to Rule 72.

15 MR. ADAMS: Well, it really seems like
16 in the federal practice -- I keep going back to
17 it, but they call it a "scheduling order," is what
18 they call that. And instead of a plan, it seems
19 like it would be more accurate or consistent to
20 use something like a scheduling order because it
21 is an order, it's not a plan. It's going to be an
22 order; it's going to be in writing, and it's going
23 to be sent to all the parties. If you call it a
24 scheduling order it would be --

25 PROFESSOR EDGAR: A proposed

1 scheduling order?

2 MR. ADAMS: A proposed scheduling
3 order.

4 PROFESSOR EDGAR: It would be a motion
5 for a propped scheduling order.

6 MR. SPARKS (SAN ANGELO): A motion for
7 a proposed scheduling order, but you have to
8 change it everywhere it appears as being plaintiff
9 -- change it to motion.

10 CHAIRMAN SOULES: Well, this has come
11 up before, but I can't remember how it got
12 resolved. Is anything that's filed a pleading or
13 is that just the petition and the answer, and that
14 sort of thing, Rusty? Is this proposed plan --

15 MR. MCMAINS: See, there's no talk
16 about -- our rules don't have any definitions of
17 pleadings as an instrument because all the
18 instruments have names.

19 MR. SPARKS (SAN ANGELO): You talked
20 earlier about the term within 30 days after filing
21 of the "initial pleading"? And you said our Rules
22 of Civil Procedure don't ever use initial
23 pleading.

24 CHAIRMAN SOULES: They don't call that
25 "initial pleading."

1 MR. SPARKS (SAN ANGELO): We damn sure
2 don't want a plan of yours either.

3 CHAIRMAN SOULES: No, a plan, that's
4 right. I'm trying to address that. I'm just
5 wondering whether "pleading" as used in Rule 72
6 encompasses everything gets filed except the
7 specifics, which are motions and --

8 MR. MCMAINS: Well, motion is an
9 application for relief or actions of the court, as
10 defined. I mean, we try to define what "motions"
11 were. And, basically, all instruments that were
12 filed were either pleadings or motions.

13 MR. SPARKS (EL PASO): If we adopt
14 Hadley's suggestion, though, there can't be any
15 questions.

16 CHAIRMAN SOULES: That's right. All
17 right. Where all do we make a change?

18 PROFESSOR EDGAR: All right. First of
19 all, you do it in C-1 where it says "plan." Then
20 you do it in C-2, twice. Then you do it in C-4,
21 second line and I haven't gotten any further than
22 that. Then it would be in E. There it would
23 simply read to a schedule rather than plan -- just
24 say schedule.

25 CHAIRMAN SOULES: Where is that now.

1 MR. MCMAINS: E, Page 4.

2 CHAIRMAN SOULES: Let's see, that
3 takes care of 4. We talked about the conflict
4 with one 166-G -- C and D.

5 PROFESSOR EDGAR: Yeah, I've got a
6 question. C-4 does conflict, I think, with
7 166-G. And for that matter -- and I hadn't wanted
8 to get ahead of us, but I think that Paragraph A
9 back on Page 2 might conflict with Rule 245.

10 CHAIRMAN SOULES: Let's see, what
11 conflicts with 245, Hadley?

12 PROFESSOR EDGAR: Just a second.

13 CHAIRMAN SOULES: Okay.

14 PROFESSOR EDGAR: I think Paragraph
15 A. Let me look now. I just made a note on there
16 earlier. Let me look back and see.

17 You see, Rule 245 deals with the assignment
18 of cases for trial generally. And so it seems to
19 me that all of this, beginning with Subparagraph
20 A, you need to consider Rule 245 because all of
21 this is going to conflict with 245.

22 All right. It may not, but they're really
23 talking about different things, yet they seem to
24 be somewhat -- and I just raised the question
25 about whether -- I mean, there's really not

1 anything inconsistent with what we are doing with
2 Rule 245, yet the whole philosophy of assigning
3 cases for trial has drastically changed.

4 So, again, I come back that I really think
5 that 3, 4, and 5 need to be in the Rules of
6 Procedure. And Rule 245 is one thing that needs
7 to be considered there. And I don't know whether
8 we could do anymore, except maybe to point that
9 out to the Court, and point out that there are
10 apparent inconsistencies with Rule 245, Rule
11 166-G, and this kind of thing. And somebody needs
12 to go through very carefully and see wherein there
13 might be some other conflicts.

14 CHAIRMAN SOULES: Well, that's true.
15 245 says, "The Court is on its own motion" and I
16 guess this directs the Court how it must exercise
17 its discretion in ruling on its own motion, but it
18 certainly, I mean, no question --

19 PROFESSOR EDGAR: The philosophy is
20 different.

21 CHAIRMAN SOULES: Oh, yes, very much.

22 PROFESSOR EDGAR: And these standing
23 side by side with the Rules of Civil Procedure
24 governing over these in the event of any conflict
25 would certainly give rise to --

1 MR. LOW: Plus, 245 says, "may," and
2 then our rule uses sometimes "shall." You know,
3 the Court "shall" do certain things. 245 says the
4 Court "may."

5 PROFESSOR EDGAR: I'm saying that I
6 think the rules literally could sit side by side,
7 but the philosophy expressed in them are
8 inconsistent.

9 MR. LOW: Well, and also, the language
10 will somewhat have to be changed. It might have
11 to be from "may" to "shall" in some cases. And I
12 agree that we ought to just point out to them that
13 they should consider putting part of this, maybe,
14 into Rule 245 as they deem appropriate or changing
15 245 to dovetail with that. And that's the most
16 you can do.

17 PROFESSOR EDGAR: I mean, really, it
18 seems to me that the Court could simply abolish
19 current Rule 245, and make Rules 3, 4 and 5
20 Subdivisions A, B and C of new Rule 245.

21 MR. LOW: Right.

22 PROFESSOR EDGAR: Or something. There
23 are a number of different ways it can be done.
24 But it's going to take some real careful thought,
25 it seems to me. And I don't really know that we

1 are equiped to sit here right now and try to think
2 through all of the possible ramifications in the
3 best way recommended that it be done.

4 MR. LOW: I would move that that's
5 what we do.

6 CHAIRMAN SOULES: If you lifted 3, 4,
7 and 5 out of these Administrative Rules and put
8 them right into 166, first of all, and then
9 started splitting what would be a pleading or
10 what, you know, facts -- broadcasting that through
11 the rules, then you would really be able to put
12 all this in the rules because it's pretrial docket
13 control. It's right what 166 originally started
14 out to do with a lot more specifics and teeth and
15 less discretion with a trial court whether to do
16 or not to do it.

17 MR. LOW: And by some definitions, in
18 other words, so you wouldn't have to repeat by
19 each rule such and such means pleadings, docket
20 control. You know, what you are talking about
21 right in the rule.

22 CHAIRMAN SOULES: There are conflicts
23 with Rule 166-G and C and D, because 166 is
24 altogether discretionary, and this rule takes that
25 discretion away and makes it mandatory. So what

1 166 says the Court may do, and what 245 says the
2 Court may do, the Court is now required to do
3 under those Administrative Rules, in many cases;
4 is that right, Judge?

5 JUDGE CASSEB: That's right. But then
6 you're saying that the Rules of Procedure are
7 going to take precedence over this thing. But
8 then if you take this out and put it under rules,
9 then you're not going to have nothing to comply
10 with House Bill 1658.

11 CHAIRMAN SOULES: I know. And that's
12 not likely that we're going to get these in the
13 rules, probably not likely.

14 We get now to this 3D, we get to the problem
15 that Kronzer has raised. Jim believes that when a
16 party feels aggrieved by the entry or the
17 rendition of an order for completion of discovery
18 for preparation for trial and for trial setting,
19 that that party ought to be able to ask for a
20 hearing and get a hearing to complain in open
21 court to the judge.

22 In any case, these rules only permit that if
23 the case appears to be sufficiently complicated to
24 require close supervision. In other words, 4 is
25 the only place where you can request that a

1 scheduling conference be held which the Court
2 shall hold.

3 MR. LOW: And it goes further.

4 PROFESSOR EDGAR: Now, what did you
5 just say, 4?

6 CHAIRMAN SOULES: I'm sorry, D.

7 PROFESSOR EDGAR: D, all right.

8 CHAIRMAN SOULES: I apologize. I was
9 reading the 4 in parenthesis. D on Page 15 of the
10 materials is labeled 4; is that right. No, it's
11 on Page 3. That's right, at the bottom there,
12 right below where we've been working. I've got
13 two drafts going here.

14 It is the only place where you can ask for
15 and require the Court to hold a hearing on your
16 scheduling.

17 MR. LOW: In addition to that, I mean,
18 if you write it the way that Crown is talking
19 about, it might take care of another problem.
20 Because what if somebody has filed a motion for
21 scheduling order, does that take priority then
22 that you can't have a conference unless it's
23 complicated? Or what takes priority, you know?
24 And if you put it like he says, that in any case
25 they may do that, that would include a case where

1 somebody has already made application or there
2 might be other orders.

3 I think you ought to be able to get a hearing
4 at any time, and that ought to take precedence
5 over the other, because what happens the way it's
6 written is, if somebody has already made
7 application for one, does that preempt this, or
8 what? Which one prevails, D or the one above?
9 And if Kronzer -- what he's talking about will
10 take care of that situation, priorities.

11 CHAIRMAN SOULES: So the Court doesn't
12 have to have any conference with the lawyers or
13 the parties unless the Court thinks the case
14 requires close supervision.

15 JUDGE CASSEB: Or to put it on the
16 complex docket.

17 CHAIRMAN SOULES: That's the way they
18 would define it, requires close supervision.

19 MR. LOW: I would move that we put
20 that any party may request that a scheduled
21 conference be held. You might have to change some
22 of the other language. I think the party ought to
23 have the right to request it.

24 CHAIRMAN SOULES: Just say, "at any
25 time," and strike out "a case appears to be

1 sufficiently complicated to require close
2 supervision." "At any time a party may request
3 that a scheduling conference be held, which the
4 Court shall hold."

5 MR. LOW: You don't want to put it
6 where somebody requests it, like, within three
7 days of trial. I don't know. We better just go
8 ahead and leave it like you have got it, because I
9 see a can of worms.

10 CHAIRMAN SOULES: Just change D.

11 MR. SPARKS (EL PASO): No, you can't
12 change D because all these things run after it on
13 the next page. D is set up for that.

14 CHAIRMAN SOULES: Let's make this --
15 well, let's see. Is D ever referred to after
16 that?

17 MR. SPARKS (EL PASO): Yes.

18 CHAIRMAN SOULES: Well, let's just
19 insert the D. Let's see if we can make that E,
20 what is now D, and then just write a new D that
21 says part of that language. The part that we were
22 going to leave in, D. "If at any time a case" --
23 no, "at any time a party may request that a
24 scheduling conference be held."

25 PROFESSOR EDGAR: The party may

1 request a scheduling conference.

2 CHAIRMAN SOULES: "May request a
3 scheduling conference." A scheduling hearing is
4 easier because hearings are defined, and notice to
5 the parties, and all that sort of thing. So "the
6 scheduling hearing which the Court shall hold."

7 JUDGE CASSEB: Within the same
8 timeframe period.

9 CHAIRMAN SOULES: Within 10 days.

10 JUDGE WOOD: 10 days of what?

11 PROFESSOR EDGAR: Of the request.

12 JUDGE WOOD: Well, the request
13 shouldn't be made until all parties have answered
14 to appear.

15 CHAIRMAN SOULES: Actually, this
16 doesn't kick in until you have got appearances,
17 Judge.

18 JUDGE WOOD: All right.

19 CHAIRMAN SOULES: Then old D would
20 become E. Judge, what we've done here is, the
21 committee's consensus is that, any party should
22 have the right to have a scheduling conference.
23 The only scheduling conference that is provided
24 for now is, whenever a party believes that the
25 case needs close supervision, that's D. So we

1 have suggested that we insert a new D.

2 MR. SPARKS (EL PASO): Luke, why don't
3 you put that on 5 within C because it's the only
4 one it could apply to. You've got that --

5 CHAIRMAN SOULES: All right. That's
6 fine. It would be (5) under C. (5) under C would
7 be, "At any time a party may request a scheduling
8 hearing which the Court shall hold within 10 days
9 of the request."

10 PROFESSOR EDGAR: Well, now, the top
11 of C talks about "within 30 days after the general
12 appearance of the last defendant to appear." Then
13 we don't want to say "at any time." You might
14 say, "within any time thereafter."

15 CHAIRMAN SOULES: Well, why don't we
16 just strike out "any time."

17 PROFESSOR EDGAR: That's right.

18 JUDGE CASSEB: That's it.

19 CHAIRMAN SOULES: "A party may request
20 a scheduling hearing which the Court shall hold
21 within 10 days of the request." Then D would stay
22 D.

23 MR. BEARD: Now, are all of those
24 subsections on D back in under that, too? Are you
25 going to repeat that?

1 CHAIRMAN SOULES: That will be C-5, so
2 we don't change D.

3 MR. BEARD: Well, you're required
4 under the present D to file -- under 1 and 2
5 you're supposed to do certain things.

6 CHAIRMAN SOULES: We're not going to
7 talk about how complicated it is or why it needs
8 special attention. It's just that if you want to
9 have a hearing on scheduling, you'll get a
10 hearing.

11 JUDGE CASSEB: And then go on to
12 something else.

13 CHAIRMAN SOULES: And then D goes into
14 trying to get a certification as a complex case.

15 MR. SPARKS (SAN ANGELO): So I gather
16 what you are saying by 5 is, that any party can
17 request a scheduling hearing before a judge under
18 C to amend the already schedule that has been
19 filed.

20 CHAIRMAN SOULES: For any purpose.
21 That or just whenever he files his proposal. In
22 other words, whenever you file, Sam, your -- C-1,
23 C-2 and 3, you could say, "I want a hearing on
24 this." Of course, if it's C-2, the 10 days is not
25 going to work.

1 MR. SPARKS (SAN ANGELO): Say you have
2 added additional parties and everybody has come
3 in, and we all file a new plan. 20 more days go
4 by and we want to amend that plan. Can you do it
5 under 5, is what I'm asking you.

6 CHAIRMAN SOULES: Yes, I think so.

7 PROFESSOR EDGAR: Now, would you refer
8 to the scheduling conference under D as a
9 scheduling conference or as a scheduling hearing?

10 CHAIRMAN SOULES: I think it ought to
11 be "hearing," because "hearing" already requires
12 notice to the parties and open court and that sort
13 of thing.

14 PROFESSOR EDGAR: Okay. So you want
15 to change that "conference" on the last line to
16 read "hearing"?

17 CHAIRMAN SOULES: Well, conference
18 permits it to be held in chambers. If parties
19 don't object, hearings can be held in chambers,
20 too. Don't you think that ought to be "hearing"
21 because we know what hearings are?

22 PROFESSOR EDGAR: I agree.

23 JUDGE CASSEB: Where are you
24 changing?

25 CHAIRMAN SOULES: That's in Line 3 of

1 D, the very last line on Page 3.

2 JUDGE CASSEB: Okay. Changing it to
3 what?

4 CHAIRMAN SOULES: To "scheduling
5 hearing."

6 JUDGE CASSEB: Okay.

7 PROFESSOR EDGAR: Although you do have
8 pretrial conferences.

9 CHAIRMAN SOULES: Yes. Then that
10 would be in the third line of the fourth page,
11 too, "scheduling hearings."

12 PROFESSOR EDGAR: And the next
13 sentence, the next line underneath that, too.

14 CHAIRMAN SOULES: And hearing, yes.

15 PROFESSOR EDGAR: And in 2, also.

16 CHAIRMAN SOULES: "Conference" would
17 be changed to "hearing" throughout so I could pick
18 up the notice requirements.

19 MR. BEARD: Under this scheduling
20 hearing, the judge does not have to do anything.
21 He listens to them and he just says "forget it;"
22 is that right. Under D, he has to do one, two,
23 three, four, five, six. But in this one he
24 listens, and he doesn't have to do anything?

25 CHAIRMAN SOULES: That's right.

1 What's been omitted is the opportunity to go to
2 the judge and plead with him.

3 Okay. We didn't have any other changes on
4 Page 4.

5 PROFESSOR EDGAR: Now, under rule --
6 nothing on Page 4, you did change E, didn't you,
7 the schedule a while ago?

8 CHAIRMAN SOULES: "Scheduling
9 hearing"?

10 MR. EDGAR: In E, in all cases where
11 the proceeding is not subject to a "schedule"
12 rather than "plan." You know, we changed "plan" to
13 "schedule" a while ago.

14 CHAIRMAN SOULES: Okay, good.

15 JUSTICE WALLACE: Is that "schedule"
16 or "scheduling order"?

17 CHAIRMAN SOULES: "Scheduling order."

18 JUSTICE WALLACE: Is it "schedule" or
19 "scheduling order"? We referred to "scheduling
20 order."

21 PROFESSOR EDGAR: Let's see what
22 Subsection E is.

23 JUSTICE WALLACE: It's on the motion
24 for a proposed scheduling plan.

25 PROFESSOR EDGAR: I guess that would

1 be "schedule order." Yes, "scheduling order."

2 JUDGE THOMAS: So, could we just say
3 like on E, "In all cases where the proceedings are
4 not subject to a scheduling order under Section C
5 or Section D"?

6 PROFESSOR EDGAR: Right.

7 JUDGE THOMAS: Comma.

8 PROFESSOR EDGAR: Yes.

9 JUSTICE WALLACE: How did "scheduling
10 order" get under there when it was a "plan"
11 everywhere else?

12 PROFESSOR EDGAR: I don't know. I
13 think Mr. Friessen probably was thinking of those
14 alternatively in his mind because it would --

15 CHAIRMAN SOULES: Well, under D, a
16 close supervision case, you have to have an order.

17 PROFESSOR EDGAR: Well, you do under
18 C, too.

19 CHAIRMAN SOULES: Under C we talked
20 about plan and that's --

21 MR. EDGAR: Yes, we had a scheduling
22 plan, though. The Court then could render an
23 order. See, so it's going to be subject to a
24 scheduling order as a result of a plan. See C-4,
25 so it would be scheduling order under both of

1 them.

2 CHAIRMAN SOULES: That's right. There
3 are some language inconsistencies.

4 PROFESSOR EDGAR: At the top of Page
5 5.

6 CHAIRMAN SOULES: Okay.

7 PROFESSOR EDGAR: I think we need to
8 take a look at Rule 166-B(5)(b).

9 CHAIRMAN SOULES: We've got some
10 problems here with parenthesis 2 at the top of
11 Page 5 because of the provisions in Rule 166-B and
12 elsewhere.

13 PROFESSOR EDGAR: B(5)(b)
14 specifically, and Rule 63.

15 CHAIRMAN SOULES: B(5)(b) and Rule 163
16 -- Rule 63, isn't it?

17 PROFESSOR EDGAR: Rule 63.

18 CHAIRMAN SOULES: On pleadings and
19 discovery, which are 30 days and 10 days before
20 trial and 7 days before trial.

21 MR. SPARKS (SAN ANGELO): Let me
22 interject too because I'm going to be
23 corss-examined about this. As you read subsection
24 2 there, literally on its face, you can't get to
25 trial before 135 days. So you've got 90 days for

1 discovery and 25 days before the trial setting.
2 And I was instructed specifically to tell you-all,
3 "Ain't no damn Supreme Court going to slow our
4 courts down."

5 I'm serious. We try some cases within 40
6 days of filing.

7 MR. MORRIS: The answer to that is,
8 don't get on that track. Filing those -- over
9 there under the other two options, file what you
10 want. That's only for people who don't do a damn
11 thing, Sam.

12 JUDGE CASSEB: What's the conflict you
13 said?

14 CHAIRMAN SOULES: We've got 30 days.
15 We'll get right to that.

16 JUDGE CASSEB: Tell me what the rule
17 is. I don't have a copy.

18 PROFESSOR EDGAR: Rule 166-B(5)(b).

19 JUDGE CASSEB: Says what?

20 PROFESSOR EDGAR: Well, it talks about
21 the 30 days. Let me find it here. "If you expect
22 to call an expert witness when the identity of so
23 and so has not been previously disclosed if --
24 appropriate inquiry, then you must supplement to
25 include the names and telephone numbers, but in no

1 event less than 30 days prior to the beginning of
2 trial except upon legal court."

3 CHAIRMAN SOULES: The problem with our
4 Rules of Discovery, as they were overhauled in
5 1984, contemplated that -- we got a pretty serious
6 problem here on this (2) on top of Page 5. And it
7 is a direct conflict with the discovery rules.

8 The discovery rules that we set up in 1984
9 permitted us to take discovery all along. Of
10 course, 166 could set a different schedule, and
11 without any kind of an order being entered,
12 discovery was to be supplemented not less than 30
13 days prior to trial, including the designation of
14 experts and a lot of people practice that, they
15 don't designate their experts until they get up to
16 that 30-day deadline for a lot of good reasons,
17 maybe some bad ones. But, anyway there are a
18 few.

19 The way this is set up, discovery has to be
20 completed 45 days before the date set for trial,
21 so we've got an absolute conflict there.

22 MR. MORRIS: Luke, not really. As you
23 know, I was on that subcommittee that put this
24 mess together. Down there in G, once again,
25 you've been given the right to extend time limits

1 by agreement of the parties. And if you come up
2 to that 45-day period and you haven't got it
3 completed, both parties can extend it. I know up
4 there it says "shall," but the feeling was that by
5 giving the parties the right under G to extend
6 their discovery, that they were getting off the
7 hook.

8 CHAIRMAN SOULES: If Rule 1 says TRCP
9 controls, then you can supplement inside of 45
10 days. You can supplement down to 30 days, so
11 you're making discovery in violation of this rule
12 without agreement.

13 PROFESSOR EDGAR: If the parties
14 agree, Lefty, then you wouldn't have any problem.
15 But if the parties don't agree, then you would
16 have a direct conflict. So I don't really think
17 that the rule really solves the problem.

18 MR. LOW: That's a re-drafting problem
19 that's going to take some time.

20 CHAIRMAN SOULES: And the
21 supplementation of the rule, you know, that is if
22 you discover that an answer, when given, was
23 wrong. So a party Branson knows that an answer,
24 when given to me was wrong six months ago, and he
25 answers it on 31 days prior to trial, he amends,

1 which is his duty. And when he has done that,
2 he's straightened it out under the rules; he has
3 no more responsibility to me. I'm cut off from
4 discovery long since. And he isn't going to agree
5 to me taking the deposition of a guy over again
6 because he doesn't have to. So I don't get any
7 discovery on a changed answer that he knew was
8 wrong whenever it was given.

9 I don't mean to blame Frank. He would never
10 do that to me. But there's an example of how it
11 can happen, and the rules are in conflict there
12 and they need to be straightened out. Are we
13 going to -- and for information that constitutes
14 supplementation and gives rise to the need for
15 discovery, is that good cause to take discovery
16 within 30 days?

17 MR. SPARKS (EL PASO): I think the
18 place to attack this problem, though, is is
19 166-B. Because 166-B on the 30-day rule is really
20 almost in a -- particularly in a medical
21 malpractice case or a products case is your
22 continuance motion.

23 PROFESSOR EDGAR: Is what?

24 MR. SPARKS (EL PASO): Is a
25 continuance motion on 31 days before a trial you

1 get your -- the real experts. You have to run out
2 there and take their depositions and then you have
3 to name your experts and run out and get them, and
4 so the trial court just passes the case. And I
5 really think we ought to attack the problem in
6 166-B.

7 What's happening is, the courts, with the
8 local rules are the pre-trial rules, are saying,
9 "Plaintiffs will designate their experts by
10 January 1; defendant's will do theirs by February
11 1." And that will be 60 days before trial.

12 And I noticed -- I haven't seen it, but
13 Kilgarlin was saying in a talk he gave that the
14 Dallas Court of Appeals has excluded or reversed
15 because the trial judge allowed a witness to be
16 disclosed in violation of their rules, which is a
17 60-day rule, and said that that witness shouldn't
18 have been allowed to testify.

19 So I don't know how you're going to do it,
20 but I really think that we need to amend 166-B so
21 that these experts are designated in enough time
22 in advance for trial so that we could complete
23 discovery.

24 PROFESSOR EDGAR: The scheduling order
25 should take care of that.

1 MR. SPARKS (EL PASO): That's right.
2 But there is no scheduling order in this part of
3 the Administrative Rules. This is when you don't
4 do anything, as Rusty called my attention to it.

5 PROFESSOR DORSANEO: This last 45 days
6 is when 50 percent of all discovery is done.

7 MR. BRANSON: The person that gets a
8 products or malpractice suit into this time slot
9 doesn't need an expert anyway. You can't possibly
10 get through this process with a medical negligence
11 suit or products suit.

12 MR. SPARKS (EL PASO): Yes, but the
13 problem is, a lot of times one side knows always
14 when they lose their expert they just consult
15 until a few days before trial. But you're right;
16 there's an absolute conflict that has to be
17 remedied either here or more, practically, I think
18 in 166-B.

19 CHAIRMAN SOULES: Well, you've got two
20 dates. So really, Sam, it seems to me like we've
21 got to deal with both. We've got to say that
22 supplementation has got to be done by a date and
23 discovery finished by a subsequent date because
24 when that supplementation comes down you need time
25 to take discovery if you feel you need it. What

1 if 166-B(5) were changed to say, 45 days and this
2 were changed to say 30 days and that would give
3 you 15 days to try to get the work done, and if
4 not to at least set a basis for good cause?

5 MR. SPARKS (EL PASO): I'm sure I'm in
6 favor of that because I'm more and more, just like
7 the rest of you, I'm taking a deposition, say, on
8 the first day of trial or they take a deposition
9 on the first day of trial because of the
10 scheduling with the lawyers and the witnesses.
11 And the judge says, "Well, I'm not going to grant
12 a continuance, this case has been set, but before
13 Dr. Jones testifies you can have his deposition
14 Tuesday night." And, you know, we're all doing
15 that all the time. It seems to me that that the
16 purpose of the rule was to avoid it and we ought
17 to really try to avoid it by the rules.

18 MR. ADAMS: If you've got a case
19 that's worth all of this discovery that you're
20 talking about, you're going to depose with those
21 experts, you're going to have a scheduling order
22 and that's going to provide for designation of
23 witnesses and the time to take your depositions
24 and all this sort of thing, and if you're not
25 going to have a scheduling order, I think you

1 ought to just leave it like it is. If neither
2 party cares enough to have a scheduling order
3 rendered, then it's not a distinct enough case to
4 be trying to draw some rules on a hearing.

5 CHAIRMAN SOULES: In this room and
6 after a lot of years at it, I'll say that we often
7 have to wake ourselves up to the fact that we're
8 trying a lot of special kinds of cases, those of
9 us who are at this table, and they represent not a
10 very large percentage of the cases that are on
11 file or that even get tried.

12 And the rules have to accommodate also those
13 cases that the other half of the Bar practices for
14 the other half of the clients that are represented
15 in the state and we shouldn't leave a trap there.
16 We should have supplementation at some point and
17 the opportunity to do discovery if they want to
18 because a lot of those lawyers never will file a
19 scheduled plan or a motion to get a case set for
20 supervision. They'll just try their cases, and
21 probably that's the best way to have cases tried,
22 because people don't have to pay too much to get
23 that kind of trial, and they get as good a trial
24 as they need.

25 PROFESSOR EDGAR: Well, if the

1 sentiment of the group is that maybe 30 days is
2 too short a time under Rule 166-B, then if we
3 recommended the amendment of that rule to 45 days,
4 that would coincide with the 45 days here, and
5 then there wouldn't be any conflict between them.

6 CHAIRMAN SOULES: Still don't have any
7 discovery after supplementation, and that's why I
8 wanted to move this to 30, so there would be a
9 15-day period between supplementation and
10 discovery cutoff where you could at least scramble
11 and try to set up good cause if you couldn't get
12 it done.

13 MR. BRANSON: That sounds logical.

14 CHAIRMAN SOULES: Okay. So we'll
15 change 166-B to 45 days and this one to 30.

16 MR. BRANSON: Luke, I'm sorry I was
17 out of the room when you-all discussed D under 4.
18 There was a question that bothered me throughout
19 the Task Force that I never quite understood.
20 What happens if the judge doesn't hold a hearing?
21 It says "shall."

22 MR. MCMAINS: We fixed that.

23 MR. BRANSON: You did? Okay. It's
24 been handled.

25

1 CHAIRMAN SOULES: Well, we really
2 didn't fix D. It says, "If at any time the Court
3 believes." Suppose he says, "I don't believe."

4 MR. MCMAINS: But you fixed the
5 scheduling hearing. Are you talking about
6 under --

7 MR. BRANSON: 4-D.

8 CHAIRMAN SOULES: He's talking about
9 D, and what if the judge doesn't believe? That's
10 the first full sentence at the top of 4, Rusty.
11 We should probably say, "The Court shall hold a
12 hearing," like we did on the other one.

13 MR. BRANSON: Okay. But let's say you
14 apply, and the Court is in trial, or the Court is
15 in the hospital and the Court, for some reason,
16 does not comply by the rule. What are the
17 remedies?

18 CHAIRMAN SOULES: None now, because
19 it's discretionary whether he does or doesn't hold
20 a hearing.

21 PROFESSOR EDGAR: Well, it says the
22 court "shall" hold a hearing within 10 days of
23 request.

24 CHAIRMAN SOULES: Oh, I see.

25 PROFESSOR EDGAR: So it says "shall

1 hold."

2 CHAIRMAN SOULES: I'm not reading it
3 right.

4 PROFESSOR EDGAR: It seems to me you
5 have to got to go back to mandamus. If that is a
6 mandatory duty and the Court fails to do it, just
7 like failing to hold an in-camera inspection or
8 something like that.

9 CHAIRMAN SOULES: If you're entitled
10 to a hearing, you're entitled to a hearing. You
11 can get that. You may have wished you hadn't.

12 PROFESSOR EDGAR: I really think,
13 though, that language could be cleaned up, saying,
14 "If at any time the Court believes," it requires
15 -- I think it maybe should say, "Should the Court
16 determine that the case requires close supervision
17 it may --" rather than -- I think that's a little
18 more judicial.

19 CHAIRMAN SOULES: Professional.

20 PROFESSOR EDGAR: "Should the Court
21 determine."

22 CHAIRMAN SOULES: Or "if at any time
23 the Court determines." That would be the least
24 language change.

25 PROFESSOR EDGAR: "If at any time the

1 Court determines."

2 CHAIRMAN SOULES: If you want to
3 change it differently, Hadley, that's fine with
4 me.

5 PROFESSOR EDGAR: That's fine. I
6 don't care.

7 JUDGE CASSEB: Where are you now?

8 CHAIRMAN SOULES: We're just back on 4
9 up there at the top. Instead of "If at any time
10 the Court believes," change it to, "If at any time
11 the Court determines that a case requires," and so
12 forth.

13 All right. I was distracted there. Someone
14 was making a comment about one of these rules on 5
15 or 6. Was it you Sam Sparks of San Angelo?

16 MR. SPARKS (SAN ANGELO): What happens
17 on -- almost any personal injury case, you want to
18 take the doctor's deposition as close to the date
19 of trial as you can take it. And under these
20 rules, you can't do it. I mean, 30 days under
21 what you amended -- it is 45 right here, 30 is
22 better. But, you know, I don't see why the
23 parties by agreement can't agree to take an expert
24 or do some discovery closer to the date of trial.

25 PROFESSOR EDGAR: They can under G.

1 Look under G, Sam.

2 MR. SPARKS (SAN ANGELO): All right.

3 JUDGE CASSEB: Tell me what date you
4 changed. You changed 45 to 30?

5 CHAIRMAN SOULES: Yes, sir. In this
6 rule on page --

7 JUDGE CASSEB: 5.

8 CHAIRMAN SOULES: 5, in the third
9 line, we changed that to 30.

10 JUDGE CASSEB: Oh, okay.

11 PROFESSOR EDGAR: And then you're
12 going to recommend that 165-B(5) be changed to 45.

13 CHAIRMAN SOULES: That's right, to
14 create 45.

15 PROFESSOR EDGAR: Is that Sam Sparks'
16 committee discovery rules?

17 CHAIRMAN SOULES: Exactly.

18 MR. SPARKS (SAN ANGELO): You know,
19 Gilbert and I are standing here talking. You've
20 got a personal injury charge, you're going to have
21 a doctor to testify. A week before trial, he
22 walks in and he says, "I can't come and testify."
23 You know, the other side looks at you and says,
24 "I'm not agreeing to any damn deposition." And
25 you go to the judge and say, "Well, Judge, I want

1 a continuance." And he says, "Oh, no, I'm bound
2 by these rules here. You're going to trial."

3 CHAIRMAN SOULES: You've got good
4 cause, though, see.

5 PROFESSOR EDGAR: There's another
6 problem, Sam. And you're right; motions for
7 continuance are a separate problem, and they're
8 dealt with on Page 6, under subdivision H. We
9 talked about this in the subcommittee earlier
10 today, too. There's a problem here in a conflict
11 between this and our current motions for
12 continuance practice under Rules 251 through 254.
13 And that needs to be separately addressed by the
14 Supreme Court because you're right; I think that
15 might be a proper ground for a continuance under
16 our current rules.

17 MR. SPARKS (SAN ANGELO): Well, in the
18 current rules, you don't have to show
19 unavailibility for the first continuance and the
20 next one you do.

21 PROFESSOR EDGAR: That's right.
22 That's right.

23 MR. ADAMS: But the rules right now
24 only require reasonable notice to take a
25 deposition.

1 CHAIRMAN SOULES: That's right.

2 MR. ADAMS: And reasonable notice may
3 be the week before a trial. That still be
4 reasonable notice. Under these rules, you're
5 going to take all that out.

6 CHAIRMAN SOULES: See, the reasonable
7 notice provision of the deposition thing is under
8 fire right now, but that is the only discovery
9 tool there is that doesn't have a long fuse. If
10 you get into a tight spot and you have to have
11 discovery close to trial, there's only one way and
12 that's depositions. And that's why we've got to
13 keep that reasonable and not start giving a bunch
14 of arbitrary deadlines back into depositions
15 because at least you've still got that way out.

16 MR. ADAMS: Is this going to cut this
17 off with this 30-day or 45-day rule and are they
18 going to cut off --

19 MR. SPARKS (SAN ANGELO): Sure,
20 because you don't have an agreement.

21 CHAIRMAN SOULES: Except good cause.
22 You would have to show good cause.

23 MR. SPARKS (SAN ANGELO): Well, then
24 you have got to amend that to say by agreement or
25 good cause.

1 CHAIRMAN SOULES: Well, it says that.

2 PROFESSOR EDGAR: That's what it says
3 on Subdivision G.

4 CHAIRMAN SOULES: On G.

5 MR. ADAMS: But then you have got to
6 take up the Court's time with a motion and a
7 hearing.

8 CHAIRMAN SOULES: That's right. But
9 whenever you cut off discovery, you have got to
10 show a good cause to get it or by agreement.

11 MR. ADAMS: I think the other party
12 ought to show a prejudice. The party who doesn't
13 want that deposition to be taken is the party who
14 ought to file the motion and ought to come forward
15 with something that substantiates a reason to have
16 it other than just some arbitrary rule.

17 CHAIRMAN SOULES: That's not where the
18 burden is on discovery. I mean, maybe that would
19 have been a better way to do it.

20 MR. BRANSON: Maybe we ought to make
21 his client sign.

22 CHAIRMAN SOULES: I'm sorry.

23 MR. BRANSON: Maybe we ought to make
24 his client sign.

25 CHAIRMAN SOULES: Let's get on, if we

1 can. We do have some problems with this
2 continuance. They need to go into the rules.

3 It's a quarter to five, so we can work as
4 late as you-all want to work.

5 We didn't have anything else on Page 5,
6 except -- let's see here. Okay. That's all. Now,
7 on H, I object to the certified mail.

8 MR. BRANSON: Since there is a
9 conflict between the current rules and the
10 proposed Administrative Rules, would it be
11 appropriate for this committee to move that we
12 delete that portion?

13 CHAIRMAN SOULES: The certified mail
14 portion?

15 MR. BRANSON: Yes.

16 CHAIRMAN SOULES: I think so. How
17 many feel we ought to delete it? How many feel
18 you ought to have to communicate with your client
19 by certified mail to be able to prove it to the
20 Court with a green card? No hands.

21 How many feel you ought to be able to certify
22 to the Court that you have mailed your client a
23 copy and the Court ought to accept that subject to
24 some contest. Show by hands.

25 MR. BRANSON: I would suggest that the

1 entire provision currently conflicts with our
2 Rules of Civil Procedure. I would move that this
3 committee urge the deletion of the entire
4 provision page and continue with our Rules of
5 Civil Procedure on continuance. And I don't think
6 that ever got a fair and reasonable hearing in the
7 Task Force, at least, not at any committee meeting
8 I was present at.

9 CHAIRMAN SOULES: Well, that is the
10 recommendation of the committee that met that
11 these provisions be put into Rules 251, 252 and
12 254 where we have the procedures for motions for
13 continuance and the requisites.

14 MR. BRANSON: At this time I would
15 move that rather than putting them in the rules,
16 we merely urge the Court to delete Section H and
17 continue with our present rules on continuance.

18 JUDGE WOOD: Without having heard all
19 the reasons in the Task Force, I would agree. I
20 don't see the point. It simply presumes, I would
21 assume, prima facia that the lawyer is somehow or
22 another not advising his client of it and
23 violating his fiduciary relationship with this
24 client. But as I say if it's been hashed out and
25 that's what everybody wants --

1 MR. BRANSON: That's really not what
2 happened in the committee. Any time anyone
3 attempted to address this problem, they were
4 repressed in the Task Force.

5 MR. SPARKS (EL PASO): Well, that's
6 not exactly right. They finally did amend it so
7 you could send a copy of it, but you didn't have
8 to have a signature. For awhile they were strong.

9 PROFESSOR EDGAR: It only required the
10 signature of your client for a while, Frank,
11 remember?

12 MR. BRANSON: I'm not suggesting there
13 wasn't discussions, but I'm suggesting that at the
14 point in time this rule was discussed with the
15 full Task Force there was pressure placed on the
16 Task Force that was undue. And the rule was not
17 representing the majority of the Task Force
18 members. It was merely what the Task Force
19 thought the Chief Justice desired. And I would
20 urge that this committee at least go on record
21 opposing Section 8.

22 JUDGE WOOD: Well, I have stated my
23 position on it and I agree, but we're not doing
24 that here today, are we?

25 MR. BRANSON: No. We're at Section 8.

1 JUDGE WOOD: We're not here discussing
2 philosophy.

3 MR. BRANSON: Well, but it does
4 conflict with the current Rules of Civil Procedure
5 so it gives us an opportunity to address that.

6 CHAIRMAN SOULES: We've got a motion
7 to delete Subdivision 8 because it conflicts with
8 Rules 1 and 2 because it puts requisites of
9 motions for continuance in two places, two
10 independent sets of rules which would be
11 confusing. Is there a second?

12 MR. LOW: I second it.

13 CHAIRMAN SOULES: Move to second. All
14 in favor show by hands. Opposed? It is unanimous
15 that we delete --

16 MR. SPARKS (EL PASO): I voted no.

17 CHAIRMAN SOULES: Oh, I'm sorry. Two
18 opposed.

19 MR. SPARKS (EL PASO): On my vote, I
20 want the record to reflect that I am not for 8 as
21 written, but I think we have to address it, and I
22 would --

23 CHAIRMAN SOULES: What are we
24 addressing? The fact that you give your client a
25 copy of the motion for continuance, is that the

1 aspect of it that you want to address, Sam?

2 MR. SPARKS (EL PASO): Yes. There was
3 a lot of support for this, not just with the
4 Professor but also with the trial judges in the
5 Task Force and I don't like this. I am really
6 more for making uniform rules of continuance in
7 the 251 series. I'm not for having to get a
8 client to sign it. And I've sure got mixed
9 emotions about mailing a copy, but I voted for
10 mailing a copy and I think that's the compromise
11 that I would probably support, because I was
12 convinced with the problems that are going across
13 the state that that may be a way to eliminate some
14 of the continuances that were not valid.

15 I just think we have to address it rather
16 than recommend to the Court that this be deleted,
17 because I think something is going to happen and I
18 just assumed we had input on it.

19 MR. BRANSON: Sam, that was the type
20 of statement that was made in the Task Force, but
21 I never did find out what the cause that went
22 across the state would be. This administrative
23 set of rules is to attempt to address docket
24 problems. I submit Section H does not do that.

25 PROFESSOR EDGAR: Well, this was

1 particularly a concern, as I recall, in domestic
2 cases where parties wanted the divorce and they
3 were calling the judge and wanting to know, "Why
4 in the hell can't we get a divorce?" And the
5 Court then looked at the docket and said, "Well,
6 the parties came in and asked for a continuance."
7 And the parties didn't know anything about it, but
8 the attorneys had done it without their client's
9 consent. Now, as I recall, that was part of the
10 problem, wasn't it, Judge Casseb --

11 JUDGE CASSEB: That's correct.

12 PROFESSOR EDGAR: -- as we heard it?
13 And the trial judges were very concerned about
14 this and felt that if the client, in some way, had
15 to be a party to the continuance, that less
16 continuances would be granted.

17 MR. MCMAINS: Yes. But this is also
18 in Rule 3; it isn't in Rule 4. The first section
19 of it says that Rule 3 doesn't apply, if there's a
20 category case that controls Rule 4. So whoever
21 the lawyers were doing that, that fixed it.

22 MR. BRANSON: If it's a problem in
23 domestic relations cases, we could leave it in the
24 domestic relations.

25 PROFESSOR EDGAR: I'm just trying to

1 reconstruct what happened in the Task Force that's
2 all. I'm not trying to amend it one way or the
3 other.

4 MR. MCMAINS: But, I mean, I think we
5 had already established earlier on that we had
6 taken the family cases out of Rule 3.

7 MR. BRANSON: One thing that got
8 squelched when we attempted to discuss in the Task
9 Force that really bothered me was, by doing this
10 in Rule 3 and making it applicable to family law
11 in Rule 4, you really have taken the profession of
12 law and changed it something other than
13 professional. You basically said, "Lawyers cannot
14 be trusted, and we're going to acknowledge that by
15 the Administrative Rules." And I have not seen in
16 17 years of law practice that that is the case.
17 And I objected to it then. No one really cared to
18 discuss it with the Task Force. I object to it
19 arduously now, and I consider it an insult.

20 CHAIRMAN SOULES: Did you have a
21 comment to make, Judge Thomas?

22 JUDGE THOMAS: Going back to what was
23 said, I do agree that there was some conversation
24 that this was a problem in some family law cases,
25 but I got the impression that it was a problem in

1 the smaller areas as opposed to the specialized
2 family courts. And I'll certainly go on record as
3 saying that it is not something that the family
4 law counsel or the Board's certified family law
5 specialists, who happened, also, to be judges,
6 feel is necessary.

7 MR. LOW: I think, as Frank said,
8 that's dealt with in the Canon's of Ethics about,
9 you know -- I think it ought to be dealt with
10 there and not here.

11 CHAIRMAN SOULES: Just from having
12 attended those, I think if we don't address
13 mailing the thing to your client, at least, that
14 this is going to be a part of the Administrative
15 Rules just like it reads right now. That is
16 something that the Task Force powers it be are
17 going to require.

18 MR. BRANSON: I still believe you have
19 got nine reasonable men sitting on the court, and
20 I can't believe that they're going to adopt this
21 and slap the legal professors in the face. I
22 couldn't believe that from the Task Force. I
23 think if there is a grievance procedure
24 established, it needs to be followed. And if
25 lawyers are not doing that, they need to be

1 reprimanded by the same token. I can't see
2 slapping every lawyer in the face in the State of
3 Texas saying, "You can't be trusted."

4 MR. MORRIS: I think you're right, at
5 least, in your perception, from my having served
6 on that committee with you. The thing that you
7 may recall is that Dean Friessen pointed out that
8 this had been done in a couple of states, and
9 where it had been done, the motions for
10 continuance dropped by over 50 percent and it
11 helped get cases through the system. And that's
12 the purpose of what this Task Force is doing, is
13 getting cases through the system.

14 CHAIRMAN SOULES: Now, if we do
15 address it, and we really talk about just the
16 first sentence, I think the rest of this H is in
17 the rules, "shall state the reason for the
18 delay." You always have got to state the grounds
19 for the motion for continuance; that's already
20 there. "The Court shall make a finding on the
21 record," that's not in the rule but we could
22 change the rule.

23 But the last thing I want to point out is, if
24 this goes through the way it is, this says "all
25 motions for continuance." It doesn't even say

1 "continuance of the trial date." Every time you
2 file the motion -- you're in trial and you can't
3 take a deposition, you're in trial, and you want a
4 motion for sanctions delayed. Now, this says all
5 motions for continuance. And we file those a lot
6 more often on pretrial matters where really it's
7 just a lawyer's conflict, than we do on a trial
8 date. It may be intended to be directed at the
9 trial date, but that's not what it says.

10 PROFESSOR EDGAR: It is; that's what
11 was intended.

12 CHAIRMAN SOULES: Well, that's not
13 what it says.

14 PROFESSOR EDGAR: But that's what was
15 intended.

16 MR. BRANSON: Did we not just vote,
17 Luke, to recommend to the Court that they delete
18 Rule 8?

19 CHAIRMAN SOULES: We did.

20 MR. BRANSON: Well, aren't we now
21 going back and doing just what we voted to do.

22 CHAIRMAN SOULES: We are. I just want
23 to be sure that everybody understands that the
24 risk of just shooting at it that way is that this
25 is going in like it reads.

1 MR. BRANSON: Going in where?

2 CHAIRMAN SOULES: In the
3 Administrative Rules.

4 MR. BRANSON: To go where?

5 CHAIRMAN SOULES: To be promulgated by
6 the Supreme Court of Texas and make it a rule that
7 we all have to live with.

8 MR. BRANSON: Well, isn't it to be
9 addressed by the Supreme Court? I mean, we're not
10 assuming approval of the Supreme Court of that
11 Task Force, which I would submit was not an
12 adequate study of this problem.

13 CHAIRMAN SOULES: There's a high risk
14 that this will go in like it's written if we don't
15 address the specifics of it that we object to and
16 if -- in other words, I don't want to --

17 MR. BRANSON: Is that right? If we
18 recommend to the Court that Rule H conflicts with
19 our current rules and recommend against, is there
20 a high risk that the Supreme Court will adopt that
21 verbatim?

22 JUSTICE WALLACE: Repeating again what
23 I said this morning, there are 9 individuals on
24 the court, and on every other rule that we
25 considered up there everybody has had their say

1 majority vote.

2 CHAIRMAN SOULES: My response may not
3 be exactly like being heard, Frank. I'm saying if
4 we just put it to them, up or down, we may not
5 have communicated all we wanted them to hear. If
6 it's going to be adopted judges -- if you don't
7 agree with us to excise it totally, listen to the
8 problems that are there and at least address these
9 where ever you accept H at least change it, in
10 other words. So far all we've told them is up or
11 down. We haven't told them --

12 JUDGE WOOD: What we're objecting to,
13 Mr. Chairman is, should -- certainly a motion for
14 continuance should be written and signed and it
15 should state the reasons. And I would assume what
16 we're objecting to -- or some of us are objecting
17 to -- is the elite words "by the client" and shall
18 contain a certification by counsel that a copy has
19 been mailed by certified mail to his client. That
20 expression, I assume, is what we're objecting to,
21 isn't it.

22 CHAIRMAN SOULES: And the word "all"
23 as opposed to a motion for continuance of the
24 trial date.

25 MR. BRANSON: And why should the trial

1 judge enter a specific reason for the
2 continuance?

3 JUSTICE WALLACE: If the reason to set
4 out in the motion and the judge signs the order is
5 that not a finding on the record or the reason for
6 the delay?

7 MR. BRANSON: It always has been.

8 JUSTICE WALLACE: It looks like that's
9 just a duplicate to me.

10 MR. BEARD: I spoke to them the last
11 time we had it up. I don't think the trial court
12 should do anything but, you know, grant or deny
13 these motions. And it's only on findings of fact
14 and conclusions of law we should say anything
15 else. I said that the last time we went through
16 it but -- the trial courts have got plenty to do
17 and it depends on the lawyers to go draw it up
18 anyway. The lawyers are going to draw it up with
19 all these reasons in there. I just don't think
20 the Court should have to make anymore findings.

21 MR. MCMAINS: I just thought that
22 maybe the Court might like to know, at least I
23 want it in the record, it is sufficiently
24 inexplicit as to what a client is. I'd be real
25 interested if you ever get down to the Witlog and

1 Styers case (phonetic) case, to find out whether
2 or not lawyers send motions for continuance to the
3 insurance company or to his insured, in order to
4 identify who he thought his client was, or as to
5 whether or not he ought to send it to both, or
6 only the insured, or whatever. I mean, it's that
7 type of nonspecificity that there's a lot of
8 things here that don't meet the eye. They are
9 designed to deal with, you know, a specific type
10 of problem. There ought to be some other way to
11 control it. But I'm inclined to agree with Frank,
12 just slapping everybody's face because of a few
13 violators, is not a good way to handle it.

14 CHAIRMAN SOULES: Okay. I just want
15 to be sure everybody's comments are on record.
16 We've taken a vote, and Frank is right. But at
17 least if the Court disagrees with us, I want them
18 to be able to look at this and see the reasons why
19 we did object, and if we are going to take any
20 part of it, at least try to take only those parts
21 that make sense.

22 JUDGE THOMAS: The other extremely
23 controversial area, at least, that we've hit so
24 far were, you know, the effective dates and we
25 came up in that situation with an alternative.

1 And, you know, going along with what you say, my
2 experience from having talked to the Dean and
3 served, also, on the Advisory Committee is, you
4 know, this is an area where he's real big. And,
5 therefore, if he has a shot of getting it back in
6 by making his pitch to the Court, maybe this would
7 be another appropriate place to say, "Okay.
8 Here's an alternative." So if we did it on the
9 time limits and the effective dates, then this
10 might be a good one to do it.

11 PROFESSOR EDGAR: Let me make a
12 suggestion along that line. Let me just read what
13 I've kind of constructed here. "All motions for
14 continuance of the trial date shall be made in
15 writing and signed by the client or shall contain
16 a statement by counsel that a copy has been mailed
17 to the client. The motion shall comply with the
18 applicable Texas Rules of Civil Procedure." And
19 that way then you've got to go back, and we're
20 right back to Rule 251 to 254.

21 CHAIRMAN SOULES: If the Court is
22 going to take any of H, how many feel that's
23 acceptable or livable? Show your hands.

24 MR. LOW: That's all right. But I
25 have one comment on that. 251 allows the

1 attorneys and so forth; 252 is just the client
2 only. So, now, if you say that, you know, "or"
3 that the clients received a copy, are you implying
4 that then the client didn't sign it?

5 PROFESSOR EDGAR: "It shall be made in
6 writing and signed by the client or shall contain
7 a statement by counsel that a copy has been mailed
8 to the client."

9 MR. LOW: All right. What I'm saying
10 is, I see where you're making it on the lack of
11 want of testimony, then the client has got to
12 sign. I don't know. You know how the courts have
13 interpreted that, but that's got to be signed by
14 the client anyway. You might be implying in that
15 that the attorney can do it in that situation or
16 you amend --

17 PROFESSOR EDGAR: Well, I think you
18 can.

19 MR. LOW: You know, maybe the cases
20 have held that, but the rule up here says -- Rule
21 251, says by the attorney or the client, the
22 affidavit here. I mean, if we're not running any
23 conflict, I agree with what you're saying; I'm not
24 disagreeing.

25 MR. SPARKS (EL PASO): I disagree. I

1 don't think anybody is going to get a signature
2 with a rule that permits you to send a copy. And
3 I think the very -- and that's the reason I voted
4 against Frank's motion. I think to even have the
5 option of having a client sign is going to bring
6 problems to lawyers, because as a practical
7 matter, where it's a defense situation I usually
8 can figure out who my client is.

9 As a matter of fact, the criticism has been,
10 you know, there are less plaintiffs out there that
11 would agree to a continuance if you had to bring
12 them in to sign a motion. But just having those
13 words in there when I know with that option
14 lawyers are going to send copies to clients, and
15 having signed them, just having that option, I
16 think is going to bring problems to lawyers. And
17 for that reason, my alternative position would
18 simply be a certification that you send a copy and
19 drop the language "having the clients sign a
20 motion for continuance." And many times, it's a
21 real problem getting a signature of a client.

22 CHAIRMAN SOULES: Would you accept
23 that, Hadley?

24 PROFESSOR EDGAR: I don't have any
25 problem with it, but what's wrong with the

1 option? I mean, as long as the option is there,
2 why how does that create a problem, Sam?

3 CHAIRMAN SOULES: If I could I speak
4 to that. So that the lawyer is on the stand under
5 cross-examination he's been sued. You had the
6 option, did you not, to have your client sign
7 this? Yes. Why didn't you?

8 MR. SPARKS (EL PASO): That was my
9 answer, Hadley.

10 MR. BEARD: It still needs to be
11 mailed or delivered because occasionally you have
12 a client that does not want anything mailed to
13 him --

14 CHAIRMAN SOULES: Mailed or delivered
15 to the client.

16 MR. BEARD: -- or to his home, because
17 he doesn't want anybody to know that he's been
18 sued.

19 PROFESSOR EDGAR: My only concern,
20 Sam, is that in view of what I remember from that
21 Task Force meeting, that many of the judges,
22 particularly, felt that the language of the client
23 signing the motion for continuance would reduce
24 the number of continuances.

25 CHAIRMAN SOULES: But the Judge can

1 handle that by saying, "I'm going to reset this in
2 three days and I want your client here to give
3 some testimony. I want to hear your client on
4 this point."

5 PROFESSOR EDGAR: I understand that.
6 But I'm just trying to thing of getting this
7 through the Supreme Court, that's all.

8 CHAIRMAN SOULES: Yes, I know.

9 PROFESSOR EDGAR: I have no problem
10 with proceeding with that suggestion personally,
11 but I don't know whether practically that will
12 sell or not.

13 CHAIRMAN SOULES: How many feel that
14 the option to have the matters signed by the
15 client should be included in the rule? How many
16 feel that it should be deleted from the rule? How
17 many feel that it should be continued? Let me see
18 that.

19 PROFESSOR EDGAR: I don't think it
20 should be, but --

21 CHAIRMAN SOULES: All votes -- there's
22 two. You vote, O'Quinn, to continue it in there?

23 MR. O'QUINN: It's optional either
24 way.

25 MR. BRANSON: Luke, what he's saying

1 is, you can leave out the defendant or client.

2 PROFESSOR EDGAR: John's voting that
3 we should leave the option in there.

4 CHAIRMAN SOULES: Okay. It's 7 to 2
5 to delete it. And the court should be apprised
6 that there is feeling on the committee that the
7 option should be preserved. But the feeling is
8 that the alternative would be, "All motions for
9 continuance of the trial dates shall be in writing
10 and shall contain a statement by counsel that a
11 copy has been mailed or delivered to the client.
12 The motion shall comply with the applicable Texas
13 Rules of Civil Procedure."

14 MR. TINDALL: Could that be a trial on
15 the merits?

16 CHAIRMAN SOULES: Well, they use trial
17 dates on this.

18 MR. TINDALL: Well, in family law
19 cases you've got a whole series of trials. That's
20 a day long -- well, you do; you have day-long show
21 causes.

22 MR. MCMAINS: Well, at the moment,
23 this rule doesn't apply to the family law anyway.

24 MR. TINDALL: Okay. As long as I'm
25 not --

1 MR. O'QUINN: I don't understand why
2 this rule doesn't apply to family law cases.

3 CHAIRMAN SOULES: I think it may.
4 They use "trial date" and "trial setting". Either
5 one is fine with me, whichever. Does it matter to
6 anybody?

7 JUDGE CASSEB: Mr. Chairman, subject
8 to being overruled again by the Chair, I think
9 you've gotten into the philosophy right now on
10 that vote and did not address the deal as you say
11 who is commissioned to do. Show the conflict and
12 then try to resolve the conflict with it, the
13 existing Rules of Civil Procedure. Now, I'm
14 saying we have gotten away from that and take a
15 vote to do away with this whole thing, that, to
16 me, getting into the philosophy of this thing.

17 I'm telling you, personally, I always have
18 been against it, but what I'm saying is, we're
19 getting off track here. And if we're going to
20 start getting into philosophy on these rules, we
21 ought to address to all of them once and for all
22 and not keep jumping around.

23 Now, if these rules, as they stand here, are
24 in conflict with the Rules of Procedure that we
25 are on now, we ought to do it like you have been

1 doing right along.

2 CHAIRMAN SOULES: Some of that did and
3 some of the discussion was off point, and I can
4 see that. And I appreciate your bringing us back
5 on track. The next changes that we had on Page 6,
6 that was to change, and I'll have to go through
7 all these in order -- because the last bears on it
8 --

9 JUDGE CASSEB: Why don't we agree to
10 quit at 5:30, Luke, seriously.

11 CHAIRMAN SOULES: We're not going to
12 resume on these tomorrow, but we can adjourn.

13 MR. MORRIS: If we're not going to
14 resume then, I think that we -- if we're going to
15 do a philosophical-type vote, we ought to sure try
16 to get that in before we quit.

17 CHAIRMAN SOULES: Okay. Let's do that
18 but first I'd like to get a vote that will you
19 will refer the changes back to the subcommittee
20 and whatever, you know, sort of like we did the
21 Appellate Rules, that we can express to the
22 Supreme Court the matters that we did bring up
23 earlier as being our requested changes.

24 Let me just tell you what they are so that
25 nobody is surprised. We changeed "family law"

1 into "title," delete the provisions to local rules
2 in F and G so that all family law matters are
3 controlled by Rule 4 and not by variance of
4 various local rules.

5 JUSTICE WALLACE: Luke, on page 7
6 there we changed "child custody" to
7 "conservatorship."

8 PROFESSOR EDGAR: C-3.

9 CHAIRMAN SOULES: C-3, "child custody"
10 was changed to "conservatorship shall order."
11 That takes care of the family law parts on Rule
12 5. That needs to be scrubbed out against Rule
13 185, "sworn account rule," which we didn't have
14 time to do but we know we have to. Then on
15 page 9 --

16 PROFESSOR EDGAR: Signing of judgment.

17 CHAIRMAN SOULES: "Defer signing of
18 judgment" under B-3, instead of "entry of
19 judgment," the same problem we've had; that should
20 be "defer signing of judgment."

21 PROFESSOR EDGAR: And then C-1, same
22 thing.

23 CHAIRMAN SOULES: And C-1, the same.
24 Change "entry" to "signing." We did not have
25 anything on Page 10.

1 PROFESSOR EDGAR: I think on Page 10 --

2 CHAIRMAN SOULES: Maybe we did.

3 PROFESSOR EDGAR: No, four lines from
4 the bottom of E, the word "then" shouldn't be
5 there.

6 JUSTICE WALLACE: "Occurs," and then
7 strike "then."

8 PROFESSOR EDGAR: Yes, sir.

9 CHAIRMAN SOULES: The word "then"
10 should be deleted. Okay, strike that. And then
11 we've got to revise a statute reference whenever
12 it gets codified for 200-A on Page 11. And then
13 on Page 12 we have to signal a change in 18-A to
14 change a word. Rule 18-A was written whenever the
15 office of the presiding judge of the
16 Administrative Judicial Region was called a
17 Presiding Judge of the Administrative Judicial
18 District. That's not a big deal there.

19 On Page 13, we have a question as to whether
20 or not E applies to all budgeting in all courts or
21 with just the budgeting for the Administrative
22 Region, and that's on the record in our
23 subcommittee meeting and the Court can look at
24 that and decide. And then on Page 14 at the top
25 on item C.

1 PROFESSOR EDGAR: Page what?

2 CHAIRMAN SOULES: Page 14.

3 PROFESSOR EDGAR: Page 13.

4 CHAIRMAN SOULES: Do we have a change
5 there?

6 PROFESSOR EDGAR: 9-B, third line from
7 the bottom, delete "to be in effect."

8 CHAIRMAN SOULES: I'm sorry. Where is
9 that now? Page 13.

10 PROFESSOR EDGAR: Third line from the
11 bottom on Page 13.

12 CHAIRMAN SOULES: Okay.

13 JUDGE CASSEB: To do what?

14 PROFESSOR EDGAR: Delete the words "to
15 be in effect," and that then ties in with Rule C,
16 which you're going to give us.

17 CHAIRMAN SOULES: That's right. Thank
18 you, Hadley. Okay, then we get over here to C at
19 the top of Page 14. It should be changed to read,
20 "Submit the local rules," and this is the
21 presiding judge of the --

22 JUDGE CASSEB: Local administrative.

23 CHAIRMAN SOULES: "The local
24 administrative judge will submit the local rules
25 adopted by their courts to the presiding judge of

1 the administrative region for review, comment and
2 approval before they are furnished," is the way
3 the Rules of Civil --

4 JUDGE CASSEB: Take out the word
5 "transmitted"?

6 CHAIRMAN SOULES: The word "furnished"
7 is used in the Rules of Civil Procedure;
8 "furnished" instead of "transmitted."

9 JUDGE CASSEB: Okay.

10 CHAIRMAN SOULES: " -- to the Supreme
11 Court." And add "for approval pursuant to Tex R.
12 Civ. P. 3-A."

13 JUDGE CASSEB: 3-A?

14 PROFESSOR EDGAR: Yes.

15 CHAIRMAN SOULES: We have got Page 15,
16 Rule 9, that will now be 10. The local rules --
17 other than that, that's the only change.

18 PROFESSOR EDGAR: Since each county is
19 going to have to do it, then maybe "each" should
20 be proper, because each county is going to have to
21 adopt local rules, are they not, which will
22 ultimately be approved by the Supreme Court?
23 Isn't that what I was told?

24 CHAIRMAN SOULES: Right. Well,
25 actually, some of them. In the multi-district

1 counties, I guess that's okay, too.

2 PROFESSOR EDGAR: So it would be each
3 county.

4 JUDGE CASSEB: They have them in each
5 county now.

6 CHAIRMAN SOULES: In multi-county
7 districts the rules can be different in the court
8 in Zapata County and Webb County for the same
9 court. All right, Judge.

10 MR. TINDALL: Yes. Because you have
11 another judge overlapping from another district
12 that comes in.

13 JUDGE CASSEB: So you have got
14 overlapped in some, right, and then you got the
15 terms? You still got terms there you know.

16 CHAIRMAN SOULES: Okay, Hadley, I guess
17 I wasn't following you. We just insert "local"
18 and do we make any other changes?

19 PROFESSOR EDGAR: Just insert "local."

20 CHAIRMAN SOULES: No other changes on
21 15?

22 PROFESSOR EDGAR: No other changes.

23 CHAIRMAN SOULES: And then at the end
24 on Page 16, add a little "i." It says, "Local
25 rules shall not conflict with these rules."

1 "These rules," that's a term that's used all
2 through, "these rules" and that's it. Anybody
3 object to those or got any additional ones?

4 JUDGE CASSEB: We have got "effective
5 date."

6 CHAIRMAN SOULES: Effective date. We
7 talked about that one. Okay, now we're ready to
8 philosophize, and I don't say that lightly. I
9 know I'm serious. Who wants to start?

10 MR. BEARD: Luke, are we going to have
11 a bigger attendance tomorrow?

12 CHAIRMAN SOULES: I don't know.

13 MR. BEARD: It's not a very fair
14 representation of this committee for us to vote on
15 philosophy, I don't think.

16 CHAIRMAN SOULES: This committee was
17 notified in writing more than once that this day
18 would be the day to pass on these rules, and the
19 Chair can do no more than notify everybody of the
20 schedule. We've got 661 pages of other business
21 to tend to, and we'll be lucky to get through the
22 important parts of it tomorrow and Saturday.

23 PROFESSOR EDGAR: I assume then we
24 will not discuss this matter tomorrow at all.

25 CHAIRMAN SOULES: We're through with

1 the Administrative Rules for this session, and I
2 don't know whether we will get another shot at
3 them.

4 JUDGE CASSEB: I think, then, let them
5 express what they want to express and we don't
6 have to take any kind of a vote.

7 CHAIRMAN SOULES: That's right. I'm
8 not expecting a vote, but put everything on the
9 table that you wish.

10 MR. BEARD: I don't think the Court is
11 going to pay a lot of attention to us, whatever we
12 would vote with the limited group we have here.
13 That's all I'm saying.

14 CHAIRMAN SOULES: I know and I'm
15 sorry. It's still not 5:30, and this meeting was
16 scheduled to last until 5:30. Who wants the floor
17 first?

18 MR. TINDALL: I want to talk about the
19 disposition rates. I'm not here to get some
20 verbal broad-side on the rules. I want to try to
21 work with what's been presented to us but be
22 serious about recommending from this committee a
23 change on family law cases.

24 The rules as presently proposed treat all
25 family law cases the same and that's simply

1 wrong. An action brought for temporary orders
2 where the couple is just breaking up, an action
3 brought by the Attorney General for paternity of a
4 child to get support, an action by a mother to get
5 her child support enforced are totally different
6 creatures from a couple that's been married for 35
7 years and going through the pain of a divorce.

8 And we in the counsel have struggled with
9 this and have tried to come back with different
10 sets of requirements for the courts to give
11 expedited hearings on matters that involve a need
12 for temporary orders when they're in the house or
13 there's been a grab of furniture or cars and no
14 one is getting paid. Those cases need to be
15 mandated and be given expedited hearings.

16 Paternity cases where children are not
17 getting support need to be given expedited
18 hearings. People that are not getting their
19 orders enforced for support ought to be given
20 expedited hearings. And we proposed far greater
21 disposition rates than what's in these actions.

22 Now, the other side of that, though, is it is
23 wrong in the counsel's opinion to start forcing
24 the disposition of the divorce case, not these
25 other matters that I don't want to get mixed in.

1 And what we have urged is that the divorces not
2 fall within this 90, 180 and 360, except when any
3 party files a motion for disposition.

4 Now, short of that it is wrong to start
5 mandating the divorce cases that are going to be
6 set. Now, socially, that is wrong. The courts
7 are not prepared for it. And it's not a problem
8 in the courthouse of getting divorces set if
9 that's what you need. The problem is you can't
10 get the parties controlled at the time of
11 separation or the orders are not being enforced or
12 children can't get paternity cases heard. That's
13 the problem on the early end.

14 And I urge this committee to accept -- I've
15 worked with Judge Thomas on this; our counsel is
16 unanimous on this; trying to make some
17 sophistication about family law cases and not just
18 throw them into cases in the pot of liquidated
19 monetary claims, as they are vastly different.
20 And I think that that makes a sensible change in
21 these rules that we can live with.

22 JUSTICE WALLACE: Let me understand
23 what you're asking, Harry, that you leave -- you
24 take divorce itself and put it over in 3 with
25 other civil cases?

1 MR. TINDALL: It can be that the
2 deadline for disposing of 50 percent of all
3 divorce cases not be 90, 180 and 360 from the time
4 that they are filed, but 90, 180 and 360 from the
5 time any party files a motion for disposition.
6 Because so much of our work involves people filing
7 and then I talked to Hadley, yes, we know our
8 clients are talking and things are calming down.
9 And we don't want to set it and we hadn't gotten
10 information from the pension plan in New York.

11 I mean, there are things we do informally and
12 as long as we're talking, it doesn't make sense if
13 we start getting pressed by a trial docket on a
14 case. And 90 percent of these cases end up
15 getting resolved out of court. And, I think,
16 socially, that is a policy that should not be
17 disrupted. We all know, if you have handled any
18 of these cases, that the trial can be very, very
19 embittering on the parties.

20 So we don't mind expedited handling of cases,
21 but let's think of where it needs to be done and
22 not on these matters down the line. And we're not
23 trying to say that, "Hey, you have got a hot
24 case. All the lawyers have got to do after that
25 60-day waiting period is file a motion for

1 disposition and he's right on track." But if
2 not --

3 JUSTICE WALLACE: Will you put your
4 proposal, those changes, in writing and send it to
5 us.

6 MR. TINDALL: I will, absolutely
7 because --

8 JUSTICE WALLACE: Now, Friessen
9 admitted at the Task Force hearing, he really gave
10 practically no thought to family law matters. We
11 had a little problem getting the report from
12 you-all's committee in, and we just didn't have
13 input we needed. So if you do that, I don't think
14 that we will have all that problem with it.

15 MR. BEARD: I urged that same argument
16 at the Task Force and it didn't come out that
17 way. In other words, if you want on a fast track,
18 one of parties the can move for it; otherwise,
19 just let it sit there.

20 MR. TINDALL: That's right, because
21 that parlays back --

22 MR. BEARD: Dean Friessen doesn't
23 really, I don't believe, believe in that.

24 MR. TINDALL: I called San Diego. I
25 was concerned that maybe we are not going to

1 change the way they do in California, and this is
2 the truth. I called San Diego; I called Los
3 Angeles; I called San Francisco, and I talked to
4 leading family law attorneys out there. They
5 don't do any of what's here so I'm not trying to
6 -- you get to Rule 4 on family law cases, they
7 want you, within 60 days, to file a disposition
8 proposal for settlement of the case. Now, that
9 can't be done. There's no way that anyone in a
10 middle-class divorce case can possibly be ready to
11 exchange a settlement proposal in 60 days. Dean
12 Freissen's reply to that was, "All you do is go
13 down and get an extension." Well, again, if
14 either party wants to make a motion for
15 disposition they can, but it's not right to put
16 everyone into the fast track and then make them go
17 to the court and get back out. That's all I'm
18 saying. I could go into some other problems that
19 you would have. And oftentimes attorneys -- or
20 there are third party interventions like
21 grandparents, and there are a whole lot of other
22 little problems you get into. But basically,
23 until either agreed litigant seeks to move on it,
24 I don't see what is being done socially here to
25 put everyone into this scheme.

1 JUDGE THOMAS: Judge, the other thing
2 is that, at least the memo that I saw, is that
3 Friessen did look at and closely examine the
4 recommendation of the counsel. But then some of
5 the conclusions that he came up with in the
6 redrafting which we have got here, which he says
7 addresses the problems we still don't think
8 addresses the problems.

9 An example being Rule 4 on page 7, which
10 talks about, yes, we did get a concession on a
11 motion to enlarge time for mediation and
12 counseling. But the experience would indicate
13 that you cannot have any meaningful mediation or
14 therapeutic counseling under some kind of
15 arbitrary time limit. You-all have to settle this
16 in 60 days or go back to court, and what's the
17 judge going to do then? So he did -- he got the
18 report and he looked at it, and at least the memo
19 that I got -- and I guess what I'm asking you is,
20 would you like for us to restate it again, because
21 I don't think that what he came up with addressed
22 what we were asking.

23 JUSTICE WALLACE: I don't have a copy
24 of that report. Friessen must have the only one
25 because I have not seen that.

1 MR. TINDALL: We have it. His
2 response to our proposals? I have it right here.

3 MR. BRANSON: I think what the Judge
4 was suggesting is that you make the recommendation
5 just like the Court directed.

6 MR. TINDALL: That's fine. I would be
7 delighted to do that. Well, those are the
8 feelings we have. The other thing that I think we
9 really need some clarification on here, Luke, is
10 whether Rule 3 is an overlay on Rule 4. If it is,
11 then I think we have got to really -- I sort of
12 could get into a mental lapse here on some of the
13 complexities of about what you do when there is
14 not a disposition order in certain kinds of cases
15 and third parties have been enjoined. Because I
16 think the rules ought to stand autonomously,
17 rather than having to read 4, but then see how
18 that matches back on Rule 3.

19 CHAIRMAN SOULES: Well, you have to
20 have discovery in some family law cases. That, to
21 me, is governed by the schedule. Maybe Rule 3
22 doesn't come in until there is a request for
23 hearing.

24 MR. TINDALL: Well, if it's certified
25 as a complex case, then it kicks over. But

1 otherwise, I think that until a judge says,
2 "Folks, this is real complicated." There is, you
3 know, many businesses to evaluate and all kinds of
4 things. But I think it should be clear that Rule
5 3 does not apply in the case that says there is an
6 overt act saying that, "Hey, you've got to live
7 under Rule 3."

8 CHAIRMAN SOULES: Why?

9 MR. TINDALL: Why?

10 CHAIRMAN SOULES: Yes. Why shouldn't
11 you be under a discovery schedule and a
12 disposition schedule after -- I understand that
13 you are saying that -- and all I am trying to do
14 is make a record here of your points.

15 I understand that you feel that the trial
16 scheduling that is imposed by Rule 3 has some bad
17 effects on family law matters particularly,
18 reconciliation and things of that nature. And I
19 made remarks earlier that indicate to you and the
20 others that I agree with that.

21 MR. TINDALL: Reconciliation,
22 mediation or just the out-of-court peaceable
23 settlement of the case.

24 CHAIRMAN SOULES: I don't know whether
25 you will be able to settle that or not, the family

1 law section, but you ought to be able to get a
2 delay in the trial scheduling while that sort of
3 thing goes on. But once you want a setting,
4 you're going to have -- you conclude you're going
5 to have a trial. Why shouldn't 3-C apply just
6 like all the rest? You have got a discovery
7 schedule; you have got to get your discovery done;
8 You have got to have a cut-off 30 days before
9 trial. Because then you're just into an old --

10 MR. TINDALL: Because Rule 4 as
11 written has a whole other set of rules on the
12 exchange of disposition for proposals, and you
13 have cases to be certified.

14 CHAIRMAN SOULES: They are not
15 discovery. In other words, those are things that
16 are in addition to the trial track that is
17 addressed in 3.

18 MR. TINDALL: If it's only discovery,
19 I'd have to go back and examine.

20 CHAIRMAN SOULES: It's discovery,
21 trial setting.

22 MR. TINDALL: But with discovery, I
23 have no problem, once it's certified as a complex
24 case to kick back up over on that.

25 CHAIRMAN SOULES: Well, no, you don't

1 have to certify it. Either party may, without a
2 waiver of their rights, file with the Court a
3 proposed plan for completion of discovery in
4 preparation of trial, and trial setting, bang, you
5 are in 3 even though you are in a divorce case.
6 The other side can reply and you can be in a
7 simple case. Either side can ask for a scheduling
8 hearing in a simple case.

9 MR. TINDALL: Luke, you might be right
10 on discovery, on the issue of discovery alone.

11 CHAIRMAN SOULES: And preparation of
12 trial and trial setting. And that's what 3 deals
13 with, those three things. Either complex or not
14 complex or just don't worry about it. Then you'll
15 have 90 days for discovery, and it's got to be
16 finished 30 days before trial. But maybe 3
17 shouldn't attach to a family law case until
18 something is done. For example, I think if the
19 parties move for a trial date -- this is me
20 talking -- 3 ought to apply. Because you have now
21 said, "We are going to have a trial." And a trial
22 judge ought to have that on the pretrial schedule.

23 MR. TINDALL: I agree. Once you move
24 into not just having a divorce on file, but one
25 that is set for trial.

1 CHAIRMAN SOULES: If you want to get
2 a setting, you ought to be able to be willing to
3 live under Rule 3, for discovery, trial
4 preparation and a trial setting. In other words,
5 fine, if you want to argue that we ought to have a
6 kick-off point of some kind or a trigger.

7 MR. TINDALL: Well, I thought Rule 3
8 was getting into a lot more than just discovery.
9 I thought Rule 3 also dealt with trial settings.

10 CHAIRMAN SOULES: It does, discovery,
11 trial preparation and trial setting, all three of
12 those things.

13 MR. TINDALL: I'm not sure how trial
14 settings impact back on what we have discussed
15 about in terms of segregating various types of
16 family law cases, but I don't have any discovery
17 or trial preparation because at that point one of
18 the parties has moved for disposition, which would
19 trigger it being a contested matter.

20 CHAIRMAN SOULES: So they may work
21 together, but you would want to motion for
22 disposition to be a trigger as opposed to just the
23 filing of the lawsuit to be a trigger?

24 MR. TINDALL: Right.

25 CHAIRMAN SOULES: And I think you're

1 probably going to get some sympathy with that,
2 just as a matter of state policy to -- it all
3 comes down to a trial until --

4 MR. BEARD: But once a party says, "I
5 want to get this over with," then it gets on that
6 -- whatever the fast track is.

7 JUDGE THOMAS: Then it gets on the
8 fast track.

9 MR. BEARD: That's right.

10 CHAIRMAN SOULES: Unless it's exempted
11 from that as a complex case, in which event it is
12 on a complex track. Okay. Let's hear from Frank
13 Branson now on his point.

14 MR. BRANSON: I just want to make
15 certain that with the work that has been done
16 today, I have a fear that the Supreme Court might
17 look at the changes that have been recommended and
18 take it that we're overall recommending that these
19 changes make this acceptable. And if we are to
20 serve indeed in an advisory capacity, it seems to
21 me like that we should be able to say whether or
22 not we advise the Court to adopt these rules even
23 if they make the changes, Luke.

24 CHAIRMAN SOULES: That's what we're
25 hearing right now, and I would like to have your

1 view on that; I'm sure the Court would.

2 MR. BRANSON: I don't think the rule
3 should be adopted.

4 MR. MCMAINS: I think what he's saying
5 is he wants to vote on it.

6 MR. BRANSON: Yes. That's what I'm
7 saying, but I think Luke is not saying that.

8 CHAIRMAN SOULES: Well, we can vote.
9 The point was made earlier that we are down now to
10 13, and it is just now barely time to adjourn this
11 meeting. We started with about 25 or 30, I think,
12 or 25. You know, attendance is not compulsory at
13 this meeting and neither is participation. It's
14 just an opportunity. But here we are with 13. If
15 we want to vote with the 13 of us, that's fine,
16 let's vote, and let's talk because let's let our
17 voices be heard. We came to be heard; and let's
18 be heard.

19 MR. LOW: And apparently the ones that
20 left weren't interested enough to vote and the
21 ones that stayed feel strongly enough about our
22 position that we're here to vote.

23 CHAIRMAN SOULES: So let's be heard
24 and let's get it on the record.

25 MR. TINDALL: As much as Frank -- as

1 much as we would like to vote up or down, we've
2 talked about a lot of changes here today, some of
3 which have been constructive and good. And I
4 think -- are we going to vote on it just as here?
5 That's kind of an idiotic thing.

6 CHAIRMAN SOULES: We can vote on it as
7 Ernie proposes it, and we can vote on it as we
8 have had input at this juncture.

9 MR. TINDALL: Then I'd like to see --
10 there were very complex discussions here today.
11 And we've got some things I'd like to see
12 incorporated.

13 CHAIRMAN SOULES: I think that
14 certainly I will transmit to the Court anything
15 that comes to me in writing to supplement this
16 record.

17 MR. BRANSON: I'd like the opportunity
18 to address the system in the manner in which this
19 problem is addressed by the Task Force.

20 CHAIRMAN SOULES: Okay. Let's hear
21 it.

22 MR. BRANSON: In the 17 years that
23 I've had the privilege of practicing law in this
24 state, I have never witnessed any group of
25 attorneys who did so little in an effort to solve

1 what was alleged to be such a great problem. It's
2 not that the attorneys on the Task Force, nor the
3 Chair, did not have positive goals in mind, but it
4 appeared to me, as a member of the Task Force,
5 that Dean Friessen's proposal had been accepted by
6 the Chief Justice before the Task Force ever
7 studied the problem, and that any attempt to
8 address Dean Friessen's recommendations were
9 immediately squelched by the Chief Justice.

10 And I have all the respect in the world for
11 the Chief Justice and for his opinions, but I do
12 perceive him as merely one member of Supreme Court
13 of Texas. And I do believe that the rules that
14 were promulgated by Dean Friessen would be very
15 much like a grandmother with four children, one
16 named Harris, one named Travis, one named Bexar,
17 and one named Dallas, at a time when Bexar got
18 sick, giving Castor oil to all four children. And
19 I do not perceive that there was sufficient
20 evidence presented to the Task Force to mandate
21 the drastic changes that Dean Friessen
22 recommends.

23 And I think it would be a substantial
24 miscarriage of justice to totally overhaul our
25 entire Rules of Procedure in order to effectuate

1 changes that may be needed in five percent of the
2 counties of this state. And I think a new Task
3 Force, if a Task Force is the method desired to
4 address the problem, should be appointed from
5 practicing judges and lawyers in the State of
6 Texas and from law professors from the State of
7 Texas, who have practiced in our courts regularly
8 and are familiar with our problems, and an
9 individual county report be made by that Task
10 Force, and individual problems within the counties
11 be addressed as opposed to attempting to cure an
12 overall system which, even according to Dean
13 Friessen's reports to the Task Force, was not sick
14 as a whole.

15 When the Dean addressed the problems, he was
16 addressing problems in Harris County and one or
17 two other counties and making every lawyer and
18 every citizen of the State of Texas change a
19 well-proven, well-functioning system to address a
20 few acute problems.

21 And I object to the manner in which was
22 handled by the Task Force. I object fervently to
23 the manner in which questions about Dean
24 Friessen's recommendations were addressed by the
25 Chief Justice. I really felt pressure being

1 applied to members of that Task Force like I have
2 not seen in my practice of law. And I was sorely
3 disappointed in the entire process and would like
4 to go on record, both as member of that Task Force
5 and of this Advisory Committee, objecting to the
6 entire process and ask that a fair, impartial body
7 be created to look at on a county-by-county basis
8 what problems, if any, exist.

9 MR. SPARKS (EL PASO): Well, I have a
10 different perspective because I do view that we
11 need change, and I do view that the concept of
12 these rules is one that can accomplish some
13 change. However, I'm not in favor of the rules
14 simply for this reason, is that they are not going
15 to work. And that is because the dockets and the
16 filings are so numerous that that system is only
17 going to work if you can get trial settings.

18 And every lawyer in the state, those lawyers
19 in this room, know when we go on any of these
20 tracks, the probability is we are not going to go
21 to trial when it says we are going to go to
22 trial. And that's the reason I don't think the
23 rules are going to work and I think it's just
24 going to create more chaos than we have because
25 we're going to be operating under rules that

1 practically are not going to work because we're
2 not going to go to trial. And if you're not going
3 to trial, they're not going to work.

4 You can't go the 270 days with an alleged
5 special setting, it falls through and you're not
6 supposed to have anymore discovery. It just
7 doesn't make sense. If we could go to trial, I
8 think the rules have a shot of working. And I am
9 in the practice of defending lawsuits, and I am
10 acutely aware and try to get my cases up because
11 without going into the merits of prejudgment
12 interest, and applying inability to compute them,
13 it is something that we're trying to do, and that
14 is, to get trial settings and get the liability,
15 if there is, settled on behalf of the defendant.

16 But I don't think these rules are going to
17 work because I think we can all sit down there and
18 see that the trial settings are not available with
19 the pending docket, and we're going to be
20 operating under rules where the goal of trial is
21 not there. And that's why I think there is great
22 difficulty.

23 MR. LOW: I would join Frank first,
24 and I would also add this: I think that the
25 Supreme Court would be -- I think this program is

1 going to be unpopular with the lawyers, just like
2 the federal judges. They don't care how unpopular
3 it is; they are appointed for life. But this is
4 the situation, and I think our Supreme Court would
5 have a different relationship with our Supreme
6 Court. And I think the rules are arbitrary. I
7 don't think they are reasonable.

8 I think the approach from it is to approach
9 it from the other end, like Judge Casseb does with
10 the old cases, look at your tried/dismissed docket
11 and move it that way. I think that would be the
12 proper way to approach the thing rather than just
13 the rules. Now, I disagree with the concept.
14 You're going to have Administrative Rules. Well,
15 you can call it what you want to. These are rules
16 of substance that should be in the Rules of Civil
17 Procedure. You have got to go down there.
18 Somebody says, "well, here's my Rules of Civil
19 Procedure; here's my Administrative Rules." Even
20 though they're not in conflict you got two sets of
21 rules.

22 Now, the way these things are drawn, you have
23 got the rules like what the clerk -- perfunctory
24 things that the presiding judge should report
25 that. That's something that they can handle about

1 the reporting. But I think the substance of the
2 rules, that affects the lawyers and the litigants,
3 are such that, if you're going to do it, it ought
4 to be in the Rules of Civil Procedure.

5 We have rules sufficient now to take care of
6 the problem. It's a question of getting the
7 judges and the lawyers to do it. And I don't
8 think this is the right approach, and it's
9 probably one of the most unpopular proposals I
10 have seen in my area from the judges and the
11 lawyers.

12 MR. MCMAINS: I'll second the
13 popularity problem. I spoke just a couple weeks
14 ago with the state T.A.D.C. , the Texas
15 Association of Defense Counsel meeting. And my
16 understanding is that there was a widespread
17 unpopularity of rules. This is not something that
18 is politic with either docket, either side of the
19 docket, from a personal injury standpoint.

20 And certainly, in fact, the percentage of
21 cases I think -- I'm not sure that it's not true
22 statewide the percentage of cases. Family law
23 represents a very substantial portion of it, and
24 yet it was given very short shrift in the entire
25 formulation of these rules, which I think is

1 indicative of, in a way, attempting to do
2 something just -- it's kind of the rocking chair
3 attitude of just making movement and making it
4 look like we're moving but we aren't going
5 anywhere. Because like Sam has indicated, the
6 real issue is not even addressed in these rules
7 and that is your right to get a trial fast and not
8 whether or not you get a trial setting fast,
9 because we got trial settings, for instance, in
10 Nueces County; I got them through 1987 already.

11 And unless you're going to move those off,
12 there's no room for anything else. There's only
13 so many trials that the Court can dispose of. The
14 disposition of the cases that need to be
15 encouraged, and the way to do that is from the
16 other end, and that is, to make certain when the
17 trial dates actually are and that you're going to
18 get a trial, and to do that, you've got to have
19 the courts, the courtroom, the judges and the
20 personnel to make sure you get a trial. And we
21 don't have any provisions in regards to expanding
22 that or what happens.

23 For instance, in these rules what happens
24 when you get a continuance passed under either
25 rule, whether it's in the Administrative Rules

1 there. Where are you when the next trial setting
2 is? This thing all assumes that there's only
3 going to be one trial setting and that's it. But
4 if that trial setting is gone, then what do you
5 do? You're going to have to kick somebody else
6 out next week if you keep it on the docket, or are
7 you going to have to continue moving everybody a
8 week down the way? And there's just nothing
9 addressed in these rules. The assumption that is
10 false is that that trial setting date can be met,
11 and that assumption is simply physically and
12 economically untrue. It's a premise that is
13 insupportable under the facts, in my judgment, and
14 under the statistics and is one of the problems we
15 have now.

16 We have now, I believe, in most counties
17 parties willing to go to trial on their lawsuits
18 if they could get one, and can't; can't get
19 there. And others are blocking it because they
20 claim they want a trial, and then when they get up
21 to the trial date, it doesn't happen. And there
22 are courts sitting around vacant that don't have
23 trials going on, but we don't have any real good
24 way of good communication for getting cases in
25 there or, in some respects, some of those cases

1 may be the fault of the judges who aren't really
2 all that interested in working all that hard in
3 that area. And that's not an indictment; it's
4 just that there are problems that are isolated and
5 this is not a universal question.

6 But this assumptions, upon which these rules
7 are promulgated, are false. And I think that's
8 the biggest thing; I think it's misleading. I
9 think it's misleading to the citizens or the Bar
10 to suggest that this is going to solve anybody's
11 problem. As far as I can tell, it is designed
12 principally to solve Harris County's problem, and
13 it isn't going to solve Harris County's problem,
14 is what everybody in Harris County has told me,
15 that they don't think that it's going to do one
16 bit of good. Because the problem they have got is
17 the backlog, which these rules don't even
18 address.

19 So, I mean, the long and the short of it is,
20 I think it's a whole lot of window dressing and
21 not much meat may cause a lot of grief and is not
22 going to do a great deal of good.

23 JUDGE THOMAS: One of things, when it
24 starts off with the purpose, it says, you know,
25 that we're going to provide for a "just and

1 expeditious disposition." And I think that if you
2 look at Rule 3, 4 or 5, that they really don't do
3 that.

4 And that gets back to what Rusty was saying.
5 Because I can see in all of those areas where you
6 have actually increased court time, you've
7 increased hearings and really increased
8 litigation. And, for instance, family law -- the
9 Dean told me, has told other judges, has told
10 representatives of the counsel, that, for
11 instance, frankly, family law is not where the
12 problem is. That is not what has been the big
13 complaint in the court system throughout the
14 state. But once we get the rules, they have done
15 away with maybe the one thing that we do best, and
16 that is, agreed property settlements and
17 uncontested divorces, because they've thrown some
18 requirements in here that just create more
19 paperwork. So what the lawyers are going to start
20 doing is having to create paperwork to meet the
21 rules.

22 Another example would be the disposition
23 report that you have to find, and you have to file
24 it 60 days or so. And I can see the paperwork.
25 The lawyers will file their proposed property

1 disposition, but it's not going to serve the Court
2 and it's not going to serve the lawyers. Because
3 what they're going to say, their proposal will be,
4 "I want all of the community property and all the
5 separates that the other person can't prove." That
6 complies with the rule, but it certainly does not
7 help to expedite. And so I agree with the
8 consensus that the rules, while there is a good
9 purpose, and we can all use some change, they
10 don't do what we need to do and that is to get rid
11 of the backlog.

12 CHAIRMAN SOULES: Anybody else? Judge
13 Casseb, do you have anything you want to say in
14 reply to any of this?

15 MR. TINDALL: Luke, I want to put one
16 on the record. Harris County has, what I think
17 is, a totally indenfensible habit in our family
18 law courts and that is, they have dead weeks. If
19 there's one thing that ought to be dealt in local
20 rules, under these Administrative Rules, is to
21 abolish dead weeks.

22 Our family law courts take off the last week
23 of every even-numbered month. And it used to be,
24 Judge -- I think they might have gotten rid of it
25 when you were on the trial bench. Certainly, I

1 know, all the civil trial courts in Harris County
2 had dead weeks, six weeks a year wasted, valuable
3 trial time.

4 CHAIRMAN SOULES: What do they do?
5 They just don't do anything?

6 MR. TINDALL: They don't do anything.
7 They "catch up on paperwork." They don't try
8 cases for six weeks out of the year.

9 MR. ADAMS: I agree with many of the
10 comments that have already been said, and I'm not
11 going to reiterate them.

12 I do think that in the event that some rules
13 are promulgated, that there ought to be a
14 threshold level at which they become applicable.
15 And that if the courts are not performing at some
16 acceptable level, then these rules would be
17 triggered to help these judges that are not
18 performing. And maybe there are some other things
19 that could be done, too, some sanctions or
20 recommendations, or some publicity, or whatever,
21 to get some judges to be more productive.

22 But I don't think that any set of rules can
23 be designed that should be applied across this
24 state, and would be able to effectively deal with
25 the problems of moving cases across the State.

1 For instance, in Jefferson County, we have --
2 as we probably would rate the best in the state
3 with regard to moving cases. And our courts have
4 designed a system that works well, and they don't
5 need to be interfered with. And they ought not to
6 be penalized, and their individuality should be
7 recognized. And I think in the long range is the
8 history of the court administration, that having
9 various judges come up with ideas and demonstrate
10 and have the dockets around the state and judges
11 around the state be able to develop new ideas and
12 share new ideas, in the long run, will better aid
13 the administration of justice in trying to set
14 some rules in stone here for everybody.

15 MR. BRANSON: I move that this
16 committee vote to reject Dean Friessen's proposal
17 in toto.

18 MR. LOW: I'll second that motion.

19 CHAIRMAN SOULES: Before we vote,
20 Chief Justice Hill believes that a strong
21 statement to the legislature that our courts are
22 going to move cases faster and more efficiently
23 will get more help for the courts to try to
24 accomplish that task. That is one of the things
25 that's at the heart of this effort. I don't know

1 whether this is a way to do it or not. We have
2 certainly heard a lot of controversy about it all
3 over in this room and elsewhere, but that needs to
4 be said. I mean, that is what is one of the
5 things that's motivating him and the Court to
6 consider these rules whether they're adopted or
7 not is that they feel this will signal that there
8 is a system or there will be a system or there can
9 be a system that will improve the flow of cases
10 and the disposition of litigation if our judges
11 can just get enough help to meet these schedules
12 and move cases as indicated.

13 MR. BRANSON: Well, Luke, that may be
14 a conflict, but I'm not opposed.

15 MR. LOW: Let me say this. By my
16 seconding that motion, I'm not criticizing the
17 Chief Justice. I agree the problems and,
18 everything and, you know, I'm not saying that he's
19 wrong. It's just my opinion this is not the way
20 to do it. And I'm certainly not overlooking the
21 problem and he's recognizing the problem, and if
22 there is a problem, but I'm just saying I don't
23 think it's the way to do it.

24 CHAIRMAN SOULES: Okay. There are 12
25 here. Motion was made and seconded. Any further

1 discussion? Those who believe the rules should be
2 rejected show by hands. 9. Those who believe
3 that the rules should be passed, show by hands.

4 MR. BEARD: Well, are you saying "as
5 is" or the general idea? I vote that we should do
6 something and I don't object to all the general
7 idea. And there's not anything that the Court
8 puts out there that they cannot reverse. And I
9 believe that something needs to be done, and I
10 don't think the lawyers will ever agree on any
11 change.

12 CHAIRMAN SOULES: The vote is nine to
13 one, and two abstaining. I'm not voting as
14 Chairman. I vote that I think something needs to
15 be done. But I'm not sure -- I vote because I
16 think something needs to be done. But I'm not
17 sure.

18 MR. TINDALL: I think you can get a
19 unanimity on that. We all want our cases tried.
20 We all want hearings. We want adequate
21 personnel. I mean that's --

22 MR. MCMAINS: One other comment,
23 before we break up, that I would like on the
24 record, one of things which has been mentioned to
25 me in private by a number of judges, trial judges,

1 is, what are you going to do with a judge who
2 doesn't follow the rules? There are no penalties
3 in these rules. You do have reporting
4 requirements, and you have got kind of veiled
5 threats that might materialize in there, but
6 there's not really any enforcement mechanism in
7 here to require anything. And if a judge can't
8 give you a trial of that type because he's trying
9 something else, nothing should be done.

10 CHAIRMAN SOULES: Well, but until we
11 get an accountability, which is another word that
12 the Chief Justice uses, and he expects to achieve
13 that through here, he does not expect to be able
14 to get anything --

15 MR. MCMAINS: Don't get me wrong. I'm
16 not opposed to any of the statistical recording
17 stuff, as I don't think anybody is here. We're
18 talking about changing the way cases are set and
19 moved through the Court, not the Court reporting
20 on them. That's totally different. That's a
21 totally different issue in terms of
22 accountability.

23 MR. O'QUINN: Let me say something
24 here. Also, I don't think anybody in this room is
25 opposed to courts giving fixed times to try a

1 lawsuit. God knows, if that was the rule, I'd be
2 shrieking to pass it. What I think is going to
3 happen is we're going to force lawyers to get on
4 Draconian schedules to hurry up and wait and spend
5 lots of time on paper work and BS, and nothing is
6 going to happen.

7 The problem is the cases aren't getting
8 tried, not that the lawyers aren't doing the
9 discovery. And every trial judge in this state
10 has already had the power to solve that problem in
11 his courtroom. He can take all the cases that are
12 in there and say they're set and by God, they're
13 going to be tried. And I don't care if you've
14 done discovery or not; they're going to be set.

15 But what we have here now is a set of rules
16 that says the lawyers are going to have to do all
17 this work in a certain period of time and the
18 trial judge doesn't have to do a darn thing.

19 And I think what needs to be, is some rules
20 that says trial judges must go to trial unless he
21 can show and send a written copy of his reasons as
22 to why he didn't go to trial to the Chief Judge
23 like I have to send to my client a motion for
24 continuance. Let him explain why he didn't go to
25 trial. That's where the accountability needs to

1 be. And then he will put the heat on the lawyers
2 to do their job. But to put heat on me to do my
3 job does not get the case out of that trial court
4 because I can't put any heat on that trial judge.
5 So I say the problem is, come up with a set of
6 rules that puts the heat on the trial judge by
7 statistical reporting and by accountability of the
8 Supreme Court or whomever, as to why those cases
9 aren't being tried, and then he will put the heat
10 on the lawyers to get them ready. And a system
11 like that I am totally for. I am totally for any
12 system that gets cases tried quickly.

13 CHAIRMAN SOULES: Essentially, the
14 counties that are in good shape, are the counties
15 have hard working judges that cooperate with one
16 another for the disposition of cases.

17 MR. O'QUINN: Exactly.

18 CHAIRMAN SOULES: And the counties
19 that are in trouble are the counties that have a
20 number of judges who don't work hard enough and
21 many judges who won't cooperate with the others.
22 And until that problem is solved nothing we do is
23 going to take care of disposition cases.

24 MR. O'QUINN: Okay. There's a
25 district judge in Houston, Texas who was the

1 ancillary judge for this half of May, the first
2 half. During her responsibility as ancillary
3 judge, she walked out of her courtroom and went to
4 Europe on a vacation; she did not care. She put
5 the burden of her ancillary docket on the rest of
6 the judges. She just said, "I'm leaving. You
7 have got ancillary problems, go find somebody
8 else." Now how are you going to tell her to do
9 anything Monday?

10 She called a pretrial conference Monday she
11 had a courtroom full of lawyers with the air
12 conditioning off. Yes, sir, off, sitting there
13 for a pretrial status conference, she made
14 everybody sit there and all they had to do was
15 tell her what the status of the case was. And the
16 defense bar and the plaintiff's bar was berserk
17 and they finally concluded the only reason she did
18 it was to try to force people to settle cases.
19 She doesn't want to try anything. Yet the poor
20 lawyers are going to get discovery done on
21 Draconian basis to sit around and waste three
22 years to get a trial. We'll be adjourned until
23 8:30.

24 CHAIRMAN SOULES: Okay.

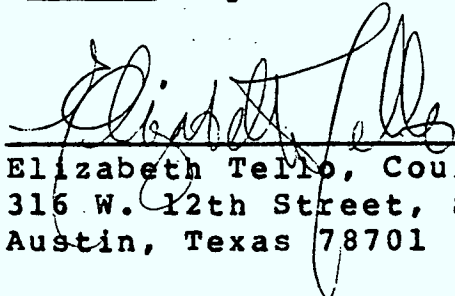
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STATE OF TEXAS ><
COUNTY OF TRAVIS ><

We, Elizabeth Tello and Chavela V. Bates,
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WITNESS OUR HANDS AND SEAL OF THIS OFFICE, this
the 3rd day of June, 1986.



Elizabeth Tello, Court Reporter
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3. <u>May 17, 1986</u>	<u>1</u>	<u>1</u>

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Defendant's Exhibits No. _____

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