SUPREME COURT ADVISORY BOARD MEETING
Held at 1414 Colorado,
Austin, Texas 78701
September 13, 1986

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INDEX

TEXAS SUPREME COURT

ADVISORY BOARD MEETING

September 13, 1986

CHAIRMAN SOULES: Let's bring this meeting to order and get started.

We're going to take the last paragraph on Page 8. Is there any controversy over the -- okay, I'm sorry. On Page 153 of the materials, the last paragraph of Rule -- proposed Rule 279 -- is all that's left of that Rule to work on today.

Hadley, is there any change in that current law?

PROFESSOR EDGAR: Yes, it just says that the words "legally" or "factually" have been added because lots of people have argued from time to time, "What is that, is that legally insufficient evidence or factually insufficient evidence?" And clearly it means, I think, legally sufficient, certainly after verdict. And since you can't make a factual insufficiency argument before verdict, we thought to remove any doubt about what that means, to let people know it means both. So that's why we were recommending that be included.

CHAIRMAN SOULES: Does that -- in effect, that's stating in the rules something the rule did not state, but which was understood by everybody to be the law anyway?

PROFESSOR EDGAR: Well, it wasn't understood by everybody because people argued about whether or not that meant legal or factual, when, any way you look at it, it means both. So, we just thought we would clean it up. It really has become somewhat redundant, maybe, but we were just doing that to make clear to the bench and bar what's --

MR. WELLS: Well, if it's legally insufficient, you make the objection before. You know, this kind of lets you hide behind the law, don't it?

PROFESSOR EDGAR: But you've always been able to do that by filing a Motion for Judgment N.O.V. We haven't changed the law any by this.

CHAIRMAN SOULES: This is what the law is. It just states it expressly, whereas the rule previously did not so state it.

PROFESSOR EDGAR: That's right.

CHAIRMAN SOULES: Any -- is there any

objection to this?

JUDGE TUNKS: I'm not sure I understood what change he made.

CHAIRMAN SOULES: All right, Judge. As Hadley was saying, in the past, raising insufficiency of the evidence --

JUDGE TUNKS: Factual insufficiency.

CHAIRMAN SOULES: -- was done after verdict -- either factual or legal insufficiency.

For example, even though you can object to the submission of an issue based on legally insufficient evidence -- there is no evidence to support it -- even if you did not do so after verdict, you could move for a Judgment N.O.V. because there was no evidence to support it. So you could actually raise that after verdict even though it was not raised before.

JUDGE TUNKS: But you can't ask for -- what bothers me is this terminology here. It appears to state -- to infer that a basis -- that an objection to an issue because there is factual insufficiency is sufficient to keep it from being submitted. That is not correct.

CHAIRMAN SOULES: That's correct. You -- there's no question that you properly stated

the law there.

JUDGE TUNKS: The fact that this language suggests that to me might also suggest it to somebody else. The claim that the evidence is factually insufficient may be made after the submission to the jury.

PROFESSOR EDGAR: Well, that's a correct statement of the law because that's the only time it can be made.

JUDGE TUNKS: That's right. But it infers that factual insufficiency could be made before the case is submitted to the jury.

CHAIRMAN SOULES: Of course, it cannot do so.

PROFESSOR EDGAR: I don't read that --

JUDGE TUNKS: I think probably Hadley corrected it. I just didn't understand him clear enough. I think you took out the word "factually" here; did you not?

PROFESSOR EDGAR: No, you see, the rule as it now reads just says, "a claim that the evidence was insufficient to warrant the submission may be made for the first time after verdict."

JUDGE TUNKS: Yes, sir.

PROFESSOR EDGAR: And people have, from time to time, said, "Well, does that mean legally insufficient evidence or factually insufficient evidence?" Well, actually it means both, and that's what we've said.

JUDGE TUNKS: Well, you cannot possibly file an objection to the submission of an issue on the grounds that the evidence was factually insufficient to sustain it -- to void or submit it.

PROFESSOR EDGAR: Does this indicate that you can?

JUDGE TUNKS: I think it does. It did to me.

PROFESSOR EDGAR: Well, that's not our intention.

JUDGE TUNKS: Well, that's all right.

PROFESSOR EDGAR: And certainly that was not --

JUDGE TUNKS: I just wanted to clear that up in my own mind.

CHAIRMAN SOULES: All right, any further discussion on final paragraph of Rule 279?

Okay. Those in favor of recommending the Supreme Court adopt this final paragraph, show by

hands. Opposed? That's unanimously recommended, then.

MR. RAGLAND: Lou, may I ask a question?

CHAIRMAN SOULES: Yes, sir. Tom Ragland.

MR. RAGLAND: As usual, I'm about two days late on things. In the first paragraph, third line -- we were talking about that yesterday -- did we leave the word "limiting" in there -- "limiting construction"?

CHAIRMAN SOULES: No, it was taken out.

MR. RAGLAND: Taken out?

CHAIRMAN SOULES: Yes, sir.

PROFESSOR EDGAR: We deleted the whole paragraph, not just that part of it, Tom.

CHAIRMAN SOULES: All right. Now, we're going to move to Rule 286.

MR. SPARKS (San Angelo): Can you tell me how Rule 279 finally reads?

CHAIRMAN SOULES: Well, Sam, it reads --

MR. SPARKS (San Angelo): What was done in the first big paragraph on Page 7?

CHAIRMAN SOULES: Oh, before we leave that, we need to raise Harry's concerns of yesterday whether or not we should submit "factual" or insert "factual" in -- on Page 152, in the paragraph that's in plain type, not in italicized type, in the fifth line, before the word "element." Anybody have a chance to --

PROFESSOR EDGAR: Well, it certainly wouldn't hurt anything, and if it's a cause for concern then I certainly have no problem with including it.

CHAIRMAN SOULES: Bill, what do you think about inserting the word "factual" in that fifth line? It's a matter Harry had concern about and you were --

PROFESSOR DORSANEO: I don't like the idea of it. I thought about it, and I think it will create confusion.

CHAIRMAN SOULES: Why so?

PROFESSOR DORSANEO: Well, we're really talking about deeming a component element of -- we are really talking about a legal element, if we're going to talk about anything. We're talking about deeming that the judge found that a particular component was supported by sufficient

evidence. I don't -- I just don't think the word "factual" adds anything at all.

MR. REASONER: Well, I -- Luke, I have thought about this further and the thing that bothers me, if you will look back -- and I didn't get a chance to talk to Hadley about it this morning -- but the old rule referred to deeming the issues themselves, you know, which I take to be the issues that would have been submitted to the jury.

PROFESSOR EDGAR: The fact issue.

MR. REASONER: The fact issue. Why wouldn't it work, Hadley, if you just substituted "questions," because as I understand the deemed issue practice, you never went back and thought about whether the issue was too broad or too narrow, or how many issues there would have had to have been. You were just deemed the answers to however many issues were necessary to support the cause of action, assuming you had a sufficient submission for them to be necessarily reparable. So why wouldn't it work just to put "questions"?

PROFESSOR EDGAR: Well, the problem that I have conceptually with that, Harry, is that with a broad-form question, a question in all

probability is going to consist of what we used to think to be an independant ground of recovery or defense --

MR. REASONER: Well, but --

PROFESSOR EDGAR: -- and we don't really mean that, you see.

MR. REASONER: No, but for "deeming" ever to come up, somebody has got to say, here is a question that was not asked to the jury, or maybe there are two questions that were not asked to the jury. They really got to say they were questions that were not asked to the jury.

PROFESSOR EDGAR: No, that's not what we were talking about yesterday. We were talking about a situation in which a question was asked, but it was factually deficient with respect to an essential component of that question. If we're talking about fraud, for example.

MR. REASONER: But that's another way of saying, Hadley, if fraud consists of A, B and C, we didn't ask C to the jury. There is a factual inquiry that was not made, whether because of the definition or the way the question was asked. So there was a question that was not asked, and that's really what you want deemed, is

the jury's factual response to C.

So it seems to me that the use of "question" really is parallel with the prior practice. When you inject the notion of an element, by which I take it you mean in this instance, an element of a cause of action in a legal concept, that's radically different from our prior deemed issue of practice.

PROFESSOR DORSANEO: No, I don't think it is, because we're deeming that there is evidence -- we're deeming a finding, all right? The findings are what are deemed and there are findings on particular --

MR. REASONER: No, that's -- that may be what you are doing in your head; that's not what this language says. It says, "deeming" --

PROFESSOR DORSANEO: Well, I think you need to read the language more carefully if you don't think that's what it says.

MR. REASONER: All right. Well, read it. It says, "deeming the element." It's not saying it's deeming any finding; it's not saying it's deeming the answer to any question. It's saying it's deeming an element of a cause of action.

CHAIRMAN SOULES: I think Harry's got a -- has raised a new matter here and I think it needs to be addressed. Sam Sparks, San Angelo.

MR. SPARKS (San Angelo): I don't think it's a new matter. We kicked this thing around yesterday ten times. And Judge Pope sat there, and we used the examples of five elements of fraud. Now, one of them is omitted. That's what we've been talking about all this time.

And I was told yesterday -- both Edgar and Bill said that was a legal element. You know, one of the five requirements is omitted from the instruction that's given to the jury and it's going to be deemed. That's what we kicked around yesterday. And it's not factual, it's just an element. And in that case it's a legal element. This is not a new -- we talked about this yesterday for two hours.

MR. REASONER: Well, are you supporting me, Sam?

CHAIRMAN SOULES: Well, let me say this: From the --

MR. SPARKS (San Angelo): I don't want the word "factual" in there. I think it creates a problem. Without it in there, it covers both

factual and legal.

MR. REASONER: I think you're right, and that's why I think it ought to say "questions."

MR. SPARKS (San Angelo): Well, let's vote on it.

PROFESSOR EDGAR: Well, the thing -- if it says "questions," though, Harry, it just says "when the ground of recovery of defense consists of more than one question," okay? The jury is asked, "Do you find that the defendant's negligence proximately caused the plaintiff's injury? What amount of damages, if any?" The jury answers damages; does not answer question -- does not answer the liability question. Then you're going to deem a finding of "yes" on the first question that was not answered? That's not what we intend here. We're talking about when a question contains more than one element.

PROFESSOR DORSANEO: See, and before it was one question per element, before, under the old scheme. That's why it said "issue" before, because each element had to have it's own separate question under the separate and distinct scheme.

PROFESSOR EDGAR: Its component part.

PROFESSOR DORSANEO: Its piece. Now, maybe "element" isn't a very good word, but it comes as close to identifying what we have always been talking about as anything else we had to use, I think. And when you say "factual element," I'm not sure what a "factual element" is.

MR. SPARKS (El Paso): What is wrong with the use of the word "issue" in this particular --

PROFESSOR DORSANEO: Because it doesn't mean anything.

PROFESSOR EDGAR: Because it creates an ambiguity because "issue" in the before time -- before we changed it -- meant "question" and not "legal issue." I really think that's the problem with the current rule. It has the word "issue" in it, and we don't know whether "issue" means issue in the sense of component part of a claim or a defense, or question, which could be bigger than one issue in the sense that you are mentioning it.

Really, that's why I suggested we change it to "element." I'm not completely happy that "element" -- "element" isn't great -- but I wouldn't want to say "part." When I hear "parts," I start thinking about cars, see? I have to talk

"element" -- that's as close as I can come. And it really isn't a factual element; it's an element, like materiality is an element of a fraud case.

CHAIRMAN SOULES: Do we have three alternatives? One that we just leave "element" there without any modifier. The second, that we modify element by inserting the word "factual" -- "factual element." And then, third, that we replace "element" with the word "question."

Now, are those the three alternatives that are before the house?

MR. REASONER: No, I would say you could not completely replace -- because I think Hadley is right. The preparatory language doesn't make sense if you use "question." But it seems to me that, when you get down to what it is you are deeming, that you could substitute "question" for "element" there.

CHAIRMAN SOULES: Harry, tell me exactly how that would work because that -- I'm afraid I don't yet understand.

MR. REASONER: It may well be that I don't understand, but I think down at the end when you say, "and make a file written" -- well, let's

see. Where you have the last element or elements, I believe it would work if you substituted "question" there.

CHAIRMAN SOULES: Rusty.

MR. MCMAINS: I mean the whole thing is modified when you get right down to what it is that we are deeming it talks about, if there is factually sufficient evidence to support a finding thereon.

It's a finding on an element of a cause of action, or a ground of recovery or a ground of defense. And that's a finding which is as close as we can come in the current practice to describing whatever the animal is, because when you submit to the jury a question with a whole bunch of definitions and instructions in a broad form -- we can call that a "jury finding," or we can call it an "implied finding" when we get to the nonjury situation -- but to call it a "question" is wrong; to call it an "instruction" is wrong, and to call it a "factual finding" is not necessarily accurate. But it doesn't make any difference when you talk about factual elements because we talked about findings here. That's as clear as it needs to be.

People are going to understand how this works the same way it used to work, to the extent that it ever worked; and to the extent that it didn't work, it ain't going to work again. But that's not a new problem. We aren't creating any new problems that weren't there before.

CHAIRMAN SOULES: Well, that's debatable, but we did that yesterday.

MR. REASONER: Yeah, well, I --

CHAIRMAN SOULES: Justice Wallace. Excuse me, Judge, I didn't see you.

JUSTICE WALLACE: The perception I get sitting here listening -- and I certainly share in what I'm about to say -- is that I'm not sure anybody in here understands what this says. And if this group doesn't understand it, how in the world is that trial judge going to understand it up there on the bench when you start hitting him with it?

Now, if I understood Hadley's explanation yesterday, this was intended to cover an alternative ground of recovery or defense that was lacking in the legal or factually sufficient evidence.

MR. MCMAINS: No.

PROFESSOR EDGAR: No, that was on the top of Page 8, Judge Wallace, which we have eliminated.

JUSTICE WALLACE: Oh, I'm sorry.

PROFESSOR EDGAR: We're talking over here on Page 152.

JUSTICE WALLACE: That's what I get for coming in late.

PROFESSOR EDGAR: I share Rusty's view. This is not intended to change the law in any way the mechanics of "deemed findings," Harry. We're just simply trying to find a word which is sufficiently descriptive to cover the changes we made yesterday. And I don't really -- to whatever extent it was confusing before, it will remain confusing; but to whatever extent it was explanatory, it will continue to be so.

PROFESSOR DORSANEO: Well, all I can say is when Hadley and I went through this at the last meeting, Rusty, we sat down and tried to make it mean what it has always meant, in terms of the change from narrow as you practiced to broad as you practiced, to preserve it. This is as close as we could come to getting it to be the same as it has been for -- since it was invented. And I'm

confident that putting "factual" in is going to make a bigger problem than it's going to do an improvement. And what the problem --

MR. REASONER: Well, I'm not confident either way, but I'm persuaded by Rusty's enthusiasm that we can't improve on it at the moment and we might as well move on.

CHAIRMAN SOULES: Well, is everybody satisfied that we leave this the way we left it yesterday?

JUDGE TUNKS: Resigned to it, instead of being satisfied.

CHAIRMAN SOULES: Resigned to it, all right.

Let's go on to 286. Is there a controversy about this?

MR. SPARKS (San Angelo): Luke, my question is still the same, is the first paragraph just like it's written? Is that what we have adopted, no changes?

PROFESSOR EDGAR: No, we added after the underlined portion, "submitted or requested," we said, "are waived" instead of "shall be deemed as waived."

MR. SPARKS (San Angelo): All right,

that's fine. What other changes in that paragraph?

PROFESSOR EDGAR: That's all.

MR. SPARKS (San Angelo): Thank you. And then the second paragraph --

CHAIRMAN SOULES: Deleted.

MR. SPARKS (San Angelo): The whole paragraph?

CHAIRMAN SOULES: Yes, sir. And the last paragraph is maintained as suggested.

MR. SPARKS (San Angelo): All right. Thank you.

CHAIRMAN SOULES: Excuse me for overlooking your request there, Sam. I apologize.

MR. SPARKS (San Angelo): I'm used to it.

CHAIRMAN SOULES: Well, then, I doubly apologize.

PROFESSOR EDGAR: 286 is simply textual.

MR. MCMAINS: Luke?

CHAIRMAN SOULES: Rusty.

MR. MCMAINS: Excuse me, did we -- I don't remember any real discussion on the last paragraph yesterday.

CHAIRMAN SOULES: We did that before you got here this morning.

MR. MCMAINS: Well, you didn't talk about the -- what you have left in here is just "question." And, once again, you ignore the fact that there are elements that can be now included by instruction or definition that are just as much a challenge -- may be challenged by a sufficiency of the evidence.

PROFESSOR EDGAR: That's right.

MR. MCMAINS: Such as in the current status of the law, any inferential rebuttal instruction.

CHAIRMAN SOULES: Well, do we want to reopen that and take it up, or what are we going to do? We've got a lot of work to do today.

PROFESSOR EDGAR: Would you just say "question" or "element thereof"?

MR. MCMAINS: Well, I mean, I -- just to -- technically speaking, you make an objection that there is no evidence to support this admission of an unavoidable accident instruction. I mean -- you know, so it's an instruction. I don't know why you don't use the same question-instruction definition like we used

previously.

MR. REASONER: Well, now under the existing practice you would have to object before the charge was given, right -- on an instruction?

PROFESSOR EDGAR: Yeah, that's right.

MR. MCMAINS: Not to say that there is no evidence of unavoidable accident, but then I don't -- since it's not a finding, I guess there isn't any place we can do it.

MR. REASONER: I think on an instruction you are required to object before the charge.

PROFESSOR DORSANEO: Well, that's -- see, that's because you're playing by the old rules.

MR. REASONER: What are known as the current rules, the last time I looked at my book.

MR. MCMAINS: Yes, but, I mean, when an entire defense -- when the recovery and defense, both, may be contained in an instruction --

MR. REASONER: But you're really opening up the entire charge for a post-verdict attack if you put that in there.

PROFESSOR EDGAR: Well, that's always

been true.

MR. MCMAINS: Well, if all you can do is attack the question, and I'm going to submit your defenses by instruction, then you have --

CHAIRMAN SOULES: Excuse me, we can't get a record with two people talking.

MR. REASONER: I beg your pardon?

MR. MCMAINS: That's fine, I just want to know what the rules of the game are.

CHAIRMAN SOULES: Okay.

MR. MORRIS: Luke, let me ask you something.

CHAIRMAN SOULES: All right. Lefty Morris.

MR. MORRIS: I'm sorry I wasn't here a little earlier either.

What is the rationale for this paragraph -- this last paragraph?

MR. JONES: That was a compromise that we had to throw to David Beck in the subcommittee to get the --

CHAIRMAN SOULES: If we have time to go back to that before 12:30, we will. We've got a lot of other work to do. We have resolved the -- we have voted and passed on the last paragraph

of 279. I don't like doing this, I tell you right now, but I've got -- I guess I have to -- somebody has to. We've got to move on. We have voted on every aspect of 279. Now, we are going to 286. If we have time to go back to matters that we have earlier dealt with at the end of today's session, we will do so.

It's my hope that when we get through today we will have acted on every rule that was before this Committee when we started a year ago. And that we will not need another session before we make our report to the Supreme Court.

286.

MR. SPARKS (San Angelo): Can't we just finish this one, Luke?

CHAIRMAN SOULES: We have finished it.

MR. SPARKS (San Angelo): It is finished?

CHAIRMAN SOULES: Yes, sir.

MR. SPARKS (San Angelo): Okay.

PROFESSOR EDGAR: 286 is textual. Just two changes; "of" to "from" and "change" to "charge."

CHAIRMAN SOULES: Any objection? Okay. Those in favor, show by hands. Opposed?

That's unanimously recommended.

295.

PROFESSOR EDGAR: Rule -- We hashed this around at an earlier meeting and the subcommittee went back and tried to incorporate the changes and suggestions that were made as a result of the earlier meeting and this is what we came up with. We were simply trying to explain in writing what really happens because the rule, as it was stated, was somewhat confusing.

MR. REASONER: Hadley, is there any -- is there thought that there is to be any limitation on how many times the judge can retire the jury? I mean, can he just keep doing it indefinitely,

or --

PROFESSOR EDGAR: Well, the rule, as it is recommended, does not put any limit on the court, but does state that if it happens more than once, then the court may declare a mistrial.

PROFESSOR DORSANEO: You are going to explain in writing to the jury, in open court, the nature of the unresponsiveness. You are going to explain it in writing and in open court, or what?

PROFESSOR EDGAR: That's what the rule

-- the rule says that it's to occur in open court now, and is to be called to the jury's attention in writing. That doesn't change the law.

PROFESSOR DORSANEO: I'm just complaining about the language of it.

PROFESSOR EDGAR: Well, that's -- okay. Whatever would be better.

MR. SPARKS (El Paso): Hadley, a lot of times when you have a verdict form that has a lot of instructions juries don't read the instruction, "if you've answered yes to this question, skip down to 12," rather than -- and they go right through and they answer every question. And, many times, the lawyers can look and see that it's a clear verdict for the plaintiff or a clear verdict for the defendant, even though the jury has not followed the instructions because they have answered every question, when they were not to under the instructions on which questions to answer, depending on the answer they gave to the preceding question. Does that make it an informal or defective verdict, or a purported verdict?

So this rule would call now for the -- even though clearly a judgment could be rendered on the

verdict -- the judge to send it back to have them erase some answers.

PROFESSOR DORSANEO: I think that's always been so.

MR. SPARKS (El Paso): That never does happen?

PROFESSOR EDGAR: Well, no, because the court just simply ignores the immaterial answers.

MR. SPARKS (El Paso): That's true. Everybody does.

PROFESSOR DORSANEO: Yeah, but I think the logic of it is that they are not finished until they are finished, until they have done it properly. So they could always go back and change something that they have already written down, if the fact they hadn't followed the rules overall was brought to their attention.

It's kind of almost a philosophical -- gets to be a philosophical point. You say, "You've answered enough for me to render judgment on this verdict. Do I need to instruct you to go back and follow the rules on the theory that if you do that, you might erase what you have already put down and replace it with something else?" So, I

think, in theory, you could insist -- one party could insist upon the jury following the rules. People don't do that, and that's what doesn't happen in practice.

MR. SPARKS (El Paso): That's true. I don't think it's defective if you get a verdict that you can write a judgment on.

CHAIRMAN SOULES: Any further discussion on 295? Rusty.

MR. MCMAINS: Well, the only -- I think the question that Sam was asking is: Do you have to -- under this rule, would it appear that you have to send the jury back?

MR. SPARKS (El Paso): That's right.

PROFESSOR EDGAR: We did not -- with respect to the amendment, that does not change the directive under the current rule. I mean, the current rule would still require that.

MR. SPARKS (El Paso): Right.

PROFESSOR EDGAR: So we have not changed that practice.

MR. MCMAINS: Yes, but I -- but I tend to agree with Sam. I'm not sure that that verdict -- a verdict in which they've answered some questions they didn't have to answer because they,

for instance, didn't answer their predicate questions -- like they will frequently do in a negligence case with a percentage question when they didn't find somebody negligent -- I don't think that renders the verdict defective, and I don't think this rule applies.

Under its revision I'm not sure that's true. And this says it is with a mandatory "shall," and I just don't know.

MR. LOW: What you're saying is, that it should be, if it's not responsive to the issues required by the jury to be answered, and maybe that the ones they answer might not be required, you know, for a verdict. It could possibly eliminate -- see, it won't matter to those that they are not required -- see, the jury is instructed to answer only -- go down to 12 to answer to so they are really not required to answer those others that they did.

PROFESSOR EDGAR: Rusty, maybe I'm reading it incorrectly, but I think under the current rule, literally applied, the court would be required to send the jury back. It says, "If it is not responsive to the issue, the court shall call the jury's attention thereto in writing and

send them back for further deliberation."

MR. MCMAINS: But I'm not sure how you can claim it's unresponsive when they answered a question. I mean, they are posed the question. It is true that the predicate says you don't have to answer that question.

PROFESSOR EDGAR: But it says you will not answer it. It doesn't say you don't have -- it just says you shall not answer it, or you shall answer it only in the event you have done so-and-so.

MR. MCMAINS: Well, I understand that, but I still don't --

MR. REASONER: But I thought the law was, if the jury's answers are sufficient to base a judgment on, the judge can ignore the rest of it.

PROFESSOR EDGAR: They do.

MR. REASONER: And I guess it comes down to what kind of gloss you put on responsive, or something. But, to me, an immaterial answer -- it doesn't matter whether it's responsive or nonresponsive.

MR. LOW: What if they go back and change something else after that? You have

already got a -- or you can go back and say, "Well, wait, don't answer it."

MR. REASONER: Well, that's entirely possible but I don't -- this rule does not -- as I read the existing rule, this rule has not made any change.

PROFESSOR EDGAR: That's right.

CHAIRMAN SOULES: The predicate is not responsive both ways, the present rule and the proposed rule.

PROFESSOR EDGAR: The reason you asked us to go back and work on this, you looked at Rule 295 and you said, "Well, if the verdict is to be reformed, then it really isn't a verdict yet because it's not a verdict until it is accepted." So then we added the word "purported" and that's how that came about. Then, we recognized that responsiveness was not entirely accurate, that maybe we ought to include conflicting answers in there, so we included that. And then we tried to make it clear what the court was to instruct the jury when they were called back into open court, and we included that.

MR. REASONER: Well, now conflicting answers is in the old rule.

PROFESSOR EDGAR: And -- no, it wasn't either. Not in old Rule 295.

MR. REASONER: Well, the way I read it, "If it is not responsive to the issue submitted, or contains conflicting findings, the court shall call the jury's attention thereto in writing and send them back for further deliberation."

PROFESSOR EDGAR: Well, I apologize. I stand corrected. I'm looking at Rule 295 that we have here on 155. And, David, I had presumed when you typed this the stuff in brackets was the old rule, and I don't see anything there about conflicting answers.

MR. BECK: Yeah, that's correct. I don't have a copy of the rules, Harry. If you're referring to --

PROFESSOR EDGAR: I'm just simply relying on what we have in the book.

MR. REASONER: Well, I think if we're relying on David Beck, we may want to reexamine this entire proceeding.

MR. BECK: Thank you, Harry.

PROFESSOR EDGAR: Now, the one change the Committee recommended as a matter of policy,

though, was that after the second time around, the court would declare a mistrial.

MR. REASONER: That is intended?

CHAIRMAN SOULES: May declare a mistrial from the second time, forward.

PROFESSOR EDGAR: Yes.

MR. REASONER: Well, the only question I would have is whether it's clear to everybody that the court is not limited on how many times it can send them back.

MR. BECK: But, Harry, doesn't that vary from case to case, circumstance to circumstance?

MR. REASONER: I would think so, David. I don't think this rule ought to speak to it one way or another. I mean, once it makes a strained argument that this implies you can only do it once, it seems to me.

MR. MORRIS: Luke, I kind of like the idea of keeping the concept of a defective verdict because, otherwise, under this rule, you may have -- according to Rusty's scenario, you may have a verdict in which a judgment could be entered, but the court, following this rule, would send it back.

MR. LOW: The caption was correcting --

MR. MORRIS: It said "Correction of the Verdict," when only a defective verdict should be corrected.

CHAIRMAN SOULES: So, you would leave the "defective" word in the title?

MR. MORRIS: I think so. I think it makes it more plain. Because if you get a verdict upon which a judgment can be entered, it's not defective.

CHAIRMAN SOULES: Is there any controversy over that? David Beck.

MR. BECK: Let me just raise a question. At one of our former meetings we had a big debate about what the word "informal" meant and what an "informal verdict" was. And the reason we dropped "defective" out of the title is because the text of the rule refers to both an informal and a defective verdict. So it really was just, basically, a housekeeping matter. We weren't trying to make any substantive change there. But, if somebody can tell me what an "informal verdict" is, maybe we can decide whether that even belongs in the rules.

PROFESSOR DORSANEO: One that's not signed properly. One that's not signed in accordance with the rules on who should sign the verdict.

MR. SPARKS (El Paso): Well, why would that be "informal" rather than "defective"? That's defective.

PROFESSOR EDGAR: We deliberated this at a prior meeting, too, and didn't come up with any better answers.

CHAIRMAN SOULES: How about putting in the caption "Correction of Informal or Defective Verdict"?

MR. BECK: See, that's the debate we had in committee and decided, rather than to lengthen the title, we just not modify verdict at all and let the text of the rules speak for itself.

CHAIRMAN SOULES: Let's just take a consensus on that, because it can't be that controversial what we call this. Shall we leave it like it is? Insert -- or leave the word "defective" there, or modify it by putting both "informal" and "defective" in the caption?

PROFESSOR EDGAR: Or leave both of

them out.

MR. ADAMS: I think there is another alternative, and that is to strike out the "informal" -- just take that out of there.

MR. LOW: Out of the whole rule.

MR. ADAMS: I don't know how you are going to distinguish between an "informal" and a "defective."

MR. REASONER: But, you know, my --

CHAIRMAN SOULES: How much research has been done to determine whether that word "informal" has ever been relied on by an appellate court? I don't think we ought to be voting on it, then, if we haven't thoroughly researched it, because we may be taking out something important.

MR. REASONER: That's the way I feel. I never have run into an informal verdict, but I presumed somebody that put it in here thought there was such a thing.

CHAIRMAN SOULES: Okay. How many think the caption should be -- Lefty has raised a point here that can't be that controversial, but it does need resolution. How many feel that the --

MR. SPIVEY: Go ahead and give us the

alternatives you were going to give us before you start asking questions.

CHAIRMAN SOULES: I just did, and I'll do it again now.

MR. SPIVEY: Thank you.

CHAIRMAN SOULES: The first alternative is the caption would be "Correction of Verdict"; second alternative, "Correction of Defective Verdict"; third alternative, "Correction of Informal or Defective Verdict."

How many for option one, "Correction of Verdict"? Show by hands. Eleven.

How many for "Correction of Defective Verdict"? Six.

How many for "Correction of Informal or Defective Verdict"? So there's a majority for leaving it the way the Committee proposed it.

MR. TINDALL: What about voting on deleting that term "informal" and killing off that snake? I can't believe that no one in this committee here has ever heard of an "informal verdict," that it must just be --

CHAIRMAN SOULES: Have you researched it?

MR. TINDALL: No, I haven't.

CHAIRMAN SOULES: Has anybody researched it that can give us the law on the subject?

MR. SPIVEY: Are you going to let Tindall out of order, because --

CHAIRMAN SOULES: No, I didn't -- I don't want to take something out of a rule that we haven't researched to find out if it has a purpose.

JUSTICE WALLACE: I'd say if Burt Tunks hasn't seen one, there probably is no such thing.

MR. ADAMS: Well, there won't be after the rules are adopted.

CHAIRMAN SOULES: All right. We can vote on that, and certainly this committee can do so, but if we --

MR. TINDALL: Let's kill off "informal verdict" because, really, no one at these tables has ever heard of one in all of our trial experience. There is no such thing, and I move that we delete "informal or" and just talk about "defective verdict."

MR. SPARKS (San Angelo): I'll second that.

CHAIRMAN SOULES: Moved and seconded. Any further discussion? All in favor, show by hands? Twelve. Opposed? Twelve to four to delete the word "informal."

MR. LOW: No matter what it is, if it's not defective, you don't need to fool with it -- whatever "informal" is.

PROFESSOR DORSANEO: Maybe "defective verdict" is one that's unreasonably dangerous and an "informal" one is really wrong.

PROFESSOR EDGAR: Now, what you've just done -- and let me raise a question here. If the verdict is defective, the court may direct that it be reformed, right then and there, huh? "Defective" now covers a conflict; the jury doesn't have to go back in and deliberate?

MR. ADAMS: That's how it's going to be reformed.

MR. JONES: I hope to God after 277, there will never be another conflict.

MR. SPARKS (El Paso): I hope there will never be another verdict.

MR. REASONER: I want to tell you, Sam, Franklin is a lot closer to right than you are.

MR. SPARKS (San Angelo): Sam, so you understand, the purpose of this is so the court can -- if you get a "no" answer where you need a "yes" on the plaintiff's side, the court can send them back and say you've answered "no" here and it should be "yes"; you understand?

MR. SPARKS (El Paso): Maybe I ought -- maybe I ought to --

CHAIRMAN SOULES: We have some more work to do on this rule now because of the last vote. Because we talk about the nature of the unresponsiveness -- or do we -- the nature of unresponsiveness or conflicts? Is there anything else in here that deals with informalities that we need to change?

MR. ADAMS: Well, I have a question in this regard --

CHAIRMAN SOULES: Gilbert Adams.

MR. ADAMS: -- and maybe somebody else can answer it. Suppose the jury did not answer the percentage of fault and it comes -- they have got two parties that were negligent, but they didn't answer the percentage of fault, they answered damages. You send them back to answer the fault, and they want to change the damages.

Now, are they going to be able to change other issues in response to their answer to the -- say, the unanswered issue?

MR. TINDALL: They can right now --

PROFESSOR EDGAR: Well, until they return that verdict --

CHAIRMAN SOULES: One at a time, please. We're trying to make a record. Who wants to speak?

MR. ADAMS: So is it the consensus, then, that they can change any of the other answers along with the -- say, an unanswered?

CHAIRMAN SOULES: Yes, sir, until they have a verdict, it's -- they are in deliberations; is that right?

PROFESSOR EDGAR: That's right.

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN SOULES: Yes, sir, Bill Dorsaneo.

PROFESSOR DORSANEO: Does -- This second sentence, does it mean to you, Professor, only that an incomplete verdict, if it is not responsive to the questions contained in the court's charge, that the answers to the questions are in conflict?

The conflict thing, that's -- we studied that conflict cases, body of law, and then the other -- another group of cases that we had to deal with the verdict, are cases where the verdict is incomplete, where the jury hasn't answered a question that it's meant to answer under the instructions --

PROFESSOR EDGAR: Conditioning instructions.

PROFESSOR DORSANEO: -- and the conditional instructions.

Now, really, when we go through this and teach it, those are the two situations we're concerned with, principally. Do you think that first part makes it plain that it's talking about, you know, if it is not responsive to the -- to the questions, does that mean to you incomplete verdict situation; or should we use those words? Because I'm having trouble figuring out what's going on here in this rule, I'm saying.

PROFESSOR EDGAR: Well, if there is any question about it, I think we could certainly say, "If it is incomplete, not responsive to the questions, or the answers are in conflict, the court shall --"

PROFESSOR DORSANEO: I would prefer to do that. And that leaves me with two things that I'm pretty sure about, and a third possible general category that may cover other problems -- and I don't know what they could be, but -- at this point.

PROFESSOR EDGAR: But we could just simply say, "If it is incomplete, not responsive to the questions."

PROFESSOR DORSANEO: Okay, "or the answers are in conflict." I think that would be a decided improvement.

The next thing I would say, when you say, "explain in writing to the jury in open court," I get the idea that what the judge is meant to do is to read -- is to sit down and write this business out rather than -- rather than to start talking before sitting down and planning out verbatim what is meant to be said; is that clear enough?

PROFESSOR EDGAR: That's right, that was the purpose -- that was what was done under the old rule, and we have simply intended to retain that.

PROFESSOR DORSANEO: But is it clear enough to everybody here that the trial judges are

not meant to just go in there and start talking?

CHAIRMAN SOULES: What about changing this to read, "instruct the jury in writing in open court." That's what he's going to give them, isn't it, a further written instruction?

MR. REASONER: I think that's a good idea.

PROFESSOR DORSANEO: I mean, the idea is that he's meant to write it down before he says anything, so he doesn't do it wrong. Especially in the case of a conflict, there are problems -- potential problems of comments suggesting how that conflict ought to be resolved. We do the trial judges a favor if we make them right it down first.

PROFESSOR EDGAR: You want to say, "shall, in writing, instruct the jury in open court"?

MR. SPARKS (El Paso): Why is there a necessity to do it in open court?

PROFESSOR EDGAR: Because you don't want -- as I -- the cases say you don't want the judge to go into the jury room, in the absence of counsel and the parties, and instruct the jury.

MR. SPARKS (El Paso): Well, of

course, nobody wants that.

PROFESSOR EDGAR: Well, that's why it says that.

MR. SPARKS (El Paso): Well, as a practical matter, a lot of times when you're in trial and you go back and you get a question or -- of course, when a verdict is there you're going to be there, hopefully.

PROFESSOR DORSANEO: In this area, it's not a problem. It would be in the other rule that it's a problem.

MR. SPARKS (El Paso): I move that we adopt 295 with the modification of -- in the first -- second sentence, "If it is incomplete, not responsive to the questions contained in the court's charge," et cetera. I move that that be adopted.

PROFESSOR EDGAR: Do you want to say, "The court --"

MR. SPARKS (El Paso): Yes.

PROFESSOR EDGAR: "-- shall, in writing, instruct the jury in open court," or do we want to change that language?

MR. SPARKS (El Paso): Yes.

MR. BECK: Hadley, don't we need to

change the second part of that, if we're going to change the first part, to include an incomplete situation?

PROFESSOR EDGAR: Yes.

CHAIRMAN SOULES: I'm sorry. Judge Tunks.

JUDGE TUNKS: Mr. Chairman, I've been measuring some of these suggestions against what is probably the most common example of defect or a judgment informality in the jury verdict. That's in connection with a ten to two verdict where you have ten jurors who agree on all of the verdict, and two who disagree with it. In that case, under the form that we submit, the ten jurors who have agreed to the verdict sign at one given place, and the presiding chairman of the jury -- presiding juror, signs at another place.

I've seen verdicts in which there would be in answer to special issue number one, ten "yes"; two "no." They didn't indicate -- didn't identify the jurors who were going to answer it -- those ten issues "yes." And at no other place could you tell which ten jurors voted "yes" on special issue number one and which two jurors voted "no" on special issue number nine, ten, or two. That's

the most common example of an informality or defect in the jury. The verdict of the jury is really the jury's opinion as to how an answer [sic] should be asked and how a question should be answered.

The way you render it for "formal verdict" is to have it reduced to writing in accordance with the instructions that the court gives them. It's an "informal verdict" if it isn't properly reduced to writing that their holdings indicate.

I am not sure that these suggested changes in this rule are going to take care of that situation. There are some situations that I doubt the language of these suggested changes would take care of that situation.

Another frequent example of an error of the jury in signing a verdict: If there are ten jurors, those ten jurors are directed to sign at the particular place on the verdict sheet. Frequently when that occurs -- and a foreman of the jury is one of the ten jurors who do agree with all the answers, he doesn't sign it where he's instructed to answer it. He signs it on the line where the signature is permitted for the foreman if there is a unanimous verdict. Is that

a defect? I don't know. I can't tell under this rule whether this language that we are using in this rule, now, corrects all those possible defects or errors or informalities in that verdict.

PROFESSOR DORSANEO: I think I agree with Judge Tunks. We ought to put "informal" back in the first sentence -- makes me happy.

CHAIRMAN SOULES: If the word "informal" were left in the rule, would you be more comfortable with those concerns, Judge Tunks?

JUDGE TUNKS: I believe so.

MR. TINDALL: Well, isn't that a defect, Judge? If it's not signed by the jury, properly, that's a defective verdict and you send them back.

CHAIRMAN SOULES: Well, one distinguished jurist finds that problematical. How many more will?

PROFESSOR DORSANEO: Now, I think there is a case that was before the Supreme Court last year -- argued last year -- McCauley versus Consolidated Underwriters. It involved these very questions of jurists in a ten-two verdict situation not -- it involved other questions, but

not playing by the rules. And I'm straining my brain here trying to remember whether the Court of Appeals opinion out of Tyler -- writ was granted and then it was ungranted.

You used the word "informal" -- and I frankly don't remember -- but they may well have. And before I'm going to vote "yes" to deleting the language, I'd like to know how it was construed. Because, to me, if it's a problem of signing, then that's a question of a formality. It may be a defect is something else, technically.

CHAIRMAN SOULES: If there is anyone who will vote in the majority on the deletion of the words "informal or," we'll move for reconsideration. If not, we'll move on. Judge Tunks has expressed his concerns, and those concerns will be there for the court as well.

MR. RAGLAND: I have a question, Luke. Ordinarily, wouldn't polling the jury in that situation under Rule 294 -- wouldn't that give some indication, in the record, as to whether or not that foreman was voting with the ten, or if he was just signing the verdict? And if it turns up, the court can take care of it at that time. I mean, I can't imagine anyone receiving -- a lawyer

receiving a verdict that he had some question about and wouldn't ask the jury to be polled.

MR. TINDALL: Yeah, Rule 294, the rule right before that deals exactly with that issue about to poll the jury, and if there is a negative vote, you send them back.

CHAIRMAN SOULES: All right. We -- let's see. We need to change, then, by way of grammer, some more words in the last part of this -- Hadley?

PROFESSOR EDGAR: All right. I would suggest that in -- the second sentence will read, "if it is not incomplete," would need to be inserted there; "responsive to the questions contained in the court's charge or the answers to the questions are in conflict, the court shall, in writing, instruct the jury in open court of the nature of the incompleteness, unresponsiveness, or the conflicts," and then continue on as it says.

CHAIRMAN SOULES: "And provide the jury"?

PROFESSOR EDGAR: Yeah, "and provide the jury."

MR. REASONER: Could you -- is that -- could you give us an example of the difference

between "incompleteness" and "unresponsiveness"?

PROFESSOR EDGAR: The jury doesn't answer all the issues is "incomplete."

MR. REASONER: Yeah, that's "incomplete," I understand that.

PROFESSOR EDGAR: "Conflict" is when the answers are in conflict.

MR. REASONER: I understand "conflict."

PROFESSOR EDGAR: Now, what was your other question?

MR. REASONER: Well, you said there is a third category of nonresponsiveness.

MR. BECK: Harry, suppose in a damage issue, the jury is asked to answer in dollars and cents, and they answer it "50 percent of the profit" --

MR. TINDALL: Or they answer "yes."

MR. BECK: -- is that an unresponsive --

MR. REASONER: Yeah, yeah.

PROFESSOR EDGAR: We don't put "and" before "provide"; "provide them with such instructions and retire the jury for further deliberations." Somebody said to put "and" before

"provide" and it doesn't belong there.

CHAIRMAN SOULES: Oh, I see. Okay, I didn't do it, that's right. Okay. Sam Sparks, El -- excuse me.

MR. SPARKS (El Paso): The last sentence -- don't you have to make that change, also?

PROFESSOR EDGAR: Yes, that -- "should the jury again return an incomplete, nonresponsive or inconsistent verdict, the court may again instruct the jury in the same manner" -- yeah, thank you, Sam.

CHAIRMAN SOULES: Okay. As just read by Hadley -- is that a motion, Hadley, that it be adopted, recommended in that form? Is there a second?

MR. SPARKS (El Paso): I second.

CHAIRMAN SOULES: Sam Sparks seconds it.

MR. RAGLAND: I have some questions about -- further down in this rule here before we start voting on it.

CHAIRMAN SOULES: Okay. Tom Ragland, further discussion on this.

MR. RAGLAND: Fifth line from the

bottom we use the word "necessary." It seems to me to be inconsistent with what we have in Rule 277 where the judge is to instruct the jury, to give them instructions that are proper to render a verdict. What is necessary to render a verdict, may not necessarily be proper.

PROFESSOR DORSANEO: Second that motion.

CHAIRMAN SOULES: Okay. So you are suggesting that we change the word "necessary" to read "proper to enable the jury to render a verdict"?

MR. RAGLAND: Well, just "proper." I think you have to read 295 in connection with 277, but I think you ought to use the word "proper" in place of "necessary."

CHAIRMAN SOULES: All right. Any objection to that change? There being none, we'll make that change in the proposal.

MR. RAGLAND: Then I have an additional question, Luke.

CHAIRMAN SOULES: Yes, sir, Tom Ragland.

MR. RAGLAND: Second from the bottom phrase "in the same manner." I assume this means

if they are given the supplemental charge because of the conflict -- they go back and deliberate, and they come back with a conflict -- does this limit the judge to giving the same instruction the second time that was given the first time? If he says, "in the same manner" -- it seems to me like we don't need that "in the same manner."

CHAIRMAN SOULES: Well, "in the same manner" is meant to mean instruct the jury in writing in open court, that manner.

MR. RAGLAND: Well, I think that's what everyone here understands it to mean, but I'm not sure somewhere else in a different environment that it would not mean -- or the contention could be made that you can only give the same instruction you gave the time before.

PROFESSOR DORSANEO: That language has caused trouble, too -- it has.

CHAIRMAN SOULES: How could we change it so that we --

MR. RAGLAND: I just suggest we just delete the phrase "in the same manner." Have it read, "The Court may again instruct the jury and retire them for further deliberations or declare a mistrial."

CHAIRMAN SOULES: Any -- excuse me. Any objections to those changes? Harry Reasoner?

MR. REASONER: Well, you know, it seems to me that given its proper meaning, "in the same manner" could not mean that you had to give them the same instruction. I mean, that's not what "manner" means. And if you -- if you have -- if you require a written instruction in the first instance and then don't make clear that you are doing it in the second, I suppose that a judge would be legitimate to take from the literal language that they could do it orally the second time.

MR. RAGLAND: What about saying "The Court may again instruct the matter" or "may again instruct the jury --"

PROFESSOR EDGAR: "In like manner"?

MR. RAGLAND: "-- in accordance with this rule."

CHAIRMAN SOULES: Well, if there's -- if that's the problem, that it's unclear, just say "may again instruct the jury in writing in open court."

PROFESSOR DORSANEO: Yeah, that would be better.

CHAIRMAN SOULES: Lefty Morris.

MR. MORRIS: Luke, I'm looking at the existing rule. We don't have a reference to even -- to this matter of them coming back. Has there been some problem created? I haven't had a problem with judges knowing they can repeat it over and over again. And I guess I have some trepidation about venturing into this area unless we know of problems. Just say, "should the jury again return a nonresponsive verdict, then they can instruct them or declare a mistrial."

Well, what if they come back a third time? I don't know that a problem exists under the current rule. The judges that I've been dealing with can figure it out. I think we're getting into some new areas here where it could be argued, "If they come back that third time, judge, we want a mistrial."

CHAIRMAN SOULES: Do you have a motion for an amendment?

MR. MORRIS: I just move that that whole sentence beginning with "should the jury" to the end of Rule 295, as proposed, be deleted.

PROFESSOR EDGAR: Well, I have no pride of authorship here. As I recall, in the

committee this was something that Franklin suggested and he is not here right now. Is he still here?

MR. TINDALL: It was to preclude the premature mistrial. We wanted to give them another chance.

PROFESSOR EDGAR: Well, I know. I'm talking about the subcommittee. I'm trying to think of what the subcommittee was trying to accomplish when this was added.

MR. BECK: I think Harry stated accurately what the thought was. The thought was that they wanted to make certain that a trial judge could not declare a mistrial until he at least instructs the jury one time. That's my recollection, Hadley.

MR. REASONER: Well, that's clear under the existing rule.

MR. MORRIS: That's right. They're going to instruct them one time under current 295. They may not the second time, but, certainly, it seems to me like the judges are competent to make that determination. And this seems to me like it precludes a third time -- or it is certainly arguable. If I was in there wanting to get a

mistrial, I would start arguing, "No, judge, you can't do this again. Now, is the time they have come back and the hammer falls. It's mistrial time."

CHAIRMAN SOULES: Okay. Motion is to delete this last sentence --

PROFESSOR EDGAR: Here's Franklin.

CHAIRMAN SOULES: Franklin, Lefty Morris has moved that we delete this last sentence of Rule 295, and some thought that may have been your suggestion that this be included.

MR. JONES: Mr. Chairman, I don't have any recollection of that. I don't have any strong feelings either way on that.

Who's moving it? If Harry Reasoner or David Beck want to do it, well, I may --

MR. REASONER: We got you now, Franklin. I seconded Lefty's motion.

CHAIRMAN SOULES: The other way to handle the problem, if we want to make it clear that the judge can instruct as many times as he wants to, we could write it that "should the jury thereafter return, the court may, from time to time, as necessary thereafter instruct," and just make it clear that the court can instruct until

he's frustrated in trying to get a verdict and then declare a mistrial. That's an alternative.

Excuse me, Harry Reasoner.

MR. REASONER: Excuse me, Luke. My reaction -- I thought there was a body of law that was, you know -- I don't see this as a problem under the existing rule, I mean. I would presume it to be a matter of the court's discretion how many times he can send the jury back before he declares a mistrial. I mean, I suppose at some point he's brutalizing the jury and you'd have to reverse it. But by attempting to create a rule, a generic rule in this, that limits his discretion, seems to me we may be making something worse that's working fine now.

CHAIRMAN SOULES: Okay. I didn't mean to particularly suggest that. I only wanted to offer that as --

MR. JONES: Sounds to me like you may be getting outside of the -- what Carlisle De Hay used to call the Allen charge in federal court, which is "We don't have hung juries in federal court."

CHAIRMAN SOULES: David Beck.

MR. BECK: I don't think the last

sentence was intended to limit the trial judge at all, and I don't think the language, if read properly, would so indicate. But it seems to me there are enough questions raised about the addition of that last sentence; but I don't know if we're not better off just striking that and leaving -- and let's just go with the existing rule.

CHAIRMAN SOULES: David Beck, then, seconding Lefty's motion to delete it. Any further discussion?

All those in favor, show of hands. Opposed? Okay. Looks like it's about 11 to 1 to delete the last sentence.

Anything else now on Rule 295? Okay. With that deletion and the changes that have been mentioned, is there a motion that the balance of it be recommended to the Supreme Court for adoption?

MR. LOW: I so move.

PROFESSOR EDGAR: Second.

CHAIRMAN SOULES: Who made the motion?

MR. LOW: I did.

CHAIRMAN SOULES: Okay, Buddy -- and Hadley seconds. Those in favor, show by hands.

Opposed? That's unanimous.

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: I move that someone go through the other rules relating to the charge and replace the word "issue" with the word "question" when appropriate in the Rules of Civil Procedure, and replace the term "explanatory instruction" with the word "instruction" in order to make what we have just voted on consistent with the remainder of the rules. And I guess I also -- well, I'll just leave it at that.

PROFESSOR EDGAR: In seconding that motion, I want to specifically let the record reflect that Rule 294 needs to be changed in that regard, and since the following two rules were not within the scope of our subcommittee's work, I specifically refer to Rule 301 and Rule 324c.

CHAIRMAN SOULES: Has anyone ever tried to get from West or Butterworth or any of these publishers any help on where words are in the Rules? Where certain words are in the Rules? In other words, they probably got these on computers -- I just wonder if anyone has ever --

JUSTICE WALLACE: Bill and I talked

about that yesterday. I'm going to call Troutman and West and see if they can give us some help on that.

PROFESSOR DORSANEO: We can table that "lead counsel" problem, too, that way and ask that computer where that phrase appears.

CHAIRMAN SOULES: If we can get it that way, that's best. If not, we may need some help on this edit.

MR. LOW: Luke, maybe Bill can go through. There might be a few other words that's the same thing. Maybe after he's had a chance to review he'll see some other words that we changed, and may be others, and he can -- perhaps if he'll give a list of the words --

JUSTICE WALLACE: Are there rules on West law? Does anybody know for sure?

MR. LOW: I don't know, Judge.

MR. REASONER: Yeah, that would sure solve it, wouldn't it?

PROFESSOR DORSANEO: I'm sure we can prevail on West Publishing Company, though, to provide the Supreme Court with the --

JUSTICE WALLACE: We'll just tell them we won't give them any more material if they don't

do it.

PROFESSOR EDGAR: That concludes our subcommittee report.

CHAIRMAN SOULES: Hadley, that's a -- Hadley and Franklin and all the people -- David -- the people that worked on this, we are much indebted to you, and we really appreciate the, now over one year, or approximately a year's effort that you gave this. And I express that from the Chair, and I know that other members share that.

Thank you very much for dedicating yourselves to this effort to revise the charge rules to try to bring them with the current practice. Much obliged. I know the Supreme Court will be as equally as appreciative.

Okay. That brings us -- Harry, you want to give us your report next? It follows in pages --

MR. TINDALL: Okay.

CHAIRMAN SOULES: -- starting on Page 156.

MR. TINDALL: Okay. Let me just tell you what this first one is -- and this is not a proposal, it's just a drafting suggestion. It follows from -- let me see if the letter is here that triggered this. Yes, if you will turn to 164

a minute.

The letter was initiated on -- or the drafting was initiated on response from Richard Kelsey. Kelsey wrote about one matter that Rule 200 -- which is not addressed in my subcommittee, but dealt with Rule 324 -- which was that it appears that we have, in reality, reinstituted the motion for new trial practice because now, as we amended the rules -- I believe it was in '84 -- matters dealing with factual insufficiency of the evidence against the greater weight and overwhelming preponderance of the evidence, excessiveness of damages, and incurable jury argument, all of those matters are now required as a motion for new trial. And so we really haven't slayed-off the new trial practice. And this guy points out that anyone worth his salt would include those in a motion for new trial.

So I went back, and after talking with Rusty -- where is Rusty? He was of the opinion, you know, if there is really grievous error in the trial it ought to be contained in a motion for new trial. So I just went back and redrafted 324 to reinstitute the new trial practice.

Now, I wasn't on the committee. I believe it

was slayed in '77; was it not? It's been about nine years we got rid of the new trial practice. And I just, you know, redrafted it so we would go back to a new trial practice.

Where is Rusty? I would like Rusty to come in here because he's the one -- if you can grab him -- he's the one that is very persuasive on why we ought to go back to the --

CHAIRMAN SOULES: You know, the subcommittee chairmen on various subcommittees of this advisory committee are asked to draft rules for us to consider, whether or not they are going to recommend them, so that we have got something concrete here to look at and to work on. This rule was submitted to the -- or the request was submitted to the Committee on Administration of Justice in September of 1985. And the Committee on Administration of Justice recommended that the current practice not be changed. In other words, that this rule not -- that this proposal not be adopted. But when it comes here, in order to get it in form_where we can consider it, each of the subcommittee chairmen redraft these. That's what Harry has done, and Rusty is here to speak to it.

Sam, you got your hand up?

MR. SPARKS (El Paso): I was just going to ask a question because I remember when we went through and changed it, however many years ago, the purpose was to try to get a case into the appellate system more rapidly than we were doing it. That was the overall purpose.

I'm just wondering -- my experience has been it hasn't changed the time at all, and I was wondering about everybody else's experience. But I remember the overriding purpose of the people that worked on the -- this elimination of motion for new trial to be a prerequisite in certain cases or certain circumstances, that was the real purpose. But I -- I've not seen it.

MR. TINDALL: I don't think it's eliminated in family practice. Even in nonjury cases, motions for new trial are filed, and it not only sharpens your argument, you begin to figure out what the other side is going to say. I'd like to hear from Rusty because he's the one that persuaded me to write this rule.

CHAIRMAN SOULES: Rusty, we're looking at Page 156, Rule 324. What's your discussion on that, please, sir?

MR. MCMAINS: All I'd -- I think Harry

and I talked at either the last meeting or the meeting before last about this -- there was some discussion about it. The question is whether you return to the philosophy that we held for essentially 30 years -- 35 years probably -- and then by statute prior to that -- that the trial judge ought to get a look at what the complaints are against his conduct at the trial before you take him up on appeal and try to reverse it, to give him a last shot.

And the thesis being, he's got several opportunities, obviously, to correct the error in terms of granting a new trial, if he committed an error during the course of the trial, and probably, that he is in a better position than anybody else to know how harmful or not that it was.

The elimination of the motion for new trial practice largely created, what I personally had predicted at the time, was a backlog in the courts of appeals and the Supreme Court by allowing, basically, people to go back and flyspeck the records after the case is tried, and even after a motion for new trial. You got a long period of time in which the appellant has an opportunity to

go back, flyspeck the record and assign 375 or 400 errors, as you probably are aware in the Texaco case, that undoubtedly would not have been perceived to be important by the person -- by the losing litigant at the time that he left the courthouse with the verdict against him. He knows, pretty much, why it is he lost and what it is he needs to complain about. But, it allows him an opportunity and it's, basically, an anti-jury verdict bias of the new rule to go back and allow a second guess under the current practice of every ruling that the trial judge conceivably made -- a lot of times which there weren't even rulings. But they'll go ahead and argue that it was kind of, sort of a ruling.

Any time anybody makes an objection, you just go catalog it. It has had the effect -- and I think Judge Wallace will probably confirm -- of lengthening briefs. It has lengthened time for submissions in the of courts of appeals, and it has proliferated the writing of opinions on a bunch of immaterial crap that is contained in the briefs. I'm not sure that it has increased the number of reversals, but it has delayed and bogged down the process, in my judgment.

And the question is whether you return to the motion for new trial practice of before where you don't have to deal with a lot of things that the people, when they lost a lawsuit and then within a month thereafter -- or however long you want to have to amend the motion for new trial -- were not able to figure out that it was harmful as to particular rulings. And that's --

MR. JONES: Might I inquire, is this a matter of history or --

CHAIRMAN SOULES: Speak up, Franklin, I can't hear you, please, sir.

MR. JONES: I was just interested in what rationale prompted the abandonment?

MR. MCMAINS: The rationale was the -- Franklin, I think, actually was generated by Judge Pope in 1976. Judge Pope was antagonistic to the motion for new trial practice just because of the number of times that he would read in the sheets that the Court of Appeals used it as an out to say they raised this point, but it wasn't raising a motion for new trial and isn't presented anywhere else by a motion for Judgment N.O.V. or whatever. So it is waived.

CHAIRMAN SOULES: Well, it went out at

the same time the notice of appeal went out, whenever they -- they said they simplified the appellate process, tried to eliminate traps that could be eliminated and then rewrote the time periods, and had a complete overhaul of the appellate rules that took place in about that time --

MR. MCMAINS: 1976.

CHAIRMAN SOULES: -- deleted the motions for new trial, almost altogether -- if not altogether. And since that time, the court --

MR. TINDALL: They came back in 1984 and added all these post-verdict motions.

CHAIRMAN SOULES: -- and added the post-verdict matters where there needed to be some kind of hearing -- or might need to be some kind of hearing because it couldn't be a record, really, without a motion for new trial. So those got back in.

MR. MCMAINS: Well, this rule has been tinkered with on a number of occasions --

CHAIRMAN SOULES: Yes.

MR. MCMAINS: Since '76, virtually every two years. We've been operating under a new or different motion for new trial practice on the

average of every two to three years because things keep happening.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Going back to the old sup-waiver rules, what this really means is if somebody got a ruling during the course of the trial that was wrong, and that would be a basis for reversal of the judgment because it probably caused the rendition of an improper verdict, if they didn't get that in their motion for new trial and put it in there, that they've lost that case. And I think -- I think that it is not fair on lawyers to require them to flyspeck the case within the motion for new trial time period upon pain of waiving a complaint that they should be allowed to make. We're not sneaking up on any trial judges. The judge has already ruled, why should that assignment of error have to be assigned in the trial court? Why isn't it good enough to assign it in the appellate brief?

From an appellate specialist standpoint, the complaint that I would have about that is that I would like to know sooner, all right? I would like to know what the assignments of error are sooner. But the practical reality of reinstating

the old practice is that a lot of lawyers are going to waive legitimate complaints, and that would probably be a good thing for me, but I don't think it's a good thing for the administration of justice.

CHAIRMAN SOULES: Harry Reasoner.

MR. REASONER: My concern is I don't think you'll have that much actual waiver, although there may be some cases, particularly lawyers who don't have a daily transcript, or are not going to be able to look at a transcript before they are forced to file a motion for new trial. I think they may be at a serious disadvantage.

But isn't what you are really going to wind up with, Rusty, is lengthy boiler plate motions for new trial where a person feels obligated to put in 300 points for everything he can dream up in his motion for new trial? And it really is just another hypertechnical trap for the unwary. I mean, it never is in the interest of justice to require this assignment, to think that a trial judge really might do something about it, or could do something about it, are going to be called to his attention without using this as just one more

snare for the unwary.

CHAIRMAN SOULES: Hadley Edgar, and then David.

PROFESSOR EDGAR: Let me just second what Harry and Bill have said. The purpose of modernizing our appellate rules was to keep it from being a trap for the unwary, and this was all part of the -- this was simply a part of the whole in order to accomplish this. And once the trial court has had an opportunity to rule on a matter, then why should it be subject to further trial court review as a predicate for appellate complaint?

The matters which are now listed in Rule 324, if you will look at them, are only matters upon which the trial court has not yet had an opportunity to rule. And as to those matters, the trial court should not be ambushed. The trial court should have an opportunity to review these matters before it is subjected to appellate review, and that's why they are there.

But as to other matters, it seems to me that in keeping with the liberalized appellate practice and we -- really, the appellate practice today is really probably far more technical than we ever

intended it to be. I mean, waiver is still just rampant in this area, far more than it is at the trial level at times. And I'm really against doing anything that compounds the hypertechnicality of the appeal. So I'm opposed to the motion.

CHAIRMAN SOULES: David Beck.

MR. BECK: I'm opposed to the motion, too. I must say that I'm a great believer in setting up pitfalls in the rules, but I think this would represent such a fundamental change in philosophy that I just don't think this committee ought to go on record as flip-flopping back and forth on such a fundamental change. This was debated for years before we made this change, and I think we ought to stick with it.

CHAIRMAN SOULES: Okay. What's the recommendation of the Committee?

MR. TINDALL: I move that we vote it down.

CHAIRMAN SOULES: Move to be voted down. Is there a second?

MR. LOW: I second.

CHAIRMAN SOULES: Okay. Those in favor, show hands. Opposed? That's unanimously

rejected.

MR. TINDALL: One other report on our subcommittee, Luke, is -- I think it's got a good point. I'm not sure of the answer. Turn to Page 159. I am not experienced in motions for new trial following judgments rendered on citations by publication. If there is someone else here that's got more experience in that area, please let me know. The problem is that I didn't know this was even in the law until I read this Gilbert versus Lobley case that he cited, and it's a writ he refused outright.

When you file a motion for new trial as a defendant in a citation by publication case, you have to serve the opposing party, you can't just give notice to the counsel of record. The problem is that under our rules -- let's say, the judgment was on January the 1st of 1985. When you file it here on September the 1st, 1986, that motion is deemed to have been filed on the 30th day following judgment, for appellate purposes. The problem is you then got to have service on the adverse party and have a hearing by the court within the 75th day. Well, there is no way if it's deemed to have been filed on the 30th day

following the day of judgment, even though you filed in September, the judge has only got until October the 15th to hear it. How do you get them served in time to have a hearing? Does everyone understand the calculating problems?

Well, there's two ways you can deal with it. One I drafted is: You can serve the adverse party under Rule 21a, that would be one suggestion; or another suggestion would be, that it would be before service of completion on the last party adversely interested in such judgment.

PROFESSOR DORSANEO: Harry, I'm not -- I'm not following -- I don't understand what the problem is exactly. I understand it's in this Paragraph "d"; am I right?

MR. TINDALL: That's right.

PROFESSOR DORSANEO: Would you explain it to me again. I remember when this was added -- when Judge Gittard recommended that it be added, and I didn't exactly follow it then, and kind of took what he did on faith -- good person to follow on that basis ordinarily. But what is the problem with that?

MR. TINDALL: The problem is one of calculation. The judge loses jurisdiction on the

75th day following the date of judgment, okay? If, in a citation by publication, when you go under Rule 329d, like Dan -- you see, if the motion is filed more than 30 days after the judgment, all of the period of time specified in Rule 308 shall be computed as if the judgment were signed 30 days before the date of the filing of the motion.

PROFESSOR DORSANEO: Okay. Let's stop. So if you take the date the motion was filed and you just pretend the judgment was signed 30 days before.

MR. TINDALL: That's right. And then you've got to get service on the adverse party. Conceivably, if you've got service the very day you filed it, he would have the right to have an answer on the next Monday following 20 days. You've got a maximum of 45 days in which to get him served and have a hearing on the motion for new trial.

PROFESSOR DORSANEO: That's what I don't see.

PROFESSOR EDGAR: Where does that 45 -- where does that period come from? What part of the rule, Harry?

MR. TINDALL: Well, the judge loses jurisdiction of the judgment after 75 days. And for a motion for a new trial following citation by publication judgment, you've already lost 30 days when you file it.

PROFESSOR EDGAR: Where did you get the 75-day period? What rule is that?

MR. TINDALL: Isn't that 324?

MR. MCMAINS: It's 329b.

MR. TINDALL: 329b.

PROFESSOR EDGAR: Well, the 329b doesn't talk about motions for new trial following citation by publication, does it? That's for a motion to modify corrected reform of the judgment.

MR. MCMAINS: Hadley, the way the computation works and the reason for the "d" portion of the rule, is because of the allowance of up to two years, I guess it is, in this rule when you have served somebody by publication to file a motion for new trial.

Since all of our periods ran from the judgment, and none run from the motion of new trial, he had to go back and fix it. So what he did was treat the motion for new trial when it is filed within the two years as if it is filed on

the 30th day after judgment.

PROFESSOR DORSANEO: I see, now. On the last day that it could be filed, if it was a regular motion for a new trial.

MR. MCMAINS: That's right. And so that then that all of your periods -- you treat the judgment as if it was entered 30 days prior to the date of the motion for new trial, which means that you have lost that 30-day period in the plenary jurisdiction of the trial court. So you're left with 75 days. Their complaint, I gather, is they've got only 75 days to complete their service and get a hearing.

PROFESSOR DORSANEO: Yeah, that's not right.

MR. MCMAINS: I think you can correct that, in all probability, in terms of at least giving another 30 days if you treat the judgment as signed on the date that the motion for new trial is filed.

PROFESSOR DORSANEO: But is 30 days going to be enough in this situation?

MR. MCMAINS: I don't know.

PROFESSOR DORSANEO: It would seem to me this would be a situation where there may be

some problems getting service of citation accomplished.

MR. TINDALL: Well, that's the problem, then, and one alternative would be -- or, alternatively, the motion for new trial may be served upon the adverse party or his attorney under Rule 21a. Of course, that's a problem of whether you're still around -- you know, you may have closed your law office or don't want to represent the client.

PROFESSOR DORSANEO: I don't like serving --

MR. TINDALL: I mean, that's an eternal --

MR. WELLS: You may not know who his attorney is.

MR. TINDALL: Well, that's an eternal problem. Presumably, you know, there would be something in the court's record to indicate who the judgment holder or attorney was at the time.

PROFESSOR DORSANEO: I like the second alternative -- I mean, the "d." Changing "d" seems to avoid the problem of figuring out who this attorney is. I guess we could tell them, "Put your name in there, Harry," and then we'd

know who we could serve in all these cases.

MR. TINDALL: Sure. Well, before the completion of service -- let's see. Then it would be -- or we could do it -- we could deem that the motion for new trial is filed on the date -- or the judgment is deemed to have been signed on the day the motion for new trial was filed and that would give them 75 days, if we went that approach, rather than 45 days, which is the impossible burden now. That might be a --

MR. MCMAINS: Now, Bill, the only problem with the amendment of "d" as it is, is the party -- the last party adversely interested --

MR. TINDALL: It could be forever.

MR. MCMAINS: I mean, I -- you know, if you've got -- a lot of this, of course, is in land litigation and you may be -- it may be that you've looking for a long -- some of those parties you may have been looking for a long time, or their heirs.

MR. TINDALL: We could change "d" then to say, "If the motion is filed more than 30 days after the judgment was signed, all of the periods of time specified in Rule 308a(7) shall be computed as if the judgment were signed." And

strike 30 days and put, "on the date of filing the motion." Is there anything wrong with that?

PROFESSOR DORSANEO: I just like the whole idea of treating this as a motion, thinking -- giving it a timetable like an ordinary motion for new trial. I think what we have here is we have, in effect, a new lawsuit. That's why somebody -- there wasn't a lawsuit -- I mean, it's the same -- the motion for new trial is the vehicle for virtually automatically getting a new trial for setting aside the judgment, because this contemplates that there will be -- somebody will show entitlement that they didn't know about the -- that they were cited by publication, that they didn't know about the judgment within a two-year period, and now they're coming back and satisfying a fairly minimal burden. And what happens is you're going to have the trial. I think this "d" is a bad idea to begin with.

MR. MCMAINS: Well, now, I -- it's not a bill of review procedure. You don't have a trial.

PROFESSOR DORSANEO: It used to be called a Statutory Bill of Review -- and that's not good to call it that -- and it's a lot closer

to a bill of review of procedure than it is to an ordinary motion for new trial.

MR. MCMAINS: Well, at any rate, my real -- now that he has mentioned it, Bill, though one of the things that is of significance is that the effect of this Rule, too, is to deny you an ability to amend the motion because, under our current rule, you've got 30 days in which to file or amend. So if you file the motion for new trial and you've left something out, since the current rule deems that as having been filed the 30th day, you don't get a chance to amend it again.

So it -- I mean, you know, it actually has two vices. In addition to cutting out the 30 days, it also means that you better take your best shot or you don't have any opportunity to amend. And the other side can come in and say, "Well, you forgot to allege X and --"

MR. TINDALL: Isn't the real world that if you have a citation by publication and motion for new trial, they are almost always granted? I mean, I never had one. It's just one of those things.

PROFESSOR DORSANEO: I had one about two years ago and I had some trouble explaining

the standard for granting it to the trial judge.

MR. TINDALL: But it was granted. Judge Tunks, you've been around, am I not --

JUDGE TUNKS: I don't know anything in the world about citation by publication and the acts of following that.

MR. REASONER: Well, you know, the rule says "good cause." I think you would have to show something. You'd have to make some showing that you had some basis for --

MR. TINDALL: If I was in Europe?

MR. REASONER: Well, no, I don't think mere absence -- I think you would have to make some showing you had some basis for hoping to prevail if you got a new trial.

PROFESSOR DORSANEO: Well, the case has defined "good cause" in a very generous way.

MR. TINDALL: I didn't know about the lawsuit. I had no personal knowledge. That's almost enough, isn't it?

MR. REASONER: I don't think that's sufficient.

PROFESSOR DORSANEO: Well, if you read the cases to see that that's what it says is sufficient --

MR. REASONER: You've now taken a stronger position as we've gotten into this discussion.

MR. TINDALL: What is wrong with changing it to say, "that will be computed as if the judgment were signed on the day of the filing of the motion"?

PROFESSOR EDGAR: "Of a timely motion" -- "the day of filing a timely motion."

MR. TINDALL: Well, sure. I think you are always working within the -- of a timely motion. That --

PROFESSOR EDGAR: That at least gives him 30 more days. That may not be --

MR. TINDALL: That gives him 75 days in which to get his service and have a hearing.

MR. RAGLAND: Would it be simpler just to say he's got 75 days, rather than trying to incorporate the timetables set up with another rule somewhere? This is a different breed of cat, it appears to me.

MR. TINDALL: Well, ostensibly there would be -- you kick in, Tom, to the appellate tables. I think they are trying to make them as consistent as possible. It's like the old nunc

pro tunc --

MR. RAGLAND: Well, I understand that, but wouldn't it be simpler just to say you've got 75 days to get your business tended to and to go on about your business?

MR. TINDALL: Well, that's what it is when you say, "shall be computed as if the judgment were signed on the date of filing the timely motion."

PROFESSOR DORSANEO: I think somebody ought to go back and rewrite "d" to explain to a lawyer who is reading it what the timetable is when this procedure is being followed. And this cross-referencing to other things is, I think, frankly, keeping the timetable a bit of a secret from most of the people. And that's --

MR. TINDALL: Well, what are you saying to me?

PROFESSOR DORSANEO: Well, what I'm saying is that this is a different breed of cat. And the last change that brought it into the fold, brought it into the fold in a confusing kind of way. And if this breed of cat required somebody -- the defendant's previous -- the judgment -- the creditors-to-be, or whoever they are, whether

they're creditors or not -- the judgment winners, the judgment holders -- to be served by citation in contemplation of maybe one preliminary hearing on good cause or maybe one new trial that incorporates the elements under the rule, and the new -- the trial on the merits which -- I think, the cases say you can do it either way -- that there ought not to be this short -- maybe there ought not to be this short time span within which the court has to act.

And it's a different kind of thing when somebody has been cited by publication and there is a judgment. There really hasn't been a trial, and what we are trying to do now, here, is to have a trial. The showing is, as I read the cases, fairly minimal if you were cited by publication. And imposing this -- this timetable on the matter that is applicable to an ordinary motion for new trial may not be a good idea. It's really, clearly bad in the respect you point out that it may be bad as a general proposition to have that timetable. And I'd like to see somebody study -- think about that. You know, how much time should somebody have to serve, how much time should they -- I mean, should there be any clock running at

all on serving citation for this motion for new trial? How much time should they have to have a hearing? Should there be any clock running at all before there is an order signed granting or denying this new trial?

MR. TINDALL: Right now, they've got 45 days. And if we change it to the date the judgment is deemed to have been signed on the day you file it, that would give them an additional 30 days to get their act together and try to get relief. That doesn't seem revolutionary to me.

CHAIRMAN SOULES: Let me suggest this: I understand some of Bill's concerns. I'm not sure we can solve all of those and patch up the problem that's been raised here, Harry, but if --

MR. TINDALL: Bexar County Legal Aid is who wrote the --

CHAIRMAN SOULES: Suppose we say this: We stop there at the word "signed," and in order to try to reveal and not keep secret the time periods, add "So it shall be computed as if the judgment were signed and the time periods in Rule 329b begin to run on the date of filing the timely motion." So that we key them back to the time periods in 329b, we just don't leave it for

them to try to conclude what it means as if the judgment were signed. We go ahead and say, "and the time periods begin to run."

MR. WELLS: Does this apply in family law matters?

PROFESSOR DORSANEO: That's where it comes up. It's the case I had, a family law case, where somebody's parental rights were terminated when they were cited by publication, and they ought not to have a 10,000-mile-an-hour track they have to run.

MR. WELLS: But there are some family interests that have developed within that two-year period, ought they to be able to drag things along for how long? The contestant -- the husband comes back after a year and ten months. Isn't there some interest in having a prompt determination?

PROFESSOR EDGAR: Well, I don't think Bill is perhaps saying that -- that there shouldn't be a prompt determination. It's just how prompt it should be, and whether he should be placed on a fast track up or out; isn't that your concern, Bill?

PROFESSOR DORSANEO: Right. If I have X number of days to serve somebody or time is up

-- jurisdictionally up -- I have X number of days to convince the trial judge to set this for hearing. My opponent knows that and they may have a different attitude about when the hearing ought to be -- probably never. I just don't like imposing these -- what seem to me to be artificial deadlines borrowed from another subject area, merely because it's called a motion for new trial when it is a different breed of cat.

MR. TINDALL: Luke, I have some reservation. I don't -- I haven't followed through -- you've got 329b, which is an entirely different creature from 329 -- I mean, 329 is an entirely different creature from 329b. It seems like the rules are structured that the motions following citation by publication are to be handled separately. I don't know what the effect is of kicking them back over to all those things that we have about plenary authority, to correct and modify, and, you know, just on and on and on. Do we want to vest a court with that or do we really vest a court only with granting a new trial? I'm not sure what those cases hold. I haven't gotten into it.

CHAIRMAN SOULES: Harry Reasoner.

MR. REASONER: Well, you know, if I could ask Harry, I'm having trouble reading 306a(7). As I read it, it says that, "With respect to motion for new trial filed more than 30 days after judgment is signed pursuant to Rule 329 when process has been served by publication, the periods provided by Paragraph 1 shall be computed as if the judgment were signed on the date of the filing of the motion." Isn't that in conflict with the --

PROFESSOR DORSANEO: Was that just amended, Harry?

MR. REASONER: Yeah.

PROFESSOR DORSANEO: Yeah, that was changed both there and in the appellate rules for another reason. So you've pointed out another problem.

MR. REASONER: Yeah, so, I mean, at least if I'm understanding it, it's in conflict with the existing language. So, at a minimum, we ought to conform it to --

PROESSOR DORSANEO: Why don't we conform it and that will be -- do basically what you want to do, Luke, I think, and save the bigger problem for another meeting.

MR. TINDALL: Just make the motion as deemed to have been -- the judgment is deemed to have been signed on the day you filed it. Isn't that really what that says, Harry, anyway?

MR. REASONER: That's what Paragraph 7 of 306a -- that's the way I read it now.

MR. TINDALL: Yes.

PROFESSOR DORSANEO: Is there a motion on the floor, Mr. Chairman?

CHAIRMAN SOULES: Why doesn't somebody restate it before we --

MR. TINDALL: Well, I would move we change 329d, like Dan, to say, "shall be computed as if the judgment," and try to get the language exactly --

CHAIRMAN SOULES: Read the whole thing so I can --

MR. TINDALL: All right. 329d would read, "If the motion is filed more than 30 days after the judgment was signed, all periods of time specified in Rule 306a(7) shall be computed as if the judgment were signed on the date of filing the motion."

PROFESSOR EDGAR: Harry, why don't we just simply say, "that all periods of time shall

be computed as specified in Rule 306a(7)," because that's what 306a(7) says. Because, as amended, 306a(7) says, "that it shall be computed as if the judgment were signed on the date of the filing of motion."

MR. TINDALL: Well, what if we just deleted "d," then?

PROFESSOR DORSANEO: Well, then, nobody will know if --

PROFESSOR EDGAR: Then nobody will know when it -- you need to refer back, I think, to the time period in 306a(7). But, you see, it's in looking at Rule 329d -- it is that part of that provision after 7 -- paren 7 -- that creates the ambiguity.

MR. TINDALL: All right. That's acceptable.

JUDGE THOMAS: So how is it going to read, Hadley?

PROFESSOR EDGAR: Well, I would just say, "If the motion is filed more than 30 days after the judgment is signed, all periods of time shall be computed as specified in Rule 306a(7)." Wouldn't that do it?

MR. TINDALL: Yes.

PROFESSOR EDGAR: Now, I'm just asking --

MR. TINDALL: Well --

CHAIRMAN SOULES: Is that your motion?

PROFESSOR EDGAR: Yes.

MR. TINDALL: I'll second that.

PROFESSOR EDGAR: I'm asking if that will do it.

MR. TINDALL: I think that cures it. Now, we need to go back to the changes --

MR. REASONER: Let me ask one question. Hadley, did you say the way it reads now is that "all the periods of time specified" --

PROFESSOR EDGAR: No, I said, "all the periods of time shall be computed as specified in Rule 306a(7)."

MR. REASONER: Okay. My question, then, is: What is the referent of all the periods of time? I mean, are we talking about periods of time not provided for in Rule 306a? I mean, are there additional periods of time you are purporting to govern?

PROFESSOR EDGAR: Yeah, I see what you mean.

MR. RAGLAND: It looks like to me that

Paragraph 7 of 306a relates only to the motions filed under 329. I don't know how you can be confused if you keep one to the other.

MR. REASONER: Well, there would -- you know, I guess you could make an argument that there are other relevant time periods governed by other rules and --

MR. RAGLAND: But Paragraph 7 relates only to those motions filed under 329.

MR. REASONER: I agree. And the way the rule is presently drafted, it makes clear you are limiting it to those periods of time governed by 306a. It just seems to me that you ought to leave it that way.

MR. TINDALL: Well, Harry, how would you do 329d, then, if it's not like Hadley suggested?

PROFESSOR EDGAR: Well, to remove any problem, you could just simply repeat here in 329d where it says, "shall be computed as if the judgment were signed on the date of filing the motion." Which is a repeat from 306a(7), which is what I was trying to eliminate. But if that's some problem with that, well, just repeat it.

MR. RAGLAND: Of course, then if you

-- if the court at some later date amends 306a(7), well, then, you've got to go back and amend 329. I don't know whether it would be a big problem, but it looks like it is just keyed right into Paragraph 7, and you ought to just leave it like that.

PROFESSOR EDGAR: That's what --

CHAIRMAN SOULES: Harry, if we took the words out "all of the" and just said, "periods of time shall be computed as specified in Rule 306a(7)," would that help your concern?

MR. TINDALL: I think so.

CHAIRMAN SOULES: Harry Reasoner. If we took out "all the periods," and just said "periods of time shall be computed as specified in Rule 306a(7)"? If there's some other period of time, I guess --

MR. REASONER: Well, suppose you just -- let me just ask Hadley a thing about this. If you said, "If the motion is filed more than 30 days after the judgment was signed, Rule 306a(7) will govern"?

MR. TINDALL: It's really -- if you really read 329 in its entirety, "d" is not really very germane to anything else contained in that

rule. Nothing else in there really has anything else to do with the appellate timetables except "d." It's really inappropriate there. It ought to just be completely covered under 306a. The question is: Do we want to lead the practitioner from 329 back to 306a?

PROFESSOR EDGAR: Well, I would think that's what the scriptors originally intended because then you look at that, then you have to look at Rule 306a(1), and then you have to look at Rule 329b. And that's how you ultimately get to your 75-day max. And that's what Bill was -- I mean, that's the mental route that the practitioner has to take to do this. And that's why Bill was suggesting that what we should do is, perhaps, set up an independent timetable, set out in Rule 329b, to keep the lawyer from having to go through those mental gymnastics. But I think for the time being if we could, in some way, just refer him to the time period in 306a, regardless of how we would do it that would be adequate.

MR. TINDALL: Well, without trying to build a clock here, couldn't we just say, Luke, going back and changing "d" only ever so slightly so we don't know what all the periods of time and

all that gets him -- just say, "specified in Rule 306a shall be computed as if the judgment were signed on the date the motion is filed." It's a repeat of 306a(7).

PROFESSOR EDGAR: Yeah, that's right. That's fine.

CHAIRMAN SOULES: Okay. One last suggestion -- does anyone else have a suggestion? I've got one last thought on it.

What if we say -- I believe this is more or less what Harry Reasoner was suggesting, too -- "If the motion is filed more than 30 days after the judgment was signed, the time period shall be computed pursuant to Rule 306a." Because all we're trying to do is get them back to 306a. That's the whole purpose of this now, isn't it? That's all that's left of the purpose of "d" down.

MR. TINDALL: Well, I would put 306a(7) You've got --

CHAIRMAN SOULES: 306a(7), okay. "The time period shall be computed pursuant to Rule 306a(7)."

MR. TINDALL: Period.

CHAIRMAN SOULES: Period.

MR. TINDALL: I so move.

CHAIRMAN SOULES: Second? Is there a second to that?

JUDGE THOMAS: Second.

CHAIRMAN SOULES: Who was that -- seconded by Judge Thomas?

JUDGE THOMAS: Yes.

PROFESSOR EDGAR: Exactly how is that going to work?

CHAIRMAN SOULES: "If the motion is filed more than 30 days after the judgment was signed, the time period shall be computed pursuant to Rule 306a(7)."

PROFESSOR EDGAR: "Time periods --"

CHAIRMAN SOULES: Yes, sir.

PROFESSOR EDGAR: "-- shall be computed --" as what?

CHAIRMAN SOULES: "-- shall be computed pursuant to Rule 306a(7)."

Any further discussion? In favor, show by hands? Opposed, like sign. That's unanimous.

Are we going to permit the service to be made on counsel of record pursuant to 21a?

MR. TINDALL: I wouldn't recommend that.

CHAIRMAN SOULES: You don't recommend

that.

MR. TINDALL: No, because the problems are -- we all know you get the judgment for the client, the client has lost, you and the client have had a falling out -- there could be a million other reasons why service on the attorney would be inappropriate up to two years after the judgment.

PROFESSOR EDGAR: I guess what your alternative -- if you couldn't find the original plaintiff, you could go out and get citation by publication, wouldn't you?

MR. TINDALL: I guess.

PROFESSOR EDGAR: In the family area, Harry, I can see this as a real problem.

MR. TINDALL: I've not seen it come up in my practice, and I've been doing family law work for 11 years. Although when you are sitting in the court waiting for your case to be heard, there are scores of default divorces rendered on citation. I thought it was more in land litigation where they can't find the record title holder, and there's a spat over --

CHAIRMAN SOULES: Judge Thomas.

JUDGE THOMAS: I agree with Hadley and Harry, and I do see it. And particularly in

family law, I think that service upon the attorney would be unfair to the attorney and would not do what we're trying to do. That would just scare the blank out of me.

CHAIRMAN SOULES: Is there any motion, then, that 21a service be permitted?

MR. TINDALL: I move that we not accept that.

MR. SPARKS (El Paso): I second.

CHAIRMAN SOULES: Moved and seconded that that be rejected. In favor, show by hands. Opposed? That's unanimously rejected.

MR. RAGLAND: That means you don't serve the attorney; is that right?

CHAIRMAN SOULES: That's right.

MR. TINDALL: That's right. The practice is as usual.

MR. RAGLAND: I don't want to be forced into filing an answer.

MR. TINDALL: Although I'm sure -- how many of you knew that you had to serve the attorney? I mean, that was a revelation to me. I mean, you had to serve the party with citation on a motion for new trial, that's sort of an arcane area of the law.

Luke, let me move on --

CHAIRMAN SOULES: Yes, sir.

MR. TINDALL: Our committee is charged with Rule 315 to 331 and those have been the only two problems that have been addressed to our subcommittee in the last two years -- that is, the new trial issue and then the issue that was raised on 329.

I took the liberty of looking at all these other rules -- and I don't want to spend a lot of our time on it -- but if the committee could sort of give me some thought, I will pursue it for our next called meeting. That deals with the issues of remittitur and correction. Rules 315 through 319 -- if you're on Page 161, these rules have a lot of -- shall I call it "archaic phraseology," and so forth.

For example, I didn't know on a remittitur that you, in placation, you had to go down and sign a written release on a remittitur in front of the court clerk, as opposed to just signing and acknowledging it before a notary public. So, that seemed like something that is probably never done. I don't know if there is any great change being -- yes, Bill?

PROFESSOR DORSANEO: Harry, we had to make a decision when we were working on the Rules of the Appellate Procedure where appellate procedure would begin and trial procedure would end.

MR. TINDALL: Sure.

PROFESSOR DORSANEO: And our committee did redraft -- did come to the same conclusion that you came to in reviewing these rules; that is, they needed some work. And we did redraft them all, as a matter of fact, and the draft exists.

MR. TINDALL: Well, I'd like to see what you have on that because our committee could review them. I mean, there is -- like I say, 315 is an example of the problems you have, the correction of mistakes; 316, which is really our judgment nunc pro tunc --

PROFESSOR DORSANEO: 331 is a great rule if you look at that. That's the one that --

MR. TINDALL: 331 is -- well, 330, yes, and 331, I'll -- you'll see, I covered those over here. I'm not sure what 330 -- look at 330 for a minute. It really is -- administrative rules, I think, are covered under Rule 200a, now,

talking about, "The following rules of practice and procedure governing all -- in all civil actions and district courts in the county where the only district court of said county vested with civil jurisdiction, or all the courts having successive terms." I suppose county with more than two district courts -- and it goes into matters that are largely repeated in Rule 200a. I don't know -- it's really not a Rules of Civil Procedure as much as an administrative type thing that judges sit for each other. And 331 -- read that. That is the wildest rule in the whole set.

PROFESSOR EDGAR: That's the funniest thing. You can't help but laugh when you look at that rule.

MR. REASONER: Yeah, I just read it. I can't read it, it hurts my head.

MR. TINDALL: Well, my thought was 331 could be repealed and we'd never -- there is no --

PROFESSOR EDGAR: I so move.

CHAIRMAN SOULES: It reads like a rolling stone.

MR. TINDALL: Well, see, I think this was, you know, in 1949 or '41, whenever they did that.

PROFESSOR DORSANEO: It is a pre air conditioning rule.

MR. TINDALL: That's right. It was late in the afternoon, and they just made that and carried forward.

CHAIRMAN SOULES: What are you suggesting here, Harry?

MR. TINDALL: Well, I would certainly move that 331 be repealed. I mean, nobody knows --

PROFESSOR EDGAR: Second.

MR. TINDALL: -- what that thing says and there's never been a case that cites it.

PROFESSOR DORSANEO: I suggest that the old appellate committee that worked on these send to you the draft and we defer action on these rules. We made fun of Rule 331, but it must have meant something to someone at the time it was written in such an apparently confusing way.

MR. SPARKS (El Paso): I would suggest if there's never been a case citing it, that it is a perfectly good rule.

CHAIRMAN SOULES: So we're going to defer to the next called meeting these 315 through 331?

MR. TINDALL: Well, I -- yes. Actually, Bill's work and Rusty's on the appellate really only cover Rules 315 through 3 -- well, actually through --

PROFESSOR DORSANEO: We went all the way back and started worrying about it at Rule 301, Harry, actually.

MR. TINDALL: Right.

CHIEF JUSTICE POPE: May I --

CHAIRMAN SOULES: Yes, sir, Chief Justice Pope.

CHIEF JUSTICE POPE: -- talk about Rule 331. You know, I don't know what they had back before 1941 in the way of exceptional courts, but, thereafter we started in with special district courts that handled juvenile cases, and then special district courts that handled family law cases. And we still have ten, I think, district courts, criminal cases only. But there has been a great movement by the legislature, and by everybody else, to get all district courts in one package so that they are all the same. And very frankly, I don't know of any district courts of exceptional classification or description, and I would recommend we repeal Rule 331.

MR. TINDALL: I join Judge Pope in that. As I say, there is no citation of anything of what that court means.

CHIEF JUSTICE POPE: We now have juvenile courts under the same rules, domestic relations courts or district courts -- everything is now district courts.

CHAIRMAN SOULES: Okay. Motion has been made to repeal Rule 331, and seconded. Is there any further discussions? Okay. All in favor, show hands. Opposed? That is unanimously -- that vote is unanimous to recommend to the Supreme Court to repeal Rule 331.

MR. TINDALL: Luke, one correction and then we'll quit. What does Rule -- does anyone know what Rule 330 accomplishes that's not covered under the government -- under -- I guess under -- yes, the Government Code?

PROFESSOR DORSANEO: Well, you have to take the Court Administration Act, which is not now in the Government Code.

MR. TINDALL: I understand it's 200a(1).

PROFESSOR DORSANEO: 200a(1)?

MR. TINDALL: Right.

PROFESSOR DORSANEO: And it has provisions on transfer in exchange of benches. But my recollection is that it is not broad enough to cover all the things covered in Rule 330, I assume, because the draftsman took the existence of Rule 330 into account when they did the Court Administration Act provision.

So, somebody needs to decide whether or not Rule 330 says anything that isn't already said in the transfer and exchange of benches provision and I think it's Chapter 7 of -- or Section 7 of Article 200a(1).

When I taught it this semester, I felt compelled to teach Rule 330 and the Court Administration Act together. It looked like the latter applied to exchange of benches in lower level -- below district level.

PROFESSOR EDGAR: Vertical, rather than horizontal.

PROFESSOR DORSANEO: Yeah. All the transfer mechanisms are horizontal -- or they are traditionally horizontal.

PROFESSOR EDGAR: 201a is vertical.

PROFESSOR DORSANEO: And that's in transition -- the whole area is in transition, as

everybody knows, but that requires careful look.

MR. TINDALL: All right. I'll look at that further. And one other thing that bristles through these is they keep talking about matters that can be done in vacation. And, again, I'm not -- does anyone have any experience about the power of judges during vacation to do anything, or is that just simply, again, a relic we need not concern ourselves --

PROFESSOR DORSANEO: I don't think -- what we would have to ask, are whether there is any court that doesn't have continuous terms. And I don't think there are any courts at -- county level, district level courts -- that have vacations like in those paucian days of yore when we used to get time off -- or predecessors did. I think all courts have continuous terms and the vacation concept is a relic.

MR. TINDALL: Well, see, like Rule 315 -- Rule 318 --

CHAIRMAN SOULES: Harry, do we have suggested changes on these rules?

MR. TINDALL: No, I'm just --

CHAIRMAN SOULES: Well, we've got a lot of work to do here. We really need to -- if

we want to come up with new ideas, let's do it for our next meeting.

MR. TINDALL: All right, I agree.

CHAIRMAN SOULES: I apologize for interrupting, but we do have some requests from the public here.

Is that -- have you got any other matters?

MR. TINDALL: No, that's our committee.

CHAIRMAN SOULES: Thanks for raising those as matters to be addressed in the future.

Okay. Sam Sparks, why don't you give us your -- are you ready to give us your report?

MR. SPARKS (El Paso): Sure. As they are passing those around, let me just take up 103 first. We have done 103 every time we've been here, I think. Let me remind us what we have done.

CHAIRMAN SOULES: Harry, while they are passing those out, we do encourage you to review those 300 series rules, if you will, for housekeeping and other changes for our next meeting. Will your committee undertake that?

MR. TINDALL: Sure will.

CHAIRMAN SOULES: Good. Thank you.

MR. TINDALL: All of you should have two 103s. If you don't have two 103s, raise your hand. There should be one that strikes "officer," and then one from Sam that just says -- I think you didn't change the caption.

MR. SPARKS (El Paso): That's right, I should have.

MR. TINDALL: And then there is a 107 I'm passing out.

MR. SPARKS (El Paso): Let me briefly go over what we have done. In November of '85, we changed 103 to require the district -- to require the clerk to send out the citation by certified mail mandatory upon the request of the attorney. That has been voted on. Then we got into the 103/106 area as to who can serve and who can do that, and I think the only real issue left on the 103 is the issue of professional process servers or who, in addition to a sheriff, constable or clerk, can accomplish the service.

And there are really two different proposals that come in. One is what I'm going to refer to as purely the federal, the federal rule, which allows anybody over 18 to serve without a court order. And then a lot of proposals came in to

allow anybody under the federal rule -- but having it on application of motion and order. So that's -- and then we had several that came in that specifically allowed professional process servers. But it seems to me, anybody over 18 years of age, whether they be appointed by motion and order, would take care of that, too.

So I really think the only thing remaining on Rule 103 is whether or not you want service by anybody over 18 years of age, and, if so, do you want a motion and an order, or do you want it just like the federal rules? Most of the people that have looked at this rule favor the adoption of the federal practice not requiring a motion or order.

MR. REASONER: I move we adopt the federal practice.

MR. TINDALL: Well, which one is that? I drafted mine a little bit different --

MR. SPARKS (El Paso): It's yours.

MR. TINDALL: It's mine. Okay.

MR. REASONER: It's the one where you don't have to get a motion or order for anybody over 18.

MR. TINDALL: That's right. But you can't have an -- without an order of the court,

not anyone can serve. That was the consensus of the committee the last time.

CHAIRMAN SOULES: That's right.

MR. TINDALL: And that's the way I -- and then -- okay.

MR. SPARKS (El Paso): It is the single-spaced one.

MR. TINDALL: Right.

MR. REASONER: I'm sorry. I didn't understand what you said.

CHAIRMAN SOULES: The vote -- this committee voted to not permit persons over the -- any persons over the age of 18 to serve absent a court order.

MR. REASONER: Okay. I'm moving the other way. I move -- as I understand the federal practice, it seems to me to require to get court orders on this is just paperwork and expense for the parties and just one more hassle for the judges to have to sign orders permitting service. And it seems to me that the federal practice works fine.

MR. TINDALL: Well, Harry, the --

CHAIRMAN SOULES: There was a long debate about the reasons why the state practice

and the federal practice -- and we can redo it today, if you wish --

MR. REASONER: No, no. I --

CHAIRMAN SOULES: -- but there was extensive debate in the last -- record of the last meeting.

MR. REASONER: I didn't know the committee had debated. I must have missed the last meeting.

CHAIRMAN SOULES: All right. It had to do with default judgment, automatic default judgment, as opposed to motion for default judgment. There were -- that -- at the conclusion of that discussion, this committee voted to require court order before anyone over the age of 18 could serve -- just anybody could serve.

And then we also debated the fact that there's this emerging professional process serving group that, in all likelihood, will get some kind of sanction from the legislature, some kind of probably affiliation with Private Investigator's Commission, and probably will have some kind of bonding that will emerge. And when that is done --

MR. REASONER: I didn't mean to reopen

it. I thought that Sam indicated that was a live issue.

CHAIRMAN SOULES: Okay.

MR. SPARKS (El Paso): I thought it was, but then we're looking at the double-spaced version of 103.

JUDGE THOMAS: Well, actually, yours didn't call for a motion in the double-spaced version.

MR. TINDALL: No, mine does not call for a motion. I thought the consensus of the committee was you wouldn't have to have a motion to get private service. You had to have an order of the court --

CHAIRMAN SOULES: Order of the court, that's right.

MR. TINDALL: -- without having to go and present a written motion for it.

CHAIRMAN SOULES: That's correct.

MR. TINDALL: I wrote here, "The order authorizing a person to serve process may be made without written motion and no fee shall be imposed for the issuance of such order."

CHAIRMAN SOULES: That's correct.

MR. TINDALL: So it's just like an

order for anything the judge would routinely sign.

CHAIRMAN SOULES: I misspoke when I said it required a motion; it requires an order.

MR. TINDALL: An order, that's right.

CHAIRMAN SOULES: Okay. And that was our consensus.

MR. TINDALL: Well, I would move the adoption of the single-spaced provision of Rule 103.

MR. LOW: I second that.

PROFESSOR EDGAR: I just have a textual question about it. I presume -- and I am going -- I don't like the way the original rule is written either because it is somewhat confusing, but it is kind of compounded here. You are saying, aren't you, that numbers one and two are when you make service by personal service?

MR. TINDALL: That's right.

PROFESSOR EDGAR: All right. Now, it doesn't say that. It says, "All process may be served by," without distinction between personal or by mail. And then it comes down and says, "or if by mail."

I would just suggest that we start out up here by saying, "All process may be served by

personal service, by so-and-so and so and so, or if by mail." And then it really doesn't say who is to serve if it's by mail. It just says "if by mail" either of the county in which the case is pending, but it doesn't say who is to serve in that event by mail.

MR. SPARKS (El Paso): Hadley, on the Rule 103 that we're looking at, the single-spaced one, it does not have the change we voted in November of '85, and in that the sentence that begins "service by registered or certified mail," this doesn't speak exactly to yours, but it does -- that should read "Service by registered or certified mail and citation by publication shall, if requested, be made by the clerk of the court in which this case is pending." That should be embodied in the 103 we're looking at.

CHAIRMAN SOULES: Let me say that this -- the single-spaced version does not require an order.

MR. TINDALL: Yes, it does require an order.

CHAIRMAN SOULES: Where? It says that in the last sentence. It says --

MR. TINDALL: "The person authorized

by the court -- or any person authorized by a court order," we could say that, if that would make it clear.

CHAIRMAN SOULES: How does that differ from Sam's Rule 103?

MR. TINDALL: Sam's is that it doesn't require -- well, Sam's requires by motion and order.

CHAIRMAN SOULES: Well, if we just strike out "motion and" doesn't that get us to the same place, and the language is otherwise complete?

MR. TINDALL: Well --

MR. SPIVEY: Mr. Chairman, are we trying to cover all service of process here?

PROFESSOR DORSANEO: No, this is just "who."

CHAIRMAN SOULES: This is citation.

MR. SPIVEY: Well, but isn't this rule supposed to address the "service of process," period? Why not instead of saying "who may serve," just put "Rule 103 Service of Process."

PROFESSOR DORSANEO: But it is only, "who may serve." The other rule is about whether it's this way or that way or later.

MR. SPIVEY: Then -- then aren't you using a term that's not appropriate by just saying "officer" -- just put down who may serve?

MR. TINDALL: That's the reason on that single-spaced -- look at the single-spaced one.

MR. SPIVEY: Yeah. But you've got -- all right. Okay.

MR. REASONER: But, you know, we've got a grammatical problem in --

PROFESSOR DORSANEO: After "if by mail" we have to decide whether we're going to let this authorized person serve by mail or whether we're only going to let officers do that.

MR. REASONER: Well, but you've got the further problem in that these references to county made sense when all you were talking about was sheriffs and constables, but it's not clear what they mean when you are inserting a court-appointed person.

MR. LOW: Strike that. You can get the sheriff of one county to go to the other. He's just as good as anybody over 18.

CHAIRMAN SOULES: I think we have to discuss that actually.

MR. TINDALL: Now, if a sheriff will go to another county, what's wrong with that?

PROFESSOR DORSANEO: He can only go by mail.

CHAIRMAN SOULES: But then the "of" would need to be changed to "in." If we go with the double-spaced version -- let me see if I could work through the first two or three lines. The first line would be okay. The second is okay. "Eighteen years of age," change that to, "who is authorized by court order."

MR. WELLS: Are there other copies of the double-spaced. I haven't gotten one.

CHAIRMAN SOULES: I'm sorry. Do we have other copies of it?

JUDGE TUNKS: Here -- here are most of them right here.

CHAIRMAN SOULES: Okay. Starting with the line that says, "Eighteen years of age" change "and" to "who." Change "appointed" to "authorized by." Strike "motion and," put in "court order." Strike "of" and put "in." So it says, "or by a person who is not a party and is not less than 18 years of age who is authorized by a court order, in any county in which the party to be served is

found." So that --

MR. REASONER: Well, Luke, don't you want to just strike that? What good does the reference to --

MR. TINDALL: Yeah, it's a redundancy.

CHAIRMAN SOULES: Well, it does say that any sheriff or any constable can serve the party in any county where he is found. That's not been the prior practice. Used to, the sheriff of the county in which the party is found had to do it.

MR. REASONER: But I -- but I'm fearful that it would be read to mean that if I want to serve somebody in Fort Bend County, I have to hire a process server in Fort Bend County rather than hiring one in Houston to go over to Fort Bend County.

MR. TINDALL: I think Harry is right.

PROFESSOR EDGAR: Well, that's what that "of any county in which the party is to be served" means. It means that all those people have to be in that county and that's not what is intended, I don't think.

CHAIRMAN SOULES: Well, then, let's take it out. That's not what I thought --

MR. TINDALL: Couldn't we end it with a period after "order," and then start that thing by mail as a whole other problem?

MR. REASONER: I think that would be a cleaner way to deal with it.

CHAIRMAN SOULES: That makes sense.

JUDGE THOMAS: Luke, can we insert where you're saying "and who is authorized by court order" and put "written court order"?

CHAIRMAN SOULES: That's fine with me. Any objection to that?

JUSTICE WALLACE: You want to put "any" before "sheriff"?

CHAIRMAN SOULES: Yes, sir. "All process may be served by any," instead of "the sheriff" in the first line. In the second line, the same, and add "written court order." Okay, then --

PROFESSOR DORSANEO: Could you run that --

PROFESSOR EDGAR: Let me make a quick suggestion-here -- I mean, Luke, if I may?

MR. WELLS: Luke, which one are you working from?

CHAIRMAN SOULES: The double-spaced

one.

PROFESSOR EDGAR: If this is what we mean to say -- well, first of all, we're talking here about personal service, aren't we?

CHAIRMAN SOULES: That's right.

PROFESSOR EDGAR: Why don't we say "All process may be personally served by any sheriff or constable or by any person not a party who is not less than 18 years old -- 18 years of age and appointed by motion and order."

MR. WELLS: It doesn't take a motion.

PROFESSOR EDGAR: Well, okay. You've striken "motion" -- "and is appointed by order."

CHAIRMAN SOULES: "Authorized by written court order."

PROFESSOR EDGAR: "Authorized by written order."

MR. REASONER: That's redundant, isn't it?

CHAIRMAN SOULES: Well, "personally served," I think is, too. Why not "personally served"? -

PROFESSOR EDGAR: "May be personally served by any sheriff or constable."

CHAIRMAN SOULES: Does that add

anything "personally" -- the word "personally"?

PROFESSOR EDGAR: Yeah, because then we are going to talk about mail later on.

CHAIRMAN SOULES: Well, that is personal service. Mail is also personal service.

PROFESSOR DORSANEO: Well, that's the debate. See, that's the thing.

PROFESSOR EDGAR: Well, that's the problem about that. See, really, "personal" is ambiguous to -- it could mean in hand.

MR. TINDALL: All right. One suggestion, Luke, that I picked up on mine is, I would delete that "by a person who is not a party." And the reason is that later on, the way this rule is now written, it talks about no officer who is a party to or interested in the outcome of the suit shall serve any process. And I would insert down there where it has "provided," that's where you would put "provided no officer or authorized person." See the single-spaced -- I picked it up down there, and you combined the disqualification into one sentence.

MR. REASONER: So it would read, "no officer or authorized person"?

MR. TINDALL: That's right.

PROFESSOR DORSANEO: Luke, all of this stuff in the middle comes out until we get to the proviso, right?

MR. TINDALL: That's right. Luke, if I could read back from what I think might be a pretty clear rule -- are you agreeing, Bill, that all that stuff about mail in the middle can come out?

PROFESSOR DORSANEO: Yeah, the only thing I'm worried about is that -- I mean, this is an old notion. This is an old territoriality notion of sheriffs and constables being restricted in their authority to the counties where they function. I think all -- you know, constables is another problem in our county. Constables stay in their precinct.

MR. TINDALL: Oh, sure.

PROFESSOR DORSANEO: And they're still going to stay in their precinct regardless of what this says, presumably.

MR. TINDALL: But there are those horrible cases where they have gone outside their precinct unknowingly and they got service, and that was deemed to be invalid. Now, as a rule, they're not going to go beyond their territory

anyway.

MR. REASONER: They might mail something.

MR. TINDALL: We're not going to have them mail it. Sheriffs or constables or individuals won't be mailing. It will be the clerk only. Isn't that what we're --

MR. SPARKS (El Paso): No.

MR. REASONER: No.

MR. TINDALL: No?

MR. SPARKS (El Paso): No. The change that we made in November was that if the lawyer requests, the clerk has to because a lot of clerks were refusing to.

MR. TINDALL: Oh, the clerk can, but --

MR. SPARKS (El Paso): But you can also have the sheriff do it under --

PROFESSOR DORSANEO: Well, you can, but they don't. It's a nice thought, but it doesn't happen. But what I'm wondering about, is there something in some other book, like the Constitution, that imposes a territoriality problem? I would think not, because all we're really saying is that any person, including

sheriffs and constables -- oh, no, we're really saying more than that.

MR. ADAMS: Well, they're over the age of 18. Well, no --

PROFESSOR DORSANEO: They have to be authorized by a court order. I'm just wondering if there's any other reason, other than old-fashioned thinking, for restricting your constable or a sheriff to a particular geographic location as a matter of authority or law. If there is, then we can't solve that problem here.

CHAIRMAN SOULES: Well, there may be some statutes that limit them; but if there are, they are limited, but they are not limited by our rules.

MR. TINDALL: No. Luke, let me see if this doesn't sort of get a basis of what we're talking about.

CHAIRMAN SOULES: All right.

MR. TINDALL: "All process may be personally served by any sheriff or constable or by any person not less than 18 years of age authorized by written court order."

JUSTICE WALLACE: Let me run this by you, too -- just the wording of it, Harry. "All

process of personal service may be served by any sheriff, constable, or any other person not a party to the suit who is not less than 18 years of age and is authorized by written court order."

MR. TINDALL: I took out that "who is not a party to the suit" because later on you'll see, we have a -- provide -- there is a disqualification sentence that follows it.

JUSTICE WALLACE: Okay. This was just in structure, "any other person not less than 18 is authorized." In other words, instead of any sheriff or any constable or any other you got, either a sheriff, a constable, or another person.

MR. REASONER: That's good.

MR. TINDALL: That's right. Okay. So it would read, "All process may be personally served by any sheriff, constable, or any other person --"

CHAIRMAN SOULES: No.

MR. TINDALL: No?

CHAIRMAN SOULES: No. You need a disjunctive between sheriff or constable and then a comma.

PROFESSOR DORSANEO: Because you suggested that "court order" modifies all the way

back to "sheriff," otherwise.

MR. TINDALL: "Comma," all right.

CHAIRMAN SOULES: "All process may be personally served by any sheriff or constable, or by any person not less than 18 years of age authorized by written court order."

MR. TINDALL: Right. And then it would seem to me we could skip that -- all that next three lines and pick up where it says, "No officer or authorized person."

CHAIRMAN SOULES: "No officer or person who is a party." You don't need to say, "authorized" again, do you?

MR. TINDALL: Well, because -- no. We're picking up "No officer or authorized person who is a party to or interested in the outcome of the suit shall serve any process."

PROFESSOR EDGAR: If he's a party, he's not going to be authorized, though.

MR. REASONER: We're going to make it clear he can't be.

MR. RAGLAND: Why don't we just substitute "person" for the word "officer" and go on?

MR. TINDALL: All right. "No person

who is a --" oh, that's right, that cures it. "No person who is a party to or interested in the outcome of the suit shall serve any process." I don't know why we need the "therein."

CHAIRMAN SOULES: Period. That's right.

MR. TINDALL: And then the last sentence is typed in the double-space. It would be "service by."

PROFESSOR EDGAR: No, we do need "therein," too.

CHAIRMAN SOULES: Why?

PROFESSOR EDGAR: Because the person who may be a party and interested -- oh, "in the outcome of the suit," all right.

CHAIRMAN SOULES: Okay.

MR. TINDALL: All right, "service by." And then the last sentence is typed "Service by registered or certified mail and citation by publication shall, if requested, be made by the clerk of the court and in which the case is pending."

PROFESSOR DORSANEO: Okay. Let's go back now that I understand, listening to what Sam said, do we want to say in this first thing

"served," any modifier at all? The question I have policy-wise is: Are sheriffs and constables and other persons authorized to mail?

MR. TINDALL: No.

PROFESSOR EDGAR: Not by this.

PROFESSOR DORSANEO: They are not now by this.

CHAIRMAN SOULES: They will be. They are now. The sheriff and the constables are now, and another -- if you think that a person who is authorized becomes an officer of the court -- I don't know how that would play out. He also would be because under 106, "citation can be served by any authorized -- officer authorized to serve by mail."

MR. SPARKS (El Paso): I think the question is: Are we certain that service by mail is personal service?

PROFESSOR DORSANEO: No, as a matter of history, it is not. In Nauer versus Neff, (phonetic) it says "service by mail" is constructed service and it doesn't count.

MR. SPARKS (El Paso): So the word "personally" that we are putting in there probably should be removed, or we're changing the practice.

PROFESSOR DORSANEO: If we're going to do it all, let's do it like it says in 106. If we're going to give them the whole thing say, "may be served by personal delivery." I think 106a(1) talks about delivery or by mail in the manner provided by 106.

CHAIRMAN SOULES: "Personally" doesn't appear as a modifier to "serve" at any place that I recall.

PROFESSOR DORSANEO: If you ask the question, "Is mail to you directly, personal service on you?" I say historically, no; maybe, yes.

CHAIRMAN SOULES: Rusty, do you have a point on something -- on this "personal"?

MR. TINDALL: You have to accept it in person is what 106 says.

CHAIRMAN SOULES: Rusty has his hand up, and I have recognized him on this.

MR. MCMAINS: Well, all I wanted to find out was, were we intending by this rule, or are we limited in some of the other rules as to whether we are talking only about sheriffs and constables of this state, or is this intended to be -- you can get personally served in any state

by a local sheriff or constable because there's nothing here about limiting it to the State of Texas or

to --

MR. TINDALL: That -- Rule 108 covers defendant out of state. That's a whole different --

PROFESSOR DORSANEO: But he's talking about two different -- I think we're obviously talking about Texas constables and sheriffs. The issue that's not addressed is whether they can mail outside the state as well as mail outside -- as well as go outside their counties, and that has never been addressed. That's not addressed in the rules now --

MR. TINDALL: That's right.

PROFESSOR DORSANEO: -- in so many words. I'm not worried about saying that constable or sheriff --

MR. TINDALL: Well, it is addressed under Rule 108, Bill. Any defendant outside the state can be served in the same manner of citation to a resident defendant. So, if we permit mail on a resident defendant, we also will authorize service by mail on a nonresident defendant.

PROFESSOR DORSANEO: I agree with that construction of it, but I have heard a very knowledgeable jurist say that they don't read it that way. There is no need to get into that.

MR. SPARKS (El Paso): Well, Rusty has got a good point, though. We have always had reference of the county of residence, and we might should say, "any sheriff or constable in the State of Texas" or something like that. I don't know how anybody -- why anybody would think the sheriff of Alaska would be embraced, but --

MR. REASONER: Interestingly enough, the way I read 108, you can have any disinterested person make service without even getting a court order. We're making it easier to get service outside the state than we are inside the state.

PROFESSOR DORSANEO: That's right. They take care of it in the return. There are tougher return requirements that have to be sworn to.

MR. REASONER: I don't agree with that. I mean, why --

MR. TINDALL: It has to be sworn to. They have to verify the return.

MR. REASONER: Why? You mean I can

just hire any jerk in Alaska, but in Texas I have to go and get a court order?

MR. TINDALL: Uh-huh. England has a registered sergeant-at-arms. You never hired one of those?

MR. REASONER: I -- well, no. But it just doesn't make sense to me to have more stringent requirements for in-state service than for out-of-state service.

MR. TINDALL: Well, Luke, I would -- I think in view of that discussion -- strike -- I would delete the word "personally served," so we don't get into creating problems that we weren't intending to create.

CHAIRMAN SOULES: Delete the word "personally," then, in the first line as we read it.

MR. TINDALL: Just say, "All process may be served by any sheriff or constable," et cetera, et cetera.

CHAIRMAN SOULES: Okay. I guess I'll read the whole thing, then.

PROFESSOR DORSANEO: That defers the question until we get to Rule 106, you see. 106 needs to be -- now, the problem of mail or

personal delivery or whatever is in Rule 106 now. It didn't go away, it just moved to a different number.

CHAIRMAN SOULES: Okay. "All process may be served by any sheriff or constable, or by any person not less than 18 years of age authorized by written court order. No person who is a party to or interested in the outcome of the suit shall serve any process. Service by registered or certified mail and citation by publication shall, if requested, be made by the clerk of the court in which the case is pending."

The motion is made that we -- are you making a motion that we adopt that?

MR. TINDALL: I so move.

CHAIRMAN SOULES: That's Harry Tindall's motion. Is there a second?

JUDGE TUNKS: I second.

CHAIRMAN SOULES: Judge Tunks seconds. In favor, show by hands. Further discussion -- excuse me.

MR. REASONER: Well, I just -- just -- my only question I have, it's clear that that comprehends service by mail by these people?

PROFESSOR DORSANEO: No, but we have

more rules -- we have another rule. It is deferred to Rule 106.

MR. SPARKS (El Paso): But I think it is clearer they can serve by mail.

CHAIRMAN SOULES: Well, it is under Rule 106.

MR. SPARKS (El Paso): Yeah.

JUSTICE WALLACE: It says all process.

CHAIRMAN SOULES: Those in favor, then, show by hands unless there is further discussion.

PROFESSOR DORSANEO: I have further -- one further thing. The last sentence -- is the last sentence clear that it doesn't, by negative implication, exclude service by registered or certified mail of these other persons?

PROFESSOR EDGAR: That's my concern.

MR. REASONER: That's the point I was making, too.

MR. SPARKS (El Paso): How could it if you have the phrase "if requested"? I mean, it seems like that is a direct --

PROFESSOR EDGAR: The question is by this sentence -- could you argue that this precludes that sheriff or constable from affecting

mail service?

CHAIRMAN SOULES: In my judgment, that sentence should be Item 3 under 106a because it tells everybody, everybody can serve it by mail. And a clerk, if requested, must serve it by mail, and that's where it really fits.

MR. REASONER: Yeah, that would be much better.

MR. SPARKS (El Paso): That would do it.

PROFESSOR DORSANEO: That's an excellent suggestion.

CHAIRMAN SOULES: All right. Could we move that, and then, Harry, would you accept an amendment that we take the second -- no, the third sentence --

MR. TINDALL: The last sentence.

CHAIRMAN SOULES: -- the last sentence, and move that to a new subparagraph 3 --

MR. TINDALL: Yes.

CHAIRMAN SOULES: -- under 106a?

MR. RAGLAND: I want to raise a question, Luke. These rules, this 100 series here, are really talking about two different things. It's talking about -- in 103, about

process, 106 talks about citation, and they are not necessarily the same thing. A citation is a process, but a process is not a citation. You've got show cause. You've got injunction, temporary injunctions and all that sort of thing. If we're trying to get at where all process be served according to this draft of 103, looks like we're going to have to do some housecleaning, especially on 106.

CHAIRMAN SOULES: Well, how about moving that last sentence to the end of 103? Maybe that's still a better place for it because it says "service by registered or certified mail and citation by publication may be made by the clerk in which the case is pending."

MR. RAGLAND: And then 106, because you've got "citation" and it refers to "officer." And these people appointed or authorized who are not certified law officers, I don't think come within the term "officer" under Rule 106.

CHAIRMAN SOULES: Well, would it solve your problem if we put this last sentence of proposed Rule 103 --

PROFESSOR DORSANEO: You're doing the right thing. The problem he mentions is a bigger

problem.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: There isn't any direction in these rules about how this other process is to be served. I mean, there is just a big hole.

JUSTICE WALLACE: You can just start out that last sentence with "In addition to the above," and that --

MR. TINDALL: That cures it, yeah.

CHAIRMAN SOULES: What's that?

JUSTICE WALLACE: Start that last sentence, "In addition to the above, service by registered or certified mail and citation by publication, shall, if requested, be made by the clerk of the court."

CHAIRMAN SOULES: Okay, Judge. And where would that -- where would we put the sentence in --

MR. TINDALL: Right before "service."

CHAIRMAN SOULES: Just leave it where it is in 103?

JUSTICE WALLACE: Put "In addition to the above" before "service." Start the sentence with --

CHAIRMAN SOULES: And leave it in 103?

JUSTICE WALLACE: Yes.

PROFESSOR DORSANEO: But that still doesn't -- there still is that big problem overall of how these other orders are meant to be dealt with.

PROFESSOR EDGAR: Well, Rule 103 deals with service of process, and 106 talks about citation --

PROFESSOR DORSANEO: Right.

PROFESSOR EDGAR: -- which could be two different things.

PROFESSOR DORSANEO: It could be two different things, and there is no 106 for the other process.

PROFESSOR EDGAR: That's right, and that's the point Tom is bringing up. And I don't know that just simply adding, "In addition to the above" cures the problem that Tom has raised.

PROFESSOR DORSANEO: And that's the issue. Maybe if we change Rule 106 such that it applies, we could consider whether we want to change that --

MR. TINDALL: Yeah, broaden it.

PROFESSOR DORSANEO: -- to apply to

the process.

CHAIRMAN SOULES: Why don't we go ahead and leave this sentence in 103 and change it as Justice Wallace has suggested. And then, Harry, again -- of course, your committee has a tremendous amount of work, but would you-all undertake to determine whether Rule 106 and these other rules that talk about citation, whether we could just substitute the word "process" for "citation" or add after "citation," "or other process," so that we broaden those?

MR. TINDALL: We can do that, but we're really not changing -- to change the rules we have discussed here today does not create a problem that's not already there, because Rule 103 still talks, today, about process, and 106 is citation. I agree it needs to be worked through.

CHAIRMAN SOULES: Well, but if we leave this language in 103 as proposed --

PROFESSOR DORSANEO: Then we can go on and save this other problem for later.

MR. TINDALL: Yeah, I don't want --

CHAIRMAN SOULES: It will be just like I read it, except in the last sentence we will add the word "In addition to the above," before

"service."

MR. TINDALL: Right.

CHAIRMAN SOULES: Those in favor, show by hands. Opposed? Okay, that's unanimously recommended for adoption.

Next item.

MR. TINDALL: One thing, Luke, if I can just talk because -- I did 107 because I thought it was a mandate from the committee last time, and, frankly, I need to talk to Sam first about this. There was -- were you going to bring up 107, also?

MR. SPARKS (El Paso): No, I was going to yield to you.

MR. TINDALL: Okay. There was some concern last time about when we start allowing court-authorized people to serve papers that -- what kind of return do they have? And so, if you have the 107 there, I put in that any return by an authorized person, which would be distinguished between a sheriff or constable, shall be verified so that if we did have the true and false service, there would at least be a criminal sanction against them for false swearing. And that would be the only change. And, again, 107 is talking

about citation.

CHAIRMAN SOULES: But that's the way it is now done and you're going to --

MR. TINDALL: That's right. And we're going to address that --

CHAIRMAN SOULES: You're going to look at that for --

MR. TINDALL: We have in our county a precept, which I am told exists in no other county. You talk to a lawyer in Dallas, and they have never heard of a precept. Do you have them in Lubbock, Hadley -- precepts?

PROFESSOR EDGAR: Oh, we speak of little else there, Harry.

MR. TINDALL: A precept -- I don't quite know what that creature is, but Ray Hardy issues them frequently.

PROFESSOR EDGAR: What is it?

MR. TINDALL: It's a show cause. We call them precepts, but -- so I don't know what all that whole area of process includes -- injunctions, TROs, show causes. I mean, that's sort of a lot of loose language.

PROFESSOR DORSANEO: All process is a command to act.

MR. TINDALL: It should be a summons, but that's --

PROFESSOR DORSANEO: Those are all just names --

MR. TINDALL: That's right.

PROFESSOR DORSANEO: -- of things that we used to have around like a show cause order. That just makes me -- when I try to change my forms just to say "order," doesn't say "show cause order," it makes people all kinds of uncomfortable.

MR. TINDALL: Yeah.

CHAIRMAN SOULES: Okay. Is everybody agreeable to this change in Rule 107? Is there any --

PROFESSOR EDGAR: Why don't you just say -- why don't you say, "The return of the authorized person executing the citation"?

MR. LOW: It's not really the return of the person, it's the return of citation for that person. It's the return of citation; it has to be.

MR. TINDALL: All right, "return of citation by an authorized person shall be verified"? That's --

PROFESSOR EDGAR: Well, I was just suggesting you don't have to say "officer" or "authorized person." You just could say "authorized person."

MR. LOW: The return can only be by those people we've already said who can serve it, so the return has to be.

MR. TINDALL: Well, the policy -- the judgment you've got to make is: You give a sheriff or constable a preferred status by allowing them to continue business as usual. But for these court authorized people, they have to verify that they served. That was the way I drew it.

MR. LOW: Okay.

MR. TINDALL: So that's the reason I put -- but I agree it should be, "The return of citation by an authorized person shall be verified." Sheriff and constable can do it as they always do.

MR. LOW: Of course, there's one little change. It might be a sheriff or constable of another county. Usually, you thought it would be the sheriff or constable of the county where they would be available if you had to call them,

and if it's another county, they may not be available. I mean, you know, they have always been the sheriff or the constable. I don't know, that's not true either, it could be service outside. Okay.

MR. TINDALL: Well, I move that we take 107 as proposed with changing "any" to read "the return of citation by an authorized person shall be verified."

PROFESSOR EDGAR: Well, what are you going to do with executed? Read it as you propose it.

MR. TINDALL: All right. It would be exactly as typed except you would strike the word "any" and you would --

PROFESSOR EDGAR: In 107?

MR. TINDALL: In 107.

MR. SPARKS (El Paso): Read -- Hadley, he's got a proposal.

MR. TINDALL: Don't you have one?

PROFESSOR EDGAR: I'm trying to find where "any" is. I've got all those three paragraphs --

CHAIRMAN SOULES: Right against the left-hand margin, right here.

MR. SPARKS (El Paso): Fifth line.

MR. TINDALL: "Any" would be --

PROFESSOR EDGAR: Oh, all right.

MR. TINDALL: And just put "The return of citation by an authorized person shall be verified."

PROFESSOR DORSANEO: Where does it say Rule 108?

MR. TINDALL: In 108, it says, "The return in such case shall be endorsed on or attached to the original notice, and shall be in the form prescribed by 107, and shall be signed and sworn to by the party making such service before some authorized -- by the laws of this State to take affidavits under his hand and seal such --"

PROFESSOR DORSANEO: I think "verifies" is probably good enough, but it doesn't --

MR. TINDALL: I agree.

PROFESSOR DORSANEO: -- really mean anything, is what I'm telling you. It means --

MR. TINDALL: I think "verify" covers it, frankly. But I take no pride in the adequacy of that. We certainly say in other instances "the

pleadings shall be verified," and we know what that means without --

PROFESSOR DORSANEO: It usually says "verified by affidavit or supported by affidavit," though, in all those other places most of the time. I think "verified" is Texas legal slang like "sworn." And, if we are all happy with that, that's probably okay.

MR. TINDALL: I'm happy with it.

CHAIRMAN SOULES: Okay. So the motion is that we recommend to the Supreme Court the changes in Rule 107 that Harry has written here, with modification "any" in the underscored portion of the fifth line be changed to "a --"

MR. TINDALL: No. "The return of citation."

CHAIRMAN SOULES: "A return of citation"?

PROFESSOR DORSANEO: "The return."

MR. TINDALL: "The return of citation."

CHAIRMAN SOULES: "The return of citation," and then pick up "by an authorized person."

Any further discussion? All in favor, show

by hands. Opposed? That's unanimously approved.

PROFESSOR DORSANEO: Do you have any changes for Rule 106 recommended, Harry, that conforms?

MR. TINDALL: I'm going to defer to Sam Sparks. I did not address 106, but I think we've got a rule suggestion pending in the Supreme Court right now on 106, do we not, Sam, that would delete the -- 106 deals with a whole host of other issues that we have not really addressed here in 103 and 107 about authorizing individuals to serve papers. It deals with -- if you have attempted service, then you might try to go ahead and leave it at the doorstep at the place of business. And it goes into other issues that we have not really addressed here.

PROFESSOR DORSANEO: But 106 is -- the three rules that work together are 103 -- at least most of the time -- 103, 106, and 107. And the meat in the coconut is in 106.

MR. TINDALL: Well, for the difficult defendant who you truly cannot find, the sheriff has been out, and we can't find, we want to leave it on his door.

PROFESSOR DORSANEO: That's the second

part of 106. You see --

MR. TINDALL: The first part of 106 is where a court can authorize an individual to go serve papers because the sheriff has been unable to do so.

PROFESSOR DORSANEO: No, 106a sets forth the basic rules on service.

PROFESSOR EDGAR: That's right.

MR. TINDALL: I understand that.

PROFESSOR EDGAR: Then "b" --

PROFESSOR DORSANEO: "b" is what all lawyers talk about as using Rule 106.

MR. TINDALL: Right.

PROFESSOR DORSANEO: 106 contains the main rule and then it contains the -- the so-called 106 practice.

MR. TINDALL: Well, I don't think 106 needs to be changed. And if you read through it -- in view of what we've just done to Rule 103. Do you agree, Hadley?

PROFESSOR EDGAR: No, I don't, Harry, because it says "unless a citation or an order of the court otherwise directs, citation may be served by any officer authorized by Rule 103." You now mean any person authorized --

MR. TINDALL: It should be "any." I agree, yes.

PROFESSOR EDGAR: All right. And then also you continue down there in subdivision b, and this is now, "the court may authorize service," it says, "by an officer or by any disinterested adult named in the court's order." I think that language should be rephrased to dovetail with the changes we have made in Rule 103. I don't know exactly what at this point, but I think some change needs to be made there.

PROFESSOR DORSANEO: I would suggest we could take out the "who" in that language and just talk about --

MR. TINDALL: I agree.

PROFESSOR DORSANEO: "And the court may authorize service at the usual -- or by leaving at the usual place of abode," et cetera.

MR. TINDALL: "May authorize service by leaving a true copy," see?

PROFESSOR DORSANEO: It talks about the method, you see? It talks about a different method, rather than the authorized methods of personal delivery or mail. And then it would be -- would be is forget about who is doing it --

MR. TINDALL: That's right.

PROFESSOR DORSANEO: -- but would give you a different way to do it by tacking it on their door or leaving it with their kids, et cetera. Now, that would work. And I would move the changes in Rule 106 by changing in the introduction in 106a the word "officer" to "person," and by eliminating in 106b(1) the words "by an officer or by any disinterested adult named in the court's order."

MR. TINDALL: All right, I would -- Luke, let me -- and I think that covers it. Do you not agree, Bill?

PROFESSOR DORSANEO: Yeah. The only thing I'm worried about is whether we need to go back and rethink 107 about this -- there was an additional requirement in 106b about this authorized -- this disinterested person being named in the order, you see? There's a requirement there, not only that there be an order but that the order have the name of the person rather than the XYZ Publication Process Serving Company.

MR. TINDALL: I understand, yeah. Let's take one at a time. The first thing -- I

think this may be housekeeping -- on -- does everyone have Rule 106 in front of them to look at? In the third line --

CHAIRMAN SOULES: You're not looking at anything other than the rule book, are you?

MR. TINDALL: That's right. Does everyone have a rule book they can look at? The third line, strike the word "officer" and replace it with the word "person," and that dovetails with who can serve and then it tells how. And then "b(1)" would strike -- it would -- after the word "by," the first word "an officer or by any disinterested adult named in the court's order," that would be striken so that it would read "by leaving a true copy of the citation." And those would be the changes to make it consistent with the changes in 103. And I would so move.

PROFESSOR DORSANEO: Second.

CHAIRMAN SOULES: Okay. Restate them again, please, for me, Harry. Let me follow it one more time.

MR. TINDALL: On 106, strike the word "officer" and replace it with the word "person."

CHAIRMAN SOULES: In the second line of 106a?

MR. TINDALL: Yes. And then under 106b(1) where we have the word "by," delete the phrase "an officer or by any disinterested adult named in the court's order," so that it would read "by leaving a true copy of the citation," et cetera, so that 103 then becomes who may serve, and 106 really becomes --

PROFESSOR DORSANEO: Methods, yeah.

MR. TINDALL: Method of service. Do you agree, Bill?

PROFESSOR DORSANEO: Uh-huh.

MR. TINDALL: The caption really becomes -- "Method of Service" would be the caption.

PROFESSOR DORSANEO: Right.

MR. TINDALL: And that's, essentially, you've got to serve them in person; or by court order, you can leave it at the doorstep.

PROFESSOR DORSANEO: No, that all looks -- we're getting -- oh, to hell with it, be quiet.

MR. TINDALL: Okay. And the last change -- the last change would be on 107. I see just one other return, now. We should say -- no, we cured that in the one I had "the return of the

officer or authorized person." We can forget that.

CHAIRMAN SOULES: Before we vote, we're going to have to have another meeting, so why don't we get as much of a consensus before we reduce our group any much more and try to get a consensus on when we can meet again.

PROFESSOR DORSANEO: Could we meet for one day -- come early, stay late?

CHAIRMAN SOULES: I don't think we can meet -- do this in one evening. I don't know. We're going to have another report from Harry's committee because the best thing to do will be to scrub these things completely through in order to solve the process of citation issue that we just had and organize the rules about who may serve.

MR. TINDALL: I'll defer. To me, that's a larger issue that may take a long time to --

CHAIRMAN SOULES: Well, we're not going to get through today, you understand?

MR. TINDALL: I understand.

CHAIRMAN SOULES: We're going to have to have a meeting between now and the end of the year.

MR. LOW: Hadley and I were just discussing a simpler way to do it is to go back and just talk about who may serve all citations and just list the persons. And then how, you know, that person -- and then put in there by, you know, disqualification. And then you've got different rules in 106 that also incorporate 103, and some of them you don't even have to repeat. And you can say, you know, just start out "in addition," "and to others," when they can't find them. And you could shorten them and just say who and how and then the return.

CHAIRMAN SOULES: Well, there is no question we can do that, but we need it in writing for the Court to act and we can't get it written today --

MR. LOW: That's right.

CHAIRMAN SOULES: And for the most part, the members of this committee like to see what's written before they vote.

MR. LOW: I understand that.

CHAIRMAN SOULES: So we do need to charge Harry's committee with as much information as we possibly can give him so that we do get written proposals on the table for the next

meeting.

PROFESSOR EDGAR: I further suggest that when we get through with that, we might look and see that Rule 104 needs to be substantially modified, if not deleted.

MR. LOW: Deleted, maybe.

PROFESSOR EDGAR: But I simply call that to the attention of the committee. And, also, to look at Rule 105 and see if any changes need to be made there, as well.

PROFESSOR DORSANEO: That's the thing I was -- I didn't mention when I told myself to be quiet. It would be nice if 103 and 106 were next to each other.

PROFESSOR EDGAR: Yeah, just simply rearrange them. Put them in the order in which it happens.

MR. TINDALL: Well, let me get the consensus here, and we'll know -- I think we've got an idea on how we want 103 written, and I think we've got an idea on how 106 is written. We will, perhaps, completely delete 104 and 105, or at least incorporate those provisions into other rules so that logically, then, we would have three core rules: Who may serve; how they are to be

served; and then the return.

CHAIRMAN SOULES: That's make sense. That last part of 103 we just talked about would be under "how."

MR. LOW: And then, there is one specific thing that applies to citation that may not apply to other process, and you'd have to take that and specify 106. You know, by giving to somebody that's at that address or person that makes --

MR. TINDALL: Well, Luke, I think we've got a pretty clear direction here. We voted on this, I know at least twice now, and I think we've got -- I don't know -- you know, there's no need to just grind and refine on this forever. I think we've got a clear mandate of this committee on the changes we want now. I urge that we go ahead and send those to the Court because --

CHAIRMAN SOULES: How are we going to send them to the Court?

MR. TINDALL: Well, based on the changes we have approved here today.

CHAIRMAN SOULES: Well, I know, but there is not anything in writing on the table and that is a problem.

MR. TINDALL: Well, we voted on 277, and I didn't see all that in writing at the end. And we went through some very serious issues on the court's charge that we are going to send on to the Court without having it finally back here flyspecked once more.

MR. REASONER: What about sending them out by mail, Luke? Would anybody have any objections?

MR. TINDALL: I'll do that. I just -- I want to see us move forward.

CHAIRMAN SOULES: Okay. Let me say this. We are going to have to have another meeting between now and the end of the year. We have covered about half of this book. And I think the reason is because we covered the first half, the half that we have covered very thoroughly, and it took all that work to get it out, no question about it. But we still have matters pending that we have to address. It's not fair to those persons that have asked for our help for us not to get their matters dealt with before the Court promulgates rules and then takes -- in effect, we're going to delay for one or two years, the enactment of other -- of more rules in the regular

course.

MR. TINDALL: Could we go ahead and vote on the changes to 106? And I think with that, we can complete the real problem dealt with, and then in terms of the fine tuning, get this thing rewritten.

CHAIRMAN SOULES: Sure.

MR. TINDALL: And I will be glad to take on as a longer term project, because that gets into these issues that I think I'd like to put a law clerk on and tell me about citations and summonses and precepts and all that other.

CHAIRMAN SOULES: Okay. Can we get that for the next meeting? We need that for the next meeting.

MR. TINDALL: I'll do my best.

CHAIRMAN SOULES: Okay.

MR. TINDALL: Sure. But I'd like to go ahead and get our changes approved today. I really would, Luke. I mean, we've had them here -- the only change we have not had before the committee in writing is the conforming change to 106 where we put the word "officer" first and we delete --

CHAIRMAN SOULES: What do you want

approved, Harry? We've approved 103, and we've approved 107. We've talked about -- do you want approved the thought that we reorganized --

MR. TINDALL: 106a, which is really a housekeeping change. It's to conform with the change that was made in 103.

CHAIRMAN SOULES: Is the committee, in principal, in agreement with the discussion that we just talked about in terms of reorganizing the process service rules and the changes -- the specifics that have been brought up?

All who are in general agreement with that, show by hands. Opposed? Okay.

PROFESSOR EDGAR: But Harry is going to reorganize it, though, and it's -- is he not?

CHAIRMAN SOULES: I don't -- he said he was going to try.

MR. TINDALL: I'll do that, but I'd like to go ahead and get this committee's approval on the changes as we discussed them here today and voted on 103 and 107. And if we can get the housekeeping to 106, then we can complete that and I can get off the floor until later on in terms of --

CHAIRMAN SOULES: Let me just say,

Harry, somebody has to be the bad guy. There are rules in other committees, particularly in the committee on the administration of justice that you can't even take up a matter that's not before the committee in writing --

MR. TINDALL: I understand that.

CHAIRMAN SOULES: -- in the proper form and so forth. We are attempting to give you guidance -- all the guidance we possibly can, but the committee can't pass on something in my judgment until it's here and in writing.

PROFESSOR EDGAR: For example, Buddy brought up a good point that maybe we could take and put all of this in one rule and make it very simple and just have everything in chronological order. Delete Rule 104, which everybody says doesn't mean anything. And I would hate for us to adopt these rules -- have these go to the Court -- have them promulgated with Rule 104 still on the books. I mean, I think there are a number of things that we -- we need to look at this whole thing. And I would prefer to see it all in writing as we are going to approve it, in its entirety, before we let it out of committee. Now, that's my reaction.

CHAIRMAN SOULES: Now, we may do markups, minor markups or major markups, on what's here, but everybody, when it's through, has their notes made on a piece of paper that has the text that we passed; and at least, we need to get to that point, and we're not there today.

When can we meet again? Who's got a suggestion between now and the end of the year?

MR. BLAKELY: Mr. Chairman?

CHAIRMAN SOULES: Yes, sir, Newell.

MR. BLAKELY: Let me raise this aspect of the thing. I've got a mental picture of what the Court plans to do -- how fast it plans to operate and so on. And it hopes to get the rules settled on in December and then put it into the Bar Journal to be effective before the legislature ends; is that right, Justice Wallace?

JUSTICE WALLACE: Well, that was the plan. We thought we were going to get through today.

MR. BLAKELY: What will this having a new meeting do if we don't meet until December -- you see -- or if we could meet later this month or early October and still achieve your objectives?

JUSTICE WALLACE: If we don't meet

until December, I don't think it's going to be physically possible for the Court. In effect, you've got a two-week month in December, is what it boils down to in getting anything done -- a three-week month at the most. And it's going to be very difficult, if not impossible, to get that done and comply with the 60-day requirement of publication in the Bar Journal before we can get an effective date. I say we're going to have to move that effective date down to at least until July 1 if we waited until December.

CHAIRMAN SOULES: Justice Wallace, comment, if you will, on your feeling as to the Court's attitude about such delay on the matters that we have passed on and still have before us in terms of --

JUSTICE WALLACE: There is no real problem. The concept we talked about is to establish a firm practice of amending rules no more frequent than every two years, and have them set a date, whatever it is, the first of any month you want to mention, but on the first day of so-and-so month -- and this next year will be the odd-number year, is when the lawyers can expect rule changes to be made -- and then stick with

that. And that's what we're working toward.

Now, there is nothing magic about any month, except I know the Rules of Evidence have been setting on the table for some time now. We're waiting to get all those approved and promulgated along with these Rules of Procedure. And we're going to have a day when rules are going to be promulgated, and when you get to get the rules of evidence, civil procedure, appellate procedure -- whatever the rules are. This is going to be the time when you expect new rules and give the Bar out there and Bench notice that we're going to start looking for these. This is the date they're going to be published, instead of us going down to the courthouse and come to find out 30 days ago new rules were published and nobody has seen them yet.

MR. BLAKELY: Now, was any of this tied in with the legislative session to get it done?

JUSTICE WALLACE: No.

CHAIRMAN SOULES: And for your work, Newell, I think that the Court could go ahead and do what it may wish to do on the Rules of Evidence, maybe promulgate them in order to take

care of those Rules of Evidence before --

JUSTICE WALLACE: We could go ahead and work on the Rules of Evidence and prepare an order and promulgate an effective date at a time when these rules would be ready, where we can meet that definite date. And that way, you can get your work done because the order is there; they have been promulgated; and the effective date will just be moved up.

MR. BLAKELY: There is one little wrinkle, and that's moving certain Rules of Civil Procedure into the Rules of Evidence. A little suggestion that I think we could deal with in ten minutes today, if we could do that.

CHAIRMAN SOULES: I did want to get a report from you today, and I think there is a matter on Rule 202 -- is that -- have you had a chance to see something that got submitted on Rule 202?

MR. TINDALL: Luke, I think I've got a clear direction, and I think Sam and I have conferred we're going to get together and have this thing -- is it the consensus of the committee that if we lived in a perfect world that all this be combined in one global rule much like our

discovery rule? Would that be the way the committee's preference would be? Let me just get some ideal thinking from you.

PROFESSOR DORSANEO: My preference for now would be to have Rule 103, as we voted on it, Rule 107 and Rule 106 as tentative suggestions. That done, together with looking at Rules 104 and 105 and treating that as a package, maybe I would want to go back and look at 101 and 102 and see what in the world they are about.

MR. TINDALL: Sure.

PROFESSOR DORSANEO: 102 is not about anything --

MR. TINDALL: I think everything from 99 through 107 --

PROFESSOR DORSANEO: -- and get that done because that's a real problem today in law practice on service of citation. And the legal community has wanted that problem to be addressed. And that can be done and it can be completed. It could even be done from my perspective by a subcommittee, somewhat like the way the appellate rules were done at the back end because we don't have any policy issues involved at all. This is really just a matter of choice.

MR. TINDALL: We've agreed on what we want.

PROFESSOR DORSANEO: But on the other hand, this larger question of comprehensive look at service of process and the methods, that is going to take a long time to do. And I would rather go ahead and do something that is a lot more than mere patchwork that solves the real lawyer's problem as quickly as possible in a professional way, leaving the larger overall thing to a definite later time. That would be my suggestion.

CHAIRMAN SOULES: Okay. We do want to hear from Newell, and Justice Wallace has a couple of things he wants us polled on.

But when should we meet again? Can anybody meet before the end of the year? Should we make it a January date?

MR. SPIVEY: No, not in January. Some of us will be skiing.

MR. REASONER: What about the end of October?

JUDGE THOMAS: How about reasonably after November 4th?

MR. TINDALL: What about November 8 --

7 and 8? That's after election day.

CHAIRMAN SOULES: Tom?

MR. RAGLAND: I'm in agreement that this whole series -- 100 series ought to be looked at very carefully. But it occurs to me that there are very valuable and substantial rights which hinge upon due process, et cetera, et cetera.

And I think that it is significant enough to where this committee, whenever it meets, come here with the idea of devoting their entire attention to that portion, this 100 series here, because there's a lot of things that I don't know, just in reading this, that raised some questions in my mind. There's a lot of statutes that deal with police officers. There are a lot of other rules. There is a line of cases, for example, that says that the statute of limitations is not tolled unless service is requested timely within the two-year period or four-year period of time. I don't know what effect it might have on Rule 128, for example. It may not have any at all, but I think it merits some real serious consideration, rather than trying to cram it in between 4:00 and 5:00 on Friday some afternoon.

MR. SPARKS (El Paso): Or 11:00 and

12:00 on Saturday.

MR. RAGLAND: That's right.

MR. SPARKS (El Paso): Which is where these rules have been for six months.

MR. RAGLAND: That's right. I think that this is important. I mean, this is not like discovery rules where, you know, the Court could come back and patch it up later on if it's not given the proper attention. I think it is important enough where we have a special session, if you please, to deal with this one portion of the rules.

CHAIRMAN SOULES: Tom, are we going to have two more meetings or one?

MR. RAGLAND: Well, I don't know, Luke.

CHAIRMAN SOULES: Well, if I make the next one a special session on this, and we've still got work to do on the other --

MR. RAGLAND: Well, I understand that, and I'm not saying that the other work is not important. But I think this certainly has constitutional implications -- dimmensions here that maybe some of the other rules don't have quite that significance.

CHAIRMAN SOULES: It would be my plan to take up something "noncontroversial" first thing Friday morning, and then put these right where the 270 series rules were on in this meeting's agenda. So as soon as we've got a crowd and we can get to work on these, we'll work on these until we get them done and then do the rest of the rules. And everybody take a look --

MR. RAGLAND: But noncontroversial matters always generate a lot of debate whether it's controversial debate or not.

CHAIRMAN SOULES: Well -- but if we start on these things first, we start before a lot of people get here.

Seventh and 8th -- is that a time that is available?

MR. REASONER: I've got a conflict on the 7th.

MR. RAGLAND: What month?

CHAIRMAN SOULES: November.

MR. TINDALL: First weekend after election.

PROFESSOR EDGAR: Is the 7th on a Friday?

CHAIRMAN SOULES: Seventh is on a

Friday. Harry has got a conflict with that. Harry, do you want to have an alternative to the proposed meeting?

MR. REASONER: No, if I'm the only one that's got a conflict, it sounds like a good date.

CHAIRMAN SOULES: Well, you may not be the only one.

MR. REASONER: Well, you might move a lot faster if I wasn't here.

PROFESSOR DORSANEO: That's -- I was going to say it would probably speed up the meeting.

CHAIRMAN SOULES: Judge Thomas?

JUDGE THOMAS: How about the next weekend? I don't have a calendar in front of me.

MR. TINDALL: I've got a conflict if we're going to -- I'm already committed. The 21st, we're getting close to Thanksgiving.

CHAIRMAN SOULES: That's the weekend before Thanksgiving. That puts us two short weeks in a row.

PROFESSOR EDGAR: Judge Wallace, if we met on the 7th and 8th and perhaps completed our business, do you feel that that would give the Court an opportunity to deal with these matters

and to meet the time schedule that you had originally anticipated, or do you think that's still crowding it too much?

JUSTICE WALLACE: Well, let me tell you just kind of what was involved in getting to us. First, of course, Luke gets together and sends me an exact form of what the committee has done. I, then, have got to get my secretary to prepare the order for the Court, and then we can get a date set ahead of time to get the Court together to work on these, presuming we can get that done in one or two days -- one or two sessions.

So, if we were working toward December 1, I'd say any time past the 7th and 8th of November is going to be impossible. We'd just have to move the effective date forward. That would be the only thing I could consider.

PROFESSOR EDGAR: But you think that maybe the 7th and 8th might be within the ballpark to achieve what you had originally --

JUSTICE WALLACE: I would hope we could get it done.

CHAIRMAN SOULES: I need some direction from the committee on that. We've been

working for a year on a lot of rules, and I have pulled them together as best I can. But my plan was to create when we're done -- and I can even do it before that -- I can do it and have it ready for the next meeting -- another one of these that's got all of our recommendations for approval. I'm not going to put in the ones that we've rejected, but whatever we approved, make a book and send it to all of you so that you can look at it and satisfy yourselves that it reflects what we have done.

And, if I have missed something -- I'm sure I must have missed something -- then I can get feedback from you, and that's going to be a 30-day process, chances are. I mean, if I send it out for feedback within the week, I think you would feel rushed. Two weeks would probably be the fuse that I would put on it and legitimately get everything back. And then taking your comments and making the corrections is going to take a while. So, you know, to get this done right, carefully, it's going to be hard to meet that December deadline even if we had gotten through today.

JUSTICE WALLACE: Well, I think the

best thing -- the prudent thing would be to move our effective date forward because, like I say, there is nothing magic about it. One date is as good as another. I just feel very strongly that the lawyers out there and the judges should have a date. This is the date, the first day of this month. Whatever the date is, that every two years, that's going to be the date when new rules are promulgated, if there are any, and stick with it and there is nothing magic. I know we need to get some evidence matters -- or get as soon as possible because of that; and that's the only thing.

And I think -- Mr. Blakely, do you see any reason why we can't have the Court go ahead and promulgate the rules, and you would know exactly what they are as an accomplished fact, except the question of when the effective date is going to be? Would that interfere with your work in any way?

MR. BLAKELY: No, that would be fine.

JUSTICE WALLACE: Okay. Well, let's just plan to do that. And when we get it all together, then let's do it and give ourselves enough time to do it right, and we'll pick it up

when the committee gets through --

CHAIRMAN SOULES: All right.

JUSTICE WALLACE: -- because I don't know of anything that the Bar out there is just waiting for us to do this, so they can do things the right way. There is nothing I don't think that we're doing that is that much of an emergency.

CHAIRMAN SOULES: So if we don't do it in early November, we're going to be --

PROFESSOR EDGAR: Well, let's do it in early November, and give us more time to double-check and make sure there are no mistakes in there.

CHAIRMAN SOULES: Beg your pardon?

MR. SPIVEY: We all can't be here on any one day, so let's just pick a date and --

CHAIRMAN SOULES: Okay. Let's -- whatever date is proposed then -- 7th and 8th or the 14th and 15th are the dates.

JUDGE TUNKS: Fourteenth and 15th of November?

MR. TINDALL: I urge the 7th and 8th. It will give us more time to -- if we have to call another meeting after that.

MR. SPIVEY: That's a good idea. The earlier, the better.

CHAIRMAN SOULES: Well, let's just take a poll on how many want to start the meeting on the 7th, and how many want to start it on the 14th?

How many on the 7th? Show by hands. Eleven. How many want to start on the 14th? Well, of those that are here, the preference is pretty significant that it start on the 7th.

MR. EDGAR: 8:30?

CHAIRMAN SOULES: 8:30. We're going to work from 8:30 till --

PROFESSOR DORSANEO: 6:30.

MR. TINDALL: Luke, I suggest we commit both full days until we get ground through this. Is that too oppressive to say we'll work late Saturday afternoon rather than noontime?

MR. SPIVEY: That's a very good suggestion, with the exception there is a heck of a football game that afternoon.

MR. TINDALL: Is there? Well --

PROFESSOR EDGAR: Well, then, you've got to make a plane reservation, too, in advance, and you've got to get out of here when your plane

leaves.

PROFESSOR DORSANEO: I would rather work Friday later and go home in time to watch a real football team.

CHAIRMAN SOULES: What if we go ahead and schedule to work from 8:30 to 6:30 on Friday and from 8:30 to 1:30 on Saturday? Does anybody know what the plane schedules are after 1:30?

PROFESSOR EDGAR: On Saturday?

CHAIRMAN SOULES: Yes, sir.

MR. SPIVEY: We can schedule it at 1:30, and then if we have to adjust it, we can just make a short adjustment.

CHAIRMAN SOULES: Okay. Newell, you've got some -- well, let me get these matters for Justice Wallace, first of all. We need to get polls on a couple of things.

One of the matters that the Court wants guidance on is the prospect of shortening briefs to 30 pages unless special leave of the Court is given. Since we are not going to have another meeting, we may have -- of course, we will have one now on the 7th -- get the committee's feelings and the Court's proposal to, one, limit briefs to appellate courts to 30 pages, double-spaced, typed

or equivalent, on 8 1/2 by 11 paper, exclusive of index and table of cases. The party may petition the Court to permit additional briefing.

What discussion do we have on that? Harry?

MR. REASONER: What is the federal appellate rule, Luke, do you remember?

CHAIRMAN SOULES: I don't know.

MR. WELLS: Fifty pages.

PROFESSOR DORSANEO: Why have all these -- why don't we just make one for the same bright-colored paper, too. I'm against the -- imposing these arbitrary limitations on briefing. I don't write -- I write a lot of appellate briefs, ordinarily, not any longer than 30 pages, exclusive, et cetera; but my attitude is that that is a bad idea to start imposing limitations across the board.

CHAIRMAN SOULES: Harry?

MR. REASONER: Luke, I think it's a good idea because I think it's a good discipline for all of us. And the only question I would have, Judge Wallace, is that I'm used to the federal rules except that I'm not so used to it that I can remember what it is. But that -- and that seems to me that's an ample length. Thirty

pages, double-spaced sounds too short to me for the average case.

MR. SPIVEY: Is this rule trying to satisfy the lawyer or trying to satisfy the Court?

JUSTICE WALLACE: Trying to satisfy the Court. There is nothing more disheartening, as Judge Pope can tell you, when most of these briefs are read at home anyway -- you don't find time to read them -- and you get there about 9:30 and you pick up this brief, and it's 150 pages and it could be written in about 25, and it's the same thing over and over again.

As Harry said, it's the exception, and if that limit is in there, I found, and I think all of you find, that if you got that limitation, you are going to go over it again and knock out that excessive wording and say what you have to say, and you can say it adequately, and everybody is --

MR. SPIVEY: As an advocate, I'd like to see the other side file 150-page brief because I think the court probably won't read it as carefully as they would a 12-page brief. But my personal preference is -- but I wasn't sure whether the request was coming from the Supreme Court or --

JUSTICE WALLACE: Well, it is from the Court, and the 30-page is no magic -- I understood that was the federal limitation.

MR. TINDALL: I thought -- Luke, I have it right here. It's Rule 28g. It says, "Except by permission of the court or as specified by local rules, the Court of Appeals' principal brief shall not exceed 50 pages and reply briefs shall not exceed 25 pages excluding the pages contained in the table of contents, citations, and any addendum containing statutes, rules, regulations."

MR. WELLS: I think that's a reasonable rule. I think 30 is a little tight sometimes.

JUSTICE WALLACE: Okay.

MR. RAGLAND: Judge, doesn't the Court of Criminal Appeals have a rule -- briefing rule, that limits it to 60 pages and --

JUSTICE WALLACE: I don't know.

MR. RAGLAND: -- I was just wondering what their experience was on that.

MR. REASONER: Well, it's not double-spaced either, is it?

MR. TINDALL: It's just -- well,

that's another --

MR. MCMAINS: There are spacing requirements.

MR. TINDALL: Well, I hate to get into the federal rules on spacing. It just says 50 -- 50 pages is all --

MR. WELLS: The federal rule talks about the type of type and all that.

MR. MCMAINS: No, specify printing and type and everything else.

MR. TINDALL: Oh, they got everything in the world in --

MR. MCMAINS: Margins --

CHAIRMAN SOULES: Where is the Federal Rules of Procedure referenced?

MR. MCMAINS: 28g.

MR. TINDALL: 28g in the Rules of Appellate Procedure.

PROFESSOR DORSANEO: But you really have to look at the local rules. You have to look at the Fifth Circuit.

MR. TINDALL: Yeah, the Fifth Circuit has got local rules and they have got operating rules. They are -- it's layer upon layer of rules.

CHAIRMAN SOULES: How much for the reply brief -- how many pages?

MR. TINDALL: Fifty and 25.

MR. REASONER: Well, I would urge consideration of the federal rules or something like them, Judge, because it seems to me those work pretty well.

PROFESSOR DORSANEO: Well, what happens if the brief is too long then, if we contemplate that? Do you just throw it away after you read the first 50 pages?

MR. REASONER: Well, they strike it in the Fifth Circuit and people don't file briefs that are too long.

CHIEF JUSTICE POPE: You just quit reading at page 50.

PROFESSOR DORSANEO: That's what I was saying. You could do that anyway.

CHAIRMAN SOULES: Rusty McMains.

MR. MCMAINS: I've got to leave to catch a plane, but my only concern is more in the Supreme Court than in the Court of Appeals in the sense that -- particularly if the Court of Appeals has given you an extension of additional page length, you know, so that you've got a bigger

brief to start with -- you obviously have to make an application for the petition for the writ of error for extension of your briefing in the Supreme Court -- to the Supreme Court, much like I assume that the motion of extension practice has to be directed to the Supreme Court even though you are filing it in the Court of Appeals. And you are on a short time fuse for 30 days, after the motion for rehearing is overruled, to get the motion for extension filed -- acted on, et cetera, which requires some pretty expedited action on the part of the Court.

And I just -- I question how -- you know, if the Court waits a week -- I mean, it may well be that you're trying to beat the time limit and you don't find out you really can't get it into 50 pages until you're two weeks into it, and you are on an awful short time fuse to require that motion to be both filed and granted before you file the brief; and I don't know how you handle that question.

MR. SPIVEY: Why don't you put some common sense rules in there and say that it shall be -- let's take 50 pages, for instance. And then if it is -- if it exceeds that, that you could ask

permission of the Court, and if the Court doesn't grant it, you withdraw that brief and reduce it.

MR. MCMAINS: Yeah. Well, all I'm saying is that I think the short time fuse in the Supreme Court is something we ought to give credence to, to adjust the time period because the Feds will not let you -- theoretically don't let you file a brief that is longer than that unless you have got authority to do it before you file it.

MR. REASONER: But I think, Rusty, don't they send it back and give you an opportunity to refile it?

MR. MCMAINS: As a general rule, they will send it back if you've got the wrong cover or they've done anything else. They don't have to do that, but they do do it. And unless you are going to set up just a continuous -- just build in a new motion practice that's routine, which I don't think is going to help the Court any in terms of just ignoring a lot of the extra pages in the brief that they could do now, I just think it makes some sense to allow some leeway there as to what happens when you file it or get into that short time fuse situation.

I don't have any specific recommendation without anything in front of us, but it seems to me that it would be appropriate, you know, to virtually specify in the rule that if you have made -- if you certify to the Court that you made a good faith effort and can't do it in less than X number of pages, then that certificate or something ought to be good enough to get you -- at least until the opportunity -- if the court disagrees with you and sends it back -- that you should have two weeks in which to comply, or, you know, ten days or something like that.

MR. WELLS: Well, I don't think we can go into all the details of that at this point. I think it's the consensus of the group that a 50-page limitation -- application of the federal rule would make sense.

CHAIRMAN SOULES: Okay. What I haven't heard is -- or we have heard a lot of people talk about 50 pages. Are we talking about 50 pages to a side or 50 pages for the appellant and 25 pages for the appellee?

MR. MCMAINS: No, no. The 50-page limit applies to both. The reply brief which is the -- see, there is a specific reply procedure.

That's the second brief. So it's actually 75 pages total that --

MR. SPIVEY: Why don't we have somebody draft a proposed rule and we've got something to argue from.

PROFESSOR DORSANEO: I'll volunteer to draft.

CHAIRMAN SOULES: Okay. Will you work with Rusty?

PROFESSOR DORSANEO: Yeah, because I have questions about points of error, and also because bench trials, you were going to have to put in a lot of extra points of error on findings of facts and a lot of garbage that maybe shouldn't be counted as a page limit. You have a practice of restating points, maybe -- that's a dumb -- that's stupid anyway. So maybe we could work out something that would, in fact, be helpful and not just some arbitrary --

CHAIRMAN SOULES: And that would be amendments to the Rules of Appellate Procedure anyway.

MR. REASONER: I think the suggestion that we eliminate the practice -- of course, I would like to eliminate points of error myself.

PROFESSOR DORSANEO: So would I. But we are not going to do that, probably.

MR. REASONER: But, at least, we ought to get out of restating them. I wouldn't ask Justice Wallace, but I would be suspicious if anybody reads "Restated Points of Error."

JUSTICE WALLACE: There is really no point in it. If you read the points of error, you know what points they are talking about.

CHAIRMAN SOULES: Okay. The second point that Justice -- okay. So the -- is it the consensus that 50 and 25, the federal rule in terms of page limitation, is workable? Okay, anyone feel that --

MR. SPIVEY: You're talking about as a general instruction to -- that somebody ought to draft from?

CHAIRMAN SOULES: Yes.

MR. SPIVEY: I think so, with the other suggestion that he's going to take this up that it not be a nit-picking or a -- I certainly agree with him that the color of the briefs is such a ridiculous thing, and I've gotten caught --

CHAIRMAN SOULES: I'm not talking

about colors or anything just -- I guess maybe print size or type size, or how many words on a page has got to be controlled because otherwise, judges burn their eyes out reading the fine print, I would think.

JUSTICE WALLACE: Just recently, I got one of the worst briefs I have ever seen yet. It was almost 200 pages. I sent it back and told them to shorten it and make it concise, and all they did was put it on a reducer and sent the same material back. It took up less pages, but you could hardly read it because it was so small. People like that you're -- are hopeless anyway.

CHAIRMAN SOULES: So, we were really talking about pages and some control of the number or words on pages -- however it is controlled.

The second question here is that we want to get a consensus on -- or issue -- whether all points of error raised in the Court of Appeals and not addressed by that court and its opinion, are overruled as a matter of law -- or to be considered overruled as a matter of law.

JUSTICE WALLACE: The rules say that the Court of Appeals shall rise on all points before it.

MR. SPARKS (El Paso): We debated that several times last year, even, and it seems to me we were always -- the majority was in favor of maintaining the rule that we had.

JUSTICE WALLACE: Well, here's the problem you run into. The Court of Appeals -- some of them will take one dispositive point and they are right on it. They don't take up insufficiency points or anything like that. When it comes to us and we need to overturn it on that one dispositive point, and then you've got the whole process to go through again because the Court of Appeals didn't address all points like the rules say they should.

MR. SPARKS (El Paso): Well, Judge, I've even had cases where the Court of Appeals will have one dispositive point that goes to the Supreme Court and then it's a remand. And if you get it back because they haven't addressed that point -- I have had two that they end right there, and you don't have to try it again. I mean, you know, it's just -- I would be more inclined to say that the Court of Appeals has to rule on the others. I just -- I have always favored that rule, but I remember we have debated this several

times.

CHAIRMAN SOULES: Broadus Spivey.

MR. SPIVEY: I have had that experience recently where the lawyers on both sides have joined asking the appellate court to rule on those issues because both of us felt that would be dispositive, and the Court simply refused to do it. That puts us in the position of almost guaranteeing that the Supreme Court will remand it unless the Supreme Court can get as irritated with the Court of Appeals as we are.

I would like to see a rule that says, as you suggested, that if they don't rule on them, they are overruled as a matter of law. It seems to me, that gives the respondent at least something to appeal on, you know, because we feel it should be preserved. The mere fact that the -- that the Court of Appeals didn't rely on them -- didn't touch it, doesn't deprive him of the opportunity to argue it.

CHAIRMAN SOULES: Anyone else?

MR. WELLS: I agree with that.

PROFESSOR EDGAR: I feel the request is a reasonable one. I think the Court should be able to have all those points before it and decide

it without having to send it back to the Court of Appeals.

CHAIRMAN SOULES: What if they -- what if they reserved the insufficiency points? They would have to expressly reserve the insufficiency points. They pass on all the law points and say they think that disposes of the case.

MR. SPIVEY: Yeah. That's just giving them a way out. I'm saying they need to rule on it, or it's overruled as a matter of law.

CHAIRMAN SOULES: Well, what if the Court legitimately feels that the law disposes of the case, but they do want them to take another look at it, if that's disagreed with, because of the insufficiency points which may be voluminous -- may be big problems. But then --

MR. SPIVEY: Well, as a matter of housekeeping, it is all before us --

JUSTICE WALLACE: The place is where the problem is coming from, and I don't think it would do any good at all.

CHAIRMAN SOULES: I'm just raising a question. I don't know the answers.

PROFESSOR EDGAR: Well, frequently, though, the -- what happens is the Court of

Appeals will rule on the legal sufficiency point and never reach the factual sufficiency point. And then on application for writ of error, the Supreme Court reverses on the legal sufficiency point and in doing so, clarifies some of the law and some of the evidence so that then upon remand, the Court of Appeals can legitimately exercise its fact finding function.

MR. SPIVEY: But don't you allow them the opportunity to second guess their way around? Don't you give the Court of Appeals an unfair two bites of the apple?

PROFESSOR DORSANEO: It doesn't really happen that way. In a lot of cases that I see, they have decided that the evidence is legally not -- I don't mean a lot -- but in a number of cases, they decide the evidence is legally insufficient. They get reversed. Presumably, they would have found that it was factually insufficient, too. And then they find that the evidence is factually sufficient based upon looking at it the right way.

CHAIRMAN SOULES: Once they find out the evidence was good evidence instead of not good evidence, then they weigh it and find that it supports the verdict.

MR. REASONER: Well, but -- and let me just -- I'm not sure I understand this. It seems to me, as a general proposition in the administration of justice you ought to avoid the additional appellant consideration. But with what Justice Wallace is suggesting, it would be nothing that would preclude the Supreme Court from remanding cases where a change in the legal standards might indicate a different result on factual insufficiency points. The Supreme Court would still have that discretion if it seemed appropriate.

PROFESSOR DORSANEO: If they said the judgment was erroneous and then remand it to the Court of Appeals in the interest of justice to redetermine the factual insufficiency thing that's impliedly determined the first time around?

MR. REASONER: Right. Well, but I mean -- I mean, now rather than having a mechanical rule -- I mean, I sympathize with the courts of appeals when lawyers file 200 points of error. I don't blame them for not wanting to write on them when 190 appear to be irrelevant. And in the rare case where it would appear that the interest of justice would be served by remand,

I would suppose the Court would have the discretion to do that even if they treated all the points as overruled in the first opinion.

MR. SPIVEY: But, Harry, don't you have the same -- if they are really irrelevant -- the other 190 points are irrelevant by overruling them by operation of the law, doesn't that give you the same effect and give you more of a finality of a decision?

MR. REASONER: You and I are on the same side. I just didn't articulate my position very well.

MR. SPIVEY: You have a neat way of sticking the dagger in a guy.

MR. REASONER: I think -- I don't think you ought to have a practice where every time the court finds -- the Supreme Court finds the Court of Appeals hasn't clearly done it's job that it has to remand it. I mean, in the federal practice, now, you have the rare remand from the Supreme Court of the United States if they decide they want to look at some other issue.

PROFESSOR DORSANEO: We have a special problem because of the factual insufficiency --

MR. REASONER: I understand.

PROFESSOR DORSANEO: -- and complaints of jurisdiction that complicates the overall thing.

MR. REASONER: I agree, but if the Court has discretion to remand it when it wants to, it seems to me it ought to be able to treat them as overruled, except in the instance where it would be some use to remanding it.

JUSTICE WALLACE: Well, recently, we pretty much had taken the idea that in those points that the Court of Appeals did not rule on if we have jurisdiction of them, we can go ahead and address them, period. But, of course, insufficiency is a big one and they -- some of them just don't like to get into it, it seems like, and there is nothing we can do but remand.

PROFESSOR DORSANEO: But our discussion would indicate, Your Honor, that that problem would probably continue to be a problem because it is a problem, and that practice makes sense. But there are a number of cases where the insufficiency ruling is affected the second time around by what the high court did on the legal insufficiency thing.

MR. SPARKS (El Paso): But, you know,

I've had two cases -- I don't do a lot of appellate work. I usually try to get some smart lawyers in our firm to do it.

But I've had two cases that have gotten to the Supreme Court and they have gotten there with the Court's of Appeals opinion that really don't have anything to do with the briefs of either party. They get a theory in the appeal and it's gone to the court and now it's back in the Court of Appeals, really, to write on the questions that we've had. And it seems to me when you are trying to preserve those points and the Supreme Court says, "Well, if they are overruled by operation of law, then you really -- you never had an intermediate appeal," you're making those points, really as far as the record goes, directly to the Supreme Court.

MR. REASONER: Well, but to me --

MR. WELLS: Well, that's all right, isn't it?

CHAIRMAN SOULES: Justice Wallace had a reply to that.

JUSTICE WALLACE: Of course, the idea of this is not to prevent you from getting a hearing, it's to get the Court of Appeals to do

what the rules say they should do now, and that is: address all points.

MR. SPARKS (El Paso): Oh, I understand that that's the problem.

PROFESSOR EDGAR: How would you handle the situation, Judge Wallace, if the Court of Appeals did not write, for example, on the legal and factual sufficiency points, simply reversed the case on some other point that was not, and didn't write on the legal and factual sufficiency? So then the Court, then, would assume that both of those had been overruled by operation of law and then concluded that the Court of Appeals was incorrect on its -- on the legal -- that the legal sufficiency standard was incorrectly applied.

JUSTICE WALLACE: If they brought it up -- if they had that point, then we would address that, right.

PROFESSOR EDGAR: Then what would the Court do with that factual sufficiency point, which you have also implied that the Court of Appeals overruled, which is final in the Court of Appeals? How would you handle that type of problem? Would you have to send that back then to the Court of Appeals, or since the Court of

Appeals overruled it and it's final in the Court of Appeals, would you then have to automatically remand it to the trial court?

JUSTICE WALLACE: That would be a problem.

PROFESSOR EDGAR: That would be a problem.

MR. REASONER: Well, but, Hadley, wouldn't they be free to make the determination as to whether there appeared to be any point in sending it back to the Court of Appeals?

PROFESSOR EDGAR: Let's assume that the point on appeal is both legal and factual insufficiency. The Court of Appeals does not ride on the point.

Now, the only thing that can come to the Supreme Court is the implied overruling of the legal insufficiency point. The Court concludes that was -- that implied overruling was incorrect. Now, does it remand it back to the Court of Appeals because the Court of Appeals has already concluded by implication that the factual insufficiency point is good, or does it simply remand to the trial court?

JUSTICE WALLACE: Well, now, if we --

wait a minute. The appellant came up on factual and legal insufficiency. In other words, the Court of Appeals didn't rule on either one of them. A point of error to us brought the legal insufficiency. We say if the evidence is legally insufficient, that takes care of it. The appellant is right if his legal insufficiency point failed. If the Court of Appeals had ruled, we would presume that the factual insufficiency point that the Court of Appeals overruled, that there was factual insufficiency in what they ruled, and it would stand.

In other words, we find if there is no legal sufficiency, then we take care of it. If we rule -- well, there is legal sufficiency and the -- no factual sufficiency point was overruled, then you would have a finding of factual sufficiency, would be what remained, wouldn't you?

CHIEF JUSTICE POPE: Judge, if you've got a lazy Court of Appeals and you've got six factual insufficiency points in the Court of Civil Appeals and a statute of limitations point, and the Court of Appeals takes the easy way out and writes only on the statute of limitations, and erroneously so. Now, I'm not saying anything

about the factual insufficiency. There is an implied finding that there is sufficient evidence from which there is no appeal, and the Court has not addressed those points at all and really hasn't had a fair review.

CHAIRMAN SOULES: That's my concern -- what you are suggesting, Harry -- Harry Reasoner, I mean. If those factual insufficiency points are presumptively overruled by the Court of Appeals, the Supreme Court can't even look at them. They are final there. And we're deeming that the Court of Appeals has looked at them and decided them consistent with this judgment.

So it's not a matter of sending them back to look at those for the first time since they never have looked at them yet. It's a matter of, "it's all over." It was final in that court when that deemed ruling fell in place.

PROFESSOR EDGAR: All I'm suggesting, Luke, is that such a rule would cover a lot of the problem and I think would, perhaps, stimulate the courts of appeals to comply with the rule. But I can see this one instance in which that might not work and it might work adversely, too. Well, there might be an out because of the holding in

Pool versus Ford where, now, the Court of Appeals, in order to perform its function, must detail the evidence and show wherein it is factually insufficient to overturn the verdict.

PROFESSOR DORSANEO: So their implied holding would always be wrong.

PROFESSOR EDGAR: Then their implied holding would always be wrong and the case would have to be reversed to the Court of Appeals to comply with the mandate of Pool versus Ford; that might be the out.

CHAIRMAN SOULES: That's pretty convoluted --

JUSTICE WALLACE: You always got -- where you've got error below -- if you found erroneous judgment, you can remand an interest in justice, as Bill said, until you get their attention. I don't think you would have to do it more than once or twice to get it, but --

CHAIRMAN SOULES: Broadus, this seems to me like serious points of insufficiency that are dealing with maybe quite a bit of evidence that would have a hard time getting reviewed once you get this, and we may be locking ourselves out of a review with those points.

Broadus Spivey.

MR. SPIVEY: How about putting a very simple admonition that the Court of Appeals shall ride on every point raised and, perhaps, make a limitation on the number of points raised.

MR. REASONER: But, you know, to me -- I mean, I guess I'm really troubled by the whole notion that our appellate courts have to do this mechanistically because a lot of the briefs -- like I say, I don't blame judges. A lot of these points of error are unworthy of wasting a sentence on, you know.

PROFESSOR DORSANEO: You see a lot of opinions where they say we considered Points 74 through 78, and they were without merit.

CHAIRMAN SOULES: Chief Justice Pope.

CHIEF JUSTICE POPE: Well, a good judge would include in his opinion all points not discussed or overruled.

MR. REASONER: Well, I agree with that, Chief Justice, but, you know -- I guess one thing that troubles me about Pool from the viewpoint of administration of justice, it seems to me it is a tremendous burden on the appellate court if every time some lawyer irresponsibly

raises insufficiency points, they are then -- the mandate is then that they've got to write a very detailed opinion.

PROFESSOR EDGAR: No, only if they find that there is factual insufficiency. If the evidence is factually insufficient and they affirm the judgment, you don't have to do that.

PROFESSOR DORSANEO: How about this: How about saying you could imply that each one is overruled, what they are doing now, except where the Supreme Court has the jurisdiction to consider the point even though it wasn't addressed specifically in the Court of Appeals. But for insufficiency complaints not addressed specifically, that presumption or implication is not appropriate.

MR. REASONER: But you were just leaving open the only thing that's a problem.

CHAIRMAN SOULES: Sam Sparks.

MR. SPARKS (El Paso): The problem, as I understand it is, some courts of appeals are not putting in their opinion that points of error 20 through 100 are overruled because they are without merit. If we come in with a rule that says they are overruled presumptively, we're just giving

more strenth for those same courts not to ride on the points of error. I mean, I think the rule we're thinking about just further excuses the courts of appeals from not looking at points of error.

CHIEF JUSTICE POPE: I -- it frightens me to think that one's right to have points considered depends upon a court -- a court of appeals that, either through ignorance or laziness, does not talk about good points, and then those automatically are overruled. It just bothers me.

Now, what you are talking about, Judge, I'm sure, is the rule which the Supreme Court, if they disagreed with what the Court of Appeals has raised, then they are under the burden to look to the other points and there may be a whole independent ground for sustaining that judgment. And I think that's a good rule -- that the Supreme Court should look to the other points to see if the judgment can be upheld.

JUSTICE WALLACE: You're right. And as I say, two or three opinions recently are "Okay, these are properly raised in the Court of Appeals, should have been addressed by them, but

wasn't, and since it's within our jurisdiction, we're going to go ahead and decide them. If all the points raised below and not considered are within our jurisdiction, we can dispose of the case and that's no problem."

The problem is judicial economy or diseconomy of having to send a case back to the Court of Appeals for rehearing rather than getting it disposed of. And that was what concerned the Court and why I was asked to submit this to you.

CHIEF JUSTICE POPE: Judge, don't you find some occasions when you have seen courts of appeals that just dodge things?

JUSTICE WALLACE: Yeah, sure do.

CHIEF JUSTICE POPE: And then you get the -- you get a point on appeal to the Supreme Court. And there have been some times when we found error and we sent that back to the Court of Appeals just so they will do their work. And I think that has some place, too. In other words, it's easy for them to just say, "Well, we'll just shift this--right on through up to the Supreme Court and let them worry about all these things."

MR. REASONER: Well, I wonder if consideration should be given to just changing the

jurisdiction of the Supreme Court so they have jurisdiction over factual insufficiency points.

CHAIRMAN SOULES: Do you want that, Judge?

CHIEF JUSTICE POPE: Well, you've got to amend the constitution for that.

PROFESSOR EDGAR: The constitution is the only impediment to that.

JUSTICE WALLACE: Well, we've taken enough time, and I appreciate it. I'll report back to the Court pretty much what I've heard in here.

CHAIRMAN SOULES: Well, do we want to get a consensus then? How many feel that the points should be considered overruled if the Court of Appeals doesn't address the points? Show by hands. How many feel they should be considered overruled by operation of law? One.

How many feel they should not? Looks like one feeling they should, and seven feel they should not.

MR. REASONER: I have a third position. I think the Court ought to scope some nonmechanical rule so that it has discretion on whether to remand or not.

CHAIRMAN SOULES: If we could get around the problem that insufficiency points may be precluded from review by the rule, that they were overruled by operation of law -- if we could get around that, how many feel that the Supreme Court should be able to deem them overruled? Probably everybody feels that way.

PROFESSOR EDGAR: Yeah, I don't have any problem with that.

PROFESSOR DORSANEO: Yeah.

CHAIRMAN SOULES: I think pretty much there's no -- no one disagrees really with that.

MR. REASONER: I mean, to me, Justice Pope raises the case where it clearly should be remanded, where you've got the statute of limitations to consider, and that's obviously the statute. But, you know, the run-of-the-mill case where you have looked at the legal insufficiency, and it's very clear from your analysis of that that there is nothing to the factual insufficiency either. Then it seems to me, it's just a great waste to remand a case like that.

PROFESSOR DORSANEO: The other way is a problem. The other way, assuming that somebody -- where the complaint is that the evidence was

sufficient, legally sufficient, then --

MR. REASONER: I'm sorry?

PROFESSOR DORSANEO: When the complaint is that the evidence was legally sufficient, and you shouldn't have granted in the trial court, a motion for instructed verdict, or shouldn't have been reversed and rendered in the Court of Appeals, to imply the Court of Appeals logically would say the evidence is legally insufficient, we believe, and it's factually insufficient, too. And the other side appeals -- the Supreme Court thinks the evidence is legally sufficient --

MR. REASONER: Right. But now the Court of Appeals has looked at it in your hypothetical?

PROFESSOR DORSANEO: No, they haven't said anything about factual insufficiency in my hypothetical. It just kind of slid over that.

There are cases when it is remanded to the Court of Appeals that they do something that looks like it's uncharacteristic. They found that the evidence was legally insufficient on the way up and they find that it's factually sufficient on the way down. Do you understand what I'm saying?

Because of the way they are looking at the evidence is different after the Supreme Court's opinion has explained the proper approach to the problem.

CHAIRMAN SOULES: Could we constitutionally -- or could we have a rule that says the Supreme Court may, in its discretion, deem overruled by operation of law points not written on by the Court of Appeals?

CHIEF JUSTICE POPE: Well, what's wrong with the present rule? What we're thinking about is some people down there that are trying to get justice. And I don't think that even efficient administration of justice -- a system should sacrifice that thing. I mean, it's the people that are entitled to the fair considerations of their points, and for us to presume good points out of being, I don't think that's right.

CHAIRMAN SOULES: Judge, that's where I was trying to come at. If, from the record, it appears that the insufficiency points are really not good points, but since they haven't been addressed by the Court of Appeals, the case is going to have to be remanded back --

CHIEF JUSTICE POPE: Judge, the Supreme Court doesn't even have jurisdiction to think about that. That's just not a thing they can consider.

CHAIRMAN SOULES: All right. That answers my other question then. Can -- could we have a rule that says the Supreme Court, in its discretion, may consider points not addressed by the Court of Appeals as having been overruled by that Court.

CHIEF JUSTICE POPE: I thought that's what we voted on?

CHAIRMAN SOULES: Well, we were talking about not a discretionary rule, but an absolute rule.

Okay. That's -- Newell, did you need any guidance now for any work that you have before the Court or need to get before the Court?

MR. BLAKELY: Well, I would like to report, if I can hold you for 60 seconds.

CHAIRMAN SOULES: Yes, sir, please do.

MR. BLAKELY: At the March meeting of the advisory committee, the committee asked the evidence subcommittee to look at a series of Rules of Civil Procedure entitled "Evidence" to see

whether some or all of those ought to be transferred into the Rules of Evidence. Two of the rules -- now, these are Rules 176 through 185 --

PROFESSOR EDGAR: What page are we on? Oh, I'm sorry, in the rule book.

MR. BLAKELY: Hadley, I'm sorry. It's not in the rule book. I got my report in late. I circulated a two-page report which you got in the mail within the last ten days.

PROFESSOR EDGAR: I got it. I just wanted to know what file to look in, thank you.

MR. BLAKELY: Two of the rules in this group under the heading "Evidence," 184 and 184a, "Determination of the Law of Other States" and "Determination of the Law of Foreign Countries," the advisory committee itself repealed, or recommended to repeal to the Court at that March meeting because they are already in the Rules of Evidence. So we, the subcommittee, didn't consider that referred to us at all.

All of the balance of these rules, the committee -- at least the majority of the committee, recommends the status quo and no transfer. We considered them in five groupings.

About six of the rules are purely procedural and should be left in the Rules of Civil Procedure, the committee unanimously said. Those are: 176, "Witness Subpoenaed"; 177, "Form of Subpoena"; 177a, "Subpoena for Production of Documentary Evidence"; 178, "Service of Subpoena"; 179, "Witness Shall Attend"; 180, "Refusal to Testify."

Unanimously, the committee said status quo. 185 is sued on account, and it involves sufficiency of evidence, and the Rules of Evidence have run from sufficiency problems. We have tried to deal solely with admissibility and the committee unanimously recommended status quo in that regard -- leave it in the Rules of Civil Procedure.

Now, here come three groupings where the committee was split: four for status quo, two for change, 181 and 182. 181, "Party as a Witness"; and 182, "Testimony of Adverse Parties in Civil Suits" could be moved to rule 610b. 610 deals with mode and order of interrogating, interrogation and presentation, and, the courts -- deals with cross-examining adverse parties and that sort of thing. Those two rules could be put there as an additional subsection.

One of the change votes, L. N. D. Wells, who is here, would set those up as a new rule, 614, in the Rules of Evidence. So we split on that, but, as I say, it was four to two for status quo.

182a, "Court Shall Instruct the Jury on Affects of Article 3716," that's the dead man's statute which is now in the evidence rule. Again the committee voted four-two for status quo. But if you did move that into the Rules of Evidence, it could be simply put in there as the last sentence in the dead man statute. That's now in the Rules.

183, "Interpreters," could be left alone, and the committee votes four-two to leave it alone. But two people would move "Interpreters" into the rules. And if the committee wants to do that, they could put that in -- could be made the first sentence of 604, Evidence Rule 604.

So I move, on behalf of the committee, that we make no change, status quo.

CHAIRMAN SOULES: Any second?

JUDGE TUNKS: I second.

CHAIRMAN SOULES: Discussion?

PROFESSOR EDGAR: Newell, I certainly defer to the expertise and the time that your

committee has put into this. Could you explain though, just a little further, the reason why these -- the rules on -- that you have listed here under subdivision C, D, and E really don't logically belong in the Rules of Evidence?

MR. BLAKELY: Yes. The general philosophy was the status quo philosophy. If it ain't broke, don't try to fix it. And if any time you make a change, someone in the future then may argue that something different is meant because of that change and that sort of general philosophy.

PROFESSOR EDGAR: But logically speaking though, don't those three categories perhaps more logically belong in the Rules of Evidence than in the Rules of Procedure? That is, what was the consensus of the committee on that?

MR. BLAKELY: Well, I think it was a close question, and they could be, but when you say more logically in the evidence rules, I'm not sure that you can say that.

PROFESSOR DORSANEO: I have a remark about -- it's a different question. Rule 182, in my judgment, is at variance with the Rules of Evidence, specifically Rule 607 and 610 of the Rules of Evidence. Rule 182 acts as if there is a

voucher rule still existing under which you are bound by the testimony of someone you would call as a witness, and it imposes limitations that are different on leading questions, impeachments and all of that, that are different fundamentally from Rule 607 and 610 of the Rules of Evidence.

MR. BLAKELY: Well, Bill, if that's so, it's so wherever 182 is, whether it is in evidence or whether it is in the Rules of Civil Procedure.

PROFESSOR DORSANEO: Oh, that's what I'm saying.

MR. BLAKELY: Yeah, if you feel there is a conflict of some kind, that they are inconsistent, then that should be addressed whether you leave it in the Rules of Civil Procedure or put it in the Rules of Evidence.

PROFESSOR DORSANEO: Okay. Well, I understood the charge of your group was to see whether -- not only whether this should be in one book or the other, but to see whether something in the Rules of Procedure, that have been left in the Rules of Procedure that should have fallen by the wayside when the policy decision was made, to change the rules to adopt the Federal Rules of

Evidence with respect to interrogation of witnesses. And I really do see that 182 is at variance with --

MR. BLAKELY: I suggest this, then, as a way out of it. That we deal with the balance of it, that we resubmit 182, not for hurried -- on any hurried basis, not with the expectation that that would be resolved here before -- in the November meeting, but the next time, 1987 or whenever we get to do it again.

PROFESSOR DORSANEO: Well, I would certainly recommend that.

CHAIRMAN SOULES: If we got language in 182 that's at variance with the Rules of Evidence, we ought to take it out next time, in my judgment.

MR. WELLS: I think we ought to examine it between now and November.

CHAIRMAN SOULES: Well, now, that doesn't change the Rules of Evidence. Let's work toward harmonizing 182 with the Rules of Evidence. That keeps-the information that you are relying on constant, and then we can vote on whether to modify 182 which won't change the Rules of Evidence work that you're doing right now. And if

we reject that, we won't bury the Rules of Evidence --

MR. BLAKELY: So the objective would be to harmonize 182 with the Rules of Evidence?

CHAIRMAN SOULES: That's right.

MR. BLAKELY: All right.

CHAIRMAN SOULES: By changing language or deleting language that is inconsistent, whatever the method would be.

MR. TINDALL: But that's different from the charge, I think that Bill spoke of, and that is to purge the Rules of Civil Procedure of evidentiary rules. Wasn't that what we decided at our last meeting, Luke?

CHAIRMAN SOULES: Well, these are mixed problems. For example, the Court is supposed to instruct on the dead man statute. That's procedure. Suppose to tell the jury something, or maybe, it's not. Maybe it's evidentiary. I mean, either place where they kind of fit.

MR. BLAKELY: I don't understand that the subcommittee was directed to set out to purge, but simply to consider whether as a kind of a neutral mind, whether it seemed advisable to

transfer.

CHAIRMAN SOULES: Chief Justice Pope.

CHIEF JUSTICE POPE: This is the thing back when we adopted the Rules of Evidence, and I remember Judge Wallace was handling that for the Court, and I was handling the Rules of Procedure. And Rules of Evidence, you know, were -- there are many rules -- 184 is a good example.

And Jim and I went to great pains to see that the same identical wording, say, of Rule 184, appeared both in the evidence rules and the civil appeals rules. There is some instances where both appeared at different places for the convenience of the Bar.

MR. WELLS: Judge, in that connection, I think it was implicit in the whole subcommittee that whoever -- however this is published, there ought to be a note referring to the rule in the other book.

MR. BLAKELY: Which is the recommendation of Tom Ragland that I've got here a footnote on this.

Well, where does that leave us with respect to the other rules, Luke, or -- should we vote on that or --

CHAIRMAN SOULES: Let me say that we are current now with the changes that we've addressed and recommended as far as Rules of Evidence are concerned. We have nothing left pending before us on the Rules of Evidence. Those rules could be promulgated for an effective date at any time, either -- whatever our projected future date is for these rules or for an earlier date. And if the committee could act now, at least for this session -- this part of it -- and delay until another couple of years. If we're going to make any moves -- moving anything out of the Rules of Civil Procedure and into the Rules of Evidence, just, in effect, adopt this committee's recommendation that nothing be moved -- the status quo as to location.

But we do have a real problem if 182 is inconsistent with the Rules of Evidence. Let's address that and change it in the Rules of Civil Procedure and that -- what I'm saying by way of reference, we may not be able to change the Rules of Evidence for them to reference the Rules of Civil Procedure because we are going to leave them alone, presumably. But at least, we can change the Rules of Procedure to reference the Rules of

Evidence because we're not quite through with the Rules of Procedure.

So what I'm suggesting is that we approve this committee's report and charge Newell's subcommittee to make adjustments in 182 and to put cross-references in the Rules of Civil Procedure where they would be appropriate. And that would dispose of this report and then everything would be cleaned up at the end of the next meeting in early November. Is that acceptable with you, Newell?

MR. BLAKELY: Yes.

CHAIRMAN SOULES: Do you so move?

MR. BLAKELY: Yes.

CHAIRMAN SOULES: Is there a second?

JUDGE TUNKS: Second.

CHAIRMAN SOULES: All in favor, show by hands. Opposed?

Okay. Harry, did you get a chance to discuss --

MR. REASONER: I just, you know -- Luke, I guess my principal concern is that I think 182a where it is now is really a snare. I mean, I think that somebody getting ready to deal with 601b -- and I have to say it never would have

occurred to me to go back and discover that I was entitled, or should consider whether I could seek an instruction where it is in 182a.

MR. BLAKELY: We have lived under that situation for a long time because you have had the dead man's statute -- what is it, 3716?

MR. REASONER: Yeah.

MR. BLAKELY: And it said nothing about an instruction. But over here in the Rules of Civil Procedure, it is said that the Court shall instruct. So it's not something you --

CHAIRMAN SOULES: Maybe without a written proposal -- this is contrary to what I've done. We could ask Newell to submit a change in addition to Rule 601b that says the Court shall instruct the jury pursuant to Texas RCFP 182a -- just add that to the end of 601b and then get that to the --

MR. REASONER: The Court may instruct -- did you say "shall"? In other words, this appears to me to be discretionary, I mean.

CHAIRMAN SOULES: That's right. It is discretionary. The court may instruct to the jury pursuant to Rule 182a concerning the effect of Rule 601b, or language to that effect. And if we

approve that, Newell, you could write that directly to Justice Wallace so that whenever the Rules of Evidence are promulgated that could be a part of them. At least, Harry, that would snare both places until we could deal with it in a couple of years.

MR. REASONER: Yeah, that should solve my problem.

MR. BLAKELY: Now, I'm not sure what you're concluding.

CHAIRMAN SOULES: What we are doing is, we are adding something to it. We got a consensus to do what we just said. But then Harry raised the point that this is a snare not to have the right to instruct shown at Rule 601b in the Rules of Evidence.

So what I would ask you to do would be to write a letter to Justice Wallace memoralizing the act of this committee today, with a copy to me, to add to Rule 601b language to the effect that the trial court may instruct the jury on the effect of Rule 601b pursuant to Texas RCFP 182a.

MR. BLAKELY: All right.

CHAIRMAN SOULES: Are we in agreement? Show by hands who will recommend that change to

601b. Okay, that's unanimous. And it's simple, and we don't have anything else really agonizing about the Rules of Evidence? Does anyone else see anything? Okay.

Does anyone need any further guidance or help from us to get ready for the next meeting? Any reports that are pending for the next meeting?

PROFESSOR EDGAR: Let me just raise a question, and we may not want to take it up. But yesterday we resolved the recommended Supreme Court order relating to the retention and disposition of exhibits, and you have before you an identical recommendation relating to the disposition of depositions. Do you want to take that up? It shouldn't take -- we have already resolved it as a matter of policy. So maybe that's something we won't have to take up next time.

CHAIRMAN SOULES: Where is it in the book?

PROFESSOR EDGAR: If you'll look on Page 117 -- 116 and 117 of the book.

Now, actually, what I did, beginning here on Page 113, I tried to distinguish based upon what we had earlier talked about recognizing that a

deposition is really an act -- that the transcript is really the document. And -- but all I've done is simply include those terms on Pages 113, 114, 115. Then Rule 209, beginning on page 116, I was asked to come up with a rule and I, as Linda did on hers, just simply directed an order as directed by the Supreme Court. Then the order that I recommend appears over here on Page 117, which -- and Linda actually used this as a guide for hers, which we basically adopted yesterday.

Now, the only question I have is, in looking at my copy of our treatment of her order, I notice that we struck "as provided by Rule 356." But Bill says that we -- numerically, we referred specifically back to the corresponding appellate rule rather than eliminating it in its entirety. I don't know what we did there.

PROFESSOR DORSANEO: Then Harry said that's not good, and we left it out altogether.

PROFESSOR EDGAR: I thought the treatment -- if we offered treatment, it should be consistent, is all I'm suggesting. So I think we need to look, Luke, before we go any further, to see exactly what treatment we gave that language in her -- in the order which she proposed.

CHAIRMAN SOULES: All right.

PROFESSOR EDGAR: It's what was here, third paragraph.

CHAIRMAN SOULES: We took out "as provided in rule." We debated around if we were going to use the Appellate Rules or not, and we took it out.

PROFESSOR EDGAR: All right. Then I think we ought to be consistent and remove that language from this paragraph as well. Either there is no perfection of appeal, or there is perfection of appeal.

CHAIRMAN SOULES: So we would strike "as provided by Rule 356," that language appearing in the text of the proposed rule in the third line of the second paragraph --

PROFESSOR EDGAR: Proposed order.

CHAIRMAN SOULES: Proposed order, that's right.

PROFESSOR EDGAR: In the last paragraph of hers, before you put that up, how does hers read?

CHAIRMAN SOULES: We -- the subcommittee was going to write something that gave notice to a party that the disposition was

going to be made within 30 days if they didn't pick them up, and then -- but we did not get the language on it.

PROFESSOR EDGAR: All right. Then perhaps we cannot complete this then, because, again, she copied mine, and ours may be -- my suggestion may not be proper.

CHAIRMAN SOULES: Well, this is -- you can mail depositions. I never have put an exhibit to a deposition that couldn't be mailed. But I guess there conceivably could be a deposition that couldn't be mailed.

PROFESSOR EDGAR: Well, anyhow, I recommend that that provision simply being made to the clerk to mail the deposition transcript, et cetera, to the attorney asking the first deposition question is what our committee earlier suggested that I include; and then if the attorney cannot be located, get the clerk to send written notice and so on. And if there's no response, then the clerk may dispose of it.

CHAIRMAN SOULES: I think that will work with depositions, don't you? How does the committee feel about returning the deposition to the lawyer who asked the first question by mail?

You're going to have the same problems.

MR. REASONER: Say that again.

CHAIRMAN SOULES: Okay. Harry, in trying to determine how to dispose of exhibits, we determined that the clerk would just give notice to the party that the exhibits would be disposed of if they weren't picked up, because we talked around about mailing and delivering and the cost and all. Now, when you get over to depositions, won't it work to have the clerk mail them back to the party?

MR. REASONER: Are you looking at some page?

CHAIRMAN SOULES: Yeah, I'm looking at Page 117, excuse me. It's the last sentence. Or should we go to the same rule that we had, that the clerk notifies that party that he can retrieve the deposition if he cares to and then 30 days later make such disposition? That's the way we handled exhibits.

My preference would be that they would be mailed as a matter of course, because then they are out of the clerk's office and maybe somewhere, as opposed to being disposed of.

PROFESSOR DORSANEO: Why don't we give

them to the deponent?

CHAIRMAN SOULES: Because you may not even know where he's at.

PROFESSOR DORSANEO: The first -- the first attorney that asked the first question, that seems a bit of an odd --

MR. REASONER: Well, yeah, it would be nice when you get these multiparty cases. You know, it might be a guy who had a minimal interest.

PROFESSOR EDGAR: We debated that issue at great length, and it was my recollection that our decision at our last meeting was it would be very easy to administer -- the clerk could simply readily identify the addressee by seeing who asked the first question.

MR. REASONER: Yeah, I understand.

CHAIRMAN SOULES: You couldn't tell who notice of deposition, particularly if it was by agreement, and there had to be something in the clerk's office that gave him a reference point. And that was one good, clear reference point, which, for the most part, identifies the guy who wanted the deposition to begin with. Most of the time, he's the person who will start the

questioning. And that was the discussion that we reached after some debate: How could the clerk have a ready reference on disposition?

MR. WELLS: I don't understand why you couldn't treat them any different than the exhibits. I think you just put everybody on notice, and if they want them, they can come get them; and if they don't, they are disposed of.

CHAIRMAN SOULES: All right. There are the two alternatives. Judge Thomas.

JUDGE THOMAS: Luke, I want to argue to do it consistent, and recognizing that depositions can be mailed, even in little baby divorce cases, you get voluminous depositions. There is a tremendous cost, and I just think it would be better to be consistent about what the clerk's obligation is and what the attorney's obligation is. And I would argue in favor of doing it like we did exhibits.

MR. REASONER: What the Judge said seems persuasive to me. I mean, Luke, suppose you had a case--and some young lawyer who is with you took the deposition and then he left your office. And the way I would read this, the clerk would have to find that lawyer -- I mean, couldn't send

it to your office, he would have to find that individual lawyer who would probably have zero interest in receiving it.

PROFESSOR DORSANEO: You know, most depositions somebody has said, "What's your name? Where do you live?"

CHAIRMAN SOULES: Well, how does -- the clerk needs to have -- still have clear reference as to who is entitled to pick up the exhibit. We do -- I mean, the deposition -- in exhibits, it's the party who offered the exhibits that identifies the party. The clerk can send out a notice to every party and say come and get the exhibit, and then what's he going to do when they all show up at the same time? How does he pick and choose who gets them?

MR. WELLS: I suppose he can pick in terms of who asked the first question.

CHAIRMAN SOULES: That does give the clerk a clear reference. We couldn't think of another clear arbitrary reference.

- CHAIRMAN SOULES: Or the attorney who asks the first question or his nominee, I guess you could say.

CHIEF JUSTICE POPE: What about law

firms? People hire -- when they go, they hire a law firm or maybe a veteran attorney. It could be an attorney or law firm. But that law firm has a likelihood of having some continuity, whereas the personnel of the law firm may not.

CHAIRMAN SOULES: Or a representative of that attorney's firm at the time the deposition was taken.

Well, I guess what we are trying to resolve here is that the attorney or a member of the attorney's firm when he took the deposition. Does that satisfy your concerns, Harry?

MR. REASONER: It seems to me that Judge Pope is right. You'd have a lot more continuity it seems to me if you just -- you can't say -- could you say the attorney taking the deposition? Of course, the first one -- get --

PROFESSOR EDGAR: Of course, you're presuming that the attorney that took the deposition will not continue to be the attorney for that party just because that attorney left the firm.

MR. REASONER: Well, that's right. And, I guess, what really --

PROFESSOR EDGAR: And he might take

that deposition with him.

MR. REASONER: I guess, in my own unhappy experience of taking depositions, normally, I have to share with three or four other lawyers or -- and I, you know -- who happens to go first just may be arbitrary. I don't know if it makes any difference.

CHAIRMAN SOULES: How about the attorney asking the first deposition question or successor to that attorney.

PROFESSOR EDGAR: But, Harry, what we are saying here it's -- the case is over. Now, it's either mailing it to you or having it remain in the clerk's office, so what difference does it make?

MR. REASONER: I agree with you. Why don't you just throw them away? Why don't you just have the rule that once the case is over, unless somebody comes and gets the depositions, the clerk can throw them away?

MR. WELLS: Well, the clerk gives notice as they would give with respect to the exhibits.

MR. REASONER: That they are going to be disposed of and then whoever wants them can

come get them.

PROFESSOR EDGAR: And then you have to provide -- the clerk then has to provide for getting notice to everybody, and we are trying to avoid that. And we talked about all of this at our last meeting. And it was the consensus that this type of procedure is the one that would probably serve everybody's purposes as adequately as anything else.

MR. REASONER: Well, you know, just thinking about it mechanistically, it seems to me it might be easier for the clerk to send a postcard to all of the parties of record in a case that all exhibits and depositions in this case are now going to be disposed of in 30 days, and if you have any interest in them you better come get them. Because with the rule you've got -- say you've got 20 depositions. The clerk is going to have to go through and look at each one of them and may come up with a list of 20 different people.

MR. WELLS: That's the way they do it in federal court, in terms of notice and disposition of exhibits.

MR. REASONER: I hadn't thought about

it, but just one postcard to everybody involved in the case saying in 30 days they're gone?

CHIEF JUSTICE POPE: Yeah. But I may be interested in the deposition I took, and I'm probably going to be the one that asks that right question and the other side may want that deposition because they want it for the next lawsuit.

I think if I took a deposition and I paid for it and I asked the first question, just this general notice to people to come pick out what you want because I'm going to throw them away, I think that fellow is the fellow who ought to have first "takes" on that deposition. He paid for it.

CHAIRMAN SOULES: The clerk has got to -- take Ray Hardy. You tell Ray Hardy to send out notices to tell people to come get their stuff. He'll write us back and say, "You have given me no guidance between mixed demands. How am I supposed to act?" And that's probably -- but, you know, even David Garcia, who is a pretty good district clerk, is going to have the same problem and we need to have some -- and then, anybody that wants to copy it can copy it?

MR. REASONER: Well, probably the

people have copies of the deposition anyway.

PROFESSOR DORSANEO: Maybe not. A lot of lawyers --

MR. REASONER: What about having the lawyer who paid for it do it then?

PROFESSOR DORSANEO: I like the deponent the best, but the lawyer who paid for it is the next best.

MR. REASONER: Well, the deponent is exactly the opposite of Judge Pope's point because the deponent is the adversary.

PROFESSOR EDGAR: If you really don't know who paid for it, though, you've got to go back and see against whom costs were adjudged.

CHAIRMAN SOULES: That's right because whoever paid for it --

MR. REASONER: Who paid for it initially.

PROFESSOR DORSANEO: What if we do -- this is related to the problem of using depositions, and as Judge Pope pointed out a minute ago, using depositions in other cases -- that is, it could be a problem if the depositions are sent to somebody who would dispose of them or hold them in reserve for their own personal use.

PROFESSOR EDGAR: But if you intend to use a deposition in another lawsuit, and you wait forever just thinking you can go over to the clerk's office someday in the future, I really don't have much sympathy with you if when you get over there you find it's no longer there. I would expect you to use a little more diligence than that. And that -- the likelihood of that occurring really doesn't bother me very much.

JUSTICE WALLACE: And by using the last known address that is set out in your present draft, you are probably going to get it back to the law firm the lawyer is working with at the time, anyway. The case is still there, and he'll know it. And if not, they can send it on to the lawyer wherever he is. So that's at least some shield to one being interested in it and not getting it.

PROFESSOR EDGAR: I mean, we can't sit down here and protect against every conceivable, possible situation that can arise, and it seems to me that this is as good a middle ground as any.

CHAIRMAN SOULES: How about saying, "The attorney asking the first deposition question or the nominee or successor of that attorney"?

MR. REASONER: What if the party changed lawyers -- fired the lawyer?

CHAIRMAN SOULES: It would be the successor.

PROFESSOR DORSANEO: So then you're going to have to look to the judge in order to get that done all the way down to the judgment.

CHAIRMAN SOULES: You're first going to look at the lawyer that asked the first question and you've got clear authority to deliver it to him. If you can't find him, you can try to find out who his successor was. If you do find him, and he's not interested any more, but Harry is, Harry can come -- can get authority. Doesn't most of your former attorneys, whenever they are gathering notice of something they handled while they were with your firm, somehow communicate back to the firm that they have gotten some information?

MR. REASONER: I'd like to think so, but -- wouldn't it be the simplest thing to just send a notice saying that all the depositions are going to be disposed of, and if you wish any of the depositions that you took, come and get them; otherwise, they are gone?

PROFESSOR DORSANEO: The "come and get them" is the hard part because if it -- what if you and I get a notice and we both want them, and I come and get them before --

MR. REASONER: No, I say the ones you took.

JUSTICE WALLACE: Well, let's look at the problem. The problem is on the district clerks with all those rooms and rooms of depositions. Now, the problem is not attorneys. If they want the depositions, they've either got a copy or they can go down and get one. And all you're trying to do is help the district clerks dispose of all this stuff. So you send a notice to everybody, all the attorneys of record.

MR. REASONER: Right.

JUSTICE WALLACE: These depositions will be disposed of within 30 days, period. If someone comes down and wants one, which is going to be a rare occasion, they get it. And they can dispose of the rest of them, and the problem we are addressing is taken care of. I haven't heard anybody talk about a problem with attorneys who want the depositions not being able to get them now.

MR. REASONER: I think that's a good point.

CHAIRMAN SOULES: Okay. So we'll rewrite that there will be some notice given of destruction and if they are not picked up within 30 days, mailed to all counsel of record?

MR. REASONER: It seems to me that would be the easiest thing for the clerk to do. They've got a docket sheet and they can just look and see who's on the docket sheet and send notice that they are disposing of them.

CHAIRMAN SOULES: Mail one to each counsel of record for each party.

JUSTICE WALLACE: And if those clerks say, "I don't know who to give them to," let them keep them. We've given them a way to dispose of them if they want to.

CHAIRMAN SOULES: Or go see the judge.

JUSTICE WALLACE: Yeah.

CHAIRMAN SOULES: Tom Ragland.

MR. RAGLAND: Luke, I assume -- I wasn't at the last meeting, but I assume it was the committee's opinion that depositions should continue to be filed with the clerk.

CHAIRMAN SOULES: No.

MR. RAGLAND: Was that not right?

CHAIRMAN SOULES: No, that's not right. The only thing we were going to -- of course, we never did get to those rules.

PROFESSOR EDGAR: We haven't decided that yet.

MR. RAGLAND: So this proposed order only deals with depositions that are presently on file, is that --

PROFESSOR EDGAR: In cases which have been terminated.

MR. RAGLAND: Yes, that's what I'm talking about. But it doesn't deal with in the future whether or not they may be filed?

CHAIRMAN SOULES: That's right.

JUSTICE WALLACE: If they are not filed, then the clerks don't have the problem.

CHIEF JUSTICE POPE: Mr. Chairman?

CHAIRMAN SOULES: Yes, sir.

CHIEF JUSTICE POPE: Give the Court of Appeals a little more tinkering with that. And this all sounds good to me, but in the second paragraph, I wonder if we could say this: "In all cases, except those in which citation is by publication, in which judgment hasn't been

entered," and so forth. Otherwise, we are going to be destroying those kinds of depositions before there is even time for a motion for new trial before it's expired.

You've got two years to file a motion for a new trial. And surely, we would not want to be destroying depositions. It is indeed 180 days after the judgment, but still it's open for a motion for a new trial within two years.

And if I were -- like a lot of these citation by publication cases involving land suits, they cite by publication on the theory that they don't know who the owners are. They don't want to know who the owners are. And as a matter of fact, this family has got kinfolks right here in the county and they know it. So they cite them by publication, and those people find out about it and they've got two years to do something about it. But we would be destroying the depositions before the case was over.

PROFESSOR EDGAR: And I suppose there would be instances in which depositions had been taken in citation by publication.

CHIEF JUSTICE POPE: Could be.

PROFESSOR EDGAR: I mean, I could

imagine that some of the heirs -- you could locate some of them and you took their deposition, but then there was some that you didn't know whether you had all of them. So to those -- to the balance you cited by publication.

JUSTICE WALLACE: Then you are going to have witnesses as to procession and causation and all that, that might be in Timbuktu by now.

CHAIRMAN SOULES: "In all cases --" state that again, Judge.

CHIEF JUSTICE POPE: "In all cases, except those in which citation is by publication."

CHAIRMAN SOULES: Okay.

MR. REASONER: Well, do you need to add a sentence in then, Judge, saying that in cases where citation is by publication, they may be disposed of after two years.

CHIEF JUSTICE POPE: I should think so. It needs something to button it up.

PROFESSOR EDGAR: I'll work on that, that's okay.

CHAIRMAN SOULES: Okay. Are you going to do a rewrite on that?

PROFESSOR EDGAR: Well, I have to.

JUDGE THOMAS: Luke, here, again, to

keep it consistent, would it be the consensus that we want to do the same thing on the exhibits?

CHAIRMAN SOULES: To trial. Would you think, Judge Pope, that the same would apply?

CHIEF JUSTICE POPE: I would think so.

JUDGE THOMAS: Because I do get a number of exhibits in citation by publication cases. That probably comes up much more than depositions.

CHAIRMAN SOULES: So, we need to go back to your proposed order and make a note on that, too.

PROFESSOR EDGAR: Well, she's got to do a rewrite on that, anyhow, Luke.

CHAIRMAN SOULES: Okay. All right, with those adjustments, how many believe this deposition instruction would be the recommendation of the committee? Show of hands. Opposed? We've got a consensus on that subject to rewrite, and the same with yours, Judge Thomas, on the exhibits.

Okay, is there any other business that we want to address today before we adjourn until November 7th? Justice Wallace, do you have anything further?

JUSTICE WALLACE: No.

CHAIRMAN SOULES: Chief Justice Pope?

CHIEF JUSTICE POPE: No.

CHAIRMAN SOULES: Thank you very much for staying with us.

(Meeting adjourned.

REPORTER'S CERTIFICATE

THE STATE OF TEXAS X

COUNTY OF TRAVIS X

I, Priscilla Judge, Court Reporter for the State of Texas, do hereby certify that the above and foregoing typewritten pages contain a true and correct transcription of all the proceedings to be included in the TEXAS SUPREME COURT ADVISORY BOARD MEETING held on September 13, 1986, and were reported by me.

I further certify that my charge for preparation of the statement of facts is $1201.00.

WITNESS MY HAND AND SEAL OF OFFICE this, the 6th day of October, 1986.

Priscilla Judge

Priscilla Judge, Court Reporter
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